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COMMERCIAL LAWYERS

A New Era for Renewable Energy Projects in South Australia is here!

As the State Government deals with the transition towards renewables, significant changes to the legislative framework for renewable energy projects in South Australia have now come into effect. This article summarises the changes and details the impact on Landholders.

On Thursday 11 July 2024 the *Hydrogen and Renewable Energy Act 2023* (SA) ("**Act**") commenced, and the accompanying *Hydrogen and Renewable Energy Regulations 2024* (SA) ("**Regulations**") were released in final form and came into effect.

The Act establishes a streamlined regulatory framework for hydrogen and renewable energy projects ("**renewable projects**") in South Australia. The Act seeks to minimise red tape to enable renewable energy project developers ("**Developers**") to get their renewable projects up and running as quickly as possible.

The Act dramatically changes the existing state of play for the establishment of renewable projects in South Australia, with wide ranging ramifications for all South Australian landholders including primary producers and pastoralists ("**Landholders**").

Refer to our previous article here which details the changes made by the Act.

The Regulations had, prior to 11 July 2024, only been released in draft form. The Regulations have now been finalised and deal with many pertinent matters to be addressed as part of the new regime set out in the Act, some of which are summarised below.

Notice of release areas (applicable to pastoral land only)

As summarised in our previous article, the declaration of an area of pastoral land to be within a "release area" allows the Minister to grant licenses (via a competitive tender process) to Developers to carry out renewable projects on that land. It also requires Landholders of land subject to a release area to host the relevant renewable project and negotiate and agree to the terms of the relevant access agreements with the Developer.

The Regulations set out the notice and consultation process to be followed by the Minister before declaring an area of pastoral land to be within a "release area".

The Minister has broad discretion as to how this consultation process is undertaken. Whilst the Minister must consult Landholders and seek their submissions, there is no requirement for the Minister to consider any submissions that a Landholder may make as part of the consultation process.

Rent Payable to the Minister (applicable to pastoral land and freehold land subject to a special enterprise licence)

The Act sets out a requirement for Developers who hold certain licenses in respect of pastoral land and freehold land subject to a special enterprise licence to pay an annual rent to the Minister ("**Government Rent**"). This is in addition to any amounts negotiated with the Landholder.

The Act and Regulations do not specify the quantum of the Government Rent. Rather, the Regulations set out a process whereby the Minister determines and publishes a "rental determination" (by notice in the gazette) which declares the base amount of that Government Rent. The Minister can set the Government Rent generally for a class/specific circumstances of renewable projects, or on a case-by-case basis for each renewable project.

We note that during consultation on the Regulations, the rate for the calculation of the Government Rent aligned with going commercial rates payable by Developers in respect of existing renewable projects. That is, it seemed that the Government's expectation was that they would receive the full commercial return currently payable to Landholders. This was removed from the final Regulations, although it will be critical to review the calculation(s) for the Government Rent once the determination(s) have been made for the relevant renewable project(s).

We also query what impact the requirement for Developers to pay Government Rent may have on the viability of existing projects, where the Developer had already agreed to pay the going commercial rate to the Landholder and could now be facing the prospect of having to pay (in addition) Government Rent to the Minister.

The Regulations do not require the Minister to pass any portion of the Government Rent onto Landholders, although the Act does require the Minister to pay an unspecified portion of the Government Rent into the Pastoral Land Management Fund.

Interestingly, under the Regulations Developers must put forth a "rental offer" at the time of submitting their tender for a licence. The Minster grants the relevant licence depending on a variety of factors – including the rental offer. Effectively, Developers seem to be bidding for a licence (although we note that the rental offer is not the determinative factor for the grant of a licence).

Choosing the Developer (applicable to pastoral land only)

By awarding a Renewable Energy Feasibility Licence/Renewable Energy Infrastructure Licence via the competitive tender process the Minister will determine who the Developer will be for any project over pastoral land.

The Regulations specify how the Minister must assess licence applications. Criteria includes the net economic, social and environmental benefit to the State expected as a result of the renewable project, the Developer's experience, technical, operational and financial capabilities, the Developer's plan for delivering the renewable project within a specified timeframe and (as above) the Developer's rental offer.

Renewable projects of "major significance" (applicable to freehold land only)

Unlike pastoral Landholders within a release area, there is no requirement for freehold Landholders to host renewable projects on their land. This is unless the freehold land is proposed to be subject to a renewable project which is of "major significance" to the South Australian State economy. In those circumstances, the freehold Landholder will be required to host the renewable project on their land and negotiate and agree to the terms of the relevant access agreements with the Developer.

The Act and the Regulations do not specify what constitutes a renewable project of "major significance". In our view this is regrettable and unless clarified will create uncertainty as to whether Landholders will be required to negotiate and agree to the terms of access agreements with the Developer for large scale renewable projects over freehold land.

Grandfathering (applicable to both pastoral land and freehold land)

Existing renewable projects currently being undertaken (whether in their feasibility or operational phase) on pastoral land and freehold land are "regulated activities" and cannot be undertaken without the requisite licence(s) granted under the Act.

The Act and Regulations require Developers to obtain certain licences during the feasibility phase (where an option and access agreement is entered into with the Landholder) and operational phase (where the formal lease is entered into with the Landholder) of any renewable project. Developers have a grace period of 12 months from the commencement of the Act (i.e. until 11 July 2025) to obtain these licences. After the end of this grace period, if the Developer does not hold the requisite licence they will be in breach of the Act and face significant penalties.

With respect to renewable projects on pastoral/freehold land that have not yet commenced the feasibility or operational phase, whilst not clear, it seems that there is no grace period under the Act or Regulations. If this is the case, Developers are now obliged to obtain the requisite licences before commencing the relevant regulated activities, and any regulated activities undertaken in the absence of the requisite licences will be a breach of the Act.

We recommend that Landholders have their existing agreements reviewed to determine if they need to be varied to account for the changes arising under the Act and the Regulations.

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