Submission No 70

INQUIRY INTO IMPACT OF RENEWABLE ENERGY ZONES (REZ) ON RURAL AND REGIONAL COMMUNITIES AND INDUSTRIES IN NEW SOUTH WALES

Organisation: The Law Society of New South Wales

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THE LAW SOCIETY
OF NEW SOUTH WALES

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3 February 2025

The Hon Mark Banasiak MLC
Chair
Legislative Council Portfolio Committee No. 4 – Regional NSW
Parliament House
Macquarie Street
SYDNEY NSW 2000

Via submission portal

Dear Chair,

INQUIRY INTO THE IMPACT OF RENEWABLE ENERGY ZONES ON RURAL AND REGIONAL COMMUNITIES AND INDUSTRIES IN NSW

The Law Society appreciates the opportunity to contribute to this Inquiry. Our submission is informed by the Law Society's Rural Issues, Property Law and Environmental Planning and Development Committees, and responds to select terms of reference.

Overview

The Law Society understands the purpose of the Renewable Energy Zone (REZ) framework is to facilitate the efficient and orderly planning, development and coordination of renewable energy infrastructure projects. We also understand that infrastructure development within a REZ may adversely impact some landholders. In our members' experience, primary issues of concern relate to increased legal and financial risks for landholders hosting, and adjacent to, renewable energy infrastructure.

In our view, it is appropriate that the Government takes steps to safeguard landholders against these risks, which are disproportionately borne by them, in the delivery of renewable energy for the public benefit. We provide more detail on these issues under the relevant terms of reference below.

Terms of reference

(b) current and projected considerations needed with regard to fire risk, management and containment and potential implications on insurance for land holders and/or project proponents in and around Renewable Energy Zones

Installation of renewable energy infrastructure may result in reclassification of land use from agricultural to industrial, with associated changes to various outgoings including council rates and insurance. Of particular concern to our members' clients are the prohibitive increases in public liability premiums in recent times and the limited availability of appropriate insurance cover. It has been reported that these costs can also be affected by the risk of fire damage emanating from a landholder's property, both when the landholder is host

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to, or adjoining, renewable energy developments.[1] According to the Insurance Council of Australia (**ICA**), the escalating costs of natural disasters and asset repairs and replacements are among the primary drivers of premium increases and claims denials.[2] Notably, the infrastructure costs associated with renewable energy projects may amount to many millions of dollars.[3]

The Australian Energy Infrastructure Commissioner (**AEIC**) has recommended that landholder agreements should clearly state, among other things, the party that will be responsible for outgoings (and any increases in outgoings due to the project) and protections and indemnities provided to the landholder by the developer.[4]

In relation to fire and insurance risks specifically, the NSW Agricultural Commissioner has recommended:

> **Recommendation 22** - Project applicants in the renewable energy sector should cover any additional public liability insurance costs incurred by neighbouring landholders as a result of proximity and risk to new energy facilities. In cases where suitable insurance cannot be obtained, the applicant should indemnify the neighbour for reasonable risk in relation to typical public liability cover. [5]

We note that the Department of Planning, Housing and Infrastructure's (**Department**), *Renewable Energy Planning Framework*, (**REPF**)[6] incorporates general principles under the Department's *Private Agreement Guideline - Guidance for State significant renewable energy development*, (**Private Agreement Guideline**) which states that host and adjacent landholders should ensure they are indemnified from claims/loss resulting from the applicant's use of the land (including adjacent land) in connection with the agreement, and that the project applicant maintains appropriate public liability insurance.[7] We suggest the Private Agreement Guideline could be strengthened by the inclusion of model clause provisions on indemnity and insurance noting that it also contains a number of model clauses on various other key matters.[8] When serious concerns were raised in 2021 regarding problems experienced by landholders accessing public liability insurance for hosted coal seam gas infrastructure in Queensland, Coexistence Queensland (known previously as GasFields

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[1] NSW Agriculture Commissioner, *Renewable energy generation and agriculture in NSW's rural landscape and economy – growth sectors on a complementary path*, Report, 8 November 2022, 71-73, online, https://www.dpi.nsw.gov.au/__data/assets/pdf_file/0005/1449860/210395fd12ea058abf3b424f4370204d64e105bb.pdf; Michael Burt, "Public liability insurance backs farmers into a corner", *The Farmer*, February 2024, online, https://thefarmermagazine.com.au/public-liability-insurance/.

