

Attachment 1.15

Environmental implications

January 2015



1 Environmental implications

The proposed reduction in capital and operating expenditure required to maintain Ausgrid's current electricity network would result in a similar reduction in the operation and maintenance of associated systems and controls that prevent and mitigate environmental impacts.

These controls include programs such as contaminated site assessment; oil containment installation and maintenance; environmental civil works (for example, material bays, wash bays, oil storage facilities); fluid filled cable maintenance and replacement; washbay monitoring and maintenance; water treatment plant monitoring and maintenance; and PCB removal programs. The consequences of not maintaining these controls would be much more significant and are outlined below.

1.1 Company implications

Consequences of a significantly reduced environmental management program include:

- increased risk of pollution and other harm to the environment
- reduced environmental performance
- reduced legal compliance
- no demonstrable due diligence
- an increased risk of company fines, prosecutions, orders and enforceable undertakings
- an increased risk of personal fines or jail time, including individuals, managers and directors
- increased liability exposure
- increased accidents in the workplace
- increased safety risk to the public
- network supply interruptions
- increased costs, including insurances, company asset repair/replacement costs, clean up/remediation/rehabilitation costs, third party claims etc
- loss of productivity
- poor regulator relationships and increased regulator scrutiny
- damaged to reputation and public credibility / relations
- reduced competitive advantage.

1.2 Program implications

1.2.1 Environmental Management System

Ausgrid's environmental management system (EMS) adopts a holistic, integrated and risk based approach to managing our environmental program. Ausgrid's EMS is currently certified to the Australian and International Standard AS/NZS ISO 14001:2004, having demonstrated conformity with this standard by seeking external certification since 1996.

Failure to provide the resources to support our EMS reduces the ability of Ausgrid to:

- prevent incidents from occurring in the first place
- manage incidents as they arise
- demonstrate due diligence.

1.2.2 Environmental Sustainability Improvement Plan

Our Environmental Sustainability Improvement Plan (ESIP) is developed as part of Ausgrid's risk management process to fulfil our due diligence requirements and demonstrate Ausgrid's commitment to continual improvement (a requirement of AS/NZS ISO 14001:2004).

The proposed reductions would mean limited resources to deliver the environmental risk assessment program, with no resources to support the ESIP.

The ESIP also provides an opportunity to identify and implement of costs savings relating to resource use and other efficiency improvements each year.

1.2.3 Environmental management plan

Ausgrid's environmental management plan is made up of a range of programs to maintain compliance of our environmental obligations. The following programs would be affected by the reduction in operating expenditure.

Performance reporting

- Annual NGER submissions - Corporations that fail to register and report or otherwise comply with obligations under the National Greenhouse and Energy Reporting Act may be liable for penalties. These include fines of up to \$340,000 for failure to and daily fines of up to \$17,000 for each day of non-compliance.
- Australian Bureau of Statistics (ABS) Environmental Indicators Survey - The *Census and Statistics Act 1905* provides the ABS with powers to direct Ausgrid to provide information.
- Annual Report – Environmental performance as required by the *Annual Reports (Statutory Bodies) Act 1984*.
- Internal performance reporting - reducing the effectiveness of Ausgrid's Board, Executives and Managers to discharge their responsibilities of environmental compliance.

Contaminated site investigations

- Reduced ability to remediate contaminated land that will lead to potentially significant remediation costs and/or fines under the *Contaminated Land Management Act 1997*.
- Delayed contamination removal will increase the risk of the contamination migrating, which increases the risk of exposure to staff and the public.

Deliver the environmental training system

- Negative impact on internal resources to provide training and increased risk of prosecution.
- Internal environmental technical support for Ausgrid staff would be limited, which would then require external support via consultancies or law firms to maintain compliance, however due to a lack of funding it's likely there will be insufficient support for operational staff.

Deliver NNSW Strategic Environment Plan

- Unable to resource NNSW projects.

Internal and external audit program

- Unable to engage or coordinate ISO certification audits, leading to a loss of certification
- No resources to undertake environmental or safety inspections, therefore no identification of issues to prevent an incident and negative impact on due diligence.
- Implementing corrective measures would not possible.

