

9 October 2018

Sue Begg  
Commissioner  
Commerce Commission  
PO Box 2351  
Wellington 6140

### **Response to Vector's health and safety DPP reconsideration request**

The Electricity Networks Association (ENA) welcomes the opportunity to provide a submission regarding the Commerce Commission's (the Commission) recent decision on Vector's health and safety DPP re-opener request (the Decision). ENA is the peak industry body for the electricity distribution businesses (EDBs) in New Zealand and makes this submission on behalf of that industry.

ENA has three key comments it wishes the Commission to consider in relation to its Decision:

- i) We disagree with the Commission's view that Section 30 of the Health and Safety at Work Act (HSW Act) and Section 6 of the Health and Safety in Employment Act (HSE Act) "...are not significantly different in the context of Vector's Policies."
- ii) We disagree with the Commission's assertion that the question of whether or not Vector's DPP reconsideration request is valid can be determined based solely upon a narrow view of the changes of wording within the text of the relevant legislation. Significant changes to the legislative landscape, such as those brought about by the passage of HSW Act, cannot be assessed purely on the basis of the dry language of the legislation itself.
- iii) We are encouraged by the comments in paragraph 17 of the Commission's letter to Vector of the 5<sup>th</sup> September and commend them for recognising the benefits that Vector and other EDBs approach to health and safety for their staff can bring.

We expand upon each of these points below.

#### **Significance of legislative change**

Further to our comment under item (i) above – we disagree with the Commission's assessment that the requirements on duty-holders expressed in these two separate pieces of legislation are essentially the same. The requirement in HSW Act to 'eliminate risks to health and safety' and the broadening of the duty of care, read in conjunction with the purpose of the legislation – particularly the principle that workers and other persons should be given the highest level of protection against harm – marks a significant change in emphasis from its precursor legislation the HSE Act.

## Broader context to legislative change

On item (ii), we recognise and support the points raised in Vector's letter to the Commission of the 17 November 2017, in paragraphs 7 through 9. ENA's senior management also met with the same representatives of Energy Safety in May 2016 to discuss the implications of the HSW Act for operational practices in electricity networks. ENA was advised (amongst other comments) that:

- Excuses for live line work are unacceptable.
- The industry is not operating on a risk management basis. It is stuck in 'old thinking'.

ENA does not necessarily agree with or endorse these views<sup>1</sup> but given these statements from the relevant regulator as to how they would interpret the requirements of the legislation, it is not surprising that Vector and others in the industry took these statements at face value, and amended or altered their health and safety policies to reflect them. The effect of the Commission's Decision is therefore to put Vector and other EDBs in a position where they must treat any statements made by regulators as to the correct interpretation of legislation with circumspection. Vector, and ultimately consumers, are punished for the regulators' regime that contradicts itself in places.

In addition to these explicit comments to the industry from the lead safety regulator, there was also a very clear signal from Government, legislators and policy-makers at the time the HSW Act was passed that this new legislation signalled a step-change in the way New Zealand businesses should manage health and safety risk. In introducing the bill for its first reading in Parliament<sup>2</sup>, the Minister of Labour at the time called the proposed Act "the most significant law reform in this area for 20 years". He added that "A shift in the way that we all view our involvement in, and responsibility for, health and safety at work is needed to make a lasting change in our safety culture." Mike Sabin, the Deputy-Chairperson, Transport and Industrial Relations Committee, also remarked "This bill will give effect to an entirely different regulatory regime and approach". [Emphasis added.] This is consistent with other statements made in Parliament at the time.

As one would expect, Vector, amongst many other businesses across the wider economy, took these messages to heart and responded accordingly by giving a great deal of consideration to how workers could be better protected from the risks posed from hazards arising in their day-to-day activities. The changes to Vector's health and safety policy were a direct consequence of both the textual changes in the relevant legislation (incl. the 'Purpose' section) but also the signals given by Government and regulators. The Commission should recognise this broader context in considering whether or not a material change in legislative requirements has arisen during the DPP period in question.

## Comments welcomed, but clarity needed

Lastly on item (iii) we applaud the Commission for stating "...if Vector or another EDB were to exceed its quality standards ... then it is unlikely enforcement action would be warranted." It would be very helpful to ENA and EDBs if the Commission could provide additional clarity as to what would constitute 'appropriate records' that could 'robustly demonstrate' the impact of health and safety policies on quality standard metrics. If defining such records is a piece of work that has yet to be undertaken by the Commission, ENA would be happy to support and contribute to this.

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<sup>1</sup> ENA understands that WorkSafe has since changed its position on live work from that expressed above, and that they now consider it is for businesses to evaluate the risks between work options adequately.

<sup>2</sup> Hansard: Volume 697; page 16705.

## Summary

Briefly summarising the points we've made above, we think the Commission has taken an overly narrow view as to what constitutes a change in legislative requirements. EDBs, operating as they do in the real world, must take heed of both the specific letter of the law but also the intent behind the law as communicated to them by Parliament, government and regulators. It is not only unfair but also potentially dangerous to not adequately recognise the broader political and policy environment in which new legislative settings emerge. Fortunately, when placed in the position of having to choose between what they considered the appropriate approach to mitigate safety risks to their workers and economic risk to their business, Vector have rightly erred on the side of safety.

On the positive side, the Commission has stated publicly that in future it is willing to disregard breaches of quality standards that arise from EDBs taking what they consider to be appropriate steps to protect their workers and the public. ENA looks forward to receiving more information from the Commission as to exactly how it would anticipate such dispensations working in practice.

Please let me know if you wish to discuss any of the points we've raised in our submission in more detail. In the first instance please contact ENA's Senior Advisor Policy and Innovation, Richard Le Gros, at [richard@electricity.org.nz](mailto:richard@electricity.org.nz), 04 555 0075.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Graeme Peters', written in a cursive style.

Graeme Peters  
Chief Executive  
Electricity Networks Association

