



Australian Government

Australian Energy Infrastructure Commissioner

Considerations for Landholders before entering into Commercial Agreements

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About this document

This document has been prepared by the Office of the Australian Energy Infrastructure Commissioner. It is intended for use as general background information and considerations for landholders who may be reviewing commercial agreements to host renewable energy generation, energy storage facilities and/or transmission infrastructure on their property.

This guideline has been developed based on the Office's experience in observing and handling matters related to commercial agreements involving landholders, as well as our broader observations and recommendations that are set out in the Commissioner's Annual Report to the Australian Parliament (available on the Commissioner's website at www.aeic.gov.au).

The Office does not warrant or guarantee the accuracy, reliability, currency or completeness of the content in this document. Landholders are strongly encouraged to seek independent legal and professional advice before entering into any commercial agreements.

About us

The Australian Energy Infrastructure Commissioner is an independent role appointed by the Australian Government. The Commissioner's role is to:

- handle complaints from concerned community residents about wind farms, large-scale solar farms, energy storage facilities and new major transmission projects

- promote best practices for industry and government to adopt in regard to the planning and operation of these projects, and
- provide greater transparency on information related to proposed and operating projects.

License (or Access) agreements

A 'license' agreement, also known as an 'access' agreement, allows the developer rights to access a landholder's property for the purposes of surveys and assessments, typically for a specified duration of time. Activities may include the need to access the land to capture wind or solar resources data, undertake environmental and cultural surveys – as well as investigations, such as geotechnical, to determine the suitability of the site and feasibility of a project.

A license agreement does not guarantee that a project will proceed and should not bind the landholder beyond allowing the agreed access for the term of that agreement.

Matters for the landholder to consider include:

- Term of the access agreement, extension clauses and ability to terminate.
- Scope of the agreement, including what access is required, the activities to be conducted, by who and when.
- Binding clauses – clauses that may require the landholder to enter into subsequent agreements and specifying the terms of such an agreement.

- Fees payable to the landholder during the agreement including how the fees are calculated and when and how they are paid.
- A list of the reports that may be generated by the developer from the survey and/or investigation activities –and clarifying what reports will be made available to the landholder for review (e.g. external weather risks for the subject property, such as drought, flood and fire).
- Expected personnel and contractors that may require access to the property to carry out the scope of work (e.g. ecologists, engineers, Traditional Owners, security personnel, landholder liaison personnel).
- Any requirements of the landholder in the event of sale or transfer of the land.
- Ability of developer to transfer the access agreement to another party with or without landholder consent.
- Access protocols that the developer must comply with before, during and after access to the property.
- Landholder protection from potential damage, claims and legal action.
- Required insurances to be taken out by the parties to the agreement and responsibility for payment.
- Payment or reimbursement of reasonable professional fees incurred by the landholder in relation to negotiating the agreement.
- Consequences of material breaches of the agreement and ability to remedy a breach.
- A dispute resolution mechanism.

Option agreements

An 'option' agreement provides the developer with rights to lease or secure some or all of a landholder's property for the purposes of construction and operation of the project. Such an agreement should be in place for a specified period of time and may have the ability to extend the time period.

An option agreement does not guarantee that a project will proceed or that the developer will exercise its option, nor does it typically guarantee that the landholder will host the number or capacity of assets that may have been discussed with the landholder. However, option agreements may bind the landholder to the terms of a lease or hosting agreement if exercised.

Therefore, the option agreement may often contain all of the final agreement terms and conditions and bind the landholder to those conditions. This agreement must therefore be reviewed carefully.

Matters for consideration include:

- Term of the agreement, extension clauses and ability to terminate.
- Scope of the agreement, including clarity about the subject land, location of assets (e.g. transmission line towers and route, wind turbine sites) – including maps and diagrams of the proposed asset locations.
- Further to scope, clarify what ongoing access to the landholder's property is allowed by the Option agreement and any changes to the access scope and protocol that was defined in the license or access agreement.
- Compliance of proposed project scope with relevant planning permit requirements and design standards and guidelines.
- Binding clauses – clauses in the agreement that may require the landholder to enter into a subsequent agreement and specifying the terms of that agreement.
- Fees payable to the landholder during the option agreement including how the fees are calculated and when and how they are paid.
- Any requirements on the landholder in the event of sale or transfer of the land.
- Ability of developer to transfer the agreement to another party with or without landholder consent.