PCB Removal program and PCB management strategy

- Delayed PCB removal, resulting in a breach of conditions of Ausgrid's licence under the *Environmentally Hazardous Chemicals Act 1985*.
- A loss of our PCB licence would necessitate outsourcing to undertake transport and dispose of PCBs, which increase costs further due to Ausgrid supervision requirements.

Maintenance of Environmental Procedures

- Converting environmental procedures into the Business Management System would be delayed
- Workers would need to rely on out of date guidelines/procedures if there were less resources to monitor legislation changes and re-publish documents
- Limited ability to seek exemptions or provide advice and solutions to facilitate activities on the network, meaning more onerous requirements would be in place (increased project costs/delays or increased risk of non-compliance).

Manage the Environmental GIS and Web GIS

- Inability to maintain Ausgrid's Environmental GIS and associated training, resulting in employees and accredited service providers (ASPs) relying on inaccurate data.
- Increase the time needed to prepare environmental assessment and reduce the ability to identify sensitive environmental areas.
- Using out-of-date Environmental GIS data would breach our licence agreements with the various regulators/data custodians, leading to the likely loss of the use of the data completely.

Environmental Licence system

- Likely loss of Ausgrid's PCB licence, waste licences, trade waste agreements and other agreements and exemptions, meaning more onerous requirements (increased project costs and delays).

Pollution Control Maintenance Program

- Delays in reviewing chemical and environmental issues for Procurement.
- Delays in Ausgrid's Environmental Civil Works program, Oil Containment and Installation Programs, Fluid filled cable decommissioning and replacement programs would significantly increase the risk of non-compliance and likelihood of incidents.
- Failure to address known pollution issues is a clear breach of the POEO Act with significant penalties for both managers and directors.

Incident Management System

- Increased reportable incidents due to a reduction in maintenance and capital work to support the network.
- Less resources available to prevent, report and manage incidents (eg phone lines, equipment, investigations, regulator notifications etc)
- Likely delays to report pollution (must be immediate reporting) which can result in large fines. Failing to report a pollution incident posing material harm to the environment as required under Part 5.7 of the *Protection of the Environment Operations Act 1997* (POEO Act), attracts a maximum penalty is \$2,000,000 for corporations, or \$500,000 for individuals. There are further fines of \$240,000 for a company and \$120,000 for an individual for each day the incident goes unreported.
- An increase media/public attention with increased asset failures or injury.
- Inability to regularly maintain and update Ausgrid's Fluid Filled Cable management strategy, SF6 management strategy, Waste management strategy, Water management

strategy, Heritage Asset management strategy and Oil Filled Equipment management strategy will increase the risk of incidents occurring and also reduce our ability to demonstrate due diligence.

- Unable to provide the time to fully cooperate with environmental regulators would lead to increased regulator scrutiny.
- Increased community complaints by not being able to undertake our Noise Investigation Program or EMF program.
- Under POEO Act, each person who is a director, or who is 'concerned in the management' is also taken to have committed the offence.

The following programs would be affected by the reduction in capital expenditure.

Major and Minor Environmental Impact Assessment (EIA) programs

- Limited support for other business areas such as Contestability, Property and Major Projects etc
- Reduced resources will cause a backlog of works waiting for environmental approvals, causing unnecessary delays (wasted time/cost)
- This would increase the risk of work being done without environmental approvals, potentially resulting in fines of \$10 million if harm was caused.

2 Background

2.1 Compliance

Ausgrid is required to act in accordance with all relevant environmental legislation. Environmental legal obligations affect all levels of operation, from long-term network planning decisions, through to line construction and maintenance.

Consequences of non-compliance include large fines, conviction of corporate officers and remedial orders or injunctions that may delay a project or render it commercially unviable. Ausgrid through its officers, employees, managers, directors and contractors must:

- conduct proper environmental impact assessments and obtain the requisite planning approvals and pollution licences
- avoid harm to the environment in the course of conducting business and
- report any incidents immediately in accordance with the POEO Act.

