

26 October 2012

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Dear Mr Pierce,

Transmission Frameworks Review Second Interim Report (EPR0019)

I am writing to correct the misunderstanding contained in the Commission's Transmission Frameworks Review Second Interim Report (the Report) that there is a lack of competition for providing extensions to the NSW transmission network. To the contrary, TransGrid's position is that provision of extensions in NSW is entirely competitive as the attached legal advice from Ashurst Australia makes clear.


First, the Report claims (p 143) that "no parties other than TransGrid can gain transmission licenses and so build extensions" in NSW. The attached advice explains that in fact any company may own, build and/or operate an extension in NSW and that, unlike other jurisdictions, there is no requirement to obtain a specific transmission licence to do so.

Second, Table B1 of the Report (pp 139 to 140) sets out several claims about state-based licensing and land acquisition requirements. The attached advice notes that the opportunity exists for any company to apply to the NSW Minister for an Order under Section 93 of the Electricity Supply Act (NSW) 1995 that their transmission extension be declared a "transmission system" (noting that this term is defined differently to how it is under the National Electricity Rules). The granting of such an Order provides the company with compulsory land acquisition powers under Section 44 of that same Act. In addition, both TransGrid and private companies may access the ability to obtain statutory "easements in gross".

Notably, the attached advice concludes that "in NSW Transmission Extensions can be and are provided by parties other than TransGrid and there are fewer (if any) so called 'barriers' to them doing so than in any other jurisdiction".

Should you wish to discuss this matter further, please do not hesitate to contact me on (02) 9284 3148 or anthony.englund@transgrid.com.au.

Yours sincerely,



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19 October 2012



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By email: anthony.englund@transgrid.com.au

Dear Anthony

NON-REGULATED TRANSMISSION SERVICES IN NSW

You have sought our advice on 2 questions relating to the undertaking of transmission network extensions in NSW, which are currently treated by TransGrid as "non-regulated transmission services" under the National Electricity Rules (**NER**).

Set out below is a summary of our advice, followed by an outline of the assumptions on which our advice is based and our more detailed advice.

1. SUMMARY OF OUR ADVICE

1.1 May companies other than TransGrid build, own and/or operate extensions to the transmission network in NSW?

Yes, in NSW any company may do this. There is no requirement to obtain any NSW specific form of transmission licence or authorisation (as there is in other states). The only regulatory "approvals" required are:

- environment and planning approval; and
- NER registration (or exemption from registration) as a TNSP, but **only** if the proposed Transmission Extension can be considered a "*transmission system*" as defined under the NER (which it may not be, in the case of a Transmission Extension asset owned by a private generation company and which connects that company's generation facilities to Transgrid's transmission system).

If the company owner of the Transmission Extension requires an easement over third party owned land, then the company can seek to negotiate this with the third party landowner. If the third party land is **not** adjacent to the land on which the facilities serviced by the Transmission Extension are located, then the company will need power to obtain a statutory **easement in gross**. This will require an application to the relevant Minister for a

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regulation to be made to include the company's name in clause 53 of the *Conveyancing (General) Regulation*. Two private electricity transmission companies who have done this: Silverton Wind Farm Transmission Pty Ltd and Directlink (No. 1) Pty Limited.

If a company is unable to reach agreement with a third party land owner for an easement (or an easement in gross), then the company would need to obtain access to compulsory acquisition powers, similar to those of TransGrid, under *Section 44 Electricity Supply Act (NSW) 1995 (ES Act)*. To do this the company would need to apply for and obtain from the relevant Minister an Order under section 93 of the ES Act, declaring the company's Transmission Extension to be a "transmission system" under the ES Act. The privately owned Directlink transmission infrastructure has been the subject of such an order and accordingly its owner (as a "transmission operator" under the ES Act) has the benefit of compulsory acquisition powers under section 44 of the ES Act.

1.2 **Is the AEMC correct in its understanding of the provision of extensions in NSW, as described in its Second Interim Report on the Transmission Frameworks Review (AEMC Report)?**

The AEMC appears to have misunderstood some key aspects of the regulatory approvals framework and land acquisition rights for transmission infrastructure operators in NSW (as summarised in 1.1 above).

