

Friday 6th October 2023

Mr Andrew Dyer
Australian Energy Infrastructure Commissioner
PO Box 24434
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By email: cerereview@dcceew.gov.au

***Joint Energy and Water Ombudsman submission to the Australian Energy Infrastructure Commissioner
- Community Engagement Review***

Dear Andrew,

Thank you for the opportunity to provide a submission to the review of community engagement on this draft rule determination for enhancing community engagement in renewable energy infrastructure.

The comments set out in this submission reflect the views of the Energy & Water Ombudsman Victoria (EWOV), Energy & Water Ombudsman NSW (EWON), Energy & Water Ombudsman South Australia (EWOSA) and Energy & Water Ombudsman Queensland (EWOQ). We are the industry-based external dispute resolution schemes for the energy and water industries in Victoria, New South Wales, South Australia and Queensland.

Our submission is primarily concerned with the need to support a foundational level of trust and confidence within the community in relation to initiatives to support Australia's achievement of its net zero commitments. Proposed new renewables transmission and generation infrastructure is a critical part of this effort.¹ Tight delivery timeframes increase the importance of securing support among impacted communities and landholders to enable expeditious planning, construction and operation of this new infrastructure, on terms which those stakeholders have been able to engage with and have the opportunity to influence in a meaningful way.

The scale of challenge which this presents can be observed in efforts to date, where engagement has not allowed for such influence, or which has not adequately respected the interests of impacted communities and landholders, to the detriment of all parties.

Meaningful, genuine engagement, which provides the opportunity to hear the concerns of impacted communities and incorporate these into project design and delivery, offers the best means of building and sustaining trust and confidence. Engagement should be ongoing, and underpinned by clear, accessible recourse to fair and independent external dispute resolution where commitments are made, to provide accountability and assurance that any such commitments made will be taken seriously.

¹ AEMO, *Integrated System Plan*, June 2022, 9-14.

If you require any further information regarding our submission, please contact Mr Ben Martin Hobbs, Policy Insights and Engagement Manager (EWOV) on 03 8672 4239, or Dr Rory Campbell, Manager Policy and Systemic Issues (EWON) on 02 8218 5266, Mr Jeremy Inglis, Manager Policy and Research (EWOQ) on 07 3087 9423 or Mr Antony Clarke, Policy and Governance Lead (EWOSA) on 08 8216 1861.

Yours sincerely,



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Importance of EDR for community engagement and building social licence among the community

As noted in our submission to the AEMC on their draft proposed rule change – we welcome the enhanced obligations for Transmission Network Service Providers (TNSPs) when engaging in community consultation.

However, we noted the rule change was silent on any heightened obligations for TNSPs around the need for clear, easy access to both internal dispute resolution (IDR) pathways or external dispute resolution (EDR) pathways. As outlined in our submission to the AEMC's proposed rule change, good community engagement requires involved entities to provide consumers and landholders information about IDR and EDR processes available to them.² This isn't limited to the RIT-T proponents – it also applies to all involved entities, and requires generators, government and regulators embarking on community engagement to promote both their own IDR and EDR processes. Clear complaint pathways, actively promoted, are a crucial part of building community and landowner confidence in consultation and stakeholder engagement processes.

Moreover, clear pathways to decision are imperative for expeditious complaints management, in order for the parties to quickly move from dispute to resolution, and to prevent protracted conciliation, exploitation and delays. In the absence of effective IDR and EDR, disputes can unnecessarily spiral, potentially resulting in a breakdown of relationship and loss of trust between parties, raising questions about social licence of key projects.³

Complaints should not be perceived as being harmful to a landholder and TNSP relationship. Studies in other sectors have demonstrated that when a complaint is well handled, it can actually improve the relationship, as the complainant develops an understanding and trust that when issues arise they will be dealt with promptly and fairly.⁴ This is particularly important for TNSP projects where there is a forced need for a long and continuous relationship between landholder and TNSP.

Insights from complaints received highlight a range of examples of legitimate problems with consultation processes to date. They also demonstrate the value that a fair and reasonable EDR process run by an Ombudsman scheme can bring to assist in resolving complaints quickly, inexpensively, and often helping to maintain relationships between landholders and transmission companies.

