

Wind Farm Leases

Farmers in the Ballarat and Western Districts are being approached by wind farm companies seeking to place turbines on their land.

Unfortunately, in the excitement of additional income and a chance to "drought proof" their land, many cockies simply sign on the dotted line. The documents are generally option deeds or agreements for lease which commit the landowner, but not the wind farm company.

One signature can tie up the land exclusively to a single wind farm company for 25 years, cutting across generations to impact on the landowner's children and even grandchildren.

There are risks and traps involved, but also many opportunities to negotiate a better deal. With only one chance, it is critical to get it right, and we strongly recommend landowners obtain legal advice. An investment in some legal advice before signing should be seen as a vital insurance policy, and can create huge benefits later.

Here are some of the many issues to be taken into account:

- Although rent currently offered is typically around \$7,000.00 or \$7,500.00 per turbine per annum, in fact, it might be three or five years after signing before an operator starts paying rent at that rate. When you allow for inflation, this means that in today's dollars rent might be 10% or 20% less. Bear in mind that even small differences in payment terms can have a dramatic effect when compounded over the full term of the lease.
- Whilst the documents are binding on the landowner, wind farm companies can often withdraw right up until construction commences. Farmers might be in the position of having spent many hours on the deal, incurred expenses and created angst with their neighbours, for no return whatsoever. One solution to this is to ask the company to make an upfront payment so that even if the lease does not ultimately proceed, the farmer still gets some compensation for their trouble. In our experience companies have been prepared to pay quite substantial amounts.
- Whilst the towers themselves do not take up much land (usually only about a 10 or 15 metre diameter per turbine), the loss of productive land caused by new roads that the company will build for access to the turbines, initially for construction and later for ongoing maintenance, needs to be taken into account.

- Farmers also need to consider their "opportunity loss". By locking in with one company now, they are cutting off the possibility of dealing with another operator in future who might have been prepared to pay greater rent. Wind farms are a new and uncertain industry - who knows how high rent levels may rise in future, as suitable sites with good wind and which are close to the power grid become increasingly scarce. As well as this, the right to plant new trees near the turbines is often restricted in wind farm leases, limiting future forestry potential of the land.
- One thing that concerns many landowners is what will happen to the massive tower and turbine structure at the end of the lease, whether in 25 years time or earlier if the lease is terminated prematurely. Leases usually require the wind farm company to remove everything (except the concrete pad base, which is itself huge) and reinstate the land. But what if the company refuses to comply? Suing the operator won't help if, as is usually the case, they are a limited liability company set up as a special purpose vehicle for the project. One answer is to require guarantees from the directors of the company, or from the parent company. In my experience, these will be sometimes given, but more commonly they are refused. This is because it is often the case that the original developer of a wind farm intends to on sell it to an operator, and does not wish to have any ongoing liability.
- Wind farm companies will often reserve the right to shift the final position of towers from the original plan, once they have finished their wind testing. Landowners should try to keep as much control as possible over this process, to avoid turbines being placed in unexpected or inconvenient positions - for example near where the farmer was planning to plant trees or build a new shed, or in the line of the best view from the house. At an extended height of over 130 metres and base diameter of over 10 metres, a tower can somewhat dominate the vista from the kitchen window!
- Landowners should also require a description of the size and characteristics of the towers to be included in the lease itself. Who knows how the technology may change in future - the pattern in the past is that turbines have been increasing in size, and this may well continue. Colours may also change.
- There are many other conditions we recommend, to minimise disruption to the lives of the occupants of the land - such as requiring the operator to leave gates opened or closed as they found them; preventing pests or weeds being brought onto the farm; taking measures to control erosion; and many more.

Happily, Nevet Ford is seeing an increase in the number of our farming clients who seek legal advice first prior to signing. For the truth is, wind farm companies are often quite willing to negotiate to ensure that their project can proceed. We have been able to dramatically improve the terms of the deal, both legal and commercial, for many clients and give them a clear understanding of the documentation before they commit to it.

If you have clients who have been approached by a wind farm operator, or are considering signing a wind farm lease, we would be pleased to assist.

Please contact a member of our Commercial and Business Law Work Group if you require further information in relation to this matter.

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