In relation to regulatory approvals:

- the AEMC Report (pages 138 & 139) infers that the only entity entitled to operate as a transmission operator in NSW is TransGrid because there is no statutory transmission licensing regime in NSW and the only entity that has an express "transmission" function under Energy Services Corporations Act (NSW) 1995 (ESC Act) is TransGrid. This is not correct.
- Firstly, the absence of a separate transmission licensing regime in NSW does not mean that a private company cannot operate transmission infrastructure in NSW. On the contrary, it means that no such licence is required at all in order to do so.
- Secondly, the ESC Act's sole purpose is to establish and govern the activities of the specific State owned Energy Services Corporations the subject of that Act (which include TransGrid). It does not apply to any other participants in, or new entrants to, the electricity sector in NSW (including the transmission sector).
- Accordingly a company wishing to build, own or operate transmission infrastructure in NSW does not need to be "empowered" under the ESC Act or granted any form of statutory licence or other approval in order to do so. As indicated in paragraph 1.1 above, the only "approvals" it needs are environmental and planning approval and NER registration or exemption (to the extent this may be required under the NER).
- There is therefore one less (so called) barrier to entry for Transmission Extension provision in NSW, rather than an additional barrier (in comparison with other states).

In relation to land acquisition rights:

- the AEMC Report (pages 138 & 139) effectively states that in NSW only Government owned transmission network operators (i.e. TransGrid) can acquire land (with Ministerial approval). This is not correct.
- As outlined in paragraph 1.1 above:
 - Private companies can apply to the relevant Minister for inclusion in clause 53 of the *Conveyancing (General) Regulation*, so as to be empowered to

acquire easements in gross. Two private electricity transmission companies have successfully done so: Silverton Wind Farm Transmission Pty Ltd and Directlink (No. 1) Pty Limited. For ordinary "dominant tenement" easements no such regulation is required (as any legal person can obtain such an easement).

- Private transmission infrastructure companies can also apply to the relevant Minister for an order under section 93 ES Act to have their transmission infrastructure declared as "transmission system" for the purposes of the ES Act. This gives them compulsory acquisition powers as a "network operator" under section 44 of the ES Act. The Directlink transmission infrastructure has been the subject of such an order and accordingly Directlink (No. 1) Pty Limited has the same compulsory acquisition powers as TransGrid under section 44 ES Act.

The AEMC's conclusion: (on page 143 of its Report) that Transmission Extensions are capable of being supplied contestably by both existing TNSPs and third parties in all states except NSW, is clearly incorrect.

2. ASSUMPTIONS

2.1 As we understand it, our advice has been sought in respect of transmission extensions and related works which:

- (a) are specifically constructed in order to connect a generator or large load customer to TransGrid's transmission system at a substation forming part of TransGrid's transmission system;
- (b) run from the generator's (or large customer's) facilities to the boundary of the substation;
- (c) do not include any works within the substation; and
- (d) are currently treated by TransGrid and other TNSPs as "non-regulated" under Chapter 6A of the NER. That is, TNSPs treat them as being neither "*prescribed transmission services*" nor "*negotiated transmission services*" under the NER.¹

2.2 Accordingly, this advice applies only in relation to transmission extensions and related works of the kind described in paragraph 2.1 above (to be referred to in this advice as **Transmission Extensions**).

3. ADVICE

3.1 **May companies other than TransGrid build, own and/or operate extensions to the transmission network in NSW? If so, what approvals or legislation changes (if any) are required for a company to provide an extension?**

The short answer to this question is yes.

In order to do so, certain regulatory approvals will be required and the company may also need to acquire interests in any third party land. Each of these are addressed below.

(a) Regulatory approvals required

¹ It seems to us that it is arguable that these services may fall within the definition of "negotiated transmission services", however the position is not clear under the NER and this is not a question we have been asked to consider for the purposes of this advice.

In NSW any company may build, own and/or operate a Transmission Extension. There is no requirement for a company to obtain any NSW specific form of transmission licence or authorisation (as there is in other states).

The only regulatory "approvals" such a company will need, in order to be legally entitled to build, own and/or operate a Transmission Extension in NSW, are:

- (i) Environment and planning approval: i.e. the relevant approvals under the Environmental Planning and Assessment Act 1979 (NSW); and
- (ii) NER registration (or exemption): i.e. registration (or exemption from registration) as a transmission network service provider (**TNSP**) under the NER, **but only if** the proposed Transmission Extension can be considered a "*transmission system*" as defined under the NER. In other words, if the Transmission Extension does **not** amount to a *transmission system* as defined under the NER, then the company will not need to register (or be exempt from registering) as a TNSP. We make the following further observations about this:
 - (A) To be a transmissions system, as defined under the NER, a Transmission Extension must comprise both a "transmission network" **together with** "connection assets".
 - (B) So whether or not any given Transmission Extension will be a "transmission system" for the purposes of the NER will depend on the correct characterisation of its assets. For example it seems to us that, generally speaking, a Transmission Extension would usually have assets falling within the definition of "connection assets". However whether it will also have assets which fall within the definition of "network" (for the purposes of the definition of "transmission network", under the NER) is less clear and will depend on the nature and purpose of the particular assets comprising the Transmission Extension.²

(b) Acquisition of interest in third party land

If the company's Transmission Extension must cross third party land in order to connect the company's facilities to a TransGrid substation, then the company will need to acquire a registered easement (or some other form of property right) over that land, to ensure it has a registered proprietary right for its Transmission Extension to be located on that land.