Ombudsman schemes should not be excluded by voluntary agreements

TNSPs have, and are expected to, reach voluntary agreements for land access in respect of the projects they operate. Such agreements may initially be entered into for preliminary work such as surveys, then options for easement agreements and then potentially easement or acquisition agreements.

² Joint EWO Submission, *AEMC Draft Rule Determination - Enhancing Community Engagement in Transmission Building*, September 2023.

³ Cait Kelly and Adam Morton, "Australia urgently needs a grid upgrade – but the march of new power lines faces a bush revolt", *The Guardian*, Thursday 24th April 2023, <https://www.theguardian.com/australia-news/2023/aug/23/renewable-energy-new-power-lines-for-transmission-risks-concerns>; Rhiana Whitson, "Farmers battle prospect of high-voltage electricity lines on properties as expert's alternative plan rejected", *ABC News*, Wednesday 2nd August 2023, <https://www.abc.net.au/news/2023-08-02/calls-to-scrap-vni-west-transmission-line-730/102675146>

⁴ Wendel, S., de Jong, J.D. & Curfs, E.C. Consumer evaluation of complaint handling in the Dutch health insurance market. *BMC Health Serv Res* 11, 310 (2011). <https://doi.org/10.1186/1472-6963-11-310>

Understandably, when such agreements are being entered into, little attention is likely to be paid to the dispute resolution clause, particularly by landholders. Focus is usually on the intricacies of the access, the impact it will have and the compensation to be paid for it. However, given the longevity of some of these agreements and the projects themselves, it is anticipated that most agreements may at some point need to activate the dispute resolution clause. This is because regardless of how well each party conducts themselves, there will inevitably be issues that neither were able to predict and on which they may not be aligned when they do eventuate.

EWOV has reviewed a number of draft agreements prepared by TNSPs. Each of these agreements specified a form of internal dispute resolution and then an escalation pathway that involved either mediation then court, 'binding' mediation or arbitration and court. One has recently been amended to provide EWOV as an option for escalated complaints.

The EWOs consider that disputes regarding land access, including those that arise from voluntary agreements, should require:

- A robust internal dispute resolution process, which adheres to the relevant standard AS 10002:2022.,⁵ and
- The option for complainants to have their complaint referred to an existing Energy Ombudsman scheme where the complaint has not been resolved to their satisfaction within a reasonable specified period of time and the dispute is appropriate for resolution by that Energy Ombudsman scheme. It should be noted that the existing Energy Ombudsman schemes all adhere to, and are independently reviewed against the Commonwealth Government 2015 *Benchmarks for Industry-based Customer Dispute Resolution*.

In its submission to the ESC's land access code, EWOV suggested they would be able to provide dispute resolution services for land access complaints related to the Western Renewables Link in only 5% of land access cases as all other access may be through voluntary agreements which exclude EWOV.⁶ It is EWOV's understanding that for other currently planned renewable transmission infrastructure projects in Victoria, the intention is for access to be obtained solely through voluntary agreements.

Limitations of private mediation

Key limitations of private mediation include:

- **Cost and time barriers for landholders** - landholders may be required to incur a share of private mediation costs. The Resolution Institute (a membership body incorporating Institute of Arbitrators and Mediators) resolved that from September 2016 parties who have agreed that a dispute arising or having

⁵ The Australian Government the Treasury, *Benchmarks for Industry-based Customer Dispute Resolution*, 2015, [Benchmarks for Industry-based Customer Dispute Resolution \(treasury.gov.au\)](https://www.treasury.gov.au/publications/industry-based-customer-dispute-resolution)

⁶ EWOV Submission to the ESC, *Developing a Land Access Code of Practice: Consultation on Draft Code*, August 2023, available online <https://www.ewov.com.au/uploads/main/EWOV-submission-to-Essential-Service-Commission-Draft-Land-Access-Code-of-Practice-August-2023.pdf>. EWOV's estimate is based on Ausnet's Statement of Expectations monthly reporting to the Commission relating to the Western Renewables Link. Since June 2022, AusNet has entered into 587 voluntary land access agreements whereas they have accessed land under section 93 of the *Electricity Industry Act 2000* 29 times. Based on this historical data, and working on the assumption that all WRL voluntary access agreements provide for private mediation rather than reference to EWOV, EWOV would only be able to provide dispute resolution services for land access related to the Western Renewables Link in 5% of land access cases.

