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CONFIDENTIAL AND PRIVILEGED

7 OCTOBER 2022

WORK HEALTH AND SAFETY & PUBLIC LIABILITY

1 Background

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[Redacted] Relevantly, we confirm that Transgrid is a private company which was granted a 99-year lease over the NSW Transmission network by the NSW government and is a network operator under the *Electricity Supply Act 1995* (NSW) (*ES Act*).

Further, we confirm that Transgrid operates pursuant to a NSW Transmission Operators Licence licence issued under the *Electricity Network Assets (Authorised Transactions) Act 2015* and is required to operate, maintain, and control the Shared Assets as the Primary Network Service Provider under the *National Electricity (NSW) Law 1997* (**National Electricity Rules**). [Redacted]

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2 Executive Summary

Transgrid’s duties and exposure to risks in regards to the Issues are broad with respect to obligations and duties owed to its workers and contractors, and public liability.

It is the responsibility of Transgrid and its Officers to ensure that it complies with the relevant laws and Standards in order to comply with their primary duties pursuant to the *Work Health and Safety Act 2011* (NSW) (WHS Act).

A failure to implement control measures to minimise identified risks, or disregard such risks with indifference, is likely to be considered grossly negligent or reckless conduct for which Officers are at risk of imprisonment in the event of a breach.

2.1 Work health and safety duty of care

Transgrid and its Officers have the following duties:

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2.2 Occupiers' liability under statute and common law

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3 Work Health and Safety

3.1 Primary duty of care

The WHS Act imposes a primary duty of care on a *person conducting a business or undertaking (PCBU)*, being Transgrid, where they must ensure, so far as is reasonably practicable, the health and safety of:

- (a) workers engaged or caused to be engaged by the person; and
- (b) workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking.¹

Further, for the relevant purposes of this advice, Transgrid must ensure so far as is reasonably practicable:

- (a) the provision and maintenance of a work environment without risks to health and safety; and
- (b) the provision and maintenance of safe plant and structures; and
- (c) the safe use, handling, and storage of plant, structures, and substances.

These duties also apply to others in the chain of employment, including:

- (a) contractors engaged by Transgrid and their employees;

¹ See section 19(1) of the WHS Act



- (b) sub-contractors, sub-contractors, and their employees; and
- (c) volunteers.

Finally, Transgrid must ensure, so far as is reasonably practicable, that the health and safety of ‘*other persons*’ is not put at risk from work carried out as part of the conduct of the business or undertaking. However, unlike the duty owed to workers of a PCBU, the duty owed to others is not expressed as a positive duty, as it only requires that persons other than workers ‘*not be put at risk*’.²

This duty can apply to members of the public given that each location of a substation and transmission tower can be regarded as a place of work regardless of whether there are only employees of the PCBU at the relevant location from time to time. The extent and scope of this duty is covered later in this advice.

It should also be noted that where a duty exists for Transgrid, the duty cannot be transferred to another person or PCBU.

A breach of a duty may incur penalties ranging between \$620,101 for a category 3 offence up to \$3,721,686 for a category 1 offence of gross negligence/reckless conduct.

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3.2 Duty of Officers

Where a PCBU has a primary duty towards the health and safety of its workers, an Officer of the PCBU must exercise due diligence to ensure that the PCBU complies with that duty or obligation. Relevantly, the WHS Act specifies that “due diligence” includes taking reasonable steps such as:

- (a) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations, and
- (b) ensuring that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety whilst carrying out work.³

The WHS Act adopts the definition of an Officer pursuant to the *Corporations Act 2001* (Cth) which includes:

- (a) a director or secretary of the corporation; or

² See section 20 of the WHS Act

³ See section 27(5) of the WHS Act



- (b) a person who makes, or participates in making decisions that affect the whole or a substantial part, of the business of the corporation; or
- (c) a person who has the capacity to significantly affect the corporation's financial standing.

Similar to the duty owed by Transgrid, an Officer's duty cannot be transferred or delegated to another person.

A breach of a duty may incur penalties ranging between \$61,795 for a category 3 offence up to \$744,229 and/or 5 years imprisonment for a category 1 offence of gross negligence/reckless conduct.

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3.3 Concept of reasonably practicable

As mentioned above, the primary duty is qualified by the concept of *reasonably practicable* which essentially refers to what is reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:

- (a) the likelihood of the hazard or the risk concerned occurring;
- (b) the degree of harm that might result from the hazard or the risk;
- (c) what the person concerned knows, or ought reasonably to know, about the hazard or the risk and ways of eliminating or minimising the risk;
- (d) the availability and suitability of ways to eliminate or minimise the risk; and
- (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.⁴

3.4 What is a workplace?

To the extent that a PCBU's activities involve the management or control, in whole or in part, of a workplace, Transgrid must ensure, so far as is reasonably practicable:

- (a) that the workplace, the means of entering and exiting the workplace and anything arising from the workplace are without risks to the health and safety of any person; and

⁴ See section 18 WHS Act



- (b) that a workplace at which construction work is carried out, is secured from unauthorised access.

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3.5 Duty of persons with management or control of fixtures, fittings, or plant at a workplace

The WHS Act imposes a duty upon a person with management or control of fixtures, fittings, or plant at a workplace to ensure, so far as is reasonably practicable, that those things are without risks to health and safety of any person. ⁷ For example, a person who manages or controls workplace fixtures, fittings or plant has a duty to ensure, so far as reasonably practicable, that hazards are repaired or replaced in that workplace such that the hazard is eliminated or risk of injury is minimised.

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3.6 Regulations, Codes, Guidelines and Australian Standards

We note that there are several regulations, Australian Standards, and codes of practice (**Codes**) (collectively, **Standards**) that apply to the operations of Transgrid, each of which has a different level of legal authority. In summary:

- (a) Regulations - provides for further rules that have legal enforcement;
- (b) Australian Standards - there is no requirement to comply with standards unless it is referred to in a relevant law such as the WHS Act or WHS Regulations;
- (c) Codes - are admissible in court proceedings as evidence of whether or not a duty or obligation under the WHS Act or Regulations has been complied with. Further, a court may have regard to a Code as the evidence of what is known about a hazard or risk, risk assessment or risk control, and the consideration of the reasonably practicable measure.⁹

This advice is not intended to cover the specific details of each, but rather highlight that they collectively provide information with respect to the relevant standard of care and reasonable person test.

The WHS Regulation requires duty holders to work through the hierarchy of control measures when managing certain risks. The hierarchy ranks control measures from the highest level of protection and reliability to the lowest. Relevant Codes will assist in the guidance on the risk management process which includes (in order):

- (a) Elimination
- (b) Substitution
- (c) Isolation
- (d) Engineering controls.

The WHS Regulations also specifically provides a duty for Transgrid as a PCBU to manage the exposure to airborne asbestos at a workplace, and the Safe Work Australia Code of Practice “How to manage and control asbestos in the workplace” provides guidance as to the known risks and controls.

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3.7 Challenge to AER proposed funding

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4 Occupier's liability at common law and statute

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