

Essential Services Commission

Level 8/ 570 Bourke Street
MELBOURNE 3000

[REDACTED]
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Date 26 July 2023

By Email: energyreform@esc.vic.gov.au

Dear Sir/Madam,

Essential Services Commission: Making a Land Access Code of Practice: Draft Decision 15 June 2023 Land Access Code of Practice: Draft Version for Consultation 15 June 2023

The Law Institute of Victoria ("LIV") welcomes the opportunity to respond to the questions for stakeholders in the Essential Services Commission's *Making a Land Access Code of Practice: Draft Decision 15 June 2023* and *Land Access Code of Practice: Draft Version for Consultation 15 June 2023*.

With some reservations, referred to below, the LIV is currently of the view the proposed *Land Access Code of Practice*, as set out in the 15 June 2023 Draft Version for Consultation, will provide a sound, workable framework for electricity transmission companies to exercise access powers under section 93 of the *Electricity Industry Act 2000* (Vic).

The LIV's reservations are concerned with engagement and information sharing between electricity transmission companies and those who will be directly, and indirectly, affected by the companies' section 93 access. In the LIV's view, engagement and information sharing, especially, are vital if current expectations about the timing of construction of high voltage transmission power lines are to be met satisfactorily, and public confidence in electricity transmission companies' activities is to be established and maintained. The LIV calls for its reservations to be addressed in the final *Land Access Code of Practice*.

The LIV has consulted members of its Property and Environmental Law Section to inform this response.

The LIV's response to the questions posed in the consultation are as follows:

Topic: The need for an enforceable Land Access Code of Practice

Question:

1. *Do you consider that the current proposed obligations in the code of practice provide enough clarity on what is expected from transmission companies when accessing land? Do the proposed obligations provide sufficient flexibility to develop new transmission projects and undertake significant upgrades?*

Response:

Please refer to comments, below.

Topic: What activities should the code of practice apply to?

Questions:

2. *Do you identify any issues with the proposed scope of the code of practice – that it would apply to all new transmission projects and significant upgrades on existing transmission projects?*

Response:

The LIV has identified important issues with the scope of the proposed code. The issues are referred to below.

3. *Do you agree to the code of practice applying to all stages of a new transmission project in which section 93 access may be required?*

Response:

The LIV is currently of the view that it should.

Topic: Obligations prior to accessing land

Questions:

4. *Do you have any comments on the proposed general communication and engagement obligations on transmission companies before accessing land?*

Response:

The LIV has identified the following issues with the proposed general communication and engagement obligations of a transmission company, before it exercises section 93 access (with reference to parts of the proposed code):

Part 2 – Glossary

- **“affected party/affected parties”:**
LIV comments: It is most desirable that the definition be amended to include a reference to a mortgagee, receiver, or liquidator in possession of the private land.
- **“occupier”:**
LIV comments: The LIV suggests that the words “that is confirmed by the landowner” should be deleted. The LIV considers that landowner confirmation is unnecessary, and, in any event, may not be forthcoming.
- **“other parties interested in land”:**

LIV comments:

- In the paragraph after **(a)(iii)** – the opening words of **line 1** should be amended to read: “that is registered *or recorded* on the folio ...”. The italicized addition is necessary as, under the *Transfer of Land Act 1958* (Vic), documents are either registered or recorded. For example, mortgages are “registered”. Caveats are “recorded”.
- In the paragraph following **(a)(iii)** – all wording after “1958” should be deleted. If the words, “*but excludes beneficiaries ... the proposed works; or*” are to remain, they will, in the LIV’s opinion, defeat the purpose of sub-paragraph **(a)**, effectively disenfranchising those with legitimate interests from being informed by electricity transmission companies of how their activities will affect them.

Moreover, the wording, suggested to be deleted, is at odds with the Code objective **1.1.2 (a)**, namely, to:

“balance the statutory right of *electricity transmission companies* to access *private land* where necessary to provide their essential services, and *the rights of those interested in the land affected* by that exercise of power” (emphasis added).

It is also at odds with the Commission’s reasons for making a Code, set out in *Making a Land Access Code of Practice Draft Decision 15 June 2023*. For example, at page 5 under the sub-heading “Improving communication”, it is stated:

“... Under the proposed code of practice, when planning a new transmission project or significant upgrades to existing transmission projects, a transmission company *would have to communicate broadly with potentially affected parties about key details of the project and provide a point of contact for enquiries about land access.*” (emphasis added)

The persons referred to in paragraph **(a)** are, typically, “*those interested in land affected by*” an electricity transmission company’s “*exercise of power*” (to quote Code objective 1.1.2(a)); or “*potentially affected parties*” who have a legitimate interest in being informed by an electricity transmission company “*about key details*” of a project and being provided with a “*point of contact*” (to quote the *Making a Land Access Code of Practice Draft Decision 15 June 2023*) (italicised emphasis added)

- Paragraphs **(b)(i)** and **(b)(ii)** –

Both include the phrase “a lawful interest”. The LIV is of the view that the phrase is not appropriate with reference to the *Transfer of Land Act 1958* (“TLA”).