The capital and operating expenditure amounts in Ausgrid's revised revenue proposal is required to comply with almost 50 environmentally related Acts that apply to Ausgrid's activities, and their associated regulators, standards, codes and guidelines. The proposal has been designed to meet Ausgrid's legislative obligations under these Acts:

1. *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*
2. *Aboriginal Land Rights Act 1983*
3. *Australian Radiation Protection and Nuclear Safety Act 1998*
4. *Catchment Management Authorities Act 2003*
5. *Coastal Protection Act 1979*
6. *Contaminated Land Management Act 1997*
7. *Crown Lands Act 1989*
8. *Electricity Supply Act 1995*
9. *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*
10. *Environmental Planning and Assessment Act 1979*
11. *Environmentally Hazardous Chemicals Act 1985*
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19. *Marine Pollution Act 2012*
20. *Mine Subsidence Compensation Act 1961*
21. *National Environment Protection Council Act 1994*
22. *National Environment Protection Measures (Implementation) Act 1998*
23. *National Greenhouse and Energy Reporting Act 2007*
24. *National Parks and Wildlife Act 1974*

25. *Native Title Act 1994*
26. *Native Vegetation Act 2003*
27. *Noxious Weeds Act 1993*
28. *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*
29. *Pesticides Act 1999*
30. *Plant Diseases Act 1924*
31. *Product Stewardship Act 2011*
32. *Protection of the Environment Administration Act 1991*
33. *Protection of the Environment Operations Act 1997 (POEO Act)*
34. *Public Sector Employment and Management Act 2002*
35. *Renewable Energy (Electricity) Act 2000*
36. *Roads Act 1993*
37. *Rural Fires Act 1997*
38. *Soil Conservation Act 1938*
39. *Sydney Water Act 1994*
40. *Sydney Water Catchment Management Act*
41. *Sydney Water Regulation 2006*
42. *Threatened Species Conservation Act 1995*
43. *Water Act 1912*
44. *Water Act 2007*
45. *Water Management Act 2000*
46. *Wilderness Act 1987*

Further detail on Ausgrid's environmental obligations under these laws is available in NUS 174 Environmental Procedures.

2.2 Offences and penalties

Modern environmental laws contain potentially severe sanctions in the event of default by the corporation, including large fines, conviction of corporate officers and remedial orders or injunctions that may delay a project or render it commercially unviable.

The heaviest sanction applies under the Federal legislation, where the maximum fines for breaches of the Commonwealth EPBC Act are \$5,500,000 and a possible seven years jail time.

The POEO Act regulates pollution control in NSW and establishes a three tiered hierarchy of environmental offences.

1. Tier One offences (maximum \$5 million / 7 years jail) - may be imposed where a company or an individual is found by the Court to have, negligently or wilfully (actual intention and wilful blindness to the possible consequences of an action):
 - disposed of waste in a manner which harms or is likely to harm the environment
 - caused any substance to leak, spill or otherwise escape in a manner that harms or is likely to harm the environment or
 - caused any controlled substance (under the *Ozone Protection Act 1989*) to be emitted into the atmosphere in contravention of the regulations and in a manner which harms, or is likely to harm the environment.

2. Tier Two offences (maximum \$1 million / 1 year jail) - is for all other offences under the POEO Act, which cover the areas of air, noise, water and land pollution, in addition to ancillary offences for non-compliance with notices, licence provisions and directions of authorised officers.
3. Tier Three offences (a maximum \$15,000) - are minor tier two offences that may be dealt with by way of an "on the spot" fine or a penalty infringement notice.

Although fines remain the most common penalty, the POEO Act (s254) permits the court to also order an offender to take such steps as are necessary to prevent, control, abate or mitigate any harm to the environment, make good any environmental damage resulting from the offence, or prevent the continuance or recurrence of the offence.

Other sentencing options available under the POEO Act include:

- orders to pay costs, expenses and compensation incurred by a public authority in connection with the prevention, control, abatement or mitigation of any harm to the environment caused by the offence (s245)
- orders for compensation to a person who suffers loss or damage to property because of an offence, or incurs costs or expenses in preventing, mitigating (or attempting to do so) such loss or damage (ss246 and 247)
- orders to pay investigation costs incurred by the prosecutor or by other regulatory authorities
- orders requiring the publication of the conviction in newspapers (s251)
- environmental service orders which relate to a specified project which will provide a benefit to the environment of a public place or for the public benefit (s250)
- environmental audit orders (s250)
- payment into environmental trust or to an environmental company (s250)
- order to attend training or to establish a training course (s250).

2.3 Recent environmental legislation reforms

In 2014, there were a number of legislation changes that significantly expanded the powers of environmental regulators to enforce tougher penalties for environmental offences.

