Cowell Clarke
COMMERCIAL LAWYERS

Going Green - Is It All Good News For Landholders?

On Wednesday 15 November 2023 the *Hydrogen and Renewable Energy Act 2023* (SA) ("**Act**") passed both houses of State Parliament. The Act received Royal Assent on Thursday 23 November 2023 and will commence on a date to be fixed by proclamation (to be confirmed).

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

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

The Existing Regime

Currently, and before the Act commences except in very specific circumstances,[1] Landholders and Developers are free to negotiate the commercial terms of the Developer's use of the Landholder's land for the purposes of a wind/solar project. Landholders are not obliged to negotiate with the Developer, and if the parties cannot reach agreement on satisfactory terms, then the Developer cannot use the Landholder's land for the project.

The Act preserves this process in relation to freehold land, unless the proposed project is of "major significance" to the South Australian economy, in which case a "special enterprise licence" can be granted to authorise the Developer to access and undertake the project on the land.

However, the Act dramatically changes the existing arrangements in relation to pastoral and Crown land ("**Pastoral Land**"). This article primarily focuses on those changes.

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[1] *Part 6 of Division 4 of the Pastoral Land Management and Conservation Act 1989 (SA) does currently permit the Minister for Climate, Environment and Water to grant access rights to Developers for the purposes of wind farm developments on pastoral land. However, these provisions have not (to our knowledge) been utilised by the Minister. These provisions will be repealed upon commencement of the Act.*

Feasibility Licence

The Act permits the Minister for Energy and Mining ("**Minister**") to declare an area of Pastoral Land to be suitable for a wind/solar project ("**Release Area**").

Before doing so, the Minister must comply with the notice and consultation requirements set out in the regulations associated with the Act ("**Regulations**"). As the Regulations are yet to be published, there is uncertainty as to what these notice and consultation requirements will be, and how Landholders' views will be considered in that process.

After Pastoral Land has been declared to be within a Release Area, the Minister may undertake a competitive tender process whereby Developers can apply for a Renewable Energy Feasibility Licence ("**Feasibility Licence**") in respect of the Release Area.

If successful, the Developer will be granted a Feasibility Licence which permits them to undertake initial testing and feasibility studies, including the construction of monitoring equipment on the relevant Release Area.

Infrastructure Licence

If the Developer holds a Feasibility Licence (or if the land will only be used for the purposes of storing, transmitting or otherwise conveying renewable energy) then the Developer may also apply for and be granted a Renewable Energy Infrastructure Licence ("**Infrastructure Licence**").

An Infrastructure Licence authorises the construction, operation and decommissioning of project infrastructure (e.g. wind turbines, solar panels, substations) in all or part of the Release Area.

Who Can Develop On My Land?

The new process removes the ability for Landholders to choose which Developer they wish to deal with in undertaking a hydrogen and/or renewable energy project on their land.

Under the Act, ultimately, the Minister will determine who the Developer will be via the grant of the Feasibility Licence/Infrastructure Licence. The possibility of the Minister (rather than the Landholder) making this decision may be problematic for Landholders.

The Act provides that the criteria for the competitive tender process and the assessment of applications is contained in the Regulations. As above, these Regulations are yet to be published. It will be essential to review the assessment criteria to ensure they sufficiently protect Landholders. Provided there is sufficient rigor surrounding the tender selection process, Landholders may take comfort that the Developer ought to at least be reputable.

Licence Term

The initial term of a Feasibility Licence can be up to 5 years. The initial term of an Infrastructure Licence is 50 years, or such longer or shorter period as determined by the Minister.

The right for the Minister to potentially extend the term of an Infrastructure Licence (without needing to obtain the consent of the Landholder) may be concerning for some Landholders. In the absence of knowing the term of any potential renewal period upfront, to ensure that the Landholder is adequately compensated and protected during the renewed term, it is critical that the Access Agreement (refer below) is appropriately drafted to ensure that any renewal of the original term triggers a right for the Landholder to renegotiate the terms of the Access Agreement.