If the relevant third party land is **adjacent** to the company's land, then the company can seek to negotiate and agree with the third party owner on a terms for a registered easement in favour of the company's **adjacent** land (as the "dominant tenement").

- (i) Easements in Gross

² More specifically "network" is defined in the NER as: "*the apparatus, equipment, plant and buildings used to convey, and control the conveyance of, electricity to customers (whether wholesale or retail) excluding any connection assets...*"(emphasis added). So, for example (while the issue is not entirely clear) it seems to us that any Transmission Extension which is used primarily to connect a substantial market generator rather than "customers" (leaving aside the small amount of load that might be needed by the generator for start-up or support purposes from time to time), might not be properly characterised as "network" for the purposes of the NER and therefore might not be properly considered "transmission system" for the purposes of the NER.

If any third party land over which an easement is required is **not** adjacent to the company's land, then the company will need to obtain a statutory **easement in gross** in favour of the company itself.

Under section 88A of the *Conveyancing Act (NSW) 1919*, an easement in gross may only be created in favour of the Crown, a public or local authority or a corporation prescribed by regulation.

The *Conveyancing (General) Regulation 2008* prescribes a fairly lengthy list of corporations which are entitled to obtain easements in gross under section 88A. The list includes both Government owned corporations (including TransGrid, under clause 53(e) of the Regulation) and a number of privately owned companies.

So any company that wishes to be empowered to acquire an easement in gross under section 88A of the *Conveyancing Act* would need to apply to the Minister administering that Act for the making of an amending regulation to include its name in clause 53 of the *Conveyancing (General) Regulation*.

By way of example, two private electricity transmission line companies have, in relatively recent times, applied to and obtained such an amending regulation from the Minister and have had their names inserted into clause 53 of the *Conveyancing (General) Regulation*, namely Silverton Wind Farm Transmission Pty Ltd and Directlink (No. 1) Pty Limited.

(ii) Compulsory acquisition rights

If a company is unable to reach agreement with any third party land owners over the granting of an easement (or an easement in gross), then the company would not be able to obtain an easement unless it has access to compulsory acquisition powers, similar to those of TransGrid, under *Section 44 Electricity Supply Act (NSW) 1995 (ES Act)*.

In order to have access to those powers, the company would need to fall within the definition of "transmission operator" under the ES Act. It would then also be a "network operator" under the ES Act, in which case it would then have access to compulsory acquisition powers under section 44.

The definition of "transmission operator" under the Act is "a person who owns or controls a "transmission system" and the definition of "transmission system" is:

*"any electricity power lines and associated equipment and electricity structures that are a transmission system by virtue of an order in force under section 93."*³

Section 93 empowers the Minister to make an order declaring any specified electricity power lines and associated equipment and electricity structures to be a transmission system for the purposes of the Act. To date the Minister has made two such orders, namely for TransGrid's transmission infrastructure and for the Directlink transmission interconnector.

³ Note that this definition for transmission system under this Act is completely different to that which is used under the NER. In short, so it is quite possible for transmission infrastructure to be "transmission system" under this Act, but not under the NER, and vice versa.

So if a privately owned company wishes to have access to the compulsory acquisition powers under section 44 of the ES Act, it will need to apply for and obtain from the Minister an Order under section 93 of the Act.

3.2 **Is the Australian Energy Market Commission (AEMC) correct in its understanding of the provision of extensions in NSW, as described in its Second Interim Report on the Transmission Frameworks Review (AEMC Report) on pages 138 – 140 and page 143? If not, explain the current situation for provision of extensions.**

The current situation in respect of the regulatory approvals framework and land acquisition powers in NSW is set out in paragraph 3.1 above.

The AEMC appears to have misunderstood some key aspects of each of these, as identified below.