2.3.1 Pollution reforms

On 29 August 2014, significant increases for penalty notice amounts for some offences commenced under the POEO Act through the Protection of the Environment Operations (General) Amendment (Fees and Penalty Notices) Regulation 2014.

These increased penalties are intended to be proportionate to the seriousness, harm and nature of an offence; provide an effective deterrent to committing environmental offences and re-offending; and reflect community expectations regarding environmental offences.

2.3.2 Contamination reforms

The Protection of the Environment Legislation Amendment Bill 2014 was introduced into the NSW Parliament on 12 August 2014 to amend the *Contaminated Land Management Act 1997*, the *Protection of the Environment Operations Act 1997*, and the *Radiation Control Act 1990* to increase certain penalties for offences and strengthen and align the enforcement provisions of those Acts.

The Bill would change the NSW contamination regime which affects Ausgrid as a land owner whose current or past activities have caused contamination. Key changes include an increase in the maximum penalty for a company to \$1 million for a number of offences including

penalties for each day the offence continues (previously \$165,000 for a corporation and \$77,000 for each day offence continues).

There would also be an increase in the maximum penalty for directors and officers to \$250,000 where they are liable for breaches under the existing 'executive liability' provisions contained in the CLM Act.

Other contamination changes include:

- new draft guidelines on the duty to report contaminated land contained in section 60 of the CLM Act (Duty to Report)
- new powers for the LEC including a range of orders and enforceable undertakings
- a new power for the EPA to require financial assurance in the form of a bank guarantee or bond to cover management orders
- a requirement to notify of friable asbestos contamination above a certain concentration
- notification of contamination where risks are presented by a vapour inhalation pathway.

The Bill would also give the EPA powers to mandate GPS tracking of waste, issue clean up notices for point source emissions, and impose duties to prevent or to minimise non-point source emissions.

2.3.3 Planning reforms

The NSW Government has proposed new penalties to crack down on companies and individuals that breach the Environmental Planning and Assessment Act 1979 (EP&A Act). The changes include a maximum of \$5 million for corporations (up from \$1.1 million) and \$1 million for individuals.

This means Ausgrid could potentially face double the penalty if a condition of an environmental assessment (ie EIA worksheet or REF) is breached that results in harm to the environment - a maximum of \$5 million under both the EP&A Act and the POEO Act.

2.3.4 Liability

With the exception of Tier One offences under the POEO Act, most offences created by environment protection legislation are strict liability offences (Tier Two). This means that the state of mind of the offender is not taken into account when determining liability for the offence. Consequently, once the facts establishing the offence are proved, the defendant is liable unless a defence can be established. The prosecution is not required to prove that the person committing the offence held an intention or other culpable state of mind. The defence of 'honest and reasonable mistake' (section 2.5) may, be available in very limited circumstances.

In the case of both Tier One and Two offences, each person who is a director, or who is 'concerned in the management' is also taken to have committed the offence. Under general corporate law, courts have broadly interpreted those 'concerned in the management' need not be part of the board, nor even executives, they can include site or plant managers.

A company is criminally responsible for the acts of its employees, even if the employee may have done their job in a way that is not approved by the company. A company might also be liable for the acts of independent contractors and their employees, depending on the level of supervisory control exercised over their activities.

An 'occupier' under the POEO Act is a person who has the management and control of a premise or the current licence holder (Ausgrid holds a number of environmental licences). The occupier of premises from which pollution has occurred is taken to have caused the pollution, unless the occupier proves that someone other than an agent, licensee, employee, contractor, or subcontractor was responsible and that the occupier took reasonable steps to prevent the pollution. What constitutes 'reasonable steps' is not defined in the POEO Act, but it is thought that the meaning of this term will correspond closely with 'due diligence' (refer to section 2.5).

2.4 Factors for prosecution

In the event of an offence, a number of factors are considered as outlined in the NSW environmental prosecution guidelines:

- the seriousness or triviality of the offence
- the harm or potential harm to the environment
- any mitigating or aggravating circumstances
- the degree of culpability of the alleged offender
- the availability and efficacy of any alternatives to prosecution
- whether the offender has already been dealt with by non-prosecutorial means
- whether the offence is a continuing or second (or more) offence
- the prevalence of the offence and the need for deterrence
- the length of time since the offence was committed
- the length and expense of the Court hearing
- the likely outcome of a conviction
- any precedent which may be set by not instituting proceedings
- whether others are to be prosecuted in relation to the same incident.