arisen between them shall be submitted to mediation in accordance with its 2016 edition of its rules. The *2016 Resolution Institute Mediation Rules* provide that unless otherwise agreed by parties, each party shall pay its own costs of or incidental to the mediation.⁷

- **No “final decision” maker** – where private mediation does not resolve the dispute, then the landholder’s primary other form of recourse will be to take the matter to court which is an expensive and time-consuming process.
- **Power asymmetry** - There are likely to be substantial power imbalances between electricity transmission companies and landholders in private mediation proceedings. Power imbalances are likely to manifest through available resources and information asymmetries in dispute resolution and land access policy and legal knowledge.
- **Consistency of outcomes** - it can be harder to achieve consistency of practices and outcomes where agreements are bespoke, without transparency of outcomes or principles informing decisions;
- **Lack of accountability** – in comparison to Ombudsman schemes there may not be requirements for dispute resolution service providers to meet performance standards and/or undergo independent reviews which can undermine accountability of their services
- **Lack of transparency, regulatory oversight or policy insight** - matters resolved through private dispute resolution mechanisms are unlikely to be published, contributing to a lack of transparency of both issues and outcomes for both regulators and policymakers. These insights are key in regulated markets to improve community engagement processes.

Some TNSP complaints policies refer to the Australian Energy Infrastructure Commissioner (AEIC) as the escalation point for complaints. We understand that the AEIC responds to community concerns and enquiries where landholders are not aware of the pathways available to them, or have difficulties getting through those pathways. In these circumstances the AEIC serves to refer consumers to the relevant body, or where there is no appropriate forum, to consider the substance of the complaint. For example, the AEIC may seek to address grievances by community groups, whereas EWOs seek to handle individual complaints. There is no utility in the AEIC duplicating the purview of the Energy Ombudsman schemes, which are already established with the necessary systems and processes to handle the majority of complaints in an efficient and fair manner, and identify and report systemic issues.

In complex and evolving markets such as renewable energy, it is important to have a clear and simple dispute resolution pathway to help consumers and landholders stay engaged in, derive benefits from and have trust and confidence in the market. Raising awareness of the EWOs role in land access disputes, as part of community engagement will help to reduce confusion about availability of, and access to, dispute resolution services. This is particularly important as there is already community understanding about EWO schemes capability to provide independent advice and resolve other electricity related complaints. Further, the Energy Ombudsman schemes have established community engagement programs which provide outreach across their jurisdictions and can be expanded to include education and information relating to transmission expansion.

⁷ *Resolution Institute Mediation Rules 2016* (Australia), rule 9.

Benefits of Ombudsman as an external redress mechanism

In its Access to Justice Inquiry, the Productivity Commission concluded that, when governments assess regulatory and other frameworks to enable appropriate pathways for dispute resolution, consideration should be given to subsuming new roles within existing Ombudsman schemes rather than creating new bodies.⁸

As experienced and established Energy Ombudsman schemes, we are well-positioned to facilitate fair and reasonable outcomes for land access complaints. Using EWOs as the dispute resolution body for land access issues has the benefits of:

- **Accountability** – Our work is guided by and accountable to the principles in the Commonwealth *Government's Benchmarks for Industry-based Customer Dispute Resolution* and performance against these benchmarks is independently assessed every five years. This provides a significant, ongoing and established mechanism of assurance that EWOs operate in a way that is accessible, independent, fair, accountable, efficient and effective.
- **Cost and time effective dispute resolution services** – Use of Ombudsman schemes is a cost and time-effective way of resolving individual complaints compared to formal legal or regulatory avenues. As the Productivity Commission has observed, Ombudsmen mediate outcomes between parties and conduct investigations where necessary, obviating the need for legal representation.⁹ Complainants face no, or very low costs and matters can be resolved more efficiently.¹⁰ The benefits are particularly pronounced for vulnerable consumers who face a number of barriers when seeking to access formal resolution pathways, meaning they are both more susceptible, and less well equipped, to deal with legal disputes.¹¹ The Productivity Commission also notes that industry Ombudsmen can create cost incentives for providers to resolve disputes in the most efficient manner possible, by requiring providers to pay case fees when Ombudsmen assist in resolving complaints.¹² EWOs are industry-based schemes that charge providers for the complaints we handle, with costs increasing as the complaint escalates (within each EWO). We consider enhancing the awareness and use of EWOs as the dispute resolution scheme for land access complaints and the community engagement encasing it will incentivise providers to:
 - Invest in and improve engagement practices with landholders and the broader community.
 - Uphold good industry community engagement practices.
 - Improve IDR practices within TNSPs.
 - Resolve complaints at an early stage.

