Hybrid Power Purchase Agreement Template

*Mine onsite renewable energy in Western Australia*

September 2022

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How to use this template

This hybrid PPA template is designed primarily for remote, off-grid mine sites. It contains basic provisions for inclusion (highlighted) if there is a grid-connection but these will need to be reviewed based on any arrangements with the relevant network service provider and retailer for the connection point. The hybrid PPA template does not include provisions for participation in the Western Australian Wholesale Electricity Market.

Please refer to the Hybrid PPA Guide which accompanies this Hybrid PPA Template for further guidance.

Important Notices

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Date 2022

Parties

|  |  |
| --- | --- |
| IPP | [Insert entity name, ABN and address] |
| Customer | [Insert entity name, ABN and address] |

Recitals

1. *Customer* owns and operates the *mine site*.
2. *Customer* has selected *IPP* to supply, install, commission the *equipment*, operate and *maintain* the *equipment* and supply *Customer* with *electricity* from the *equipment* subject to and in accordance with the terms and conditions of this *agreement*.

Interpretation

# Definitions

In this agreement:

**agreed works program** means the program set out in Appendix D setting out the key activities and dates for performance of the *customer works* and the *works*, as amended or updated in accordance with this *agreement*.

**agreement** means this agreement between *IPP* and *Customer*, and includes the appendices to this agreement.

**agreement year** means each period of 12 consecutive months beginning on the *date of commercial operation* and subsequently, beginning on each anniversary of the *date of commercial operation*.

**approval** means an authorisation, approval, agreement, consent, licence, permit, declaration or exemption, however it is described, which is required by any *law* or an authority in order for a party to perform its obligations under this *agreement*.

**artefacts** means any fossils, bones, human remains, artefacts, coins, articles of antiquity, structures and other remains or things of scientific, geological, historical or archaeological or anthropological significance, interest or value (including any potential ‘Aboriginal cultural material’ as that term is defined in the *Aboriginal Heritage Act 1972* (WA)).

**associate** means, in relation to a party, a related body corporate (within the meaning of section 50 of the *Corporations Act* of the party or a party’s directors, officers, employees, agents and contractors.

**authority** includes a federal, state or local authority and a person authorised to carry out a statutory function.

**billing period** means:

1. the portion of a *month* at the *date of commercial operation*; and
2. each *month* after that; and
3. the portion of a *month* at the end of the *agreement*.

**business day** means any day other than a Saturday, Sunday or public holiday in Perth, Western Australia.

**buy out amount** is specified in Appendix A.

**carbon credit regime** means any statutory, regulatory or other legal regime, scheme or framework whereby *carbon credits* are issued, verified, validated, confirmed or granted.

**carbon credit** means any entitlement, right, interest, credit, allowance or benefit arising from or in connection with any removal, limitation, abatement, reduction, avoidance or mitigation of greenhouse gas emissions, or with any capture, storage or sequestration of greenhouse gases or carbon, or other comparable ecosystem service, and includes an Australian Carbon Credit Unit issued under the *Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth)*.

**carbon electricity** means *electricity* generated from a *carbon energy source* by the *equipment* installed on the *site*.

**carbon energy source** means [insert eg gas, diesel].

**change in control** means a direct or indirect change in *control* of a party (whether through merger, spin-off, sale of shares or other equity interests or otherwise) through a single transaction or series of related transactions, from one or more transferors to one or more transferees.

**change in law** means

1. a change in or repeal of an existing *law*, or the imposition of a new *law*;
2. a change in the terms of or requirement for any *approval* required at the date of this *agreement* (unless that change is due to an act or omission of the party to which it applies);

which occurs on or after the date of this *agreement* (unless that new *law* and the date it will come into force has been published before the date of this *agreement*.

**change in tax** means a change in an existing *tax* (other than income tax imposed under the *Income Tax Assessment Act 1936* (Cth) or the *Income Tax Assessment Act 1997* (Cth), as applicable, or *GST*), including a change in the rate or calculation of a *tax* or the imposition of a new *tax* (unless that change in an existing *tax* and the date it will come into force has been published before the date of this *agreement*.

**claim** means any allegation, debt, cause of action, proceeding, suit, demand or other claim of any nature however arising and whether present or future, fixed or unascertained, actual or contingent, and whether under *law* or otherwise.

**clean energy regulator** means the clean energy regulator established under the *Clean Energy Regulator Act 2011* (Cth)[[1]](#footnote-1).

**CMQ** Contract maximum quantity is specified in Appendix A.

**commercial operation** means when the installation and other *works* and commissioning in respect of the *equipment* has been completed and the requirements of paragraph G.11.1 of Appendix G  are met.

**commissioning tests** means tests conducted in respect of the *equipment* to determine that the *equipment* is capable of steady state operations so as to meet the *performance requirements*.

**condition precedent** means the conditions set out in the table in clause 6.1.

**confidential information** means:

1. the terms of this *agreement*; and
2. all data, material, technology, personal and other information disclosed or provided in any form by either party to the other party, which the receiving party knew or should reasonably have suspected to be commercially sensitive or confidential to the providing party, whether at, before or after the time of receipt.

**control** has the meaning given in section 50AA of the *Corporations Act*.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**cure plan** means a plan describing the actions and measures which a defaulting party will diligently pursue to remedy the *default event*.

**customer equipment** means *Customer’s* plant and equipment on the *mine site* which is connected to and/or consumes *electricity* from the *equipment* described in Appendix C.

**customer policies** means all rules, regulations, directives and policies notified by *Customer* to *IPP* from time to time which are intended to be of general application to persons on the *mine site*.

**customer works** means the *works* *Customer* has to complete to enable it to take *electricity* under this *agreement*, as described in Appendix B.

**date for commercial operation** means the date for *commercial operation* set out in the *agreed works program*.

**date of commercial operation** means the date on which *commercial operation* is achieved.

**decommissioning works** means all decommissioning work reasonably required to remove all improvements located above ground (but leaving buried below ground improvements) and make good any damage to the *site* caused by the removal of the *equipment*, and otherwise leave the *site* clean and free of rubbish and in a good state of repair having regard to the state the *site* was in as at the date of grant of the *site licence*.

**default event** means a failure to pay money when it is due (following the giving of a *notice* under clause 23.3(a) where applicable) or a material breach of this *agreement*.

**default notice** means a *notice* issued under clause 30.1.

**delay event** means a delay caused or resulting from:

1. a *force majeure* event affecting either party;
2. a *change in law* that requires *IPP* to carry out additional *works* or alter the *works* and which delays *IPP* in achieving *commercial operation*; or
3. a *variation* approved by Customer,

in each case only to the extent not caused or contributed to by *IPP* or an *IPP* *associate*.

**delay liquidated damages** has the meaning in paragraph G.8.1 of Appendix G.

**delay liquidated damages cap** means $[insert].

**delay liquidated damages rate** means $[insert] per day.

**direct damage** means a loss, cost or damage that is not *indirect damage*.

**discloser** has the meaning given in clause 36.2.

**electricity** means *electricity* supplied by *IPP* to *Customer* under clause 19.

**emergency** means a situation which a party reasonably determines presents a current, immediate or imminent threat of injury to persons or loss of life or damage to or loss of the *equipment*, *customer equipment* or *Customer’s* mining operations, or which otherwise justifies urgent action.

**equipment** means the facilities and *equipment* described in Appendix C, but does not include *customer equipment*.

**expert** means an expert appointed under clause 33.3.

**extension of time** means an extension to the *date for commercial operation* under the *agreed works program*.

**fixed charges** are at set out in Appendix A.

**force majeure** has the meaning in clause 28.1.

**good industry practice** means the exercise of that degree of skill, diligence, prudence and foresight that a skilled and experienced person engaged in the same or a similar undertaking would reasonably and ordinarily exercise under comparable conditions and circumstances, consistent with applicable laws and applicable recognised codes, approvals, standards and guidelines.

[**grid retail contract** means a contract under which [*IPP/Customer*] acquires grid *electricity* from a *retailer*.] *[Note: Include if grid connected.]*

**GST** has the meaning given in A New Tax System (Goods and Services) Tax Act 1999 (Cth).

**indirect damage** includes indirect liability, consequential liability, business interruption liability, loss of (or loss of anticipated) use, production, revenue, income, profit, business, savings or opportunity, whether or not any of the foregoing was foreseeable, and includes liability to other people under contract or otherwise.

**insolvency event**, in relation to a party means that:

1. the party goes into liquidation, passes a winding-up resolution, or receives or applies for a deregistration *notice* under the *Corporations Act*; or
2. a petition, resolution or other process for winding-up or dissolution is presented or threatened against the party or circumstances exist which would give rise to such a petition, demand or other similar process; or
3. a writ of execution is issued against the party or any of the party’s property or there are circumstances which justify such a writ; or
4. an administrator, receiver, receiver and manager, administrative receiver or controller (as defined in the *Corporations Act*) or similar officer is appointed or is threatened or expected to be appointed to any part of the party’s undertaking or assets, or circumstances exist which would justify such an appointment; or
5. the party is unable to pay its debts as and when they become due and payable, are taken under the *Corporations Act* to be unable to pay its debts, stop or suspend, or threaten to stop or suspend, payment of all or a class of -its debts, or circumstances exist which would require a court to presume that the party is insolvent under the *Corporations Act*; or
6. the party enters into, or resolves to enter into, a scheme of arrangement, compromise or composition with any class of creditors; or
7. the party enters into a personal insolvency arrangement or debt agreement under the *Bankruptcy Act 1966* (Cth); or
8. the party commits an act of bankruptcy as defined in section 40 of the *Bankruptcy Act 1966* (Cth);

**insurance policies** means:

1. workers compensation insurance required by *law*; and
2. public liability insurance for at least $20 million per event or series of events arising out of the same source or original cause; and
3. [Industrial disease insurance which complies with relevant Western Australian *laws* which covers persons attending *mine sites*.]; and
4. all risks property insurance covering the *equipment* against the risks of loss, damage or destruction by all insurable risks to the reasonable satisfaction of *Customer* for not less than its market value; and
5. any other insurance required by *law*.

**interest rate** means the then current bank bill *interest rate* (being the BBSW wholesale interbank rate within Australia published by the Australian Financial Markets Association, or if that rate is no longer published, its nearest reasonable equivalent), plus [5]%.

**law** includes any present or future requirement of any statute, regulation, code, proclamation, ordinance or by-law, and a binding direction from any *authority*, whether State, Federal, local or otherwise.

**LGCs** means large-scale generation certificates created under the *RET Act*.

**liability** includes all liabilities (whether actual, contingent or prospective, under any *law* or contract, or in tort), losses, damages, *claims*, costs and expenses of whatever nature or description and however arising, irrespective of when the act or event giving rise to the same occurred.