Access Agreement

Prior to accessing Pastoral Land, the Act requires a Developer who holds a Feasibility Licence and/or an Infrastructure Licence to reach agreement with the Landholder as to the terms of their access for the purposes of undertaking the wind/solar project ("**Access Agreement**").

An Access Agreement binds future owners of the land and must address matters pertaining to access to the relevant area and notice requirements in respect of the commencement of authorised works.
The Act is silent as to how key issues such as the construction, installation, operation, maintenance and decommissioning of energy infrastructure will be managed throughout the life of the wind/solar project. The Act appears to leave these matters to the parties to negotiate between them. It will be critical for Landholders to ensure that their Access Agreement appropriately deals with these matters.

Compensation

The Access Agreement must provide for monetary compensation to be paid by the Developer to the Landholder. The amount of compensation is assessed by reference to the economic loss, hardship or inconvenience suffered by the Landholder as a result of the wind/solar project. It is uncertain how this loss will be quantified.

The assessment of loss based "compensation" is drastically different to the current commercial assessment of consideration payable to a Landholder by the Developer in respect of the wind/solar project which, in many respects, will not be based on the loss suffered by the Landholder, but rather the "commercial rate" that Developers need to pay to obtain the relevant rights over the Landholder's land.
Despite the above, the Act does not appear to limit the benefits that may be included in an Access Agreement to compensate the Landholder. Assuming that is the case, Landholders are free to negotiate with Developers, and the Act does not prevent the parties negotiating other terms that might be expected to be included in any agreement between a landholder and a Developer, such as:

- a construction/disturbance payment to compensate the Landholder for disturbance to their occupation of the land during the construction of the wind/solar project;
- non-monetary/"in kind" consideration by way of track/shed maintenance, water supply, installation of fencing, solar panels for the benefit of the Landholder's primary production business etc.

Determination by ERD Court

It is important to note that if the terms of the Access Agreement cannot be agreed between the Landholder and the Developer within 6 months from the initiation of negotiations, then the terms of the Access Agreement will be determined by the ERD Court.

Landholders should be mindful of this when negotiating with Developers, as the ERD Court's determination may result in the Landholder being worse off than it could have been had it agreed to the commercial terms with the Developer.

Rent Payable to the Minister

If a Feasibility Licence and/or Infrastructure Licence is granted to a Developer in respect of Pastoral Land, or if a special enterprise licence is granted to a Developer in respect of freehold land, then the Developer must pay annual rent to the Minister.

The Minister must pay an unspecified portion of the annual rent into the Pastoral Land Management Fund.

It will be interesting to see how the annual rent payable to the Minister is calculated, as payments that the Developer needs to make in this respect are likely to impact on the other arrangements including the commercial benefit to the Landholder.

Regulations

The Act leaves many pertinent matters to be addressed in the Regulations. For instance, the Regulations will specify the notice and consultation requirements which the Minister must comply with before declaring a Release Area. As a result, the Act does not provide certainty as to what these notice and consultation requirements will be, and how the views of Landholders will be heard and addressed, before their land is declared to be within a Release Area.

The Regulations will also deal with the criteria for the Minister's assessment of tender applications from Developers for the various licences. Again, there is little certainty on this process under the Act itself. In our view it would have been preferable for greater certainty on these points to be provided for in the Act rather than deferring them to the Regulations which are yet to be published.

It will be essential to review the Regulations when they are released for public consultation to see if they provide sufficient clarification on these issues, which we note may not be for some time.

For more information, please contact Sam Richardson and Deanna Riebolge of our specialist Agribusiness team.

Sam Richardson
Director
srichardson@cowellclarke.com.au
+ 61 8 8228 1240

Deanna Riebolge
Associate
driebolge@cowellclarke.com.au
+ 61 8 8228 1150