The basic consideration of whether to prosecute an employee or a manager / director, is to determine who is responsible for the offence: who committed the act, who formed the intention, and who created the material circumstances giving rise to the breach.

Factors used to consider whether to prosecute an employee include:

- whether they knew or should have known that the activity was probably illegal
- the seniority of the employee and the scope of duties
- whether the employee took reasonable steps to draw the attention of the employer (or other party) to the impropriety of the practice leading to the offence.

Factors used consider whether to prosecute a manager or director include whether:

- there is evidence linking a director or manager with the company's illegal activity
- the person had control over the company in relation to the criminal conduct.

Note: An employee who acted in good faith and followed a specific environmental procedure is unlikely to be prosecuted.

Factors used to consider how penalties are imposed by the Land and Environment Court (POEO Act s241) include the:

- extent of harm or likely harm to the environment
- practical measures which could have been taken to prevent, control, abate or mitigate any harm
- extent that the offender could reasonably have foreseen the harm or likely harm
- extent that the offender had control over the causes which gave rise to the offence
- the offender, in committing the offence, was complying with orders from an employer or supervising employee.

2.5 Defences

A defendant would need to satisfy the court of these key statutory defences under the POEO Act:

- s118, which provides a defence for both corporations and individuals (only for Tier One offences) where:
 - the commission of the offence was due to causes over which the defendant had no control and
 - the defendant took all reasonable precautions and exercised due diligence to prevent the commission of the offence.
- s169(1), which provides a defence to any charge under the POEO Act for directors and managers who can show that:
 - the person was not in a position to influence the conduct of the corporation in relation to its contravention of the provision or
 - the person, if in such a position of influence, used all due diligence to prevent the contravention by the corporation.

Note that a 'no knowledge' defence doesn't exist. Managers and senior management need to demonstrate due diligence was exercised to prevent the offence, or prove that they had no influence over the conduct of the corporation in relation to the offence.

2.5.1 Honest and reasonable mistake of fact defence

In rare circumstances for Tier Two and Three offences, it may be possible to rely on what is called the defence of honest and reasonable mistake. The defence is not available for Tier One offences, as these serious offences all require the wrongful conduct to be carried out wilfully or negligently. This defence can only apply where the accused has an honest and

reasonable belief in a state of affairs (facts) which, if true, would not only mean that the accused would not have committed the crime charged, but also no wrongful act at all. This defence will only be established if:

- the mistake is one of fact not law
- there is actually a mistake and not just mere ignorance on the part of the person relying on the defence
- the mistake is both honest and reasonable and
- but for this mistake, the act the subject of the charge, would be an innocent act.

This defence is not available where a person has only a general understanding of events or was under a general assumption that everything was in order.

2.5.2 Lawful authority defence

The defence of 'lawful authority' may be raised where conduct is authorised by an authority issued under the POEO Act. Most commonly, such authorisation is by an environment protection licence. Authorisation of conduct by a regulatory authority under another statute (for example, a Part 5 approval or development consent granted under the EP&A Act will not be sufficient to make out this defence.

2.5.3 Due diligence defence

The concept of 'due diligence' attempts to encourage sound environmental management by making it a defence to certain offences if the person or company used all due diligence to prevent the offence (POEO Act ss118 and 169(1)). Due diligence is not defined in the POEO Act, but the cases indicate that it implies:

- directors and managers must identify all environmental risks and sources of existing or potential environmental harm and introduce measures and procedures to ensure that these risks or sources of harm are adequately addressed
- directors and managers must take reasonable precautions to prevent the commission of an offence (typically evidence of an EMS aimed at ensuring environmental compliance and the prevention of environmental harm
- an environmental compliance plan should identify both the activities of the company which could give rise to an incident, set out applicable legal requirements and identify the persons or positions responsible for management of the activity
- the requirements of due diligence depend on the circumstances of the case, but involve a mind that is concentrated on the likely risks
- due diligence is not satisfied by precautions that are merely usual in the industry, unless also designed to prevent the contravention
- whether the company or a director took the precautions that ought to have been taken is a question of fact that will be decided objectively according to the standard of a reasonable person in the circumstances
- it is not an answer for the company or a director to say that they did the 'best' that could be done given the resources available.