**maintain** includes, as necessary, repair, renew and replace.

**meters** means any meters used for measuring the amount of electricity *IPP* supplies to *Customer* at the *supply points*, and “meter” means any of them.

**meter testing fee** is specified in Appendix A.

**mine site** means [insert name of relevant mine site and location.]

**mining tenements** means the tenements granted under the *Mining Act 1978* (WA) on which the *site* is located.

**month** means a calendar month.

[**network meter** means a *meter* owned and operated from time to time by the *network service provider*.] *[Note: Include if grid connected]*

[**network service provider** means [insert relevant grid operator eg Western Power, Horizon Power].] *[Note: Include if grid connected]*

[**network service provider equipment** means all equipment owned or operated by the *network service provider*, including any *network meters*.] *[Note: Include if grid connected*.]

**notice** means a notice in accordance with clause 39, and (without limiting clause 2(a)) “notify” has a corresponding meaning.

**performance requirements** means the requirements for operating the *equipment* [and the *customer equipment*] set out in Appendix B.

**PPS Act** means the *Personal Property Securities Act 2009* (Cth).

**preliminary completion** means when the installation and other *works* in respect of the *equipment* are substantially complete as described in paragraph G.9.1 of Appendix G.

**recipient** has the meaning given in clause 36.2.

**renewable electricity** means *electricity* generated from the *renewable energy source* by the *equipment* installed on the *site*, [including *electricity* discharged by a battery system, where appropriate].

**renewable energy** source means [solar energy, wind energy]

**RET Act** means the *Renewable Energy (Electricity) Act 2000* (Cth).

[**retailer** means an electricity retailer from whom [*Customer/IPP*] acquires grid *electricity*.] [*Note: Include if grid connected.*]

**security interest** means any one or more of the following:

1. a “security interest” within the meaning given to that term under the *PPS Act*; or
2. any other security for payment of money, performance of an obligation or protection against default (including a bill of sale, mortgage, charge, lien, pledge, trust, power, title retention arrangement, right of set-off, assignment of income, garnishee order, monetary claim or flawed deposit arrangement).

**site** is specified in Appendix A.

**site licence** means the licence in respect of the *site* entered into between *IPP* and *Customer* as set out in Appendix F.

**site senior executive** means *Customer’s* “site senior executive” from time to time under the *WHS Law*.

**supply charges** means the *fixed charges* and the *variable charges*.

**supply period** means the period determined in accordance with clause 4.

**supply point** is any point at which an electrical load on the *site* is connected to the *equipment* (e.g. within a distribution board) and “*supply points*” means all of them.

**tariff** is specified in Appendix A and adjusted in accordance with Appendix A.

**tax** means any tax, levy, impost, deduction, charge, duty, compulsory loan or withholding of whatever kind.

**variable charges** are determined under clause 22.1.

**variation** means any increase or decrease to, omission from, addition to or substitution of, or change in character, quality, time for performance or sequencing of, any part of the *works*.

**WHS Law** means the *Work Health and Safety Act 2020* (WA) and includes regulations made under that Act, specifically the *Work Health and Safety (Mines) Regulations 2022* (WA).

**wilful misconduct** means any act, omission or default by a party under this *agreement* known by that party at the time of the act or default, to be wrong in the circumstances, but intentionally persisted with by that party or persisted with in reckless indifference as to whether it is wrongful or the likely consequences of the act or default.

**works** the installation and commissioning of all of the *works* required on the supply side of the *supply points* for the *equipment* that are necessary for the delivery of *electricity* to *Customer*, the *control* of *electricity* and the protection of the *equipment* and the *meters*, as detailed in Appendix B (but excluding *customer works*).

# Rules of interpretation

In this *agreement*:

if a word or phrase is defined, then its other grammatical forms have a corresponding meaning;

the presence or absence of italics is to be disregarded;

the singular includes the plural and vice versa;

a reference to a thing is a reference to the whole or any part or parts of the thing;

a heading is for convenience only and does not affect interpretation;

a reference to a clause or appendix is a reference to a clause of or appendix to this *agreement*;

the word “**includes**” is not a word of limitation and does not restrict the interpretation of a word or phrase in this *agreement*;

the word “**under**” includes by, by virtue of, pursuant to, and in accordance with;

a reference to a document includes a variation or replacement of it;

a reference to a statute includes its subordinate legislation and a modification or re-enactment of either;

a reference to person includes a reference to:

an individual, a body corporate, a trust, a partnership, a joint venture, an unincorporated body or other entity;

that person’s successors and permitted assigns;

a reference to currency is to the Australian currency;

a reference to time is time is to Perth, Western Australia time;

if the date on which a thing must be done is not a business day, then that thing must be done on the next business day;

a reference to a “**day**” is to a period of 24 hours starting and ending at midnight;

if this *agreement* requires a thing to be done within or by a specified time before the start of an *agreement year*; then in respect of the first *agreement year* that specified time is to read as a reference to a time before the *date for commercial operation*.

Commencement and duration

# When this agreement starts

Subject to clause 6, this *agreement* starts on the date it is signed by the last party to sign it.

# When the supply period starts and ends

The *supply period* starts on the *date of commercial operation* and runs for the period specified in item 5 of Appendix A.

# When this agreement ends

Unless it ends earlier in accordance with its terms or by force of *law*, and except where clauses or obligations are expressed to survive termination, this *agreement* ends at the end of the *supply period*.

# Conditions Precedent

## Agreement subject to conditions

This *agreement*, other than this clause 6 and clauses 1, 2, 33, 35, 36, 37, 38, 39, 40, 41, 42 and 46 (which become binding on and from the date this *agreement* is executed), does not become binding on the parties and is of no force or effect, unless and until satisfaction or waiver of the following *conditions precedent*:

|  |  |  |
| --- | --- | --- |
| Condition Precedent | Party for whose benefit the Condition Precedent is included | Deadline for satisfaction or waiver |
| Item 1 [Insert *condition precedent* eg The Customer achieves financial close with respect to [insert project description]] | [Customer] | [Insert date] |
| Item 2 [Insert] | [ ] | [Insert date] |

A *condition precedent* may only be waived by the party for whose benefit it is included in writing.

The breach or non-fulfilment of a *condition precedent* may only be waived in writing.

## Obligation to satisfy condition

The [parties must each]: [*Note: If a condition precedent can only be satisfied by one party, amend this accordingly: eg Customer must use reasonable endeavours to ensure the condition precedent in clause 6.1(a) item 1 is satisfied…*]

use reasonable endeavours to ensure that each *condition precedent* is satisfied within the deadline specified for that *condition precedent*;

promptly give the other party all information reasonably requested by that party to assist with any application or other endeavour to satisfy the *condition precedent*;

keep each other informed of any circumstances which may result in a *condition precedent* not being satisfied or being delayed from being satisfied; and

promptly advise the other party of the satisfaction of each *condition precedent*.

## Result of non-satisfaction of Condition Precedent

If a *condition precedent* is not satisfied or waived by the party for whose benefit it is included by the deadline specified for that *condition precedent*, [either party] may before satisfaction or waiver of that *condition precedent*, terminate this *agreement* by giving *notice* to the other party and without incurring any *liability* to the other party.

Safety, environment and compliance

# Safety and security

*IPP* acknowledges that it has management and *control* of the *site* and is responsible for discharging any duties imposed by the *WHS Law* in respect of activities on the *site*. *IPP* must take all reasonable measures to a *good industry practice* standard to:

keep the *site* and the *equipment* secure and safe; and

protect and ensure the safety of people and property on the *site*.

# Site senior executive

*IPP* must, and must ensure that *IPP’s* *associates*, comply with any lawful direction from the *site senior executive* which in the *site senior executive’s* opinion relates to the safety or security of persons or property, or to the *site senior executive’s* performance of a statutory duty.

Clause 8(a) prevails over any other clause of this *agreement*.

# Environment

*IPP* must comply with all *laws* relating to the environment in respect of the *site*, to the extent that they relate to the installation, operation and maintenance of the *equipment* during the term of this *agreement*.

Subject to clause 32, *IPP* will be responsible for the clean-up or remediation of any discharge, contamination, environmental harm or pollution which is the result of a breach of clause 9(a).

# Customer policies

*IPP* must, and must ensure that *IPP’s* associates, comply with the *customer policies* at all times whilst on any part of *mining tenements* under the management and control of *Customer*.

# WHS and environment notifications

Each of *Customer* and *IPP* must notify the other of any incident which is required to be notified or reported under the *WHS Law* or *laws* relating to the environment and which may impact the other party or the activities under this *agreement* as soon as that party becomes aware of the notification or reporting requirement, and must comply with all requirements under *WHS Law* or other relevant *law* to notify or report the matter.

*IPP* must, and must ensure that *IPP’s* associates, fully cooperate with any investigation conducted by *Customer* following the incident.

# Approvals

Each party must obtain, *maintain* and comply with relevant *approvals* to the extent set out in Appendix E.

Each party must cooperate and provide all reasonable assistance to the other party to assist it obtain and *maintain* any *approval* it requires under this *agreement*.

The site

# Site licence

*Customer* grants to *IPP* the *site licence* set out in Appendix F, and both parties agree to be bound by it.

Where applicable, clause 13(a) has effect subject to the Minister for Mines’ consent under section 82(1) of the *Mining Act 1978* (WA).

The equipment

# Works and customer works

Subject to clause 14(c), *IPP* must supply and install the *equipment* and undertake the other *works* under Appendix G.

Subject to clause 14(c), *Customer* must supply and install the *Customer equipment* and undertake the other *customer works* under Appendix G.

*IPP* and *Customer* will not supply and install any *equipment* or *customer equipment* until *IPP* and *Customer* (as relevant) have obtained and complied with all necessary *approvals* [and any other requirements in the *site licence*].

# *IPP* to operate and maintain equipment

*IPP* must operate and *maintain* the *equipment*:

safely; and

in accordance with all applicable *laws* [*Note: Approvals covered in clause 12*]; and

to the standard of *good industry practice*; and

[to the standard required and approved by the *network service provider*; and] [*Note: Include if grid connected.*]

otherwise in accordance with this *agreement*; and

to meet the *performance requirements*.

