SUBMISSION TO EWRB ON PROPOSALS IN EWRB'S CONSULTATION PAPER *REVIEW OF THE ELECTRICITY ACT*

25 February 2015

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Dear Mr Sickels

CONSULTATION PAPER – REVIEW OF ELECTRICITY ACT

We thank the Board for publishing its consultation paper *Review of the Electricity Act* issued on 21 January providing the opportunity to interested parties to comment on several proposals that the Board is considering with a view to making recommendations to the Minister to amend the Electricity Act 1992. We also thank the Board for the opportunity on 23 February to discuss the Review proposals with a Board sub-committee. The discussions were helpful and we have made a few amendments to our original draft submission in its light. We suggest that there would be merit in holding such discussions on a more frequent and regular basis.

We wish to take the opportunity presented by this submission to reiterate the points made during the discussions regarding the need for the Board to not only address the problems that have become evident in the Act but also to look forward to the likely requirements of the wider electrical industry in the ensuing years. For example, we consider that more emphasis needs to be placed on the competence of registered / licensed persons to advise on, install and maintain safely the in-house generation of electricity by photo-voltaic cells, fuel cells, etc. where consumers perceive these to be more economic than purchasing electricity or simply wish to use more sustainable energy sources at whatever cost. In other words, we suggest that the Board give thought to the "future proofing" of its current activities and, if the Act requires changes to cope with this, promote appropriate amendments.

In this submission we have addressed each of the proposals and the accompanying questions. In some cases, particularly those that are mainly of concern to individual registered / licensed persons, we do not hold strong views and tend to being ambivalent as to the proposals; however, we do have strong views on others, as will be apparent from the comments made below.

For ease of reference we have repeated the headings in the consultation paper and addressed the relevant questions. We have added one heading of our own concerning the Board's ability or otherwise to take disciplinary action against a registered / licensed person who carries out defective prescribed electrical work under an employer licence.

Part 1 and 14 – Preliminary Provisions and Miscellaneous Provisions

Broadening the Definition of an Infringement Offence

We note the Board's point that its ability to impose infringement fees is currently restricted to a very limited number of breaches of the legislation and that, generally, it is not able (by reason of the definition of an infringement offence) to impose infringement fees on licensed persons as a disciplinary alternative to taking them through the complaint process. We recognise that this is expensive for both the Board and the licensed person against whom a complaint is made.

We would make the point that the preliminary comments are incorrect in that the current legislation imposes maximum and not minimum fines and it is open to the Courts, or the Board if it is empowered to fine, to levy fines less than the maximum if equity so dictates. Accordingly, if the definition of infringement offence were amended to include some disciplinary offences, it would be open to the Board to levy fines that were appropriate for the offence. We note that there would be a safeguard in that any licensed person disagreeing with the imposition of an infringement fee would be able to appear before the Board and defend the charge.

However, on the basis of the information presented in the proposal, we would oppose this proposed change to the Act since we see a possibility that the criteria that the Board might arbitrarily set for deciding which disciplinary offences should be regarded as infringement offences may be out of line with those criteria already set by other Government agencies such as WorkSafe. It would be essential that infringement offence criteria be aligned across all such agencies and, accordingly, we consider that the Board should take advice from Crown Law on this point. We should be interested to learn its views on this matter.

We note in particular that the current definition of infringement offences includes two (PEW performed with no authority) that have the capacity to cause risk of harm to consumers or to other workers. If minor disciplinary offences were to be added to the current list of infringement offences, there would be a considerable watering down effect.

We consider that, rather than including such minor offences in the definition of infringement offences, the Board should instead request the insertion in the Act of another disciplinary mechanism that provides authority for the Board to levy fines (not exceeding some appropriate maximum) for minor disciplinary offences. Other disciplinary offences including, in particular, any that would place the public at a significant risk of harm, should continue to be dealt with via the complaints procedures that the Act currently sets out.

As regards the limited time to decide whether any disciplinary offence sits in the minor or more serious camp, 14 days appears short; however, such period should not exceed a month because, if an investigation is necessary, time will tend to obscure the facts.

Part 9 – Restrictions on Electrical Work

Disciplinary Provisions for Limited Certificate Holders

We note that limited certificate holders are exempted from the provisions of s74 and that, therefore, the Board is unable to apply (when warranted) disciplinary provisions to such holders other than cancelling the certificate. In some situations such cancellation may be appropriate but the Board makes a good point that less stringent action may be more appropriate to the particular offence.

Limited certificates are held by trainees and there may have been a good reason why, in 2006, trainees became excluded from the application of the disciplinary provisions. We suggest the Board make enquiry why this change was made when trainees were formerly subject to these provisions. For example, it may have been considered that trainees would always be under adequate supervision of a registered / licensed person (direct in the early stages of training and more remote in the late stages). If the legislation placed the entire responsibility on the supervisor for any breach /non-compliance committed by the trainee, this should, theoretically at least, ensure more stringent supervision, especially in the early stages of training.

