

T: [REDACTED]

E: [REDACTED]

3 March 2023

Essential Services Commission
Level 8/570 Bourke Street
MELBOURNE 3000

By e-mail only to: energyreform@esc.vic.gov.au

Dear Sir/Madam,

**Essential Services Commission 2023, Making a Land Access Code of Practice:
Consultation Paper, 2 February**

The Law Institute of Victoria (“LIV”) welcomes the opportunity to provide feedback on the ESC’s Making a Land Access Code of Practice: Consultation Paper (“the Consultation”).

The LIV is of the view that the current processes for access to land by electricity transmission companies under section 93 of the *Electricity Industry Act* 2000 should be modified. If public confidence in electricity transmission companies is to be maintained, the LIV believes there must be transparency and consistency in dealings and connections between transmission companies. The LIV supports the adoption of a unified set of rules across statutory access and privately agreed access arrangements to uphold consistency and confidence.

The LIV has consulted with members of the LIV Property and Environmental Law Section to inform this submission. Given the challenges in providing an appropriately informed response in the short timeframe for feedback, the LIV does not seek to respond to all questions in the Consultation Paper. Rather, the LIV has provided responses to those questions that are most pertinent and within the scope of knowledge of LIV Property and Environmental Law Section practitioners.

1. Do the principles in the *Electricity Transmission Company Land Access Statement of Expectations* provide an appropriate basis for enforceable obligations in a Land Access Code of Practice? If not, why not?

In general terms, the LIV is of the view that the principles in the *Electricity Transmission Company Land Access Statement of Expectations* are an appropriate basis for enforceable obligations. However, the LIV has provided some comments below, on certain aspects of the *Statement of Expectations*, in answer to the Questions for stakeholders.

2. Is the scope of the *Electricity Transmission Company Land Access Statement of Expectations* – applying to electricity transmission companies to access land for new greenfields transmission projects – appropriate? Should other activities related to private access undertaken by an electricity transmission company under section 93 of the *Electricity Industry Act 2000* be included in the code?

The LIV considers it of the utmost importance, in establishing public and landowner confidence in electricity transmission companies’ (“transmission company/companies”) activities, that there be transparency and consistency in the transmission companies’ dealings in connection with accessing privately owned land for construction, on-going maintenance, and decommissioning of transmission lines.

The LIV agrees it is commonplace for a transmission company to negotiate a licence agreement directly with a landowner to provide for access, rather than relying on the powers contained in section 93 of the *Electricity Industry Act 2000*, or pre-existing rights pursuant to registered easements. These direct arrangements are good practice and ought to be encouraged to promote the participation of landowners and addressing their unique concerns.

In the LIV’s view, confidence, transparency, and consistency require a Land Access Code of Practice (“Code”) to apply to both statutory *and* privately agreed access. It is the LIV’s view that there cannot be one set of rules for statutory access and another set of rules for privately agreed access as it will continue to cause inconsistencies.

3. How has your experience with land access been following the release of the *Electricity Transmission Company Land Access Statement of Expectations*? Are there any issues you have experienced that could be further addressed in a code of practice with enforceable obligations?

The LIV considers this is a matter on which others are better qualified to provide advice.

- 3.1 What do you consider are the most important problems that need to be addressed when electricity transmission companies access land under section 93 of the *Electricity Industry Act 2000*?

The LIV considers this is a matter on which others are better qualified to provide advice.

- 3.2 What other options do you think the commission could consider in addressing the identified problems relating to land access under section 93 of the *Electricity Industry Act 2000*? Are there alternative elements to consider within the code? What are the costs and benefits of those alternatives?

The LIV considers this is a matter on which others are better qualified to provide advice.

3.3 Are there any elements of the *Electricity Transmission [REDACTED] and Access Statement of Expectations* that should be clarified in a Land Access Code of Practice?

The LIV considers that the following elements of the *Electricity Transmission Company Land Access Statement of Expectations* require clarification in a Code.