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These controls include programs such as contaminated site assessment; oil containment installation and maintenance; environmental civil works (for example, material bays, wash bays, oil storage facilities); fluid filled cable maintenance and replacement; washbay monitoring and maintenance; water treatment plant monitoring and maintenance; and PCB removal programs. The consequences of not maintaining these controls would be much more significant and are outlined below.

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21. *National Environment Protection Council Act 1994*

22. *National Environment Protection Measures (Implementation) Act 1998*
23. *National Greenhouse and Energy Reporting Act 2007*
24. *National Parks and Wildlife Act 1974*
25. *Native Title Act 1994*
26. *Native Vegetation Act 2003*
27. *Noxious Weeds Act 1993*
28. *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*
29. *Pesticides Act 1999*
30. *Plant Diseases Act 1924*
31. *Product Stewardship Act 2011*
32. *Protection of the Environment Administration Act 1991*
33. *Protection of the Environment Operations Act 1997 (POEO Act)*
34. *Public Sector Employment and Management Act 2002*
35. *Renewable Energy (Electricity) Act 2000*
36. *Roads Act 1993*
37. *Rural Fires Act 1997*
38. *Soil Conservation Act 1938*
39. *Sydney Water Act 1994*
40. *Sydney Water Catchment Management Act*
41. *Sydney Water Regulation 2006*
42. *Threatened Species Conservation Act 1995*
43. *Water Act 1912*
44. *Water Act 2007*
45. *Water Management Act 2000*
46. *Wilderness Act 1987*

Further detail on Ausgrid's environmental obligations under these laws is available in NUS 174 Environmental Procedures.

2.2 Offences and penalties

Modern environmental laws contain potentially severe sanctions in the event of default by the corporation, including large fines, conviction of corporate officers and remedial orders or injunctions that may delay a project or render it commercially unviable.

The heaviest sanction applies under the Federal legislation, where the maximum fines for breaches of the Commonwealth EPBC Act are \$5,500,000 and a possible seven years jail time.

The POEO Act regulates pollution control in NSW and establishes a three tiered hierarchy of environmental offences.

1. Tier One offences (maximum \$5 million / 7 years jail) - may be imposed where a company or an individual is found by the Court to have, negligently or wilfully (actual intention and wilful blindness to the possible consequences of an action):
 - disposed of waste in a manner which harms or is likely to harm the environment
 - caused any substance to leak, spill or otherwise escape in a manner that harms or is likely to harm the environment or
 - caused any controlled substance (under the *Ozone Protection Act 1989*) to be emitted into the atmosphere in contravention of the regulations and in a manner which harms, or is likely to harm the environment.
2. Tier Two offences (maximum \$1 million / 1 year jail) - is for all other offences under the POEO Act, which cover the areas of air, noise, water and land pollution, in addition to ancillary offences for non-compliance with notices, licence provisions and directions of authorised officers.
3. Tier Three offences (a maximum \$15,000) - are minor tier two offences that may be dealt with by way of an "on the spot" fine or a penalty infringement notice.

Although fines remain the most common penalty, the POEO Act (s254) permits the court to also order an offender to take such steps as are necessary to prevent, control, abate or mitigate any harm to the environment, make good any environmental damage resulting from the offence, or prevent the continuance or recurrence of the offence.

Other sentencing options available under the POEO Act include:

- orders to pay costs, expenses and compensation incurred by a public authority in connection with the prevention, control, abatement or mitigation of any harm to the environment caused by the offence (s245)
- orders for compensation to a person who suffers loss or damage to property because of an offence, or incurs costs or expenses in preventing, mitigating (or attempting to do so) such loss or damage (ss246 and 247)
- orders to pay investigation costs incurred by the prosecutor or by other regulatory authorities
- orders requiring the publication of the conviction in newspapers (s251)
- environmental service orders which relate to a specified project which will provide a benefit to the environment of a public place or for the public benefit (s250)
- environmental audit orders (s250)
- payment into environmental trust or to an environmental company (s250)
- order to attend training or to establish a training course (s250).

2.3 Recent environmental legislation reforms

In 2014, there were a number of legislation changes that significantly expanded the powers of environmental regulators to enforce tougher penalties for environmental offences.