If the omission of trainees were the result of some drafting error, we should have no objection to the reinstatement of the pre-2006 position, but point out that the Board would need to make it clear that the ability to take action against a trainee (other than cancelling the certificate) will not absolve a supervisor where the degree of supervision exercised was inappropriate to the trainee's competence.

Part 10 – Registration and Licensing of Electrical Workers

Registration and Licensing

As the introductory notes state, the question of whether it is necessary or desirable to retain both registration and licensing has been raised previously and the Board has a point in that persons having registration only are no longer permitted to carry out prescribed electrical work other than that permitted for a householder. As we understand it, the previous abolition proposal elicited great opposition from those in the electrical industry who had no qualification other than registration; they saw registration as being their "qualification" and saw no difference between its removal and someone being stripped of a certificate, diploma or degree, which is a very rare occurrence.

We envisage that the proposal will attract similar protests from those who have registration as their sole qualification. As the Board will be well aware, the EEA has always advocated that trainees embark on training that will gain them a qualification that is registered on the National Qualifications Framework; this provides them with better portability and we have deprecated the Board's previous policy of setting the registration bar below the old ESITO's National Certificates in Electricity Supply. This has led to many employees in the ESI settling for registration and not undergoing further training to gain their NCES. We can imagine that

they will also raise their voices against the removal of registration since they would then have no qualification at all.

We might point out that, now that the Board is also encouraging trainees in the industry to gain a registered NQF in order to become registered, this problem will eventually solve itself. In the meantime, although we can clearly see the *pro et con* arguments, we do not wish to express an opinion on this question.

Contractor Licences

We note the point that contractor licences have nothing to do with employer licences and that the former are issued in Australia, with all employees who carry out prescribed electrical work being registered / licensed. The point is made that the Board sees advantages in granting contractor licences to those licensed persons with business acumen in order to reduce the number of issues associated with commercial disputes. The Board envisages that the issue of a contractor licence would better deal with situations where a licensed person is instructed by the employing entity to cut compliance corners; currently the Board can take action against the licensed person but not against the employing entity.

The EEA has always been of the view that any employer should be responsible for the actions of any of its employees rather being able to hide behind the individual registration / licensing system and would encourage any amendments in the Act that removed that situation, which is endemic with the current system. For example, it is neatly solved by the employer licence system!

Since the driver for the contractor licence appears to be one of improving the Board's ability to impose discipline on a wayward employer, we have to ask why anyone would apply for a contractor licence unless there are counteracting advantages in having one. We cannot see Government taking any steps to insist that anyone employing registered / licensed persons to have a contractor licence. Accordingly, the Board needs to explain why such employers would bother to apply for one when having it would increase their liabilities.

Issuing Employer Licences

We note that the Board wishes to have the same degree of discretion in the issue of employer licences as it has for the issue of licences to individuals. Currently, the Act requires the issue of an employer licence on receipt of a certificate from an approved person (now an accredited certification body) that a compliant system of operation exists and is being maintained. While the Board may wish to have discretion, the proposals include no criteria against which a reasoned decision to issue - or not issue – a licence would be made.

We are of the view that there is little wrong with the current requirements in the Act and the relevant Electricity (Safety) Regulations 2010 (ESRs) but consider that there is a decided lack of good published guidelines or audit guide against which the approved person may examine and assess the applicant's system of operation for compliance. The requirements in the ESRs are of necessity "bare bones" and should be given more substance to assist approved persons.

That would make the certificate, when issued, much more meaningful than it is now when the approved person must exercise a considerable amount of judgement and discretion.

We have offered to assist the Board in developing such guidelines for better assessment of systems of operation but, so far, have not received any response from the Board. We understand that the Board's subcommittee is not averse to such assistance.

We should point out once again that, although the approved person is now required by the ESRs to be a JAS-ANZ accredited certification body, there is no current JAS-ANZ document that is specifically aimed at the JAS-ANZ accreditation of certified bodies to assess or audit the systems of operation of employer licence holders. Whether such a document is strictly necessary in the circumstances should be explored among the Board, certification bodies and JAS-ANZ. However, the existence of an audit guide to assist certification bodies in their system assessment task would also make the preparation of such an accreditation document easier.

Disciplinary Provisions for Employer Licence Holders

The Board wishes to have s120 amended to have the disciplinary provisions for employer licences aligned with those for registered persons. It states that it is constrained in by the content of s 120 as to what it may do in the event of any complaint and wishes to be able to apply the same process as it follows for individuals and take evidence in respect of the complaint.

Currently s120 allows the Board to take one of various disciplinary options if it is satisfied as to one of various specified outcomes but it is silent as to how the Board may come to that conclusion. However, there is provision in s120 for any employer licence holder, having been informed of a Board finding, to make written submissions and be heard by the Board on the question.

