



Australian Government

Australian Energy Infrastructure Commissioner

8 March 2023

Mr Aaron Yuen
Essential Services Commission
Level 8, 570 Bourke Street
Melbourne VIC 3000

Dear Mr Yuen

Re: Making a Land Access Code of Practice

The Australian Energy Infrastructure Commissioner (**AEIC**) welcomes the opportunity to make a submission in response to the Making a Land Access Code of Practice consultation paper.

The AEIC fulfils a national, independent role in Australia's energy sector and our responsibilities include:

- facilitating the handling of complaints from concerned community residents about planned and operating wind farms, solar farms, energy storage facilities and new large-scale transmission projects,
- identifying and promoting best practices for industry, government and related agencies to adopt with regard to the planning, operation and governance of such projects, and
- improving information access and transparency about proposed and operating projects, and relevant government and industry information more broadly.

The timely approval and efficient delivery of large-scale transmission projects that enable the significant energy transition in Australia to occur, whilst ensuring that potential impacts of such projects to regional communities and landholders are appropriately managed, is likely to be our collective highest priority for this decade.

1. Overview

We are delighted that the Essential Services Commission is continuing to progress the development of a Code of Practice for the exercise of the power to access land under section 93 of the *Electricity Industry Act 2000* (Vic) (the **Act**).

Section 93 of the Act enables a transmission company to enter land for a range of purposes without the consent of the landholder. Part 6 of the *Essential Services Commission Act 2001* (Vic)

empowers the Essential Services Commission to make a Code of Practice for the exercise of the power set out in section 93 of the Act.

The Statement of Expectations has fulfilled an important function in setting clear and transparent expectations for the conduct of transmission companies accessing land under section 93 of the Act.

The development of a robust and enforceable Code of Practice will provide the community and transmission companies with confidence that the processes, procedures and protocols utilised in accessing land under section 93 of the Act are appropriate.

Before invoking powers such as those in section 93 of the Act, it is best practice for transmission companies to negotiate voluntary arrangements for access to land. Transmission companies should prioritise the development of strong stakeholder relationships with landholders to facilitate the negotiation of these arrangements.

However, voluntary access arrangements will not always be possible and circumstances will arise in which transmission companies may elect to access land under section 93 of the *Electricity Industry Act 2000* (Vic) (the **Act**).

The Code of Practice should clearly identify the processes, procedures, protocols and people to be involved in the exercise of section 93 of the Act. These include the processes to be followed when engaging with the landholder to achieve access, the procedures to be invoked by the transmission company and the protocols to be observed in respect of biosecurity and land use.

We recommend that the following matters be taken into account in the development of the Code of Practice:

- confirmation of the absolute need and requirement to access the land
- ensuring that all reasonable avenues to achieve a voluntary access agreement have been exhausted
- obtaining authority to access land
- developing a land access arrangement
- the protocol for specific land access activities under section 93 of the Act
- key considerations at the conclusion of access to land
- complaints and dispute resolution bodies
- other statutory powers to access land

2. Obtaining authority to access land

Transmission companies should first seek authority to access land by way of a voluntary access arrangement with the landholder. Where this is not possible, a transmission company may seek authority to access land under section 93 of the Act.

2.1. Voluntary access arrangements

The Code of Practice should encourage transmission companies to affect access by way of voluntary arrangements where possible. This can be achieved by setting threshold requirements that the transmission company must satisfy in order to make a successful application to access land under section 93 of the Act.

In developing threshold requirements, we suggest that consideration be given to matters including:

- the process by which a transmission company determines to access land under section 93 of the Act, including identification of the authorising officer and responsible officer
- the attempts the transmission company must make to negotiate a voluntary arrangement with the landholder prior to making an application
- any requirement on the transmission company to give the landholder notice of its intention to make an application
- the circumstances in which it is appropriate for the transmission company to rely on section 93 of the Act to access land

Transmission companies should be encouraged to develop and make publicly available a policy for negotiating voluntary access to land and, in the event that voluntary access cannot be achieved, the circumstances in which they intend to rely on section 93 of the Act.

2.2. Approval process for involuntary access

The Code of Practice should require a transmission company to obtain appropriate authorisation prior to accessing land under section 93 of the Act. It should set out the process for the transmission company to undertake to authorise involuntary access.

The Code of Practice should include:

- the form of the application for approval to access land under section 93 of the Act
- the opportunity for the landholder to review the application and advise the decision maker of the reasons for refusing access
- the matters the decision maker should take into account when making a decision
- the opportunity for the decision maker to attach conditions to the authority

3. Developing a land access arrangement

Regardless of whether land access is by voluntary agreement or under section 93 of the Act, many of the key considerations will be the same. These key issues should be detailed in a land access arrangement between the transmission company and the landholder.