Without prejudice to the generality of clause 15(a) *IPP* must:

operate and *maintain* the *equipment* so as to optimise the long term operational performance of the *equipment*, to protect it from premature deterioration or malfunction and to preserve its value and utility; and

use any battery system with the capacity to release stored energy to the *supply points* to store surplus energy generated by the *renewable energy source* and to the extent required to provide ancillary services to the *equipment*; and *[Note: Drafted so that renewable energy source used to meet supply requirements first and only surplus energy used to charge the battery. Consider whether this is the preferred model or whether eg carbon energy source can be used to charge battery if no surplus renewable energy. Consider impact on tariff calculations if using a different tariff for renewable electricity and carbon electricity.]*

maintain a system of electrical protection required to prevent damage to the *equipment*; and [*Note: Customer is required to maintain electrical protection on the load side to prevent damage to Customer equipment – see clause 16 below.*]

with [45] days of the end of each *agreement year*, undertake an audit of the *equipment* and provide *Customer* with a report on the condition of the major components of the *equipment* and outline what action, if any, needs to be taken to ensure the *equipment* remains in good working order; and

as soon as reasonably practicable, notify *Customer* if:

any damage to the *equipment* occurs (other than minor damage that would reasonably be considered as fair wear and tear); or

any material damage to property or personal injury or death occurs in connection with the *equipment* or the delivery of *electricity* under this *agreement*; or

*IPP* identifies any material deficiency in the *equipment* that imposes a danger to persons or property or threatens the operational integrity of the *equipment*.

At least [45] days before the start of each *agreement year*, the parties must meet and in good faith agree a maintenance program in respect of the *equipment* for the *agreement year*, which as far as reasonably possible, ensures:

that planned maintenance outages in respect of the *equipment* are during periods when *Customer’s* *equipment* is scheduled to be offline; or

if this is not possible in accordance with *good industry practice* or as a result of time limits required or recommended by the manufacturer or supplier of part of the *equipment*, then at such times as *Customer* and *IPP* agree, taking into account *Customer’s* operations on the *mine site*.

# Customer to operate and maintain customer equipment

Customer must:

operate and *maintain* the *customer equipment* to enable it to take the supply of *electricity* from the *equipment*; and

*maintain* a system of electrical protection required to prevent damage to the *customer equipment* arising from any faults in the *equipment*.

# Customer obligations regarding the equipment

## Do not overload equipment

*Customer* must not do anything, or permit anything to occur, which will or could overload the *equipment* or the *Customer equipment*.

## Do not interfere with equipment

Other than *Customer’s* right to receive a supply of *electricity* from *IPP* under this *agreement*, *Customer* must not use the *equipment* without *IPP’s* prior consent.

*Customer* must not, and *Customer* must ensure that *Customer’s* *associates*, do not, damage, interfere with, modify, *maintain*, bypass or remove the *equipment*, or attempt to do any of these things.

*Customer* must notify *IPP* as soon as practicable if there is a fault or problem with, or damage to, the *equipment* or *Customer equipment* or the supply of *electricity* to *Customer*.

## Prevent shading of solar panels

[*Customer* must ensure to the maximum extent possible that *IPP’s* solar PV panels are kept free from shade and *Customer* acknowledges and agrees that it will not take any action which does, or may reasonably be expected to, interrupt or reduce the supply of sunlight to the solar PV panels.] *[Note: Include if solar energy being supplied]*

## [Grid connection requirements] [Note: Include if grid connected]

*[Customer* agrees to provide reasonable assistance to *IPP* and its *associates* in relation to the *network service provider’s* requirements to connect the *equipment* to the grid.]

# Ownership of equipment

The *equipment* belongs to *IPP* and *Customer* agrees that the *equipment* belongs to *IPP*, whether or not it is fixed to or forms part of the land.

The customer equipment belongs to *Customer*.

The *network service provider equipment* belongs to, or is controlled by the *network service provider.]*

Power supply and purchase

# Electricity supply and purchase

## Electricity supply

From the start of the *supply period*, and in accordance with this *agreement*, *IPP* must supply such quantity of *renewable electricity* and *carbon electricity* required by *Customer* at the *supply points* up to the *CMQ*. [*Note: See Appendix B which may set quantities of renewable electricity and carbon electricity.*]

*IPP* will use reasonable endeavours to supply *Customer*, on a temporary basis, with *electricity* *Customer* requires in excess of the *CMQ*.

## Customer notification of forecast demand

*Customer* must give *IPP* a written non-binding forecast of its best estimates of its demand for *electricity* up to the *CMQ* as follows:

on an annual basis, at least 30 *business days* before the start of each *agreement year*, *Customer’s* estimated aggregate requirements for *electricity* during that *agreement year*, as well as weekly and monthly aggregate requirements; and

Note clause 2(p) in relation to the first agreement year.

on a monthly basis, at least 7 *business days* before the start of a *month*, *Customer’s* estimated aggregate requirements for *electricity* during that *month*.

## Interruptions in supply

*IPP* may interrupt or restrict the supply of *electricity* at the *supply points* without *liability* to *Customer* in any of the following circumstances:

an event of *force majeure*;

planned maintenance in respect of the *equipment*; [*Note: If clause 15(c) is included, consider limiting this to planned maintenance in accordance with the maintenance plan agreed under that clause.*]

[unplanned maintenance in respect of the *equipment* up to a maximum of [[x] days] in any *agreement year*;] [*Note: Consider whether to include an allowance for unplanned maintenance.*]

if the *customer equipment* is disconnected from the *equipment* at the direction of *Customer*; [*Note: As fixed charge is always payable regardless of consumption, this right of Customer to disconnect is not constrained. If using a model where the fixed charge may reduce or cease with reduced consumption, consider constraining Customer’s right to disconnect to identified scenarios eg planned maintenance, continued connection in breach of an applicable law, a health and safety issue or damage to property.*]

a breach by *Customer* of its obligations under this *agreement* whilst that breach remains unremedied;

[for events and constraints under the *grid retail contract*, in the *network service provider’s equipment* or the *network service provider’s* network;] [*Note: Include if grid connected*]

in an *emergency* to the extent the *emergency* is not caused or contributed to by a breach of this *agreement* by *IPP* or a negligent act or omission of *IPP*; and

any other event or circumstance which relieves *IPP* from its obligation to supply *electricity* under this *agreement*.

Note under clause 25.3(b), IPP is not liable for any interruption to supply due to the intermittent or variable nature of renewable energy source.

## Title and risk in electricity supply

Title to, and risk in relation to, *electricity* supplied under this *agreement* passes from *IPP* to *Customer* at the applicable *supply point*.

## Renewable energy certificates

Within [x] *business days* of the end of each *month* during the *supply period*, *IPP* must:

create *LGCs* in relation to all of the *electricity* sourced from renewable sources as defined in the *RET Act*, and supplied that *month* to *Customer*, and once created, transfer all such *LGCs* to *Customer*;

notify the *Clean Energy Regulator* of that transfer as required under the *RET Act*; and

inform *Customer* of all relevant details, including the date of creation and any identification codes for each *LGC*.

*IPP* and *Customer* must do everything reasonably required to facilitate the transfer by *IPP* of title to the *LGCs* to *Customer* free of any encumbrances.

## Carbon credits

If at any time during the *supply period*, the *equipment* becomes eligible for any *carbon credits* under any *carbon credit regime*, *Customer* is entitled without further payment to *IPP* to all *carbon credits* associated with the *equipment* and the *renewable electricity* supplied to *Customer* at the *supply points*, and *IPP* will use all reasonable endeavours to obtain any *carbon credits* and transfer them to *Customer*.

## [Integration with grid retail contract] *[Note: Include if grid connected]*

*[Customer* acknowledges that *IPP* obtains grid *electricity* from a *retailer* under a *grid retail contract*.

*Customer* agrees that:

If the *network service provider* or *retailer* is permitted to do or not do something under or in connected with the *grid retail contract*, then each of *Customer*, *IPP*, the *network service provider* and the *retailer* are permitted to do or not do it under this *agreement*; and

*IPP* is only obliged to supply *Customer* grid *electricity* to the extent *IPP* receives it from the *retailer*.]

# Customer may on-sell electricity and other benefits

*Customer* may on-sell or on-supply (for reward or otherwise) any *electricity, carbon credits* or *LGCs* *IPP* supplies to *Customer* under this *agreement*.

# Measuring how much electricity Customer consumes

## Meter reading

Subject to clause 21.3, *IPP* will read each *meter* (or arrange for it to be read) at least once in each *billing period*, to determine the *electricity* *Customer* consumed for a *billing period*.

## Meter tests

*IPP* must submit meter validation test reports and meter accuracy manufacturer certifications to *Customer* at least 7 *business days* prior to the *date of commercial operation*.

*Customer* may, at any time, request (in writing) that *IPP* test the accuracy of a *meter*.

[*Note: Include if grid connected*] For a *network meter*:

*IPP* will relay a *Customer* request under clause 21.2(a) to the *network service provider*; and

The *network service provider* will determine whether the test occurs, and if so the testing process and the action (if any) to be taken in response to the test; and

to avoid doubt, *IPP* will pass through to *Customer*, on a full pass-through at cost basis, all fees or charges imposed by the *network service provider* in connection with the request.

For any *meter* [which is not a *network meter*]:

*IPP* will ensure that the *meter* is of adequate commercial grade, for example is a “pattern approved utility meter” as defined under the *National Measurement Act 1960* (Cth);

when requested under clause 21.2(a), *IPP* will test the *meter* (or arrange for it to be tested) in accordance with *good industry practice* and notify *Customer* of the results; and

if the test shows that the *meter* is accurate within the applicable standards, *IPP* will charge *Customer* the *meter testing fee*; and

if the test shows the *meter* is not accurate within the applicable standards, then:

the test is free; and

*IPP* will repair or replace the *meter* at its own expense and clauses 23.5 and 23.6 apply in respect of any resulting error in a bill.

## *IPP* can use estimated readings on a bill

If *IPP* cannot obtain an actual *meter* reading in time to prepare a bill (for example, if *IPP* cannot remotely access a *meter*), *IPP* can base the bill on a reasonable estimate of the amount of *electricity* *Customer* has used.

This estimate may be based on *Customer’s* prior billing history and other information.

If *IPP* bases a bill on an estimate, then:

*IPP* will inform *Customer* on the bill or otherwise; and

if an actual *meter* reading becomes available within 12 months after the bill, *IPP* will make an appropriate adjustment in a later bill.

# Fees and charges

## Supply charges

*Customer* will in each *month* during the *supply period* pay to *IPP* the following charges:

the *fixed charges* in respect of that *month* as specified in Appendix A; and

the *variable charges* in respect of that *month* calculated as the metered quantity of *electricity* which *IPP* supplies to *Customer* at the *supply points* (measured in kWh), multiplied by the per-kWh *tariff* specified in Appendix A.

The *variable charges* will be subject to escalation in accordance with Appendix A.

The *fixed charges* may be adjusted in accordance with Appendix G.

## Payment of supply charges

Unless otherwise set out in this *agreement*, the *fixed charges* are payable whether or not *Customer* actually consumes *electricity*.