[2] Insurance Council of Australia, *Farm Insurance and Energy Infrastructure*, Factsheet, 14 May 2024, online, https://insurancecouncil.com.au/wp-content/uploads/2024/05/Updated-ICA_Briefing_Farm-Insurance-and-Energy-Infrastructure_May-2024.pdf.

[3] For example, the Gunning solar farm, with a capacity of 250 megawatts, is estimated to cost $651 million. See NSW Government, "New solar farm to power up to 92,000 homes", Media release, 8 November 2024, online, https://www.planning.nsw.gov.au/news/new-solar-farm-power-92000-homes.

[4] Australian Energy Infrastructure Commissioner, *Host Landowner Matters*, online, https://www.aeic.gov.au/observations-and-recommendations/chapter-1-host-landowner-negotiations.

[5] NSW Agriculture Commissioner (n1) 11.

[6] Department of Planning, Housing and Infrastructure, *Renewable Energy Planning Framework*, online https://www.planning.nsw.gov.au/policy-and-legislation/renewable-energy/renewable-energy-planning-framework.

[7] Department of Planning, Housing and Infrastructure, *Private Agreement Guideline - Guidance for State significant renewable energy development*, November 2024 [3.7.1] online, https://www.planning.nsw.gov.au/sites/default/files/2024-11/private-agreement-guideline.pdf ('*Private Agreement Guideline*').

[8] Those matters are: confidentiality; participation in the planning process; compensation; dispute resolution; landholder obligations; and decommissioning. Ibid, 16-19, 23, 25.

Commission Queensland) similarly developed a model *Landholder Indemnity Clause* to be used in agreements where appropriate.[9]

(d) proposed compensation to regional New South Wales residents impacted by Renewable Energy Zone transmission lines:

(i) adequacy of compensation currently being offered for hosting transmission lines

Our primary concern in this context is that the current compulsory acquisition regime in NSW does not, in our view, encourage meaningful consultation and genuine negotiation. Our members report that acquiring authorities have, in some cases, presented landholders with overly complex contractual documentation that is difficult for the landholder to navigate and requires expert analysis. This is reflected in legal instruments often containing multiple pages of apparently standard form special conditions and warranties that are not appropriately customised. For instance, we understand that some agreements contained provisions requiring the landholder to warrant that the portion of land to be acquired is not contaminated and that Aboriginal cultural heritage has not been found on the land. In our view, provisions of this nature are unnecessary and unreasonable where preliminary feasibility surveys have often already been undertaken, and having regard to the respective resources and bargaining power of the parties.

We note that the Private Agreement Guideline states that "private agreements should be tailored to the specific landholder and project…be fair, reasonable, and written in plain language" and that "the applicant should bear all reasonable landholder costs associated with entering into the agreement or understanding the implications of the agreement, including costs for independent advice".[10] We suggest the same principles should apply to facilitate agreements between acquiring authorities and landholders.

The Law Society has long called for a comprehensive review of the *Land Acquisition (Just Terms Compensation) Act 1991* NSW (**Act**). We refer to our submission dated 8 May 2024 in response to the Department's consultation, *A review of land acquisition in NSW*.[11] Our submission supported the proposed introduction of a mechanism for landowners to apply for financial support in the form of advance payments to fund the initial engagement of reasonable legal and valuer's fees and other relevant expertise. We also reiterated concerns raised in our previous advocacy on this topic including the timeframe for the minimum negotiation period, and clarification of the entitlement to just terms compensation as an overriding objective of the Act.

We would support the development of a suite of standard documents, prescribed by regulations, that are required to initiate and complete the acquisition process. We also suggest establishing a central location for publication of, and access to, all critical acquisition information. Currently users must navigate a number of agency websites to locate determinations and relevant forms.

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[9] Coexistence Queensland, *Landholder Indemnity Clause*, online, https://gfcq.org.au/wp-content/uploads/2021/07/GFCQ-Working-Group_Public_Liability_Insurance_Indemnity_Clause_Mar2021.pdf.
[10] *Private Agreement Guideline* (n 7) 13-14.
[11] Law Society letter to the Department of Planning, Housing and Infrastructure, *Discussion paper – A review of land acquisition in NSW*, 8 May 2024, online, https://www.lawsociety.com.au/sites/default/files/2024-05.pdf.

