

Windfarm Agreements

An overview of windfarm agreements in Australia, including the circumstances in which they are reached and the key terms that typically govern the relationship between landowners and developers.

INTRODUCTION

Windfarm agreements, along with other renewable energy contracts, represent a bespoke commercial arrangement in Australia.

The negotiation, drafting and execution of such agreements demand a willingness by both parties to work together, with rigorous attention to statutory requirements, industry practice, and the allocation of risk and responsibilities.

This article outlines:

- the practical circumstances required for an agreement to host a windfarm to be reached; and
- the typical features of windfarm agreements.

WHAT IS THE LIKELIHOOD OF AGREEMENT BEING REACHED?

In our experience, the landowner and the windfarm developer (**Developer**) will only proceed with a windfarm agreement in the following circumstances;

- The landowner is satisfied that it is being adequately compensated by the Developer;
- The landowner accepts that for up to 2 - 5 years during the due diligence period and construction of wind turbines stage, that the Developer will be coming and going on the land on a regular basis;
- Once the wind turbines are up and running the Developer's footprint on the land is relatively small;
- The Developer agrees to repair any damage that it causes, and it keeps its interference to the landowner to a minimum;
- The Developer is satisfied that its multi-million-dollar investment in the wind turbines on the land is secure and will not be impacted by any of the landowner's activities or actions;
- The Landowner is willing to give up many of its usual landowner rights (e.g. the right to grant a mining lease) to give the Developer the above comfort; and
- The landowner is comfortable that the appropriate arrangements are in place for the Developer to remove all the windfarm infrastructure at the end of the lease.

GRANT OF OPTION

Typically, the landowner initially grants the Developer an option to enter upon the landowner's land and conduct due diligence and all necessary testing activities to determine whether the land is appropriate for the operation of a windfarm. The Developer pays the landowner a fee for this option.

Generally, the Developer is given access to the entire land to do its due diligence on the property. The Developer must not unreasonably interfere with the landowner's farming activities and must repair any damage it causes to the land or the landowner's property.

If the Developer is satisfied with its due diligence activities and tests, it has the right to enter into a lease to operate windfarm on the land.

LEASE OF LAND – LOCATION OF WINDFARM TURBINES

Under the lease, the Developer is granted exclusive possession over a certain portion of land on which it can construct the wind turbines and any associated infrastructure.

The landowner grants the Developer the right to have all necessary access to the land to allow the Developer to carry out its turbine construction activities.

Under the current noise regulations, the wind turbines must be at least 1.5 km from any residence.

Both the landowner and the Developer agree not to unreasonably interfere with each other's activities.

EASEMENTS TO ALLOW ACCESS TO WINDFARMS

The lease will also typically grant the Developer an easement to pass over designated paths on the land so that the Developer can access the wind turbines from public roads.

Usually, the Developer is obliged to improve and maintain these paths at the Developer's costs to a standard that supports the Developer's heavy vehicles.

TERM AND RENEWAL

Windfarm projects are capital intensive, and Developers need many years of operation for this investment to be recouped.

The landowner should expect the initial term of the lease to be at least 21 years.

There will typically be an option for the Developer to elect a further term which is the same period as the initial term.

The effect of the combined length of these terms is such that the landowner needs to be of mindset that it is willing to live with the windfarm for the remainder of their time on their farm.

It is, therefore, advisable that the “next generation” who will own the farm are also engaged in and participate in the negotiations with the Developer.

RENTAL AND FINANCIAL ARRANGEMENTS

The trade-off for the lengthy term of a windfarm is the equally lengthy, largely passive income the landowner will receive.

Typically, the rent payable will compromise a fixed annual or monthly rent, determined usually by reference to a dollar per megawatt installed capacity for each wind turbine on the land.

The rent will ordinarily be payable annually or quarterly in advance and will increase at agreed intervals, by reference to the Consumer Price Index.

LIVING WITH A WINDFARM ON YOUR LAND

Windfarms are large-scale operations, and it is essential that landowners understand that there will not only be initial construction, but ongoing maintenance, upgrades, substations, transmission lines, access roads and ancillary facilities on their land.

In practice, once the construction is complete, and the windfarm is in operation, the likely interference will be minimal. However, the landowner will be required to allow the Developer and its contractors to access the leased portion of their land at all reasonable times for all permitted uses.

In short, landowners need to reconcile the fact that once the lease is signed, they will have the Developer as a tenant on the land, for many, many years.

REMOVAL OF INFRASTRUCTURE AT THE END OF THE LEASE

It is essential for the landowner that there are appropriate provisions in the lease requiring the removal of all windfarm infrastructure by the Developer at the Developer’s cost at the end of the lease.

In most leases it is a requirement that everything within 1m of the surface is removed by the Developer, at the Developer’s cost, and the land is returned to a state suitable for grazing stock (**Make Good Obligations**).

If the Developer is a non-government entity, consideration should be given as to requiring the Developer to provide the landowner with bank guarantee, security bond or some other form of security to give the

landowner comfort that the Developer will be in a financial position to pay for its Make Good Obligations at the end of the lease.

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