Unless otherwise set out in this *agreement*, the *variable charges* are payable only to the extent that *Customer* consumes *electricity*.

## Fees

*IPP* may charge *Customer* a *meter testing fee* (see clause 21.2(d)(iii)) if the relevant circumstances apply.

# Billing and Payment

## Billing

*IPP* will, within 10 *business days* after the end of each *billing period*, issue a bill to *Customer* which specifies, for the *billing period*:

the amount of *electricity* consumed; and

the *fixed charges*; and

the *variable charges*; and

any other charges, fees or other amounts payable or refundable under this *agreement*, with a brief explanation for each item; and

the due date for payment, which must be at least 14 *business days* after the date of the bill.

## Payment

*Customer* must pay *IPP* by any of the following payment methods:

electronic funds transfer; or

direct debit; or

any other payment options *IPP* and *Customer* may agree from time to time,

the total amount due in cleared funds on or before the due date.

## Late payment and underpayment

If *Customer* fails to pay the amount due by the due date *IPP* may issue a *notice* to *Customer* requiring payment of the amount due.

If *Customer* fails to pay the amount due within 5 *business days* after receipt of the *notice* issued under clause 23.3(a):

clause 30.1 applies; and

*IPP* may charge *Customer* interest on any outstanding amount at the *interest rate*:

## Reviewing bills

If *Customer* reasonably considers that a bill contains an error, *Customer* may notify *IPP* and *IPP* will review the bill and must notify *Customer* of the result (**correction notice**) within 10 *business days* after *Customer’s* *notice*.

If *IPP* reasonably considers that a bill contains an error, then in the case of an overpayment *IPP* must within 10 *business days* after discovering the error, and in the case of an underpayment *IPP* may, notify *Customer* of the error (**correction notice**).

Any dispute will be decided in accordance with clause 33.

## If *IPP* undercharges Customer

If a bill contains an error, and the error resulted in *Customer* underpaying, then:

*IPP* may determine a correcting payment, but *IPP* must not seek to recover an underpayment in respect of *electricity* supplied more than 12 months before the date of *IPP’s* *correction notice* under clause 23.4; and

*IPP* may issue a corrected bill to *Customer* no later than the next bill, setting out the correcting payment and how it is calculated; and

if after being notified of the correcting payment *Customer* does not make the correcting payment by the due date, *IPP* may charge *Customer* interest on the outstanding amount at the *interest rate* from the due date.

## If *IPP* overcharges Customer

If a bill contains an error, and the error resulted in *Customer* overpaying, then:

*IPP* will determine a correcting payment, but *IPP* is not required to correct an overpayment in respect of *electricity* supplied more than 12 months before the date of *IPP’s* *correction notice* under clause 23.4;

*IPP* will issue a corrected bill to *Customer* within 10 *business days* of *IPP’s* *notice* under clause 23.4, setting out the correcting payment and how it is calculated;

*IPP* will ask *Customer* whether *Customer* wants *IPP* to:

credit the correcting payment to *Customer’s* account; or

repay the correcting payment to *Customer*.

*IPP* will action *Customer’s* request within 12 *business days* of receiving *Customer’s* instructions.

If *Customer* does not answer a request under clause 23.6(c) within 5 *business days* of *IPP* making the request (***response deadline***), *IPP* will credit the correcting payment to *Customer’s* account within the next 7 *business days* following the *response deadline*.

[*Note: If grid connected consider whether any fees and charges need to be passed through from grid arrangements and add into clause 22 and 23 as required.*]

Risk and liability

# Insurance

*IPP* must effect and *maintain* the *insurance policies* for the duration of the *supply period* in respect of the *equipment*, consistent with *good industry practice*.

*IPP* must, if requested by *Customer*, provide certificates of currency for the insurances required under clause 24(a) which demonstrate compliance with this *agreement*.

# IPP liability to Customer

## General limitation

*IPP* will only ever be liable to *Customer* and *Customer’s* *associates* for *direct damage*. *IPP* will not be liable to *Customer* for any *indirect damage* arising out of or connected with this *agreement* however foreseeable and however caused, including by *IPP* negligence.

Without limiting clause 25.1(a) but subject to clause 25.1(c), *IPP’s* *liability* to *Customer* under this *agreement* is not in any circumstances to exceed either:

in respect of any one occurrence – the amount specified in Appendix A as the “occurrence cap”; or

in aggregate over the duration of this *agreement* – the amount specified in Appendix A as the “aggregate cap”.

The limit on *liability* in clause 25.1(b) does not apply to any of the following:

*liability* in respect of which *IPP* is entitled to be indemnified under any insurance effected by *IPP* under this *agreement*;

*liability* in respect of which *IPP* would have been entitled to be indemnified under any insurance but for *IPP’s* failure to comply with the terms and conditions of the relevant policy or the requirements of this *agreement* in respect of such policy;

*liability* in respect of third party property damage of a person other than *Customer* or *IPP* (or an *associate* of *Customer* or *IPP*);

*liability* in respect of personal injury or death or a person; or

*liability* arising from *wilful misconduct* or a fraudulent act or omission of *IPP* or its *associates*.

## Indemnity for property damage and personal injury

Except to the extent that loss is caused by *Customer’s* negligence or breach of this *agreement*, *IPP* will be liable for and must indemnify *Customer* and *Customer’s* *associates* against:

any damage to or loss of any real or personal property owned by *Customer* or *Customer’s* *associates*;

any *liability* which *Customer* or *Customer’s* *associates* may suffer, sustain or incur to any person as consequence of any loss or damage to property or personal injury or death suffered by that person;

that arises from or in connection with an act or omission of *IPP* or *IPP’s* *associates* of from any activities of *IPP* or *IPP’s* *associates* on or in the vicinity of the *site* or the performance or a failure to perform by *IPP* or *IPP’s* *associates* of any of *IPP’s* obligations under this *agreement*.

## Limitation of liability for supply interruptions for renewable electricity

*Customer* acknowledges that, the generation and supply of *renewable electricity* to a *supply point*, may be determined by factors outside of the *IPP’s* *control* and will be variable. *IPP* does not give any warranty or make any representation to *Customer* in relation to the generation and supply of *renewable electricity* from time to time and *IPP* cannot and does not guarantee that the *renewable electricity* will be:

of any particular quantity, quality or frequency; or

continuous and free from surges or interruptions.

As a result, *IPP* is not liable to *Customer* for any *liability* whatsoever (including any *indirect damage*) to supply the *CMQ* at the *supply points* where this is due to insufficient output from the *equipment* as a result of the intermittency or variability in [wind speed/ solar irradiance] at the relevant point in time. This exclusion of *liability* does not extend to a failure or disruption in the quantity, quality, frequency or continuity of, or any surges or interruptions in, *electricity* supply, where this is caused by *IPP’s* failure to comply with its obligations in clause 15.

*Customer* must use best endeavours to ensure that the exclusion of *liability* contained in this clause 25.3 is contained in any contract for the on-sale or on-supply of *electricity* made available by *IPP*.

# Customer liability to IPP

## Damage to the equipment [or network]

*Customer* will indemnify *IPP* and *IPP’s* associates against any *liability* to any person, which arises in connection with any interference with or damage to the *equipment* [or to *network service provider’s* *equipment*] by *Customer* or *Customer’s* *associates*.

## No liability for indirect damage

[Subject to clause 26.3, ]*Customer* will only ever be liable to *IPP* for *direct damage*. *Customer* will not be liable to *IPP* for any *indirect damage* arising out of or connected with this *agreement* however foreseeable and however caused, including by *Customer* negligence.

## Liability under grid retail contract [*Note: Include if grid connected.*]

*[Customer* will indemnify *IPP* and *IPP’s associates* against any *liability* (including for *indirect damage*) arising out of or connected with the *grid retail contract*, except to the extent that *liability* arises as a result of the default of *IPP* or *IPP’s associates*.]

# Proportionate liability

During the period from the date of this *agreement* up to the *date of commercial operation*, the operation of Part 1F of the *Civil Liability Act 2002* (WA) is excluded in relation to all and any rights, obligations and liabilities arising out or in connection with the *works* and the *customer works*, whether such rights, obligations or liabilities are sought to be enforced as a breach of contract or claim in tort (including negligence), in equity or otherwise at *law*.

# Force majeure

## Force majeure

For the purposes of this *agreement*, an event of ***force majeure*** means any event or circumstance which is not within the *control* of *IPP* or *Customer* (as applicable) and which by the exercise of due diligence, *IPP* or *Customer* (as applicable) is not reasonably able to prevent or overcome, and, provided the event or circumstance meets the foregoing criteria, includes the following (without limiting the generality of the nature of those events or circumstances):

earthquakes, floods, fire, lightning, storm or other natural disaster;

strikes, lockouts, bans or other industrial disturbances other than one which is specific to the *site* or the affected party;

acts of a public enemy, wars, blockades or insurrections, riots and civil disturbances, arrests, malicious damage or sabotage;

epidemic, pandemic or quarantine,

including:

any direct consequences resulting from changes in government policies, or acts or omissions of any government agency resulting therefrom; and

the consequences and impacts of the matters referred to above; or

unforeseen or unpreventable mechanical or electrical breakdown, damage or failure of *equipment*.

## Exclusions from force majeure

Notwithstanding clause 28.1, the following events and circumstances do not constitute an event of ***force majeure***:

lack of funds, financial hardship or the inability of a party to make a profit or achieve a satisfactory rate of return;

seasonal weather conditions (and the frequency of those weather conditions) for the location of the *site* which are typical and reasonably foreseeable at the relevant time of year according to the records of the Australian Bureau of Meteorology;

the intermittency or variability of the *renewable energy source*;

the existence or occurrence of adverse market commercial conditions, including loss of customers, loss of market share or reduction in demand for electric power or the commodities produced at the *mine site*;

breakdowns or failure of *equipment* caused by normal wear and tear, or the failure to properly *maintain* *equipment* and/or stock spares.

## Relief from performance

A party affected by *force majeure* shall be excused from performance of and shall not be liable in damages or otherwise to any other party for any failure in carrying out any of its obligations under this *agreement* if and only to the extent and for the time that it is prevented in whole or in part from doing so by *force majeure*.

## Actions during force majeure

A party affected by *force majeure* claiming the benefit or protection of *force majeure* shall:

promptly give *notice* to the other parties of the occurrence and circumstances in respect of which the claim of *force majeure* arises;

as soon as practicable after the occurrence of *force majeure*, use reasonable endeavours to mitigate the consequences of that *force majeure* and minimise any resulting delay in the performance of its obligations under this *agreement*;

*maintain* regular communication with the other party to describe what is being done to remedy the *force majeure*; and

resume performance in full of its obligations under this *agreement* as soon as reasonably practicable.