2.3.1 Pollution reforms

On 29 August 2014, significant increases for penalty notice amounts for some offences commenced under the POEO Act through the Protection of the Environment Operations (General) Amendment (Fees and Penalty Notices) Regulation 2014.

These increased penalties are intended to be proportionate to the seriousness, harm and nature of an offence; provide an effective deterrent to committing environmental offences and re-offending; and reflect community expectations regarding environmental offences.

2.3.2 Contamination reforms

The Protection of the Environment Legislation Amendment Bill 2014 was introduced into the NSW Parliament on 12 August 2014 to amend the *Contaminated Land Management Act 1997*, the *Protection of the Environment Operations Act 1997*, and the *Radiation Control Act 1990* to increase certain penalties for offences and strengthen and align the enforcement provisions of those Acts.

The Bill would change the NSW contamination regime which affects Ausgrid as a land owner whose current or past activities have caused contamination. Key changes include an increase in the maximum penalty for a company to \$1 million for a number of offences including penalties for each day the offence continues (previously \$165,000 for a corporation and \$77,000 for each day offence continues).

There would also be an increase in the maximum penalty for directors and officers to \$250,000 where they are liable for breaches under the existing 'executive liability' provisions contained in the CLM Act.

Other contamination changes include:

- new draft guidelines on the duty to report contaminated land contained in section 60 of the CLM Act (Duty to Report)
- new powers for the LEC including a range of orders and enforceable undertakings
- a new power for the EPA to require financial assurance in the form of a bank guarantee or bond to cover management orders
- a requirement to notify of friable asbestos contamination above a certain concentration
- notification of contamination where risks are presented by a vapour inhalation pathway.

The Bill would also give the EPA powers to mandate GPS tracking of waste, issue clean up notices for point source emissions, and impose duties to prevent or to minimise non-point source emissions.

2.3.3 Planning reforms

The NSW Government has proposed new penalties to crack down on companies and individuals that breach the Environmental Planning and Assessment Act 1979 (EP&A Act). The changes include a maximum of \$5 million for corporations (up from \$1.1 million) and \$1 million for individuals.

This means Ausgrid could potentially face double the penalty if a condition of an environmental assessment (ie EIA worksheet or REF) is breached that results in harm to the environment - a maximum of \$5 million under both the EP&A Act and the POEO Act.

2.3.4 Liability

With the exception of Tier One offences under the POEO Act, most offences created by environment protection legislation are strict liability offences (Tier Two). This means that the state of mind of the offender is not taken into account when determining liability for the offence. Consequently, once the facts establishing the offence are proved, the defendant is liable unless a defence can be established. The prosecution is not required to prove that the person committing the offence held an intention or other culpable state of mind. The defence of 'honest and reasonable mistake' (section 2.5) may, be available in very limited circumstances.

In the case of both Tier One and Two offences, each person who is a director, or who is 'concerned in the management' is also taken to have committed the offence. Under general corporate law, courts have broadly interpreted those 'concerned in the management' need not be part of the board, nor even executives, they can include site or plant managers.

A company is criminally responsible for the acts of its employees, even if the employee may have done their job in a way that is not approved by the company. A company might also be liable for the acts of independent contractors and their employees, depending on the level of supervisory control exercised over their activities.

An 'occupier' under the POEO Act is a person who has the management and control of a premise or the current licence holder (Ausgrid holds a number of environmental licences). The occupier of premises from which pollution has occurred is taken to have caused the pollution, unless the occupier proves that someone other than an agent, licensee, employee, contractor, or subcontractor was responsible and that the occupier took reasonable steps to prevent the pollution. What constitutes 'reasonable steps' is not defined in the POEO Act, but it is thought that the meaning of this term will correspond closely with 'due diligence' (refer to section 2.5).

2.4 Factors for prosecution

In the event of an offence, a number of factors are considered as outlined in the NSW environmental prosecution guidelines:

- the seriousness or triviality of the offence
- the harm or potential harm to the environment
- any mitigating or aggravating circumstances
- the degree of culpability of the alleged offender
- the availability and efficacy of any alternatives to prosecution
- whether the offender has already been dealt with by non-prosecutorial means
- whether the offence is a continuing or second (or more) offence
- the prevalence of the offence and the need for deterrence
- the length of time since the offence was committed
- the length and expense of the Court hearing
- the likely outcome of a conviction
- any precedent which may be set by not instituting proceedings
- whether others are to be prosecuted in relation to the same incident.