- Landholder protection from potential damage, claims and legal action, related to the option agreement and any ongoing access activities governed under that agreement.
- Required insurances to be taken out by the parties to the agreement.
- Payment or reimbursement of professional fees incurred by the landholder in relation to negotiating the agreement.
- The amount of administrative burden placed on the landholder to administrate the agreement – e.g. requiring the landholder to be the sole issuer of invoices to the developer in order to be paid the agreed fees.
- Mechanisms to apply if the project’s scope materially changes, particularly if the changes result in negative impacts for the landholder, such as a reduced number of wind turbines, solar arrays or transmission assets that lead to reduces revenues/fees.
- Milestones that must be achieved by the developer during the term of the agreement, including considerations if the project’s approval or financing is materially delayed.
- Consequences of material breaches of the agreement and ability to remedy a breach.
- A dispute resolution mechanism.

Lease and Easement agreements

The lease agreement (or ‘host’ agreement) is a complex commercial lease that commits the landholder for a very long time and places significant obligations and responsibilities on the landholder.

A wind or solar farm usually consists of one or more ‘host’ landholders willing to have project infrastructure (e.g. wind turbines or solar panels) located on their land. A lease agreement is a long-term agreement that is negotiated between a project developer and the landholder. This agreement is essentially a commercial lease and should set out the terms to enable the

developer to install, operate and maintain the project infrastructure.

It is important that any lease agreement presented to a landholder is fair, reasonable and written in plain English.

Landholders may also enter into agreements for land access, private transmission line easements, substations, office buildings and other items associated with a project.

Matters for the landholder to consider include:

- Fees payable to the landholder during the development stage (pre-permit approval), financial close stage (post-permit approval), construction, operation and decommissioning stages.
- Method of calculating the fee amounts and fee increases over time.
- Timing of payment of fees to the landholder by the project.
- Rights of the landholder in the event of non-payment of any fees by the project.
- Variations to fees in the event of changes to the wind turbine, transmission route or solar array layout, turbine specifications, turbine capacity and number of turbines, solar arrays, transmission towers or other infrastructure to be hosted.
- Whether there is a payment amount to the landholder in the event that wind turbines, solar arrays or other infrastructure will no longer be hosted by the landholder.
- Creation of easement details for, say, a transmission line, and associated clauses related to the easement creation and easement access.
- Easements that may be required for private infrastructure, such as for a connecting powerline between the wind/solar farm and the main transmission grid.
- Landholder’s responsibilities in regard to residential tenants on the land and/or property lessees.

- Sale or transfer of the land by the landholder or transfer of project ownership by the project.
- Restrictions on further development on the property.
- Provisions in the event of subdivision of the property.
- Term of the agreement, options for renewal of the agreement and provisions for termination.
- Required insurances and responsibility for taking out insurances and payments.
- Ability and process to facilitate mortgagee consent agreement between the developer and the landholder's financier – in a timely manner.
- Funding security provisions to protect the landholder in the event of 'tenant default'.
- The amount of administrative burden placed on the landholder to administrate the agreement – e.g. requiring the landholder to be the sole issuer of invoices to the developer in order to be paid the agreed fees.
- Dispute resolution procedure, including key contacts at the developer for the raising and escalation of issues.

Lease and Easement agreements – pre-construction

There can be quite a long period between a developer lodging a permit application for a project and commencement of construction.

Typically, a developer must obtain the necessary permit approvals and then go on to arrange and confirm project finance, known as 'financial close' or 'financial investment decision'.

Even after financial close there may still be further delays due to changes in equipment selection and design, resulting in the need for permit modifications and further approvals.

During this time, the developer needs to have 'occupancy' of the land required for the project – which is typically done via a lease and/or easement agreement with the landholder.

Landholders should consider what fees should be payable to them during this time, which may last for many years. Landholders should also consider termination provisions in the event that the landholder wishes to exit the agreement due to ongoing, unreasonable delays.

Lease and Easement agreements – construction activities

Construction activities can be particularly disruptive to the landholder for a period that may last a few years. It is important that the landholder has a clear understanding of the extent of any potential impacts to the property during this phase and has discussed how these impacts can be managed or mitigated.

Key matters for the landholder to discuss or negotiate in relation to the construction phase of project include:

- Fees payable to the landholder during the construction period.
- Proposed internal road layout for the project – consider impact on farming operations.
- Process and protocol for making changes to internal road layout during construction.
- Process and protocol for any micro-siting of assets during construction, such as the final location for a wind turbine or transmission tower/route.
- Location of other infrastructure (internal cabling, construction offices, substations, private transmission lines etc.).
- Gate policy and other on-site procedures, such as biosecurity compliance requirements, for contractors entering and leaving the property.
- Use of and payment for additional land during construction (and major maintenance activities).