(a) Regulatory approvals (licensing)

The second paragraph on page 138 of the AEMC Report states that:

*"...all states **except NSW** allow parties other than the incumbent TNSP to gain transmission licences. In every state (apart from NSW) parties can simply purchase a "licence" from the state regulator, and pay an annual fee to maintain this."*

The third column of the table on page 139 goes on to state (in relation to "State based licensing requirements to operate part of a transmission network"):

- *"no licence provisions for transmission"*
- *the Energy Services Corporations Act only gives TransGrid powers as an "energy transmission operator"*
- *under s.13 the Governor can amend the Act to add more corporations to be constituted as transmission operators"*

The clear inference from these statements is that:

- some form of statutory licence or express "power" under the *Energy Services Corporations Act (NSW) 1995 (ESC Act)*, or some other legislation, is required for a company to operate any part of a transmission network in NSW; and
- in the absence of having such a licence or such a statutorily granted power, then other parties (i.e. parties other than TransGrid) cannot operate any part of a transmission network in NSW.

This is simply not correct. As indicated in paragraph 3.1(a) above, any company in NSW can legally build, own or operate transmission infrastructure. All it needs in order to do so (as it would in any other state), are:

- (i) the requisite environmental and planning approvals (which apply equally to both encumbant TNSPs and any new entrant privately owned TNSPs); and
- (ii) registration (or exemption from registering) as a TNSP under the NER – but **only** if its proposed transmission infrastructure would amount to a "transmission system" under the NER (which it well may not - see paragraph 3.3 below).

The fact that there is no separate State based transmission licensing regime in NSW does **not** mean that a private company therefore cannot operate transmission infrastructure in NSW. On the contrary, it means that no such licence is required in order to do so and that there is therefore **one less** (so called) barrier to entry for Transmission Extension provision in NSW, rather than an additional barrier (in comparison with other states).

Lastly, an intending private transmission company does not need any form of statutory empowerment under the ESC Act or any other Act. The ESC Act is purely and simply an Act which establishes:

- the specific **State owned** Energy Services Corporations the subject of that Act (which include TransGrid); and
- their corporate objectives, functions and governance framework **as** state owned Energy Services Corporations.

The ESC Act **does not** apply to any other participants in, or new entrants to, any aspect of the electricity sector in NSW (including the transmission infrastructure sector). Accordingly a company wishing to build, own or operate transmission infrastructure in NSW does not need to be "empowered" under the ESC Act or any other legislation in NSW in order to do so. The only "approvals" it needs are environmental and planning approvals as referred to in sub-paragraph (i) above and (possibly) NER registration or exemption as referred to in paragraph (ii) above.

(b) Land acquisition

The fourth paragraph and the first dot point on page 138 of the AEMC Report state, respectively:

"While some government owned and established private generators have compulsion rights to land, new generators and other third party providers typically do not.."

"in NSW only government owned transmission network operators (i.e. TransGrid) can acquire land (with Ministerial approval);"

The third column of the table on page 139 goes on to state (in relation to "State based licensing requirements to operate part of a transmission network"):

"only government owned transmission network operators (i.e. TransGrid) have powers to compulsorily acquire land with Ministerial approval."

These statements are incorrect. As indicated in paragraph 3.1(b) above:

- (i) Privately owned transmission infrastructure companies can apply to the relevant Minister for a regulation to include them in clause 53 of the *Conveyancing (General) Regulation*, if they need to be empowered to acquire easements in gross. Currently there are two such privately owned electricity transmission companies included and who therefore have these powers, namely Silverton Wind Farm Transmission Pty Ltd and Directlink (No. 1) Pty Limited. For ordinary "dominant tenement" easements no such regulation is required (as any legal person can obtain such an easement).
- (ii) Privately owned transmission infrastructure companies can also apply to the relevant Minister for the making of an order under section 93 ES Act to have their transmission infrastructure declared as "transmission system" for the

purposes of the ES Act. This would then give them compulsory acquisition powers as a "network operator" under section 44 of the ES Act. Currently, in addition to TransGrid, the Directlink transmission infrastructure has been the subject of such an order and accordingly Directlink (No. 1) Pty Limited (as a private owner of transmission infrastructure) has the same compulsory acquisition powers as Transgrid under section 44 ES Act.

(c) AEMC's conclusion

The AEMC's conclusion at the end of page 143 of their Report states that:

*"Extensions can be capable of being supplied by both the TNSP and third parties (**with the exception of NSW**) – and so can be considered "contestable".*

Based on the matters set out above, this conclusion, in respect of NSW, is clearly incorrect. In fact in NSW Transmission Extensions can be and are provided by parties other than TransGrid and there are fewer (if any) so called "barriers" to them doing so than in any other jurisdiction.

If you wish to discuss any aspect of the our advice further, please do not hesitate to contact me.

Yours sincerely



Peter Limbers
Partner