(iv) tax implications resulting from compensation received by impacted residents

There are complex tax considerations for landholders whether they are to receive compensation for hosting renewable energy infrastructure for transmission lines, as payment for the compulsory acquisition of their land by a government instrumentality, or by way of a renewable energy lease in the case of privately owned infrastructure. For instance, tax advantages to which the landholder may have previously been entitled where the dominant use of the land has historically been for primary production, may be impacted by a potential change of land use.[12] This will depend on various factors including the type of infrastructure and compensation models that are to apply in a particular case such as the physical siting of the installation on the subject land and the nature of compensation receipts. Income received from renewable energy projects may also impact concessions that would otherwise be available to primary producers including farm management deposits,[13] and small business capital gains tax concessions.[14]

We restate our support for the provision of assistance to landholders in obtaining appropriate expert advice prior to entering agreements, including advance payments.

(j) how decommissioning bonds are currently managed and should be managed as part of large scale renewable projects

The REPF provides estimates for decommissioning costs for wind turbines ($480,000 per turbine[15]) and solar panels ($52 per panel[16]) and the Private Agreement Guidance states that "[a]n agreement may also allow landholders to request financial security such as a bank guarantee or bond for decommissioning".[17]

We note the Department's stated policy position is that the provision of financial assurance is essentially a commercial matter between the applicant/project owner and the landowner.[18] Additionally, the Department recognises that the scale and ultimate cost of decommissioning works is dependent on the outcome of a particular negotiated agreement, for example, if the parties agree that the landholder retains access to roads and underground cabling, the cost of decommissioning a single wind turbine may be substantially reduced.[19]

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[12] Such as the land tax exemption under section 10AA of the *Land Tax Management Act 1956* (NSW) – see Revenue NSW, Ruling number: *LT 097v3*, 1 May 2022, online, https://www.revenue.nsw.gov.au/help-centre/resources-library/rulings/land/land-used-for-primary-production-sections-10aa-land-tax-management-act-1956; and the intergenerational primary production exemption from duty on the sale, transfer or lease of land under section 274 of the *Duties Act 1997* (NSW) – see Revenue NSW Ruling number *DUT 050v2*, 19 May 2022 [17] online, https://www.revenue.nsw.gov.au/help-centre/resources-library/rulings/duties/dut-050v2?SQ_VARIATION_1138547=0.
[13] *Income Tax Assessment Act 1997* (Cth), Division 393.
[14] Ibid, Division 152.
[15] Department of Planning, Housing and Infrastructure, *Wind Energy Guideline - Guidance for State significant wind energy development*, November 2024, 46, online, https://www.planning.nsw.gov.au/sites/default/files/2023-03/wind-energy-guideline.pdf ('*Wind Energy Guideline*').
[16] Department of Planning, Housing and Infrastructure, *Large-Scale Solar Energy Guideline - Guidance for State significant solar energy development*, August 2022, 42, online, https://www.planning.nsw.gov.au/sites/default/files/2024-11/large-scale-solar-energy-guideline.pdf ('*Large-Scale Solar Energy Guideline*').
[17] *Private Agreement Guideline* (n 7) [4.3].
[18] *Wind Energy Guideline* (n 15) [5.7.3]; *Large-Scale Solar Energy Guideline* (n 16) [5.5.3].
[19] NSW Government, *Renewable Energy Transition Update*, November 2024,14, online, https://www.energy.nsw.gov.au/sites/default/files/2024-11/NSW-RenewableEnergy-Transition-Update-20241112.pdf ('*Renewable Energy Transition Update*').

However, the estimate provided by the Department for decommissioning wind turbines appears to be at the lower end of the scale in comparison with the estimate of $400,000 to $600,000 per turbine provided by the AEIC.[20] The AEIC has also stated that the removal of a structurally unstable turbine could cost millions of dollars and that the cost to decommission a turbine could potentially be equal to or greater than the total income generated for the landowner over the project's life.[21]

In any case, where security is inadequate or the applicant otherwise defaults on their decommissioning responsibilities, liability for decommissioning may fall to the landholder[22] and, ultimately, it has been suggested, to the taxpayer.[23] In our view, given the scale and impact of renewable energy infrastructure, its status as State Significant and Critical State Significant development,[24] and the considerable legal and financial risk to host landholders, it is imperative to maintain social licence for renewable projects by ensuring appropriate protection for landholders from liability for decommissioning costs. At the same time, we recognise that the issues are complex and that it is important to balance the competing priorities of assuring landholders, and the broader community that appropriate measures are in place to safeguard against an unfunded decommissioning liability, while not also overburdening applicants, and stifling industry, with onerous compliance costs.