Nothing in this clause will:

restrict the discretion of the party affected by *force majeure* with respect to the settlement of strikes, lockouts, or other industrial disputes or disturbances which constitute *force majeure* and the party affected by *force majeure* may refrain from settling the strike, lockout, dispute or disturbance or may settle it at such time and on such terms as it considers to be in its best interests; or

require the party affected by *force majeure* to act contrary to their commercial interests.

## Extension of supply period for force majeure

If *IPP* is excused from its obligations to supply *electricity* under clause 28.1, then the *supply period* under this *agreement* will be extended by a period equal to the period for which *IPP* was so excused.

If the *supply period* is extended under clause 28.5, then the parties agree that the *site licence* will also be extended for the same period.

[**Alternative clause:** The excusal from obligations by reason of a *force majeure* event will not operate so as to extend the *supply period*.]

## Termination for extended force majeure

If a *force majeure* event occurs which:

for a period of at least 12 *months*, prevents *IPP* from making *electricity* available at the *supply point* in accordance with the terms of this *agreement*; or

causes total or significant and permanent damage to *Customer’s* operations on the *mine site*, which cannot be rectified within a period of at least 12 *months*,

then either *IPP* or *Customer* may, unless the *force majeure* event has ceased to have effect, terminate this *agreement* with immediate effect by *notice* to the other.

# Change in Law or Change in Tax

## Changes in Law or Change in Tax

If a *change in tax* occurs or a *change in law* occurs (a **change**) and the relevant costs over any 12 *month* period as a result of the *change* are increased or decreased by an amount equal to or greater than $[insert] for any single *change* or, when that increase or decrease is aggregated with increases or decreases during the *supply period* associated with any prior *change*, by an amount equal to or greater than $[insert]:

either party may give *notice* to the other party specifying the nature of the relevant *change* and stating the proposed increase or decrease (as applicable) in any fees or charges under this *agreement* or the amount to be recovered from *Customer* (**change notice**);

where the relevant costs are:

increased, *IPP* will be entitled to pass through the effects of the *change* to *Customer*; or

decreased, *IPP* must pass through the effects of the *change* to *Customer*; and

subject to clause 29.3, effective on and from the date specified in the *change notice* (which will not be earlier than the date the *change* commences to have effect), the relevant fees and charges will be added to, increased or decreased (as applicable) or *Customer* must pay the relevant amount to *IPP* as specified in the *change notice*.

## Adjusting charges

If *IPP* adjusts any fees and charges or adds a new charge pursuant to clause 29.1, it must only adjust the fees and charges or adds a new charge to the extent necessary to reflect that proportion of the effect of that *change* that is fairly attributable to the services to *Customer* under this *agreement*.

## Disputes over adjustments

If a party disagrees with the increase or decrease (as applicable) in fees and charges or new charge proposed by the other party under the *change notice*, then the party in disagreement must notify the other party within 10 *business days* of receiving the *change notice* that it disputes the increase or decrease (as applicable) in the fees and charges or imposition of the new charge.

If the parties cannot resolve the dispute within 10 *business days* of the relevant party giving a *dispute note* under clause 29.3(a), then either party may refer the matter for resolution pursuant to clause 33.

Default, disputes and termination

# Breach and ending this agreement early

## Notice of default event

If a *default event* occurs, the party not in default may give the other party a *default notice*:

stating that it is a *notice* under this clause 30.1; and

specifying the nature of *default event*.

## *IPP* remedy and cure plan

If:

a *default notice* is given to *IPP*; and

the *default event* is capable of being remedied,

*IPP* must, within 20 *business days* (or such longer period as *Customer* may agree, acting reasonably) after receipt of the *default notice*:

remedy the *default event*; or

prepare and submit to *Customer* a *cure plan*.

Where *IPP* submits a *cure plan* to *Customer*:

*Customer* may (acting reasonably), within 10 *business days*, reject the *cure plan*, and *IPP* must within 5 *business days* amend the plan to meet *Customer’s* reasonable requirements, and re-submit the *cure plan*, in which event this paragraph (b) will re-apply; and

where *Customer* does not reject the *cure plan* within 10 *business days*, *IPP* must comply with the *cure plan*.

Where the *default event* by *IPP* is not capable of being remedied or *IPP* has not remedied the *default event* within the time set out in clause 30.2(a) or by following the *cure plan* (as applicable), *IPP* must:

mitigate the effects of the *default event* to a level reasonably acceptable to *Customer*, within a reasonable period of time; and

subject to clause 25, and without limiting any other provision in this *agreement*, pay to *Customer* a sum that is reasonably required to compensate *Customer* for the *default event* and its consequences.

## Customer remedy

If:

a *default notice* is given; and

the *default event* is capable of being remedied,

*Customer* must, within 20 *business days* (or such longer period as *IPP* may agree, acting `reasonably) after receipt of the *default notice*, remedy the *default event*.

Where the *default event* by *Customer* is not capable of being remedied, *Customer* must:

mitigate the effects of the *default event* to a level reasonably acceptable to *IPP*, within a reasonable period of time; and

subject to clause 26, and without limiting any other provision in this *agreement*, pay to *IPP* a sum that is reasonably required to compensate *IPP* for the *default event* and its consequences.

## Customer suspension for *IPP* default event

Without limiting any of *Customer’s* rights under this *agreement* or otherwise at *law*, if *IPP* does not comply with any of its obligations under clause 30.2, then *Customer* may, suspend *Customer’s* obligations under this *agreement* until the *default event* is remedied (if it is capable of remedy).

## *IPP* suspension for Customer default event

Without limiting any of *IPP’s* rights under this *agreement* or otherwise at *law*, if *Customer* does not comply with any of its obligations under clause 30.3, then *IPP* may suspend the supply of *electricity* under this *agreement* until *Customer* complies with its obligations under clause 30.3 or until *IPP* notifies *Customer* that the suspension has ended.

## Customer termination

If:

*Customer* has given *IPP* a *default notice* and *IPP* fails to remedy the breach or pay *Customer* compensation (as applicable); or

*IPP* suffers an *insolvency event*, or

*commercial operation* has not been achieved by the time that the total amount of *delay liquidated damages* paid or payable by *IPP* under Appendix G reaches the *delay liquidated damages cap*,

then *Customer* may end this *agreement* by giving *IPP* 10 *business days*’ *notice* of termination.

## *IPP* termination

If:

*IPP* has given *Customer* a *default notice* and *Customer* fails to remedy the breach or pay *IPP* compensation (as applicable); or

*Customer* suffers an *insolvency event*,

then *IPP* may end this *agreement* by giving *Customer* 10 *business days*’ *notice* of termination.

# Customer’s buyout right

## Buyout for IPP default

If *Customer* terminates this *agreement* under clause 30.6, *Customer* may elect to purchase the *equipment* for the *buy out amount* by providing *IPP* a *notice* within [15] *business days* after the date of the *notice* of termination.

If *Customer* elects to purchase the *equipment* under clause 31.1(a), *Customer* must pay *IPP* the *buy out amount* within [insert period] of the termination of this *agreement* and upon receipt of the *buy out amount*, *IPP* must transfer ownership of the *equipment* to *Customer*.

## Buyout for convenience

This *agreement* may be terminated by *Customer*, at its sole and absolute discretion, with effect from a date which is no earlier than the [x] anniversary of the *date of commercial operation* by providing *IPP* with [x] months’ *notice* of its decision to terminate. Such termination will take effect on the date specified in the *notice*, or if no date is given, on the date that is [x] *months* after receipt of the *notice* by *IPP*.

If *Customer* elects to terminate this *agreement* under clause 31.2(a), *Customer* must pay *IPP* the *buy out amount* on the effective date of termination as determined under clause 31.2(a).

In addition to the right under clause 31.2(a), *Customer* may elect to purchase the *equipment* at the end of the *supply period* by providing *IPP* with [x] months’ *notice* prior to expiry of the *supply period*.

If *Customer* elects to purchase the *equipment* under clause 31.2(c), *Customer* must pay *IPP* the *buy out amount* on the last day of the *supply period*.

Following the exercise of the right in clause 31.2(a) or 31.2(c) *IPP* must transfer ownership of the *equipment* to *Customer* once *Customer* has paid in full all outstanding amounts due to *IPP* under this *agreement* (including the *buy out amount*).

## Buyout on termination for prolonged force majeure

If this *agreement* is terminated under clause 28.6, *Customer* may elect to purchase the *equipment* on the effective date of termination as determined in accordance with clause 28.6.

If *Customer* elects to purchase the *equipment* under clause 31.3(a), *Customer* must pay *IPP* the *buy out amount* on the effective date of termination of this *agreement*.

Following the exercise of the right in clause 31.3(a), *IPP* must transfer ownership of the *equipment* to *Customer* once *Customer* has paid in full all outstanding amounts due to *IPP* under this *agreement* (including the *buy out amount*).

# Decommissioning

Subject to clause 32(b), if this *agreement* is terminated under clause 28.6 or clause 30.6 or this *agreement* expires and *Customer* does not exercise its buyout right under clause 31.2(c) then *IPP*:

retains ownership of the *equipment*; and

must promptly remove the *equipment* from the *site* and carry out the *decommissioning works* in compliance with *good industry practice*, relevant *approvals* and relevant *laws*.

If this *agreement* is terminated under clause 30.7 then *IPP*:

retains ownership of the *equipment*; and

must promptly remove the *equipment* from the *site*; and

any *decommissioning works* required to be undertaken in accordance with relevant *laws* or *approvals* must be undertaken by *IPP* but the costs and expenses incurred by *IPP* in undertaking the *decommissioning works* will be a debt due and immediately payable from *Customer* to *IPP*.

# Dispute resolution

## Dispute notice

If any dispute arises in connection with this *agreement* (**dispute**), either party may give the other a *notice* detailing the dispute (**dispute notice**).

## Negotiations in good faith

Within 10 *business days* after a *dispute note* is given, senior representatives of the parties with *authority* to resolve the *dispute* must meet and in good faith try to resolve the *dispute*.

If the senior representatives do not resolve the *dispute* within the 10 *business day* period referred to in clause 31.2(a), then:

if this *agreement* provides for the matter to determined by an *expert* or the parties agree that the dispute should be determined by an *expert*, it must be dealt with in accordance with clause 33.3; or

if it is any other dispute, either party may commence proceedings in relation to the dispute.

## Expert determination

Where a dispute or other matter is permitted or required by this *agreement* to be determined by an *expert*, or the parties agree that a dispute or other matter should be determined by an *expert*, then the dispute must be referred to an *expert* for determination administered by the Australian Disputes Centre and this clause 33.3 applies.