⁸ Productivity Commission, Access to Justice Inquiry Report, 2014, p. 50.

⁹ Productivity Commission, Access to Justice Inquiry Report, 2014, p. 11. As the National Inquiry noted in 2014, at that time, Ombudsman schemes had capacity to consider approximately 542,000 cases nationally requiring approximately \$481 million combined government and industry funding across all Ombudsman schemes. Tribunals had capacity to consider approximately 395,000 matters, required parties to pay registry and legal fees if represented and required approximately \$508 million in government funding support. Civil courts had capacity to consider approximately 673,393 matters, required payment of registry, costs and other legal fees and required approximately \$836 million government funding.

¹⁰ Ibid, p.11.

¹¹ Ibid, p.8.

¹² Ibid, p.11.

- build trust and accountability with landholders.
- **Informal process with binding powers** – Ombudsman schemes operate an informal process with in built flexibility to cater for the individual complaint. This enhances their accessibility and suitability to all types of complainants, from those that are sophisticated business operators to the most vulnerable individuals. While Ombudsman schemes will try and resolve complaints by agreement, they have the ability to make orders binding where the outcome is accepted by the landholder. This clear pathway to a determination can assist keeping the parties to a dispute focused and ensure the complaint can move expeditiously through to resolution.
- **Complaint process does not delay project** – In the instance that a landholder lodges a complaint about a scheme participant, this should not serve to prevent further access and delay the project. For example, if the issue in dispute related to an allegation of filming without consent, subsequent land access would not be prevented while the complaint was investigated.
- **Systemic issues identification and response** – EWOs approach to complaint handling and data insights enables more effective identification and response to systemic issues, which is a well-established function of EWO services - creating transparency around issues that may otherwise be undetected. Responding to systemic issues is important for addressing underlying policies or approaches that are driving complaints and for assisting consumers and landholders who have not raised a complaint or dispute but may, nonetheless, have been impacted by a systemic issue. The importance of identifying and responding to systemic issues is increasingly being recognised as an important function of dispute resolution. For example, a 2020 journal article published in the *Harvard Negotiation Law Review* which conducted a 10-year review of the Australian Financial Ombudsman Service, highlights how systemic issues approaches can be effective in identifying and resolving the root cause of issues that lay both within and outside a provider's system and provide benefits to a large number of consumers.¹³
- **Community engagement and outreach** – EWOs have extensive experience and resources available to participate in community engagement. As identified in previous research, consumers have low awareness of their rights and redress mechanisms. EWOs have dedicated community engagement staff seeking to build awareness through various initiatives, including outreach days, partnerships with local community organisations, and onsite visits to regional towns.
- **Ability to engage necessary expertise** – EWOs have established processes to engage independent experts such as arborists, engineers, energy technical experts and biosecurity experts. This enhances EWOs capability to deal with a wide range of complaints in this jurisdiction.
- **Flexible workforce in response to an evolving market and jurisdiction** – Ombudsman schemes are staffed according to complaint numbers, expanding if complaint numbers rise. For example, EWON has recently engaged a sessional workforce, able to be tapped into on short notice where volumes demand.

¹³ Nuannuan Lin, & Weijun Hu. (2020). Systemic Issue Resolution in Two Dimensions: A Reflection Based on a Ten-Year Review of the Australian Financial Ombudsman Service. *Harvard Negotiation Law Review*, 26, 113–151.

EWON, EWOQ and EWOSA are open to taking on this approach if complaint volumes increase beyond current workforce management levels.

Creating a fit for purpose jurisdiction

At all stages of a renewable energy infrastructure project, we recommend a requirement for relevant entities to:

- Have satisfactory IDR processes and practices, that comply AS 10002:2022 including referral to EDR schemes.
- Be participants/members of the relevant EWO
- Ensure the agreements they enter into with landholders specify the EWO as the default escalation point for unresolved complaints
- Refer matters to the relevant EWO where a complaint remains unresolved within a specified period of time.