The basic consideration of whether to prosecute an employee or a manager / director, is to determine who is responsible for the offence: who committed the act, who formed the intention, and who created the material circumstances giving rise to the breach.

Factors used to consider whether to prosecute an employee include:

- whether they knew or should have known that the activity was probably illegal
- the seniority of the employee and the scope of duties
- whether the employee took reasonable steps to draw the attention of the employer (or other party) to the impropriety of the practice leading to the offence.

Factors used consider whether to prosecute a manager or director include whether:

- there is evidence linking a director or manager with the company's illegal activity
- the person had control over the company in relation to the criminal conduct.

Note: An employee who acted in good faith and followed a specific environmental procedure is unlikely to be prosecuted.

Factors used to consider how penalties are imposed by the Land and Environment Court (POEO Act s241) include the:

- extent of harm or likely harm to the environment
- practical measures which could have been taken to prevent, control, abate or mitigate any harm
- extent that the offender could reasonably have foreseen the harm or likely harm
- extent that the offender had control over the causes which gave rise to the offence
- the offender, in committing the offence, was complying with orders from an employer or supervising employee.

2.5 Defences

A defendant would need to satisfy the court of these key statutory defences under the POEO Act:

- s118, which provides a defence for both corporations and individuals (only for Tier One offences) where:
 - the commission of the offence was due to causes over which the defendant had no control and
 - the defendant took all reasonable precautions and exercised due diligence to prevent the commission of the offence.
- s169(1), which provides a defence to any charge under the POEO Act for directors and managers who can show that:
 - the person was not in a position to influence the conduct of the corporation in relation to its contravention of the provision or
 - the person, if in such a position of influence, used all due diligence to prevent the contravention by the corporation.

Note that a 'no knowledge' defence doesn't exist. Managers and senior management need to demonstrate due diligence was exercised to prevent the offence, or prove that they had no influence over the conduct of the corporation in relation to the offence.

2.5.1 Honest and reasonable mistake of fact defence

In rare circumstances for Tier Two and Three offences, it may be possible to rely on what is called the defence of honest and reasonable mistake. The defence is not available for Tier One offences, as these serious offences all require the wrongful conduct to be carried out wilfully or negligently. This defence can only apply where the accused has an honest and reasonable belief in a state of affairs (facts) which, if true, would not only mean that the accused would not have committed the crime charged, but also no wrongful act at all. This defence will only be established if:

- the mistake is one of fact not law
- there is actually a mistake and not just mere ignorance on the part of the person relying on the defence
- the mistake is both honest and reasonable and
- but for this mistake, the act the subject of the charge, would be an innocent act.

This defence is not available where a person has only a general understanding of events or was under a general assumption that everything was in order.

2.5.2 Lawful authority defence

The defence of 'lawful authority' may be raised where conduct is authorised by an authority issued under the POEO Act. Most commonly, such authorisation is by an environment protection licence. Authorisation of conduct by a regulatory authority under another statute (for example, a Part 5 approval or development consent granted under the EP&A Act will not be sufficient to make out this defence.

2.5.3 Due diligence defence

The concept of 'due diligence' attempts to encourage sound environmental management by making it a defence to certain offences if the person or company used all due diligence to prevent the offence (POEO Act ss118 and 169(1)). Due diligence is not defined in the POEO Act, but the cases indicate that it implies:

- directors and managers must identify all environmental risks and sources of existing or potential environmental harm and introduce measures and procedures to ensure that these risks or sources of harm are adequately addressed
- directors and managers must take reasonable precautions to prevent the commission of an offence (typically evidence of an EMS aimed at ensuring environmental compliance and the prevention of environmental harm
- an environmental compliance plan should identify both the activities of the company which could give rise to an incident, set out applicable legal requirements and identify the persons or positions responsible for management of the activity
- the requirements of due diligence depend on the circumstances of the case, but involve a mind that is concentrated on the likely risks
- due diligence is not satisfied by precautions that are merely usual in the industry, unless also designed to prevent the contravention

- whether the company or a director took the precautions that ought to have been taken is a question of fact that will be decided objectively according to the standard of a reasonable person in the circumstances
- it is not an answer for the company or a director to say that they did the 'best' that could be done given the resources available.