3.1. Content of an access to land arrangement

An access to land arrangement, whether voluntary or involuntary, should include:

- the authority to access land, either by agreement or under section 93 of the Act
- the period for which the authority is valid
- the scope of work authorised
- the period and form of notice required for access
- property specific details
- procedures regarding access, safety and biosecurity
- the process for variation of the arrangement by either party
- the process for restitution of damages incurred on the property
- details of dispute resolution processes and relevant contact information

3.2. Obligations catering for the specific needs of private land

Property specific details to be considered when preparing an access to land arrangement, include information about:

- use of land in directly and indirectly affected paddocks
- livestock and pasture in directly and indirectly affected paddocks
- internal and external fencing and gates (including electric fencing) and whether access will require the development of new fences or gates
- existing tracks and whether access will require the development of new tracks
- drainage and water courses
- vegetation, including native vegetation
- property operations and equipment
- public utilities present on the land
- biosecurity requirements
- earthworks

4. Protocol for land access under section 93 of the Act

Once access to land under section 93 of the Act has been approved by the authorising officer, the transmission company should provide the landholder with notice of the authority to access the land and should be prepared to negotiate conditions of access with the landholder.

The Code of Practice should outline the protocol for transmission companies where a landholder is resisting or blocking access under section 93 of the Act.

4.1. Notice requirements and specific conditions for access

The transmission company should provide the landholder with written notice of the authority to access land including:

- the decision maker's written authority to access land
- the period for which the authority is valid

- the scope of work authorised
- the process for variation of the arrangement by either party
- the details of dispute resolution processes and relevant contact information
- the process for disputing the authority to access the land

The transmission company should invite the landholder to discuss arrangements for land access including:

- the period and form of notice required regarding access
- the property specific details
- the procedures regarding access, safety and biosecurity

4.2. General conditions for access

The Code of Practice should prescribe general conditions for access under section 93 of the Act, including:

- that identification and/or certification must be carried and produced when accessing land
- the energy company's obligation to rectify or compensate for damage
- limitations on access to land, including when and how land may be accessed
- limitations on access to buildings, including residential buildings
- penalty provisions for failure to comply with the authority and conditions

4.3 Landholder involvement in land access

The transmission company should be prepared to continue to engage with the landholder as a key stakeholder in the involuntary access arrangement. This could include:

- meeting with the landholder to discuss arrangements in advance of access
- notifying the landholder at the time of entry onto the land and exit off the land on each occasion that access is required
- inviting the landholder to attend site visits and witness the use of the land by the transmission company

4.4. Procedure when authorised access is opposed

The Code of Practice should specify the procedure for a transmission company to follow if authorised access is opposed, or expected to be opposed, by a landholder including the circumstances, if any, in which it may be appropriate for the energy company to:

- use force (eg. unlocking gates or creating new openings in fencing),
- brief local police,
- obtain a warrant for access, or
- make an application to a court.

Transmission companies should be encouraged to develop policies for opposed access to land under section 93 of the Act which address issues including, safety, security, authority and risk assessment protocols.

5. Key considerations after access to land has been completed

Transmission companies should be encouraged to continue to invest in strong stakeholder relationships with landholders at the conclusion of the land access phase.

At the conclusion of land access:

- landholders should be informed in writing that the land access has concluded
- landholders should be provided with an overview of the investigation(s) conducted, results of the investigation(s) and the opportunity to request further information
- the transmission company should prepare an inspection report advising the landholder of any damage to the property and the process by which it will repair or compensate for the damage
- the landholder should be provided with the opportunity to identify to the transmission company any additional damage to the property and request compensation or repair

6. Complaints and dispute resolution bodies

Transmission companies should be encouraged to develop and make publicly available an internal dispute resolution process. This should include an initial complaints process and a procedure for escalating complaints, including the appointment of an officer of appropriate seniority to manage escalated complaints.

If a complaint cannot be resolved through an internal dispute resolution process, landholders may complain to the Australian Energy Infrastructure Commissioner, the Energy and Water Ombudsman Victoria, or the Department of Climate Change, Energy, the Environment and Water. Transmission companies should include information about external complaints bodies in their public complaints and dispute resolution policy.

7. Examples of other statutory powers to access land

In developing a Code of Practice, we recommend consideration of similar legislation in Victoria and from other jurisdictions across Australia, in particular:

- *Pipelines Act 2005* (Vic)
- *Electricity Supply Act 1995* (NSW)
- *Electricity Act 1994* (QLD)
- *Electricity Supply Industry Act 1995* (TAS)
- *Electricity Act 1996* (SA)
- *Energy Operators (Powers) Act 1945* (WA)
- *Energy Reform Act 2000* (NT)

7.1. Other access regimes in Victoria (eg. pipelines)

Part 4 Division 5 of the *Pipelines Act 2005* (Vic) sets out the process by which a pipeline project proponent may seek the consent of the Minister to access land for the purpose of conducting surveys for a proposed pipeline.