Ombudsman schemes have a history of an evolving jurisdiction. Since their original electricity jurisdiction, EWOs have expanded to include gas, water and more recently, embedded networks. This has brought thousands of additional members and complaints into EWO jurisdiction. We anticipate this to continue as the market for renewables evolves and we consider EWOs' proven adaptability to be beneficial in this regard.

The EWOs will likely need the support of the regulators and their members to make any necessary changes to their governance documentation to ensure that they are fit for purpose to consider an array of land access complaints from individual consultation regarding proposed access through to complaints about the way in which land was accessed. (See appendix 1 for examples of complaints regarding individual consultation between landholders and transmission companies).

Some EWOs may need to broaden the scope of their membership / participant base to encompass both new generation and new transmission projects, including where those entities are publicly owned. AEMO's Integrated System Plan outlines the need for a significant buildout of new utility-scale Variable Renewable Energy generation and transmission to meet our emissions reduction targets.¹⁴ This is to ensure EWOs can consider complaints regarding these entities where they relate to the supply of energy. Again, this would not be completely new to many EWOs, whose members either already include publicly owned entities or who have a Memorandum of Understanding with their State Ombudsman for the EWO to handle such complaints.

The EWOs may also need to increase their monetary caps to ensure that appropriate redress is available within an alternative dispute resolution environment.

As noted above, the need for changes to EWOs jurisdiction is not new and are a natural part of the EWO evolution.

¹⁴ AEMO, *Integrated System Plan*, June 2022, 9-14.

There are a range of matters that are inappropriate and would go beyond the remit of an Ombudsman service. These include complaints relating to the proposed route of transmission works or issues relating to explicit government decisions - which are the purview of designated system planners and relevant policymakers. Complaints about the quantum of compensation offered for land acquisitions may also be inappropriate for a dispute resolution service, as these issues may be covered by the state based land acquisition acts and / or likely to involve significant sums of money that are more suitable to formal dispute resolution process. EWOs also retain a discretion to exclude complaints, or parts thereof, that may be within jurisdiction, but which we consider do not align with the spirit of an informal dispute resolution service, for example those that are lacking in substance or have not been made in good faith.

The EWOs adopt a “no wrong door policy”. This means that even where the EWO may not be the appropriate forum, the EWO will assist the referral to the relevant body to assist complainants navigate their way to the appropriate forum, help prevent them falling through the cracks or suffering complaint fatigue.

Utilising the existing EWOs is the most expedient way to assist with obtaining and maintaining social licence for transmission projects. Not only do they have all the benefits of Ombudsman schemes, they have experience in land access disputes and are state based. This means the EWOs are already well equipped to handle land access complaints which by their nature requiring understanding and addressing local concerns.

Appendix 1 - EWOV pilot jurisdiction – highlighting various issues with current community engagement on renewable energy infrastructure projects

EWOV operated a pilot jurisdiction under the Land Access Statement of Expectations, adopting an expansive approach. This allowed EWOV to receive and consider an extensive range of concerns and complaints being raised by landholders and community members.

Example of poor TNSP community engagement:

- A landholder made a complaint to EWOV about a transmission business. She had initially been advised by the TNSP that her property would not be affected by a proposed transmission route. Three years on the transmission business made contact to advise her property was now directly impacted, and the proposed transmission line would cross her property. The change in route had occurred as a result of consultation with local township, however the landholder had not received any further information or been invited to subsequent consultation.
- After EWOV referred the matter to the TNSP to action, the business apologised directly to the complainant, acknowledging a significant change had occurred, and that the landholder had not been adequately consulted. The business outlined a range of information sources, including the processes around compensation schemes and provided the opportunity for further consultation on a number of matters, including contact details for a direct liaison officer.

Another example that demonstrates how the Ombudsman's fair and reasonable approach to dispute resolution can quickly resolve complaints through information gathering:

- The customer raised concerns with EWOV about the TNSP failing to respond to their questions about the transmission project, stating TNSP had only contacted them five times in two years. The customer states they were only contacted because they made a complaint to their local council, who then complained directly to the TNSP on their behalf.
- Through EWOV-facilitated resolution, EWOV found the TNSP had contacted the customer on 14 occasions via various methods of communication, including via email and phone. The TNSP contacted the customer, regularly responded to their questions, and offered to meet with them. EWOV found the TNSP had met with and complied with section 2 of the ESC's *Statement of Expectations*, and ensured that its approach to communication and engagement with this customer was staged and timely.