- Responsibilities for provision and maintenance of shared use infrastructure.
- Removal of construction waste, including who is responsible, how it will be removed and timeliness of removal.
- Access agreements required for accessing easements during construction via a landholder's property.
- Provisions for removal of ancillary infrastructure and rehabilitation of disturbed land after the completion of construction works, such as replacement of soils over underground trenching for cabling.
- Workplace safety responsibilities during construction, including required insurances.
- Compliance with permit conditions and all relevant laws and regulations related to construction.
- Provisions and process for handling disputes such as damage to landholder's property/equipment by contractors.

Lease and Easement agreements – operational activities

Wind and solar farms typically have a project life span of approximately 25 years, while transmission lines may be 50 years or more. During the operational phase of a project, it is expected that there will be ongoing maintenance activities which will require periodic access to the property.

It is also important to consider the administration of the agreement over the course of the project. The landholder should set aside adequate time, or engage assistance, to review the terms of the agreement, ensure compliance by both parties and resolve any disputes that may arise.

In considering a proposed lease or easement agreement, key matters for the landholder to review/negotiate in relation to the operational aspects of the project include:

- Fees payable to the landholder during the operational phase of the project, including

timing of fee payments and escalation of fees.

- Additional fees payable for use of additional land during operations for major maintenance activities.
- Ongoing access requirements for operational and maintenance activities.
- Responsibility for workplace safety plans, including plans for fire and other emergencies, and the protocol for communications.
- Responsibility for compliance with permit conditions, laws and regulations related to operations (e.g. noise compliance).
- Responsibility and requirements for vegetation maintenance in around the assets – e.g. the transmission line easement
- Required insurances to be taken out by the project operator in respect of the landholder.
- Required insurances to be taken out by the landholder in respect of the project.
- Additional insurances that may be required to be taken out by (or for) neighbours to the project, such as increased public risk and liability insurance.
- Responsibility for the costs and payment of:
 - the various insurances
 - additional council rates and fees levied on the landholder as a result of the project
 - additional land taxes levied on the landholder as a result of the project
 - additional emergency services or other levies as a result of the project
 - additional duties payable upon sale or transfer of the land.

- Payment of outgoings – paid directly by the project or is the landholder required to pay and then seek reimbursement.
- Provisions for landholder to sub-let some or all of the property.
- Development restrictions that may be placed on the land by the project.
- Constraints on sale or transfer of the property.
- Term of the agreement, options for renewal and termination provisions to terminate by either party.
- Key contacts at the developer for the raising and escalation of issues and the dispute resolution process for handling alleged breaches of the agreement.
- Detailed, verified estimates of the likely decommissioning costs.
- Clarify which party (or parties) is responsible for decommissioning the site.
- Clarify which party pays for the actual decommissioning costs.
- Arrangements to ensure decommissioning funding is set aside and secured, such as:
 - bank guarantee
 - bond, or
 - trust fund.
- Ability to audit the funding security arrangements to ensure funding is in place and contributions meet the agreed requirements.
- Provisions for dealing with default by the project operator.

Lease and Easement agreements – decommissioning

At the end of the operating life of a project, the expectation is that the wind or solar farm or transmission line will be decommissioned and all turbines, solar arrays, transmission lines and other infrastructure will be removed from the property, with the property returned to its original condition as agreed in the agreement.

It is therefore important for the landholder to have a clear understanding of how the decommissioning phase should be managed by the project operator.

In relation to the decommissioning of a project, key matters for the landholder to discuss or negotiate include:

- Scope of the decommissioning and rehabilitation activities required.
- Decommissioning plan and provision of the plan to the landholder and other required stakeholders, such as the responsible authority.
- Decommissioning responsibilities of the parties, which may be defined in the plan and/or the permit, but need to also be documented in the agreement.

Seeking independent advice

Our Office strongly encourages all landholders considering entering into commercial agreements with developers to obtain independent legal, financial, valuation and insurance advice prior to entering into any agreement.

It is current practice to expect that the developer will fund or reimburse the reasonable professional services costs incurred by the landholder in negotiating the various agreements.

An agreement can always be negotiated before a landholder signs, however can be much more difficult to negotiate and vary terms of the agreement thereafter.

Further information and resources

The Commissioner's 2021 Annual Report includes the Commissioner's Observations and Recommendations, in particular Appendix A, Section 1: Host Landholder Matters (pages 27-40). This report is available at:

<https://www.aeic.gov.au/publications/2021-annual-report>

The NSW Farmers Association has also released a Renewable Energy Landowner Guide which is designed as a resource for landholders who may be considering hosting a wind or solar development on their property. This guide is available at:

https://www.nswfarmers.org.au/NSWFA/Content/IndustryPolicy/Resource/Renewable_Energy_Landholder_Guide.aspx

More information and resources are available on our website:

www.aeic.gov.au.

If you have any questions, please contact us via email at aeic@aeic.gov.au or at our toll free number 1800 656 395.