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Wind Farms in Queensland: What landowners need to know

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With the Federal Government's announcement that a fixed price on carbon will be in place from 1 July 2012, and that an emissions trading scheme will follow within three to five years, investment in the renewable energy sector is expected to increase in 2011 and 2012.

There are a number of topical property issues that landowners, developers and consultants who are considering undertaking or being involved in renewable energy projects need to take into account. Here, Partner Michele Muscillo and Associate Tammy Berghofer discuss the legal considerations for landowners who are approached by a wind farm developer.

The prospects for wind farms in Queensland

Queensland wind farms at Thursday Island and Windy Hill have been operating for many years now. However, compared to other States, Queensland makes the smallest contribution to Australia's wind energy capacity. Investment has been buffeted by the low price that renewable energy certificates have been fetching under the renewable energy target scheme (RETS), the dismissal of the carbon pollution reduction scheme (CPRS) legislation, and the difficulty in obtaining funding after the global financial crisis.

Nevertheless, the redefinition of RETS, and the Government's proposal to introduce a fixed price on carbon, have seen Origin Energy and AGL - two of Australia's largest energy retailers - recently comment on a positive future for their respective wind farm projects. If these incentives come to fruition, the certainty created as a consequence will encourage investment through initial feasibility studies and ultimately the construction of wind farms. Most local governments will enthusiastically embrace wind farm investment in their regions in the hope that it will create new jobs and boost the local economy.[1]

The State Government has placed a great deal of hope on renewable energy resource development, having recognised that it could boost the Queensland economy by more than $3.5 billion and create up to 3,500 jobs.[2] The Queensland Renewable Energy Plan outlines a number of initiatives designed to stimulate the development of renewable energy, including:

- **Resource Mapping**: The first of these maps, the Queensland Wind Map, has been released and is available online at www.dme.qld.gov.au/mines/tenure_maps.cfm. The State's intention in investing in these maps is to provide publicly available information to the private sector to stimulate site prospecting, feasibility studies, and ultimately, wind farm development. The industry anticipates further mapping which details the electricity transmission network, as that will assist in better identifying investment opportunities.

- **Pilot Renewable Energy Zones**: These will be designated by the State and will comprise areas that offer the best quality renewable energy resources and the greatest potential for network availability. These areas are likely to be the focus of investment incentives and streamlined regulatory and approval processes.

- **Amendment of the *Land Act 1994***: There is a proposal to amend the Land Act to enable agricultural lease holders to sublease to wind farms, and as a consequence, achieve an additional income stream to support the purpose for which the lease was issued.

Stages to a wind farm development[3]

A wind farm development is complex, and the developer must invest a substantial amount of money and time before the infrastructure is constructed. A typical wind farm development will go through the following stages:

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[1] Kathleen Donaghey, *Mayors give thumbs up to turbine farms*, The Sunday Mail, 21 March 2010, page 38
[2] The Queensland Renewable Energy Plan, June 2009
[3] Wind Energy TechnoCentre: www.eolien.qc.ca/?id=32&titre=Wind_farm_development_stages&em=6387, visited 25 February 2011; AGL: www.agl.com.au/about/EnergySources/wind/Pages/DevelopmentofaWindFarm.aspx, visited 25 February 2011

1. **Pre-feasibility:** This is a low-cost assessment of various potential sites for wind farms, involving:

   (a) the pre-selection of sites (perhaps based on the resource mapping details discussed above);

   (b) wind turbine model selection; and

   (c) drawing up preliminary cost estimates and financial summaries for the best sites.

2. **Feasibility:** Viable projects are analysed further to confirm assumptions and information gathered during the pre-feasibility stage. Steps involved include the following:

   (a) Inspect the site.

   (b) Conduct informal public consultation.

   (c) Assess the site's wind energy potential.

   (d) Conduct a preliminary environmental assessment.

   (e) Prepare a preliminary design for the wind farm.

   (f) Estimate costs and prepare a financial summary.

   (g) Draft a feasibility report.

   At this stage the developer will make the initial approach to the landowner and seek access to the land (by it and its consultants) to conduct inspections, carry out assessments and install measuring devices. The developer may also start preliminary discussions about a formal agreement for lease of the land. Before agreeing to anything, the landowner should consider:

   - the permitted hours of access;
   - obligations when on the land (for example, to close gates);
   - damage to the land or improvements, and make good obligations should the developer decide not to proceed;
   - security for performance of the developer's obligations, both throughout the term of the agreement and in the decommissioning phase (for example, a bank guarantee); and
   - insurance requirements and risk.

