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Three things developers should know before embarking on the renewable energy journey

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Preface

This guide has been prepared for development managers, engineers and land acquisition specialists working in renewable energy (e.g., wind, solar and BESS¹) development in Australia. It explains why Australia is lagging in the energy transition space and highlights some of the key legal and policy challenges it faces. It also identifies three key areas of risk that, while sometimes intangible, are critical to achieving project success. By identifying these risks, developers can take proactive steps to integrate them into their commercial decision-making, avoiding pitfalls caused by shifting laws and public policies.

Introduction

Change is inevitable. Despite political constraints, market barriers and media inaccuracy, the energy transition continues. The 2024 *Integrated System Plan* from AEMO² ('AEMO ISP') emphasises the urgency for investment in new generation, firming, storage and transmission to deliver secure, reliable and affordable electricity.³ It also identifies the 'optimal development path' ('ODP') for investment needed to achieve this goal by 2050.⁴

However, while the AEMO ISP focuses on these overarching issues, it offers little guidance on what developers should know when embarking on renewable energy projects.⁵ Being aware of these issues, will enable developers to improve the prospects and feasibility of projects.

This guide addresses that gap by discussing three key challenges developers typically face: accessing land, obtaining approvals and connecting to the grid. While there are many other important topics, we have chosen these areas based on our 'own meandering experience'⁶.

²AEMO means the Australian Energy Market Operator.

³Australian Energy Market Operator, *2024 Integrated System Plan for the National Electricity Market: A roadmap for the energy transition* (June 2024) 6.

⁴Ibid 11-2.

⁵Government reports are sometimes notable for what they do not contain as much as they are notable for what they do contain.

⁶Mary Schmich, 'Advice, like youth, probably just wasted on the young,' *Chicago Tribune* (Chicago, 1 June 1997) as popularised by Baz Luhrmann, *Everybody's Free (To Wear Sunscreen)* (1997).

Accessing land

The absence of a legal framework

A key challenge for developers is that no Australian state or territory has established an orderly legal framework for accessing land for renewable energy projects. This includes access for preliminary investigations and development. For example, there is no system comparable to the state-based Mining legislation (e.g. *Mining Act 1992* (NSW)) that facilitates exploration, refines the development area and secures that area for development at fair value. Similarly, there is no government mechanism for compulsory acquisition of land necessary for the generation component of projects.⁷

Impacts on communities and developers

This gap has significant implications for developers and the energy transition. Developers must negotiate directly with landowners, including First Nations groups where applicable, for access to land, often requiring dedicated teams and significant resources.⁸ This process can delay projects and lead to compensation amounts that far exceed fair value.

Building strong relationships with landholders is a practical necessity. However, this approach introduces uncertainty and can encourage some developers to engage in unscrupulous practices.

⁷Historically, this represents a significant policy shift. In the past, governments would compulsorily acquire land for all public works, including energy infrastructure, in recognition that energy supply is critical to our nation's economy and prosperity. While section 44 of the *Electricity Supply Act 1995* No 94 (NSW) allows a network operator to acquire land 'for the purpose of exercising its functions', such a statutory right does not extend to generators. The law may also restrict the power of government entities to acquire land in other ways. The High Court has found that the *Local Government Act 1993* No 30 (NSW) restricted a council from acquiring land for the purpose of a re-sale to private interests: see *R & R Fazzolari Pty Ltd v Paramatta City Council* [2009] HCA 12.

⁸In Western Australia, recent Crown land tenure reforms to create 'diversification leases' condition renewable energy development upon the surrender or partial surrender of existing pastoral leases. The consequence of such a surrender is that pastoralists will lose generational land tenure and be required to submit their pastoral activities through native title processes. In response, some developers appear to be focusing on freehold land in the mid-west and south-west where there are more likely to be environmental issues and community opposition.

The rise of flipping

The lack of an orderly framework for accessing land has led some developers to engage in unscrupulous practices that serves neither the interests of landholders nor the broader interests of the industry or energy transition. These developers are colloquially referred to as ‘flippers’ as their business model involves securing land agreements, connection agreements and development approval, then selling or ‘flipping’ the project.

However, this business model can lead to successful projects with willing landholders and communities and therefore, does not encapsulate the real issue. The core problem lies with a sub-class of flippers who secure only land agreements with minimal legal, environmental or technical due diligence and little to no community engagement. This sub-class then sell the land agreements as a ‘project’ at inflated premiums, shifting the costs and risks of unresolved matters to unsuspecting buyers. In such cases, there is no guarantee that the development can or will proceed.