While the *Electricity Transmission Company Land Access Statement of Expectations* is primarily self-regulatory, from a transmission company perspective, a Code will require more prescriptive obligations and must set out how a breach of a Code will be enforced, and how a landowner, or other person with an interest in affected land, may involve an appropriate ombudsman, or implement mediation, if there is a dispute with a transmission company.

A transmission company must be obliged, at the outset, to provide all information on how a landowner's land will be affected over the short, medium, and long term. A landowner must be informed that their land tenure (and the value of the land) will be affected by entering into a voluntary agreement with a transmission company or being subject to a transmission company's statutory powers of entry under section 93 of the *Electricity Industry Act 2000*.

The negotiation of and entry into a voluntary agreement with a transmission company is a crucial matter for a landowner and other parties interested in the land. If the Commission intends, as part of the Code, or in regulations, to prescribe the details of format these agreements, the LIV requests to be consulted on this, at an appropriate time in their development.

The comments that follow are based on the *Electricity Transmission Company Land Access Statement of Expectations, 17 May 2022* (Statement of Expectations) and not on the shortened form of the Statement of Expectations set out in Appendix B to the 2 February 2023 *Making a Land Access Code of Practice: Consultation paper*.

The comments respond to the content of the *Statement of Expectations* based on its numbered headings.

1. About this Statement of Expectations

1.1 Purpose

1.1.2 The definition of "those interested in the land" (see footnote 2 on page (iii)) is too narrow and could mislead. Interests in land are far wider than those mentioned in

the definition. For example, those with “interests in land” include licensees, mortgagees, caveators, easement holders, trustees, and section 173 agreements under the *Planning and Environment Act 1987*. In a Code, the definition should include wider interests.

1.3 Application

1.3.2 The “transmission project lifecycle” omits the important matters of “replacement” and ‘decommissioning’. In a Code, both should be added.

1.3.5 The “Statement of Expectations” does not apply to voluntary agreements between an electricity transmission company and a landowner. A Code should be incorporated into these agreements, either in full or by reference.

2. General principles for land access Approach to communications and engagement

Item 5 – Employ respectful two-way communication:

Fifth bullet point: in a Code, mention might also be made of fire danger periods and days of total fire ban. Fire danger periods are prescribed by law and officially noted in the Gazette. On a total fire ban day, it is impermissible to operate machinery that may cause a fire.

Process of communication and engagement

Item 6 – “and others likely to be directly affected”: when the existing definition of “those interested in the land” is taken into account, it is quite possible only those with physical presence might be identified and contacted. This places the transmission company and the landowner at unnecessary risk because the category of those interested in the land can be far wider. In a Code, reference should be made to other interests in the land. In the bullet-pointed examples, an additional item should be added viz “Contact persons interested in the land”, including registered mortgagees and other holders of registered interests.

Item 7 – Provide identification on contact: the Code should require a person(s) negotiating with a landowner or occupant or a person(s) supervising on-site works, in addition to clearly identifying themselves and for whom they work to the landowner or occupant, on entering land for the first time, to provide a card with their name, their employer’s name, contact number and web address to the landowner or occupant.

Item 9 – Make clear when and why access is required: the Code should require a transmission company to provide the information to “those interested in the land”

as to how the works to be undertaken will affect them, especially mortgagees and others with security interests.

In a Code, the sixth bullet-point should require that, if the specified area(s) cannot be identified before access, they will be identified as soon as possible afterwards.

Item 11 – Commit to details on how access will occur: in a Code, in addition to landowners, reference should be made to “other occupiers”, so tenants and licensees will be consulted, and their preferences considered.

Item 13 – Keep records: In a Code, the bullet-points should make mention of “those interested in the land”, in addition to landowners.

Item 14 – Maintain confidentiality and respect privacy: instead of mentioning “collects and maintains”, a Code should simply state, “An electricity transmission company will comply with the *Privacy Act 1988* and the *Australian Privacy Principles*.” The change will ensure that it is clear that a transmission company is responsible for *all* privacy aspects and the focus is not on merely collecting and maintaining.