The Act deals with ‘legal’ interests, those that can be registered. It also deals with ‘equitable’ interests. ‘Equitable’ is the word commonly used for interests that can be recorded, but not registered. See the examples referred to above.

In the context of the TLA, “lawful” is not a synonym for ‘legal’ or ‘equitable’. If “lawful” is retained, the LIV considers it will create unnecessary confusion, raising the distinct possibility of legal arguments about what the phrase “a lawful interest” means. It is in nobody’s interest for this type of argument to arise.

In **(b)(i)** and **(b)(ii)** the LIV suggests the wording be altered to remove “lawful”, and simply refer to “an interest”. This will adequately cover both ‘legal’ and ‘equitable’ interests, achieve the desired purpose, and avoid confusion.

- Paragraph **(b)(i)** “**written notice**” -

The LIV suggests there should be a definition of “written”, with the purpose of removing doubt about what format of writing is acceptable, and to provide flexibility, when giving a notice. The definition of ‘writing’

in section 38 of the *Interpretation of Legislation Act 1984* (Vic) could be adapted for this purpose.

A possible definition might be worded:

“written” means all modes of representing or reproducing words, figures, or symbols in a visible form.”

▪ **Clause 2.2.2 (b) -**

As Australia Post’s official delivery times vary, depending on where a notice is posted, the LIV suggests the clause is reworded to read, “if sent by post, four business days after posting, if the notice is posted at Melbourne. If the notice is posted at a place other than Melbourne, six business days after posting.”

▪ **Other clauses requiring inclusion of “other parties interested in land” –**

The LIV considers the following clauses should be amended to include the phrase “other parties interested in land” –

- 4.1.1 (d) and (e);
- 5.4.4 ;
- 6.1.1, opening paragraph, line 3;
- 6.2.1, opening paragraph, line 3;
- 6.2.2;
- 9.2.1 (g);
- 9.3.1 (c), (d) & (e);
- 9.4.1 (c);
- 12.1.2 (a) & (c)

because they encompass matters affecting the interests of, or deal with matters of legitimate concern to, those “other parties”.

5. *Do you have any comments on the proposed information and notices that should be provided by transmission companies to affected landowners and occupiers before accessing land under section 93 of the Act or entering into a voluntary access agreement? Should any information be added, removed or amended?*

Response:

The LIV suggests it is desirable that the format of the notice referred to in 7. *Notice of access under section 93* be set out in a Schedule. This will avoid the potential for multiple formats,

which will inevitably result in disputes about effectiveness for purpose, with the potential for disruption to the progress of works.

In respect of **clause 7.4.1 (a)**, the LIV considers the form of consent should form part of the notice of access and should be signed and dated by all of the “affected parties”.

6. *Do you consider that the proposed timing of 10 business days is sufficient period for a Notice of Access?*

Response:

The LIV presently considers that it is.

7. *Do you have any comments on the proposed maximum access period?*

Response:

The LIV considers the practicalities of proposed maximum access period are best commented on by those who may be directly affected.

Topic

Obligations during land access

Questions:

8. *Do you have any comments on the proposed risk mitigation obligations in the draft code of practice?*

Response:

The LIV presently has no comments it wishes to make.

9. *Do you have any comments on the proposed specific risk mitigation obligations in the draft code of practice related to biosecurity protocols, fire risk management and health management?*

Response:

The LIV presently has no comments it wishes to make.

Topic

Dispute resolution, record keeping and reporting

Questions:

10. Do you have any comments on the proposed complaints handling and dispute resolution obligations in the draft code of practice?

Response:

The LIV has no comments it presently wishes to make.

11. Do you have any comments on the Energy and Water Ombudsman Victoria (EWOV) being the proposed dispute resolution scheme? Are there other dispute resolution bodies we should consider? What would be the costs and benefits of those options?

Response:

The LIV presently considers the EWOV is an appropriate choice.

12. For what period of time should transmission companies be required to retain records related to land access?

Response:

Bearing in mind the limitation of action timeframes in the *Limitation of Actions Act 1958* (Vic), the LIV presently considers 7 years is an appropriate requirement.

13. What scope of records should transmission companies be required to retain?

Response:

The LIV presently considers all records relating to access should be retained.

14. Are the proposed reporting requirements appropriate to monitor compliance with this draft code of practice? If no, what reporting should be required? Do you have any comments on whether the monthly reports should be used for additional purposes?

Response:

The LIV presently considers the proposed reporting requirements to be appropriate.

Topic

Implementation considerations

Questions:

15. Is there any additional information we should consider on the expected costs and benefits of the draft code of practice?

Response:

Not so far as the LIV is presently aware.

16. Are there any other issues with implementing the code of practice we should consider?

Response:

The LIV does not presently have any other issues with regard to the implementing the code of practice.

If you wish to discuss the LIV response, please contact Phillip Nolan, Special Counsel, Property, Environment & Risk, [REDACTED]

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Adam Awty', with a stylized flourish at the end.

Adam Awty
Chief Executive