The procedure for appointment of an *expert* is as follows:

the *expert* must be appointed by the parties, or if the parties are unable to agree on such appointment within 10 *business days* of a party proposing an *expert*, either party may ask the Australian Disputes Centre to recommend an appropriate person to act as *expert*. The parties will then appoint the person recommended by the Australian Disputes Centre as *expert*; and

the *expert* determination is to be conducted in Perth, Western Australia in accordance with the Australian Disputes Centre Rules for Expert Determination operating at the time the dispute is referred to the Australian Disputes Centre (***ADC rules***). The *ADC rules* set out the procedures to be adopted, the process of selection of the *expert* and the costs involved. The terms of the *ADC rules* are deemed incorporated into this *agreement*.

The *expert* is instructed to:

determine the *dispute* within the shortest practicable time; and

deliver a report stating the *expert’s* opinion with respect to the matters in *dispute* and setting out the reasons for the decision.

Any process or determination of the *dispute* by the *expert* is made as an *expert* and not as an arbitrator and the determination of the *expert* is final and binding on the parties without appeal so far as the *law* allows and except in the case of manifest error or where either party has not been provided with a fair opportunity to make submissions in relation to the matter in issue.

The costs of the *expert* under this clause 33.3, must be shared equally between the parties unless agreed otherwise.

## Parties to continue to perform

Despite the existence of a *dispute*, the parties must continue to perform their respective obligations and enjoy their rights under this *agreement*.

## Summary or urgent relief

Nothing in this clause 33 prevents any party from instituting court proceedings to seek enforcement of any payment due under this *agreement* or to seek urgent injunctive, interlocutory or declaratory relief in respect of a *dispute*.

Other provisions

# Personal Property Securities Act

## Security interest

*IPP* retains title in the *equipment*, whether or not it is affixed to any land.

*IPP* is entitled to register with any register of *security interests*, a financing statement (or other equivalent registration) in relation to the security *interests* referred to in clause 34.1(a).

## Customer’s obligations

Customer:

must promptly do anything *IPP* reasonably requests to ensure that any *security interest* arising under this clause 34 is registered, perfected and effective in priority to all other *security interests*; and

undertakes not to amend or seek to amend (including by way of removal) the registration for any *security interest* registered under this clause 34; and

agrees that *IPP* is only required to give a *notice* to *Customer* under the *PPS Act* if the *notice* is mandatory and the giving of the *notice* cannot be excluded under that *law*, and *Customer* waives any rights to receive any *notices* unless they are required to be given and cannot be excluded; and

agrees to notify *IPP* in writing of any change to *Customer’s* details set out in this *agreement*, within 5 days from the date of such change; and

agrees that the following provisions of the *PPS Act* will not apply and *Customer* will not have any rights under them: section 95 (to the extent that it requires the secured party to give *notices* to the grantor); section 121(4); section 125; sections 129(2) and (3); section 132; section 142 and section 143; and

agrees to keep all information of the kind mentioned in section 275(1) of the *PPS Act* confidential and will not authorise the disclosure of such information except in accordance with section 275(7) of the *PPS Act*; and

waives its right under section 157 of the *PPS Act* to receive *notice* of any verification statement relating to the registration of any financing statement or any related financing change statement.

# Assignment and change in control

## Assignment by Customer

*Customer* may with *IPP’s* consent (not to be unreasonably withheld) assign or novate this *agreement* to a third person (“***assignee***”) if:

*Customer* notifies *IPP* of the proposed *assignee*; and

the proposed *assignee* signs a deed of assumption, in which it agrees to be bound by this *agreement*.

It will be reasonable for *IPP* to withhold consent to the assignment or novation if *IPP* believes on reasonable grounds that the proposed *assignee* does not have the financial capability necessary to perform its obligations under this *agreement*.

## Assignment by IPP

*IPP* may with *Customer’s* consent (not to be unreasonably withheld) assign or novate this *agreement* to a third person (“***assignee***”), if:

*IPP* notifies *Customer* of the proposed *assignee*; and

the proposed *assignee* signs a deed of assumption, in which it agrees to be bound by this *agreement*.

It will be reasonable for *Customer* to withhold consent to the assignment or novation if *Customer* believes on reasonable grounds that the proposed *assignee* does not have the financial or technical capability necessary to perform its obligations under this *agreement*.

## Sub-contracting by IPP

*IPP* must not sub-contract or delegate the performance of all or any part of this *agreement*, without *Customer’s* consent.

## Change in control of IPP

*IPP* must not permit a *change in control* without *Customer*’s consent (not to be unreasonably withheld).

If a *change in control* of *IPP* is proposed, *IPP* must notify *Customer* and provide details of:

the identity of each proposed controller;

the extent and nature of the proposed *change in control*; and

such other information as *Customer* reasonably requires to determine the financial and technical capability of *IPP* following the *change in control*.

It will be reasonable for *Customer* to withhold consent to the *change in control* if *Customer* believes on reasonable grounds that *IPP* will not continue to have the financial or technical capability to perform its obligations under this *agreement* following the *change in control*.

## Change in control of Customer

*Customer* must not permit a *change in control* without *IPP’s* consent (not to be unreasonably withheld).

If a *change in control* of *Customer* is proposed, *Customer* must notify *IPP* and provide details of:

the identity of each proposed controller;

the extent and nature of the proposed *change in control*; and

such other information as *IPP* reasonably requires to determine the financial capability of *Customer* following the *change in control*.

It will be reasonable for *IPP* to withhold consent to the *change in control* if *IPP* believes on reasonable grounds that *Customer* will not continue to have the financial capability to perform its obligations under this *agreement* following the *change in control*.

# Confidentiality

## Confidential information

Subject to this clause 36, each party must take all reasonable steps to ensure that *confidential information* is kept confidential.

## Permitted use and disclosure

A party who receives *confidential information* (“***recipient***”) from the other party (“***discloser***”) may:

use the *confidential information* only for the purposes of this *agreement*; and

reveal the confidential information only:

with the *discloser’s* written consent, subject to the terms of the consent; or

on a confidential basis, to its *associates* to the extent they need to know; or

on a confidential basis, to its insurers and reinsurers; or

if required by any *law* or rules of a recognised stock exchange to do so, in which case the *recipient* must promptly notify the *discloser*; or

if the *confidential information* is in or enters the public domain for reasons other than a breach of this *agreement*; or

if the *confidential information* was already known to the *recipient* at the time of first disclosure, or is disclosed to the *recipient* by a third party legally entitled to do so and who is not under an obligation of confidentiality to the *discloser* in respect of the information; or

on a confidential basis, to its professional advisers to obtain professional advice in connection with this *agreement*.

## Survival

The obligations of confidentiality imposed by this clause 36 survive termination of this *agreement* and any person who ceases to be a party to this *agreement* continues to be bound by those obligations for a period of [3] years after termination or expiry of this *agreement*.

# Severance

If a provision of this *agreement* is invalid, illegal or unenforceable, then it is severed from this *agreement* to the extent of the invalidity, illegality or unenforceability, and the remainder of this *agreement* remains in full force.

# Waiver and variation

## Waiver

A right may only be waived in writing, signed by the party giving the waiver.

## Variation

A variation of this *agreement* must be in writing and signed by the parties in order to have effect.

# Notices

A *notice* must be in writing and in English.

A party must send a *notice* to the other party at the address shown on this *agreement* or most recently notified in writing.

A *notice* takes effect at the time stated in the *notice*, but if no time is stated or the time stated is before receipt, then a *notice* take effect on receipt.

A *notice* which is hand delivered to the street address applying under this clause 39 is taken to have been received on delivery.

A *notice* sent by post is deemed received:

3 days after posting if within Australia; or

7 days after posting if posted to or from a place outside Australia.

A *notice* sent by email is taken to have been received at the time the email was sent unless the party sending the email knows or ought reasonably to suspect that the email and the attached communication were not delivered to the addressee’s domain specified in the email address applying under this clause 39.

Despite any other clause, if a *notice* is received or is taken to be received on a day that is not a business day or after 5.00pm on a business day, then the *notice* is received at 9.00am on the next business day.

A party may send a *notice* in more than one way permitted under this *agreement*.

If a party sends the same *notice* using more than one method, then the *notice* is effective from the time that the receiver receives the first *notice*.

# No partnership

Nothing in this *agreement* creates a partnership or joint venture between *Customer* and *IPP*.

# Entire agreement

The terms and conditions set out expressly in this *agreement* comprise the whole of the *agreement* between *Customer* and *IPP*.

# Counterparts

This *agreement* may be executed in any number of counterparts each of which is an original and all of which constitute one and the same instrument.

# GST

Unless stated otherwise, all amounts under this *agreement* exclude *GST*.

For all amounts under this *agreement* which exclude *GST*, then in addition to any amount payable by *Customer* to *IPP*, *Customer* must at the same time, in the same manner, and without deduction or set off, pay an amount equal to *IPP’s* *GST* *liability* in relation to the relevant services.

# Compliance costs

Unless stated otherwise, each party is to bear its own costs of complying with this *agreement*.

# Survival

Clauses 1, 2, 21.3(c), 23, 25, 26, 27, 31, 32, 34, 36, 39, 40, 41, 43, 46 survive any termination of this *agreement*.

# General

The *law* of Western Australia governs this *agreement*.

*IPP* and *Customer* must each comply with all applicable *laws*.

If a provision of this *agreement* is invalid, illegal or unenforceable, then it will be read down to the extent necessary to remedy the invalidity, illegality or unenforceability, or if this is not possible it is to be severed from this *agreement*, and the balance of this *agreement* remains in full force and effect.