The EEA considers that the employer licence system is complete in itself and employer licence holders should not be subject to the complicated disciplinary provisions of Part 11 of the Act. In our view, s120 is very adequate in its provisions, particularly in permitting the Board to impose a wide variety and degrees of penalty for any breaches and non-compliances.

While the provisions in s120 for the Board to reach a conclusion on an employer licence complaint, may be "lightweight", there is an expectation that the Board should come to a conclusion and this, in turn, implies the use of some means of investigation by the Registrar or someone he or she employs for the task. Investigation of an employer licence complaint should not be deemed to be *ultra vires* provided by s120.

We should not object to the amendment of s120, such as inserting a further subclause that provide that such investigation might include, at the Board's discretion, the taking of testamentary evidence, but we remain of the strong view that placing employer licences under Part 11 is totally unwarranted. We should also remind the Board that it has no member who is

representative of employer licence holders, a matter that would need to be addressed if holders were to be subject to any further disciplinary provisions.

Disciplinary Provisions for Registered / Licensed Persons working under an Employer Licence

Since the Board has raised the question of disciplinary provisions for employer licence holders, we wish to reiterate in turn a matter concerning which the industry has a strong opinion. The Board has expressed its view in its publication *Complaints Against Employer Licence Holders* (on which the EEA was not consulted prior to its publication and consequently wrote to the Board in October 2014 expressing our concerns) that, in the event that any complaint involves defective or non-compliant prescribed electrical work performed by a registered / licensed person under an employer licence, it may take action against not only the employer licence holder but also against the registered / licensed person. Subclauses 3.5 and 3.6(b) of the above publication are relevant.

We understand the Board's wish to take action against any registered / licensed person who carries out defective work since it has no way of knowing whether that person might continue to carry out defective work when working under his / her individual licence and the Board believes it must protect the public from such defective work. However, it is the ESI's long held view that when a person is working under an employer licence, the holder of that licence is responsible for the compliance of the work done and not the individual worker who performed it. This ensures that the licence holder has ample incentive to ensure in turn that each employee is competent to perform the work allocated to him/her and that any supervision is appropriate to both the work and the person. Were this otherwise, the licence holder might hide behind the implied declaration by the Board that any registered / licensed person is competent to do any work within the relevant work limits.

We object, as set out in our letter, to the inclusion of the subclauses in the Board's publication and request that they be deleted. However, in the light of the discussions with the Board's subcommittee, we consider that, if the relevant sections of the Act are deficient in not making it clear that the Board may pursue the holder of the employer licence only in such circumstances, a clarifying amendment should be requested by the Board.

We should add that we understand the frustration of the Board when it is faced with a defective work complaint and the registered / licensed person and the employer licence holder point their fingers at one another as the responsible party. To our mind, the employer licence holder, as the employer, has the responsibility to make it clear to any registered /licensed person in its employ whether the person is to carry out the work under the employer licence or under the person's individual licence. In the absence of clear instructions, there should be a presumption that the work is carried out under the employer licence and the licence holder of that licence should be liable for any defective work that is carried out. That approach should concentrate the minds of employer licence holders!

Part 11 – Disciplinary Provisions

Bringing the Scheme into Disrepute

We note the Board's proposal that it should have the power to include in the disciplinary offences the bringing of the licensing scheme into disrepute. Since the EEA has, from time to time, expressed the opinion that the individual licensing system has its limitations and that employers, rather than the Board, must make the day by day decisions as to whether registered / licensed persons are competent to perform the prescribed electrical work they are asked to do, it may be fortunate that the EEA is not a registered / licensed person!

Ass mentioned above, it would be important that the Board develop criteria against which given "conduct unbecoming", such as disreputable or fraudulent trade practices, would be assessed and such criteria would need to be published and given publicity. In that other Acts appear to have such provisions, and given suitable judgement criteria, the EEA would not object to the inclusion of such offences in those over which the Board has jurisdiction.

Discretion to Review Investigators' Decisions

We note that the Act provides no discretion for the Board to do otherwise than accept any finding by an investigator as to whether a complaint should or should not go forward to a hearing. We consider that the finding of an investigator, having made diligent enquiry and ascertained all the relevant facts, should be sound and therefore be followed by the Board. However, bearing in mind that facts may come to the knowledge of Board members that may not have been considered by the investigator, the provision of the requested discretion to the Board as a whole appears to be a prudent measure.

We should prefer, in situations where the investigator does not appear to have considered all the relevant facts, that the Board should not reject the recommendation but refer the matter back to the investigator for his / her further consideration. In general, an investigator should be expected to have greater knowledge of the facts of a particular case than Board members and, accordingly, may reach a conclusion that is not immediately explicable to Board members who have little knowledge of the case. Any discretion should be exercised with great caution and, if exercised, reasons for any rejection should be recorded in the minutes of the Board's meeting.

Yours sincerely

Peter Berry
Executive Director
25 February 2015