The importance of due diligence

Fortunately, prospective buyers are becoming more vigilant, conducting their own due diligence and incorporating potential risks into the purchase value. However, this remains far from ideal, as this sub-class of flippers often promise landholders’ disproportionate future compensation. Further, this sub-class frequently avoids paying early access compensation, deferring this liability to the development stage under the land agreements – effectively, transferring the liability to the prospective buyer.

Obtaining approvals

Navigating political risks

The challenges in the approvals space are well-known to the industry.⁹ Both sides of politics frequently exchange blame over who has approved what and when, often distracting from the core issue: approvals are taking too long.¹⁰ This is especially evident with federal approvals, as the assessment process under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* ('EPBC Act') can span several years.¹¹

A recent development that was rejected highlighted this issue. This project began before a noticeable shift in politics. There now appears to be a trend towards rejecting projects on environmental grounds, despite no formal change to the law. This underscores the urgent need for the industry to have better access to information about the likelihood of approval before committing significant resources and time to investigations and advancing through the approvals stage.

The EPBC Act's shortcomings

Uncertainty about the likelihood of approval hinders the ability of developers to plan and invest efficiently. Audits of the EPBC Act process consistently highlight the inefficiencies and ineffectiveness of this process.¹² In response, developers attempt to avoid sites with potential EPBC Act triggers, even if those sites might be suitable for development.

⁹See, for example: Peter Hannam, 'Tanya Plibersek rejects claims renewable projects are being held up by approval delays', *The Guardian* (online, 26 April 2024) <<https://www.theguardian.com/australia-news/2024/apr/26/tanya-plibersek-rejects-claims-renewable-projects-are-being-held-up-by-approval-delays>>; Peter de Kruijff, 'The 8,000-worker town that was never built and what it tells us about the renewables vs biodiversity debate', *ABC News* (online, 2 May 2024) <<https://www.abc.net.au/news/science/2024-05-02/bp-renewable-energy-town-that-never-got-built-because-of-ramsar/103738044>>.

¹⁰Hannam (n 9).

¹¹See, for example: Ark Energy, 'Ark Energy withdraws project from EPBC process' (online, 19 April 2024) <<https://arkenergy.com.au/news/2024/4/19/384-ark-energy-withdraws-project-from-epbc-process/>>.

¹²Australian National Audit Office, *Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999* (online, 25 June 2020) <<https://www.anao.gov.au/work/performance-audit/referrals-assessments-and-approvals-controlled-actions-under-the-epbc-act>>.

What is fair compensation?

There appears to be a growing policy trend of placing the responsibility solely on developers to secure community acceptance for projects, often emphasising the need to 'buy off' communities. For instance, the proposed benefit-sharing rates for solar and wind¹³ projects and the strategic benefit payments for transmission¹⁴ in New South Wales seem arbitrary. There is little publicly available information explaining how these figures were determined or how they should be universally applied across all projects.

If principles of fair compensation were applied, areas with higher value land or greater impacts, would receive higher compensation and vice-versa. This approach would allow market forces to provide an incentive for development to occur in areas of lower land value and lower impact.

The commercial impact of arbitrary compensation

The benefit-sharing rates being tied to installed capacity also fails to consider several technical and commercial realities of solar and wind development. For instance, they overlook the natural decline in electricity production over time as the plant and equipment ages. Further, they fail to account for the range of factors influencing the optimal location for solar and wind development including site conditions and the need to maximise the utilisation of planned infrastructure. While maximising generation is important, it is not the sole consideration.¹⁵ Therefore, artificially high benefit-sharing rates can distort project lifecycles¹⁶ and limit developers' ability to optimise their project design.

¹³These are \$850 per megawatt per annum (installed capacity) for solar energy development and \$1,050 per megawatt per annum (installed capacity) for wind energy development, indexed per year with CPI: see Department of Planning and Environment, *Draft Benefit Sharing Guideline* (November 2023) 15.

¹⁴These are \$200,000 per kilometre paid in annual instalments over 20 years (i.e., \$10,000 per kilometre per year), indexed per year with CPI: see NSW Government, *Strategic Benefit Payments Scheme: For private landowners hosting major new transmission infrastructure projects in NSW* (October 2022) 10-1.