It has been suggested that it is currently difficult to source suitable bonds in Australia, for reasons including cost and the lengthy term of a project lease.[25] The Government has estimated that it would cost $1.36 billion to maintain bonds up to 2030 and has stated that this cost is not presently proportionate to the risk.[26] However, it is possible that as renewable energy companies become more established, insurer appetite will increase and more companies will be able to source suitable bonds.[27]

While it is important that consideration is given to the factors potentially inhibiting the viability of renewable projects, it is equally vital to achieve certainty for landholders and the community that decommissioning is adequately funded. We support the examination of all possible solutions including statutory mechanisms. There are existing models mandating financial assurance for rehabilitation and decommissioning works in

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[20] Australian Energy Infrastructure Commissioner, *Annual Report*, 2022, 37, online, https://www.aeic.gov.au/sites/default/files/documents/2023-06/aeic-2022-annual-report.pdf ('*AEIC Annual Report*').
[21] Ibid.
[22] *Private Agreement Guideline* (n 7) 24.
[23] Brandon Long, "Concerns over renewable energy clean-up bill turns some off wind turbines in rural communities", *ABC News*, 1 October 2024, online, https://www.abc.net.au/news/rural/2024-10-01/concerns-over-renewable-energy-clean-up-bill-wind-turbines-rural/104375452.
[24] Transmission lines development is typically identified as Critical State Significant Development. Wind energy, solar energy and battery energy storage systems development are usually State Significant Development. See Department of Planning, Housing and Infrastructure, *Overview of the Renewable Energy Planning Framework*, November 2024, 7, online, https://www.planning.nsw.gov.au/sites/default/files/2024-11/overview-of-the-renewable-energy-planning-framework.pdf.
[25] See, Hamilton Locke, *How to Solve the Problem of Decommissioning?*, 5 February 2024, online, https://hamiltonlocke.com.au/how-to-solve-the-problem-of-decommissioning/; MinterEllisonRuddWatts, *Decommissioning a renewables project*, 26 March 2024, online, https://www.minterellison.co.nz/insights/decommissioning-a-renewables-project.
[26] *Renewable Energy Transition Update* (n 19) 14.
[27] See, for example, Gallagher Specialty, *Supporting Renewable Decommissioning with Surety Bonds*, 30 September 2024, online, https://specialty.ajg.com/building-blocks/supporting-renewable-decommissioning-with-surety-bonds.

connection with the mining and onshore petroleum industries in NSW,[28] and with offshore resource installations at the Commonwealth level.[29] We also note a Private Member's Bill requiring renewable energy providers to obtain decommissioning bonds is currently before the House of Representatives and largely mirrors the obligations on mineral resource projects.[30] In addition, the Inquiry may wish to consider the outcomes of a current consultation by the Queensland Government on its proposed renewable energy regulatory framework. Amongst other initiatives, the consultation is, "investigating models to provide financial assurance for end-of-life activities for renewable energy projects."[31]

This heightened focus on the issue of decommissioning liability is likely to intensify in the short term as Australia's early wind energy projects reach end-of-life. We agree with the AEIC that,

> [a]t a minimum, there needs to be clarity surrounding who is responsible for decommissioning, who pays and how those funds are secured to protect the landholder from default and ensure the work is completed properly and in a timely fashion.[32]

Any questions in relation to this letter should be directed to Sonja Hewison, Policy Lawyer on

Yours sincerely,

Jennifer Ball
President

[28] *Mining Act 1992* (NSW), ss 261BA, 261BAA; *Petroleum (Onshore) Act 1991* (NSW), ss 106B, 106C. See also NSW Resources Regulator, Policy on Rehabilitation security deposits, July 2024, online, https://www.resources.nsw.gov.au/sites/default/files/2024-10/rehabilitation-security-deposit-policy.pdf.
[29] *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), s 571; *Offshore Electricity Infrastructure Act 2021* (Cth), ss 117, 118. Note also the trailing liability mechanism introduced in 2022 to safeguard against insolvency or inability of an owner to decommission an asset – see Department of Industry, Science and Resources, *Trailing liability for decommissioning of offshore petroleum property: guidelines*, online, https://www.industry.gov.au/publications/trailing-liability-decommissioning-offshore-petroleum-property-guidelines.
[30] Requiring Energy Infrastructure Providers to Obtain Rehabilitation Bonds Bill 2024, online, https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr7265%22.
[31] QLD Department of Energy and Climate, *Draft Renewables Regulatory Framework - Supporting strong and sustainable energy communities*, Discussion Paper, December 2024 [4.3], online, https://www.epw.qld.gov.au/__data/assets/pdf_file/0023/70457/Att-3-Draft-Renewables-Regulatory-Framework-Discussion-Paper-240924.pdf.
[32] *AEIC Annual Report* (n 20) 37.