3. **Development:** If the outcome of the feasibility analysis is positive, the developer will decide whether to proceed with the project through to development. If the developer decides to proceed, it must first have the necessary approvals and have secured rights to use the land on which the turbines are to be constructed. Accordingly, the following steps must be completed before construction can begin:

   Obtain permits and approvals (once the proposal has been accepted) from local and State Government departments.

   (a) Obtain land rights for the sites.

   (b) Survey the site.

   (c) Negotiate financing.

At this stage, the landowner will be asked to enter into a lease and to consent to the developer lodging a development application in relation to the landowner's land. Before agreeing to this, the landowner should consider:

- the content of the development permits and approvals that the developer is seeking, as these run with the land and may affect the landowner's ability to use the land in the future;
- the terms of the formal documentation proposed by the developer, including commercial terms such as the length of the lease and rent. We would recommend that this be completed and agreed before the landowner permits a development application to be lodged over his or her land; and
- access rights pending formal documentation, as outlined in the feasibility stage above.

4. **Design and planning:** This stage involves a large amount of planning for the construction and operation of the final wind farm site. The developer calls for tenders and enters into contracts with the relevant service providers and builders required to complete the project. Steps include the following:

   (a) Choose final wind turbine sites.

   (b) Design mechanical and electrical systems.

   (c) Design civil engineering infrastructure.

   (d) Negotiate and conclude calls for tenders and contracts with suppliers.

   (e) Plan maintenance of the wind farm.

   (f) Plan management of the construction and operation phases as well as the environmental monitoring and follow-up required during those phases.

   (g) Plan decommissioning.

5. **Construction:** The practical construction phase involves the construction of hardstands, civil engineering work, installation of machines and connection of electrical equipment.

   During this stage, the landowner will be concerned that the developer and its consultants and contractors are observing access conditions (for example, following pre-determined road networks through the land and closing gates to prevent livestock escaping). Due to the number of people entering the land at this stage with plant and equipment, it is important that the agreement for lease or lease adequately addresses the landowner's expectations about the use of his or her land.

6. **Handover** and close out**:** This marks the beginning of the operation phase of the wind farm - when the turbines start spinning. At this stage, the developer will:

   - Commission the power station:

     (a) Perform mechanical tests to ensure compliance with manufacturer's specifications.

     (b) Verify electrical and communication systems.

     (c) Restore condition of access roads and control erosion.

     (d) Clean the site.

   - Approve commercial commissioning of the power station and take official possession of the project.

Depending on the outcome of the negotiations with the developer about payment of rent, this stage may mark the beginning of an income for the landowner, as many wind farm leases provide for rent to be paid based on the revenue generated by the wind farm.

7. **Maintenance and performance:** Operation of a wind farm includes control, monitoring and maintenance activities that must be performed precisely to keep downtime to a minimum.

   This phase is the longest phase of all because it represents the majority of the term of the lease. During this phase, the landowner should monitor revenue based on the disclosures required by the developer (depending on the terms of the lease) to ensure that the landowner is being paid the correct rent.

8. **Decommissioning:** When the power station's activity must come to an end for whatever reason (for example, the end of the machinery's service life or lack of markets), the developer must dismantle the facilities in an acceptable manner, in compliance with the contracts and agreements it has entered into. This involves:

   (a) dismantling machinery and other installations; and

   (b) restoring the site to its original condition in compliance with leases and other agreements concluded with landowners and other stakeholders (local and State Government departments).

   This is the final phase, when the developer packs up and goes home. It is essential that the lease between landowner and developer - at this point negotiated some years ago - adequately addresses the developer's make good requirements. For example, the hardstands that house the turbines comprise tonnes of concrete. The lease should clearly set out the developer's obligations in removing the hardstands (if any) and reinstating the ground. The landowner should consider whether he or she requires security (for example, a bank guarantee) from the developer for a monetary sum sufficient to ensure that if the developer does not comply with its obligations, the landowner has sufficient funds to attend to remediation of the site.

Given the impact that turbines, necessary infrastructure and improvements for a functional wind farm have on the land, landowners must ensure that the agreement for lease and lease that he or she has with the developer addresses all of the landowner's expectations during the stages outlined above. Verbal agreements or broad terms in the lease documents present a significant risk to the landowner, because history shows that ownership of these developments can change, and that discussions held 10 or more years ago are forgotten.

HopgoodGanim is currently developing a series of articles to address each stage of the wind farm development process, expanding on the practical and legal considerations for landowners briefly outlined above.

For more information on renewable energy or wind farm developments, please contact HopgoodGanim's Climate Change practice.

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