¹⁵This may be particularly relevant to solar energy given the possibility for further significant advancements in efficiency: see, for example: Lisa Cox, 'CSIRO claims new record for energy efficiency in lightweight printed solar cells', *The Guardian* (online, 12 March 2024) <<https://www.theguardian.com/australia-news/2024/mar/12/csiro-claims-new-record-for-energy-efficiency-in-lightweight-printed-solar-cells>>; Sebastián Bonilla, 'New solar cells break efficiency record – they could eventually supercharge how we get energy from the Sun', *The Conversation* (26 September 2024) <<https://theconversation.com/new-solar-cells-break-efficiency-record-they-could-eventually-supercharge-how-we-get-energy-from-the-sun-239417#:~:text=However%2C%20new%20research%20published%20in,efficiency%20for%20tandem%20solar%20cells>>.

¹⁶That is, projects may reach a commercial end of life before they reach a technical end of life due to the ongoing liability to pay the benefit sharing rates.

Connection to the Grid



Legacy issues in infrastructure

The consequences of insufficient strategic capital investment in the grid over the past decade are now becoming apparent.¹⁷ Governments face the challenge of replacing aging infrastructure and preparing for the energy transition within increasingly tight timeframes. This can result in developers being expected to address issues such as grid instability – problems that they did not cause and which should not typically be their responsibility.

Limited access to grid information

A common complaint from developers is the lack of publicly available technical information about the grid. Access to such data would allow developers to assess the feasibility of grid connections much earlier, helping to avoid or mitigate the costs associated with land acquisition and investigations. While network service providers (NSPs)¹⁸ may be reluctant to share information for commercial reasons, it is the government's role to balance public and private interests for the greater good. The opportunity cost of project failure is significant – not only for developers, but also with respect to the broader public interest.

Subcontracting risks

Grid connection risk has also introduced unique challenges in subcontracting. It is becoming increasingly commercially unviable for subcontractors to accept risks associated with grid connection.¹⁹ In our experience, adversarial approaches during contract negotiation often leads to disputes later. The parties should consider carefully how to allocate risk for factors outside their control, such as regulatory uncertainty and the historic lack of investment in grid infrastructure.

¹⁷The reasons for this are largely political. In short, power outages in New South Wales and Queensland in the 2000s led to increased reliability standards for network service providers which, in turn, led to perverse incentives to invest in network upgrades. In response, subsequent governments introduced greater regulatory oversight to network upgrades which has now led to a period of under-investment in the network.

¹⁸NSP means network service provider.

¹⁹There appears to be few contractors in the market still willing to accept this risk.

Conclusion

This guide has highlighted several challenges that renewable energy developers face during the development process – from accessing land to obtaining approvals and connecting to the grid. Developers must navigate a complex landscape where there is no requirement for land compensation to be ‘fair,’ making due-diligence essential to avoiding investing in unfeasible projects.

Political risks, particularly those linked to the EPBC Act, are another critical consideration, as governments increasingly impose liabilities for community acceptance on developers. Developers must also evaluate carefully which risks to transfer to subcontractors to minimise the potential for future disputes.

A recurring theme across these challenges is regulatory uncertainty, whether caused by gaps in the legislation, lack of transparency about new rules, or a failure to appreciate how those rules will operate in practice. While long-term solutions to these uncertainties are unlikely, being aware of them enables developers and contractors to better mitigate associated risks.

There is no silver bullet solution and responses must be tailored to the unique circumstances of each project. If you would like to explore these topics further or share your own experiences, we invite you to participate in a roundtable discussion. Please contact us to learn more.



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With over 16 years of experience, Tristan is a seasoned legal expert specialising in energy, construction, property, and planning law. His career spans top-tier law firms as well as in-house roles within ASX-listed and internationally listed companies. Tristan has provided end-to-end legal advice to a diverse range of clients, including energy companies, developers, builders and contractors, showcasing his versatility and depth of knowledge across industries.

Tristan's expertise lies in preparing and negotiating contracts, conducting contract reviews and assisting with contract management. He has also advised on planning matters, including conducting planning appeals and defending planning prosecutions. His recent work included reviewing legal agreements as part of the due diligence process for a large-scale wind, solar and green hydrogen development exceeding 5GW.

As an articulate communicator and skilled public speaker, Tristan has a unique ability to distil intricate legal and commercial concepts into clear, engaging, and actionable insights. He brings a balanced approach to his work, combining a commercial big-picture mindset with attention to detail. Committed to continuous learning, Tristan actively contributes to thought leadership and industry best practices, further solidifying his reputation as a trusted expert in property, construction and energy law.

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