2.1 Exception to notification to deal with emergencies: in a Code, reference should be made to “design, planning, construction, maintenance, replacement, operation, or decommissioning”, to fully cover a transmission company’s likely on-site operations.

3. Expectations of landowners and parties interested in land: in a Code, the second bullet point should require landowners and parties interested in the land to provide responses “in a timely manner”, not with a “minimum of delay”. The suggested phrasing better caters for the differing interests of landowners, occupiers, and those with interests in the land in other capacities.

Other:

Insurances: the Code might require a transmission company to advise a landowner to inform their insurer when entering into a voluntary access agreement, or when an entry under section 93 occurs. Both will be matters affecting a landowner’s insurance policies.

4 What obligations do you think are needed to cater for the specific needs of private land (such as, and including, biosecurity protections and processes)?

While others are better qualified to provide advice, the LIV considers it would be difficult to implement specific obligations in respect of biosecurity protection.

A transmission company should be obliged to consult with a landowner in good faith and have an awareness of any biosecurity alerts in the region, consistent with principle 18 of the *Statement of Expectations*.

The needs of individual landowners could vary significantly. For example, an organic farmer will have significant and unique obligations to maintain organic status, hence their obligations in respect of biosecurity protection should be understood and determined on a case-by-case basis.

- 5 Compared to the principles set out in the *Electricity Transmission Company Land Access Statement of Expectations*, should the Land Access Code of Practice have more prescriptive obligations about the time provided to landowners prior to accessing land, the transparency of processes when accessing land, or level of flexibility on the time to access land? If so, what specifically should be required of electricity transmission companies? What are the benefits and costs of having more prescriptive requirements?**

The LIV considers this is a matter on which others are better qualified to provide advice.

- 6 The Energy and Water Ombudsman (Victoria) (EWOV) is the current complaints dispute resolution body for the resolution of disputes involving electricity transmission companies under the statement of expectations. Are there other options for complaint handling that we should consider as we develop the code of practice? What would be the costs and benefits of those options?**

The LIV suggests that an option for complaint handling that should be considered is to utilise the Victorian Small Business Commission to ascertain whether it might be willing, or able, to provide mediation for disputes involving transmission companies and landowners, occupiers, and others with an interest in land.

Under the *Small Business Commission Act 2017* the Commission currently mediates a range of commercial disputes, including those between farmers and their creditors.

- 7 Is there anything else you want us to consider when drafting the Land Access Code of Practice?**

The LIV recommends the following be considered when drafting the Code:

- requiring a transmission company to provide a hard copy of the Code to landowners and/or occupiers, before gaining access, and to promptly provide a copy of the Code to others with an interest in land, upon identifying them;
- inserting a “Notice to Landowners/Occupiers” on the covering page of the Code (or in a prominent place) outlining that if a landowner or occupier is in any doubt as to

their legal position, they should obtain their own legal advice reaching an agreement and/or signing any documentation;

- requiring transmission companies to develop and implement standard agreements dealing with access and to publish the agreements (in downloadable pdf format) on their websites;
- requiring transmission companies to provide a hard copy of the standard agreement to be negotiated with a landowner, or occupant, at the same time as a hard copy of the Code is provided;
- including a term in the Code that has the effect of incorporating it into privately agreed access arrangements;
- including a term in the Code to the effect that it cannot be excluded or varied by private agreement, and to the extent it and a private agreement conflict, the Code overrides the private agreement;
- ensuring the full range of remedies in the *Essential Services Commission Act 2001*, Part 7-Enforcement are available for breaches of the Code by transmission companies, by designating all Code requirements as “civil penalty requirements”;
- amending or remaking the *Electricity Industry (Penalty Regime) Regulations 2022* to include the Code;
- ensuring the Code is readily accessible, via a prominent direct link incorporated into the Commission’s website home page.

If you wish to discuss further, please contact Property and Environmental Law Senior Lawyer and Section Lead, Matthew White at [REDACTED]

Yours faithfully,



Adam Awty
Chief Executive Officer