



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 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 infrastructure on their property.

This guideline has been developed based on the Office's experience and understanding in observing and handling these matters, as well as the 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 of the Australian Energy Infrastructure Commissioner does not guarantee the accuracy, reliability, currency or completeness of the content in this document and its content does not necessarily reflect the views of the Commissioner. Landholders are strongly encouraged to seek independent legal or financial 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 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 as well as undertake environmental surveys and investigations, such as geotechnical and cultural heritage 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 access for the term of that agreement.

Matters for the landholder to consider include:

- Term of the agreement, extension clauses and ability for landholder to terminate.
- 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 and when they are paid.

- Constraints 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 landowner consent.
- Access protocols that the developer must comply with before and during 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.
- A dispute resolution mechanism.

Option agreements

An 'option' agreement provides the developer with rights to lease 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 duration of time.

An option agreement does not guarantee that a project will proceed or that the developer will enter into lease, 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.

- Term of the agreement, renewal/extension clauses and ability for landholder to terminate.
- Any binding clauses (clauses in the agreement that may require the landholder to enter into subsequent agreements and terms of such agreements).
- Fees payable to the landholder during the agreement including how and when they are paid.
- Sale or transfer of the land by the landholder and ability of developer to transfer the agreement to another party with or without landowner consent.

- 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 turbines or arrays.
- 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.
- A dispute resolution mechanism.

Lease 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 landowner 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, operational 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 the annual fees by the operator.
- Variations to fees in the event of changes to turbine or solar array layout, turbine specifications, turbine capacity and number of turbines or solar arrays or other infrastructure to be hosted.
- Whether there is a payment amount in the event that wind turbines, solar arrays or other infrastructure will no longer be hosted.
- Easements that may be required, such as for a connecting powerline.
- Landowner's responsibilities in regard to residential tenants and/or property lessees.
- Sale or transfer of the land by the landholder or transfer of 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.
- Funding security provisions to protect the landholder in the event of 'tenant default'.
- Dispute resolution procedure, including key contacts at the developer for the raising and escalation of issues.

Lease 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'.

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 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 Lease due to ongoing delays.

Lease agreements – construction activities

Construction activities can be particularly disruptive to the landholder for a period that may last a few years, so 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.
- Location of other infrastructure (cabling, construction offices, substations, transmission lines etc.).
- Gate policy and other on-site procedures, such as biosecurity compliance requirements for contractors entering the property.
- Use of additional land during construction and major maintenance activities.
- Responsibilities for maintenance of shared use infrastructure.

- Removal of construction waste, including who is responsible and timeliness of removal.
- Access agreements required for accessing easements via a landholder's property.
- 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.
- Work place safety responsibilities during construction, including required insurances.
- Compliance with permit conditions related to construction.
- Provisions and process for handling disputes such as damage to landholder's property/equipment by contractors.
- Ongoing access requirements for operational and maintenance activities.
- Responsibility for occupational health and safety plans and communications.
- Responsibility for developing and maintaining the emergency plan
- Compliance with permit conditions related to operations (e.g. noise emissions).
- Responsibility for fire and emergency plans and communications.
- 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 & liability insurance.

Lease agreements – operational activities

Both wind and solar farms typically have a project life span of approximately 25 years. During the operational phase of a project, it is expected that there will be some 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 landowner should set aside adequate time on a periodic basis to review the terms of the agreement, ensure adherence by both parties and resolve any conflicts that may arise.

In considering a proposed lease 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 extra land during operations for major maintenance activities
- Responsibility for the costs and payment of:
 - the various insurances
 - additional council rates levied on the landowner as a result of the project
 - additional land taxes levied on the landowner 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 – are they 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 lease agreement, options for renewal and termination provisions by either party
- Key contacts at the developer for the raising and escalation of issues and the dispute resolution process for handling breaches of the agreement
- Ability to audit funding security arrangements to ensure funding is in place and contributions meet the agreed requirements
- Provisions for dealing with default by the project.

Seeking independent advice

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

An agreement can always be negotiated before a landowner signs, however it is much more difficult to negotiate terms of the agreement thereafter.

Further information

The Commissioner's 2019 Annual Report includes a Section on the Commissioner's Observations and Recommendations, including Section 1: Host Landowner Negotiations (pages 24-31). This is available at:

<https://www.aeic.gov.au/publications/2019-annual-report>

The NSW Farmers Association has also released a Renewable Energy Landowner Guide which is designed as a resources 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.

Lease agreements – decommissioning

At the end of the operating life of a project, there is a clear expectation that the wind or solar farm will be decommissioned and all turbines, solar arrays and other infrastructure will be removed from the property, with the property returned to its original condition. However, it is important for the landholder to have a clear understanding of how the decommissioning phase will be managed by the project operator.

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

- Scope of the decommissioning activities required.
- Decommissioning plan and provision of the plan to the landholder.
- Decommissioning responsibilities of the parties, which may be defined in the plan and/or the permit.
- Detailed, verified estimates of the likely decommissioning costs.
- Clarify who is responsible for decommissioning the site and pays for the decommissioning costs.
- Arrangements to ensure decommissioning funding is set aside and secured, such as:
 - bank guarantee
 - bond, or
 - trust fund.