Appendices

1. Key commercial terms

|  |  |
| --- | --- |
| Item | Details |
| 1. **Customer** | [Include address, contact and email address for notices] |
| 1. **IPP** | [Include address, contact and email address for notices] |
| 1. **Mining tenements** | [Insert] |
| 1. **The site** | [Insert description/coordinates etc or refer to a plan and attach as additional appendix] |
| 1. **Supply period duration** | [Specify a term of years or whatever. If you wish to specify a fixed end date, adjust clause 5.] |
| 1. **Fixed charges** | $xx per *month* during the *supply period*. [Note: Consider whether there should be separate *fixed charges* for *carbon electricity* and each type of *renewable electricity*.] |
| 1. **Variable charges** | The *tariff* per metered kWh consumed at the *supply points* will equal $xx per kWh as adjusted in accordance with the next row.  [Note: Consider whether there should be separate *variable charges* for *carbon electricity* and each type of *renewable electricity*.] |
| 1. **Escalation of variable charge** | [The *variable charge* will be increased by [2]% on each anniversary of the *date of commercial operation*.] [Note: The *fixed charge* is not escalated, but may be adjusted under Appendix G.] |

* 1. Other fees and charges

|  |  |
| --- | --- |
| meter testing fee  *[see clause 21.2(d)(iii)]* | [For a test of a *network meter*, *network service provider’s* charges will apply (see clause 21.2(c)(iii))] *[Include of grid connected*].  $[X] per test of a [non-*network] meter*, if a fee is payable (see clauses *21.2(d)(iii)* and 21.2(d)(iv)A)). |

* 1. Buyout for early termination

|  |  |
| --- | --- |
| buyout amount | [Insert formula or list of buyout amounts for each year of supply period until the amount reaches zero.] |

* 1. Equipment

|  |  |
| --- | --- |
| equipment | [Insert details of renewable energy system, battery (if applicable) and carbon energy system] |

* 1. Liability caps

|  |  |
| --- | --- |
| occurrence cap  *[see clause 25.1(b)]* | A monetary sum per occurrence equal to the maximum of the value of [6] months of *electricity* supplied under the *agreement*. |
| **aggregate cap**  *[see clause 25.1(b)]* | A monetary sum equal to the maximum of [24] months of *electricity* supplied under the *agreement*. |

1. Technical Requirements
   1. Works

[Insert *works* to be performed by *IPP* eg supply and installation of solar PV, inverters and all associated *equipment*, battery, all supply cables from switch boards to distribution boards, all other wires or other apparatus used to deliver *electricity* from the *equipment* to a supply point, *meters* other than *network meters*.]

Include catch all like below if required:

All other plant, devices and facilities on the *site* which *IPP* (in accordance with *good industry practice* or as otherwise agreed with *Customer*) judge necessary or convenient to enable, *control* or facilitate the supply of *electricity* to *Customer* under this *agreement* but excluding the *customer works*.

* 1. Customer Works

[Insert *customer works* to be performed. Note include any interconnection *works* on the load side of the *supply point* and ensure these fall within definition of *customer equipment*. Battery limits need to be clear.]

* 1. Performance Requirements

[Insert key technical requirement metrics eg: **[**

Specifications/technical design requirements [*Note: You may want to split out specifications/technical design from performance requirements. If you do this make sure you cover the specification/technical design in paragraph G.3b) of Appendix G*],

capacity [in MW, MWh per year and MVA],

installed capacity,

contract maximum quantity,

etc

[*Performance requirements* may also include a maximum instantaneous RPF and minimum annual REF:

(1) renewable power fraction (RPF): The amount of renewable power delivered to the loads compared to the total amount of power required by the load; and

(2) renewable energy fraction (REF): The portion of the total energy serviced by the renewable technology over a defined amount of time].

**Renewable power fraction (RPF):** The amount of renewable power delivered to the loads compared to the total amount of power required by the load as defined by the following equation:

*RPF*: Renewable power fraction (kWAC/kWAC)

*PREN*: Renewable power delivered to load (kWAC)

*Ptot*: Total power delivered to load (kWAC)

**Renewable energy fraction (REF)**: The portion of total energy serviced by the renewable technology being discussed over a defined amount of time as defined by the following equation:

*REFt*: Renewable energy fraction (kWh/kWh)

*EREN,t*: Renewable energy consumed over period, t (kWh)

*Etot,t*: Total energy consumed over period, t (kWh)

1. Equipment and Customer Equipment

[Insert – include general arrangement and single line diagram if possible]

1. Agreed Works Program

[Insert table of key dates]

1. Approvals matrix

[Insert required approvals and the party responsible for them.]

Except as provided above, *IPP* must obtain and *maintain* all *approvals* required for it to perform the *works* in Appendix G and to supply *electricity* under this *agreement* during the *supply period*.

1. Site licence
   1. Grant of Site Licence
      1. Grant
         1. *Customer* has the right to occupy the *site* pursuant to the *mining tenements*.
         2. *Customer* grants to *IPP*, a non-assignable license to:
            1. access and use the *site* (***site licence***) during the term of the *agreement* to enable *IPP* to install the *equipment* and perform its obligations under this *agreement*; and
            2. access such other portions of the *mine site* as may be necessary for *IPP* and *IPP’s* *associates* to travel to and from the *site* along access roads which *Customer* has the right to use.
         3. No licence fee is payable for the *site licence*.
      2. Licence Conditions

The *site licence* is granted on and subject to the following terms and conditions:

* + - 1. rights conferred on *IPP* by the *site licence* are those of a licensee and do not create or confer on *IPP* any tenancy, estate or other interest in or over the *site*;
      2. *Customer* may at any time exercise all its rights including its right to possess or enjoy the whole or any part of the *site*, provided that the exercise of those rights does not unreasonably prevent the exercise of *IPP’s* rights under this *site licence*;
      3. this *site licence* is personal to *IPP* and except as permitted by clause 35.2 of the *agreement*, the rights granted are not transferable or assignable;
      4. *IPP* must only use the *site* to do the following:
         1. undertake the *works* on the *site*;
         2. *maintain* the *equipment*;
         3. operate the *equipment*;
         4. supply *electricity* to *Customer*; and
         5. do upon the *site* all such acts and things as may be necessary, expedient, incidental or conducive to any of the above purposes.
  1. *IPP’s* obligations regarding the *site*
     1. Activities on *site*

*IPP* must and must ensure that *IPP* associates will:

* + - 1. comply with all relevant *laws* in connection with the *site*, the use of the *site* and *IPP’s* property, including the *Mining Act 1978* (WA) and *laws* relating to the environment;
      2. comply with all *notice*s from a government agency relating to the environment;
      3. allow the Crown to exercise the rights reserved to the Crown in any relevant mining tenement in respect of, and over or through, the *site*;
      4. be responsible for the safety, maintenance and operation of the *equipment* within the *site*;
      5. comply with all conditions of the relevant mining tenement relevant to *IPP’s* activities on the *site* and not do any thing which would constitute a breach of any mining tenement by *Customer*.
    1. Notification

*IPP* must and must ensure that *IPP* associates immediately report to the *Customer* in writing, and in the case of *emergency*, orally, any:

* + - 1. damage to the *site* or any significant damage to or defect in the *equipment* or any other plant, *equipment* or facility on the *site*;
      2. non-compliance by *IPP* in relation to the requirements of any *law*, *Customer* policy or *approvals*, or approval regarding the environment;
      3. discovery of an artefact, in which case *IPP* must comply with the *Customer’s* reasonable directions in relation to the discovery of *artefacts*,
      4. as soon as *IPP* becomes aware of such damage, non-compliance, or discovery.
  1. Entry by Customer
     + 1. *IPP* must permit entry to the *site* by *Customer* at all reasonable times on *Customer* giving reasonable *notice* to *IPP*, or on demand (without *notice*) in the case of *emergency*, to:
          1. inspect the condition of the *site*;
          2. perform any obligation or exercise any rights under the *agreement*;
          3. protect any *Customer’s* *associates* and any property of *Customer*;
          4. ensure compliance with *IPP’s* obligations under this *site licence*.
       2. When exercising these rights, *Customer* agrees to comply with any reasonable directions of *IPP* with regard to safety on the *site*.
  2. Consequences of termination
     + 1. If *IPP* is required to undertake *decommissioning works* under the *agreement*, then for the purposes of *IPP* complying with this obligation *Customer* agrees to grant to *IPP* a licence for up to [3] *months* to enter upon and use the *site* on a monthly holding over basis on the same terms and conditions as contained in this *site licence*.
       2. Any holding over by *IPP* after the expiration or sooner termination of the *site licence* will not constitute a renewal or extension of this *site licence* or give *IPP* any rights in or to the *site* or any part thereof.
       3. This clause F.4 survives the termination of the *agreement*.

1. – Installation of equipment and other works
   1. *IPP* to undertake the works

*IPP* must undertake, complete and commission the *works*. *IPP* must not undertake any *works* until *IPP* has obtained all necessary *approvals* as required by Appendix E and any other requirements set out in the *site licence*.

* 1. Customer to undertake the customer works

*Customer* must undertake, complete and commission the *customer works*. *Customer* must not undertake any *customer works* until *Customer* has obtained all necessary *approvals* as required by Appendix E.

* 1. Standard for works and customer works

*IPP* and *Customer* must undertake the *works* and *customer works* respectively:

* + - 1. in accordance with:
         1. the *agreement* and this appendix;
         2. *good industry practice*s; and
         3. the *agreed works program*;
      2. in conformity, and to ensure compliance, with:
         1. the *performance requirements*;
         2. all *approvals*; and
         3. all relevant laws.
  1. Installation generally at *IPP’s* risk

Except where this *agreement* provides otherwise, *IPP* accepts all risks in connection with the *equipment*, the *site* and its performance of its obligations under this appendix, and will not be entitled to make any claim against *Customer* arising out of or in connection with any such risk.

* 1. Progress reporting the works
     1. Reporting
        1. *IPP* must provide a report to *Customer*, at regular intervals to be agreed by the Parties (or failing *agreement* as reasonably specified by *Customer* but not more frequently than monthly), that includes the progress and status of the *works*.
        2. *Customer* must provide a report to *IPP*, at regular intervals to be agreed by the Parties (or failing *agreement* as reasonably specified by *IPP* but not more frequently than monthly), that includes the progress and status of *Customer works*.
     2. Progress Meetings

If reasonably requested by *Customer* or *IPP*, the parties must attend a progress meeting to discuss matters contained in a report supplied pursuant to clause G.5.1.

* 1. Timing for completion of works and customer works
     1. Timing for completion
        1. The *agreed works program* sets out:
           1. the key dates and activities for performance of the *works*, including the *date for commercial operation*; and
           2. the key dates and activities for performance of the *customer works*.
        2. *Customer* and *IPP* may at any time agree to vary the *agreed works program*.
  2. Extensions of time
     1. Extensions of Time entitlement

*IPP* is entitled to an *extension of time* for each day that *IPP* suffers a delay in achieving *commercial operation*, due to or as a consequence of the occurrence of a *delay event*.