It requires the proponent to put the landholder on notice and make reasonable attempts to negotiate an access agreement. It prescribes the form in which the proponent may make an application for access and the process by which the landholder may advise the Minister of the reason access was refused. It sets out the matters which the Minister must take into account and matters on which the Minister must be satisfied prior to consenting to access. It empowers the Minister to attach conditions to the consent to access. It requires that the proponent produce the consent prior to accessing the land and includes a penalty provision.

7.2 Electricity access regimes in other States

Authorisation to access land

Queensland, South Australia and the Northern Territory, require that electricity entities obtain authorisation from the Minister prior to exercising their statutory power to access land.¹ In Tasmania, authorisation must be obtained from the Regulator.²

Queensland, Tasmania, South Australia and the Northern Territory empower the decision maker to place conditions on the authorisation to access land.³

Notice of access to land

New South Wales, Western Australia, Tasmania, South Australia and the Northern Territory require that prior to exercising its statutory power to enter land, the energy operator give written notice of its intention to enter the land.⁴

General conditions for land access in other jurisdictions

In New South Wales an authorised officer must not exercise the power to access land unless they are in possession of a certificate of authority and they must produce that certificate when required by the occupier of the land.⁵ The use of the power is limited to daylight hours and care must be taken in respect of damage, entry by way of existing or new openings in fences and the creation of pits and the like.⁶ Powers of entry do not include access to residential buildings.⁷

¹ *Electricity Act 1994* (Qld) s 115, *Electricity Act 1996* (SA) s 45, *Electricity Reform Act 2000* (NT) s 56

² *Electricity Supply Industry Act 1995* (Tas) s 50.

³ *Electricity Act 1994* (Qld) s 115, *Electricity Supply Industry Act* (Tas) s 50, *Electricity Act 1996* (SA) s 45, *Electricity Reform Act 2000* (NT) s 56.

⁴ *Electricity Supply Act 1995* (NSW) s 55, *Energy Operators (Powers) Act* (WA) s 46, *Electricity Supply Act 1995* (Tas) s 50, *Electricity Act 1996* (SA) s 45, *Electricity Reform Act 2000* (NT) s 56.

⁵ *Electricity Supply Act* (NSW) s 61.

⁶ *Electricity Supply Act 1995* (NSW) s 54, 58.

⁷ *Ibid* s 62.

In Western Australia an officer of an energy operator must, on request, produce evidence of appointment and the authority under which the energy operator claims entry.⁸ The energy operator must ensure so far as is reasonable and practical, that the free use of any land, street, shore or water is not obstructed, that the work is not a source of danger to the reasonable utilisation of the land and that as little detriment or inconvenience is caused and as little damage done as is possible.⁹ Where damage is done, the energy company is to make good the damage or pay compensation.¹⁰

In the Northern Territory an electricity officer must provide their identification card before exercising the power to access land.¹¹

In Tasmania, South Australia and the Northern Territory an electricity entity must minimise the impact of the work when exercising the statutory power.¹²

Powers where land access is opposed in other jurisdictions

In New South Wales, reasonable force may be used for the purpose of gaining entry to land when authorised by the network operator or retailer.¹³ The network operator may also apply to a Magistrate, Registrar of the Local Court or an authorised officer of the Attorney-General's Department for the issue of a warrant.¹⁴

In Western Australia, where entry to land is reasonably required by an energy operator and the energy operator has been refused entry, is opposed or prevented from entering, or where the land is unoccupied and access cannot be obtained or a notice cannot be served without undue delay or difficulty, a Justice of the Peace may issue a warrant for entry.¹⁵ If the energy operator considers that it is not appropriate to seek a warrant, it may make an ex parte application to the Supreme Court.¹⁶

8. Other matters

Thank you for the opportunity to make a submission on this important consultation. We would be delighted to discuss these matters with you and your colleagues in further detail and expand on the background to our various observations and recommendations.

⁸ *Energy Operators (Powers) Act 1979* s 46.

⁹ *Ibid* s 50.

¹⁰ *Ibid* s 120.

¹¹ *Electricity Reform Act 2000* (NT) ss 54, 55.

¹² *Electricity Supply Industry Act 1995* (Tas) s 50, *Electricity Act 1996* (SA) s 45, *Electricity Reform Act 2000* (NT) s 56.

¹³ *Electricity Supply Act 1995* (NSW) s 56.

¹⁴ *Ibid* s 63.

¹⁵ *Energy Operators (Powers) Act 1979* (WA) s 46.

¹⁶ *Ibid*.

In the meantime, should you have any queries about this submission or require additional information please do not hesitate to contact us by email [REDACTED] or telephone [REDACTED]

Sincerely

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

Andrew Dyer
Australian Energy Infrastructure Commissioner