* + 1. Claiming an Extension of Time

To claim an *extension of time*:

* + - 1. promptly after *IPP* becomes aware of a *delay event* that causes an actual or potential delay to the achievement of *commercial operation* and in any event within 5 *business days*, *IPP* must give *notice* to *Customer* referencing this clause G.7.2 and keep *Customer* updated with progress of the actual or potential delay;
      2. *IPP* must take all reasonable actions to avoid or, if it is not possible to avoid, to minimise the consequences of any *delay event* referred to in clause G.7.2a);
      3. within 10 *business days* after giving *notice* under clause G.7.2a) of an actual delay, *IPP* must submit a *notice* to *Customer*, which must:
         1. give detailed particulars of the delay and the specified *delay event* causing the delay;
         2. state the period of time for which an *extension of time* is claimed as a result of the specified *delay event*, together with the basis of calculating that period, and any relevant supporting documentation demonstrating that *IPP* will be delayed in achieving *commercial operation*; and
         3. describe any action that *IPP* has taken and proposes to take to avoid or, if it is not possible to avoid, to minimise the consequences of the specified *delay event*.
    1. Extension of Time

Within 10 *business days* after receipt of the information required under clause G.7.2c), *Customer* must notify *IPP* of the grant or refusal of an *extension of time* for the *date for commercial operation* (as the case may be) provided that *Customer* must:

* + - 1. act reasonably in assessing the request for an *extension of time*; and
      2. grant an *extension of time* if *IPP* suffers a critical path delay as a result of the relevant *delay event*.
  1. Delay Liquidated Damages
     1. Delay Liquidated Damages for delay
        1. If *commercial operation* is not achieved by the *date for commercial operation* *IPP* must pay to *Customer* liquidated damages in the amount of the *delay liquidated damages rate* for each day of the period after the *date for commercial operation* up to and including the first to occur of the:
           1. date of commercial operation;
           2. date of termination of this *agreement*; and
           3. date on which the *delay liquidated damages cap* is reached,

(***delay liquidated damages***).

* + - 1. Where *IPP* is liable to pay *delay liquidated damages* *IPP* must pay any *delay liquidated damages* owing to *Customer* within 10 *business days* of *IPP* receiving an invoice from *Customer*.
    1. Delay Liquidated Damages a debt due and owing

*Delay liquidated damages* are deemed to have accrued each day and are a debt due and owing from the date that the invoice is received by *IPP* under clause G.8.1a)i).

* + 1. General damages if unenforceable

If any *delay liquidated damages* are determined to be invalid or unenforceable for any reason, *Customer* is entitled to *claim* against *IPP* for all loss or damage suffered or incurred by it as a result of a failure by *IPP’s* to achieve *commercial operation* by the *date for commercial operation*, provided that any such loss or damage recovered must not exceed the amount that would have been payable had the *delay liquidated damages* been enforceable.

* + 1. Delay Liquidated Damages not a penalty

The parties acknowledge that the amounts of *delay liquidated damages* have been the subject of negotiation between the parties and are considered to be a genuine and reasonable pre-estimate of the loss or damage likely to be suffered by *Customer* if *commercial operation* is not achieved by the *date for commercial operation* and are not a penalty.

* + 1. Effect on Claims
       1. Subject to clause G.8.5b), nothing in clause G.8.1 affects any right of *Customer* to make a claim that is not a claim for, arising from or connected with a failure by *IPP* to achieve *commercial operation* by the *date for commercial operation*.
       2. *Customer* acknowledges that any entitlement of *Customer* to *delay liquidated damages* under clause G.8.1, or general damages under clause G.8.3 (as the case may be), will be *Customer’s* sole and exclusive remedy for a failure by *IPP* to achieve *commercial operation* by the *date for commercial operation*.
  1. Preliminary completion
     1. Notice of Preliminary Completion
        1. *IPP* will only achieve *preliminary completion* if the *works* are substantially complete, except for minor defects which do not hinder or prevent the safe and effective performance of the *equipment*.
        2. If *IPP* considers that *preliminary completion* has been achieved, *IPP* must give a *notice* to *Customer* to that effect and the *notice* must include the date *IPP* considers that *preliminary completion* was achieved.
  2. Commissioning
     1. Notices for Commissioning Tests

Following *preliminary completion*, *IPP* must give *Customer* at least 10 *business days*' *notice* prior to commencing *commissioning tests* of any *equipment* and allow *Customer* (and any representative that *Customer* requires) to be present and to witness all *commissioning tests*.

* + 1. Commissioning Tests
       1. *IPP* must promptly provide to *Customer* any information and documentation reasonably requested by *Customer* with respect to any conducted *commissioning tests* within 5 *business days* of request.
       2. *IPP* must give *Customer* *notice* when each and all of the *commissioning tests* have been passed, or not passed, along with evidence of the results achieved in *commissioning tests*.
       3. If the *works* or any part of the *works* fail a commissioning test, *IPP* must take whatever steps are necessary to enable the relevant *works* to pass *commissioning tests* and must then repeat the relevant *commissioning tests*.
       4. The parties acknowledge and agree that where all *commissioning tests* have been completed and passed *IPP* must provide *Customer* with a written copy of the results of the *commissioning tests* that demonstrates that the *performance requirements* have all been met.
  1. Commercial Operation
     1. Notice of Commercial Operation
        1. *IPP* will only achieve *commercial operation* if each of the following conditions have been satisfied:
           1. *preliminary completion* has been achieved and all minor defects have been rectified;
           2. all *commissioning tests* have been successfully completed;
           3. [any *approvals* required from the *network service provider* to commence operation of the *equipment* have been obtained.] *[Note: Include if grid connected.]*
           4. the *equipment* is capable of generating *electricity* and exporting that *electricity* to the *mine site* in accordance with the *performance requirements*; and
           5. [the *mine site* is capable of importing *electricity* from the *equipment* at the *supply points*]. *[Include if falls within IPP’s responsibility]*
        2. If *IPP* considers that *commercial operation* has been achieved, *IPP* must give a *notice* to *Customer* to that effect and the *notice* must include the date *IPP* considers that *commercial operation* was achieved. *IPP* must not give a *notice* under this clause unless all of the requirements under clause G.11.1a) have been satisfied.
  2. Variations to the works
     1. Restriction on IPP variations
        1. *IPP* must not undertake any *variation* to the *works* under this appendix without prior written consent of *Customer* (acting reasonably), if such *variation* would:
           1. adversely impact on the fitness for purpose of the *works*;
           2. result in, or be reasonably likely to result in, a delay to the *date for commercial operation*;
           3. adversely impact on the compliance of the *works* with *laws* and *approvals*;
           4. adversely affect the *customer works*; or
           5. result in additional cost or risk for *Customer* under this appendix or the *agreement*.
        2. If *Customer* validly withholds consent under clause G.12.1a):
           1. *Customer* is not liable to *IPP*; and
           2. *IPP* is not entitled to an *extension of time* or to make any other *claim* against *Customer*,

in connection with the proposed *variation* or *Customer* withholding its consent.

* + 1. Variation requests
       1. At any time before *preliminary completion, Customer* may notify *IPP* that it requests a *variation*. *IPP* will not be obliged to perform any *variation* that this is not requested by *Customer* expressly under this clause G.12.2.
       2. If *Customer* requests a *variation* in accordance with clause G.12.2a) *IPP* must:
          1. within 10 *business days* of receiving the request determine whether the *variation* is feasible having regard to *good industry practice,* the *agreed work program* and all other systems and process in place in respect of the *works;* and
          2. notify *Customer* whether *IPP* agrees to undertake the *variation* or rejects the *variation* request.
       3. If *IPP* agrees to undertake the *variation*, *IPP* must, within 10 *business days* provide *Customer* with a *variation* quotation which sets out:
          1. the price or cost associated with undertaking the work the subject of the *variation* request based on reasonable rates and prices, including the costs associated with any potential delay by incorporation of the *variation* into the *agreed works program* (or an estimate of the price and cost where this cannot be determined with certainty at the time the *variation* quotation is issued); and
          2. the effect of the *date for commercial operation* which performing the *variation* will have.
       4. As soon as reasonably practicable and within not more than 10 *business days* of receiving the *variation* quotation, *Customer* must notify *IPP* whether it wishes to proceed with the *variation* and if *Customer* notifies *IPP* that it does wish to proceed:
          1. *IPP* must carry out the *variation;*
          2. *Customer* will be indebted to *IPP* for the additional price or cost associated with undertaking the work the subject of the *variation* which debt will be cleared by way of an adjustment to the *fixed charges* under the *agreement,* or at *Customer’s* election by payment on invoice of the relevant *variation* costs; and
          3. the *date for commercial operation* will be adjusted as set out in the *variation* quotation.
    2. Adjustment claims
       1. The parties acknowledge and agree that to the extent this appendix provides that *Customer* will be indebted to *IPP* for documented and verifiable additional costs incurred by *IPP* carrying out additional *works* or altering the *works*, this clause G.12.3 applies unless expressly stated otherwise.
       2. Except in respect of a *variation* approved under clause G.12.2d), *IPP* must:
          1. use reasonable endeavours (consistent with *good industry practice*) to minimize the extent of any additional works or alterations to the *works* and to mitigate and minimize the cost of such *works* or alterations; and
          2. as soon as reasonably practicable give *Customer* a notice specifying:

reasonable details of any circumstances requiring additional works to the *works* or alterations to the *works* and the extent of those additional works or alterations;

supporting information reasonably required to verify *IPP’s* assessment; and

the expected cost of the additional works or alterations and the change that this will cause to the *fixed charges* under the agreement if payment is by way of an adjustment to the *fixed charges.*

* + - 1. Within 5 *business days* of receiving the notice under G.12.3b)ii), the parties must meet and agree the additional *works* required or alterations to the *works* and any failure to agree within 5 *business days* of receipt of a notice from *IPP* under this clause G.12.3c) may be referred by either party for *expert* determination under clause 33.3 of the *agreement.* This clause G.12.3c) does not apply:
         1. to *variations* instructed by *Customer* under clause G.12.2d); or
         2. to additional or altered *works* carried out in an *emergency*.
      2. Once the additional or altered *works* are agreed or determined under clause G.12.3c), *Customer* will be indebted to *IPP* for the additional price or cost associated with the additional or altered *works* which debt will be cleared by way of an adjustment to the *fixed charges* under the *agreement,* or at *Customer’s* election by payment on invoice of the relevant documented and verified additional costs or as otherwise agreed by the parties.

Signing page

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| --- | --- | --- |
| **Signed by [*IPP*]** as an agreement under s 127 of the Corporations Act: | )  )  ) |  |
|  |  |  |
| Signature of Director |  | Signature of Director/Company Secretary  (Delete title which does not apply) |
|  |  |  |
| Print name in full |  | Print name in full |

|  |  |  |
| --- | --- | --- |
| **Signed by [Customer]** as an agreement under s 127 of the Corporations Act: | )  )  ) |  |
|  |  |  |
| Signature of Director |  | Signature of Director/Company Secretary  (Delete title which does not apply) |
|  |  |  |
| Print name in full |  | Print name in full |

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1. Note: “(Cth)” indicates that the legislation is Commonwealth, i.e. Federal legislation rather than State. [↑](#footnote-ref-1)