

**SOUTH AUSTRALIAN GRID-
CONNECTED BATTERY FACILITY
PROJECT AGREEMENT**

JOHNSON WINTER & SLATTERY
L A W Y E R S

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LIABILITY LIMITED BY A SCHEME APPROVED UNDER PROFESSIONAL STANDARDS LEGISLATION (AUSTRALIA-WIDE EXCEPT IN TASMANIA)

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SOUTH AUSTRALIAN GRID-CONNECTED BATTERY FACILITY

Date *6 July 2017*

Parties

- 1 **The Minister for Mineral Resources and Energy, a body corporate pursuant to the Administrative Arrangements Act 1994 (SA) (SA Party)**

Address: State Administration Centre, 200 Victoria Square, Adelaide, South Australia

- 2 **Hornsedale Power Reserve Pty Ltd (ACN 619 311 983) (Contractor)**

Address: Suite 3, Level 14 227 Elizabeth Street, Sydney NSW 2000

- 3 **Tesla Motors Australia, Pty Ltd (ABN 68 142 889 816) (Tesla)**

Address: 10 Herbert Street, St Leonards NSW 2065

Recitals

- A To enhance and ensure the security and stability of the electricity network and electricity supply in South Australia, the SA Party wishes to obtain the services of the Facility, to be constructed, commissioned and in operation by and from 1 December 2017.
- B The Facility will provide key system security services to maintain power system security, integrity and stability for the South Australian electricity network, prevent certain load shedding events, provide supply during critical peak periods and participate in ancillary services and wholesale electricity markets.
- C This agreement sets out the terms on which the Contractor will design, construct, commission and test the Facility and will own, operate and maintain the Facility so as to provide the Services.
- D Tesla is a party to this agreement for the purposes of undertaking to the SA Party, the performance of its obligations under the Contractor IPP.

Operative part

1 Definitions and interpretation**1.1 Definitions**

In this agreement:

Acceptable Security Provider means a financial institution (including a foreign bank):

- (a) that is an "authorised deposit-taking institution", as defined and regulated in accordance with the *Banking Act 1953* (Cth); and
- (b) that has a Credit Rating of at least A- (Standard & Poor's) or A3 (Moody's Investor Service).

AEMO means the Australian Energy Market Operator Limited (ACN 072 010 327).

Affected Party is defined in clause 27.1.

Annual Test means the test set out in item 3(a) of Schedule 3.

Asset Management Plan means the plan to be provided in accordance with clause 42.

Authorisation means:

- (a) any consent, authorisation, registration, filing, recording, agreement, notarisation, certificate, permission, licence, approval, permit, authority or exemption from, by or with, a Governmental Agency or judicial body; and
- (b) in relation to any act, matter or thing which may be proscribed or restricted in whole or in part by Law or otherwise if a Governmental Agency or judicial body intervenes or acts in any way within a specified period after lodgement, registration or other notification of the act, matter or thing, the expiration of the period without the intervention or action.

Baseline and Credit ETS is defined in clause 22.3.

Business Day means a day other than a Saturday, Sunday or public holiday in Adelaide, South Australia.

Capacity means the ability or capacity of the Facility to provide the Services in a manner that meets all requirements of this agreement.

Carbon Benefits is defined in clause 22.3.

Certificate of Performance Validation has the meaning given in clause 11.2(e).

Change Event means any:

- (a) change in or repeal of any existing Law or the imposition of a new Law;
- (b) imposition of an Authorisation not required at the Execution Date including due to a change in the circumstances in which an Authorisation is required, but excluding any Authorisation which was not required at the Execution Date but the requirement for which existed at the Execution Date;
- (c) change in the terms of any Authorisation after the date such Authorisation is granted;
- (d) change in the interpretation of any Law or Authorisation resulting from the decision of a Governmental Agency;
- (e) Change in National Electricity Rules; or
- (f) Change in Relevant Taxes,

that occurs after the Execution Date and which could not reasonably have been expected by the Contractor or a Contractor Associate (assuming diligent and prudent enquiries and investigations were carried out), but does not include:

- (g) a change to the length of the Trading Interval under the National Electricity Rules or a change to the market price cap or the market price floor each as defined in the National Electricity Rules or a change to the boundaries of the regions in the National Electricity Market; or
- (h) the introduction of Laws relating to the Electricity Security Target.

Change in National Electricity Rules means a change in:

- (a) the National Electricity Rules;
- (b) any Law made in connection with the National Electricity Rules; or
- (c) any application of the National Electricity Rules.

Change in Relevant Taxes means:

- (a) the imposition of a new Relevant Tax or the abolition of a Relevant Tax;
- (b) any increase or reduction in the rate of a Relevant Tax; or
- (c) a change in the basis of a calculation of a Relevant Tax.

Change of Control is defined in clause 33.1.

Claim includes any claim, proceeding, action, cause of action, demand or suit (including by way of contribution or indemnity) under this agreement, at law or in equity, including for payment of money (including damages) or for an extension of time, including by statute (to the extent permitted by Law), in tort for negligence or otherwise, including negligent misrepresentation or for strict liability or for restitution.

Confidential Information is defined in clause 36.1.

Conflict of Interest means any pecuniary or other interest whether current or perceived of the Contractor, or any Contractor Responsible Party, in any matter which conflicts or potentially conflicts with the obligations, liabilities or rights of the Contractor arising out of, or in respect of, this agreement.

Connection Point is defined in Schedule 1.

Consequential Loss is defined in clause 31.3.

Construction Completion means that stage in carrying out the Works when:

- (a) the Facility is installed, commissioned and connected to the Network and is ready for the Performance Tests to be performed;

- (b) all Authorisations required for operation and use of the Facility have been granted or issued (on terms reasonably acceptable to the SA Party) and there is no legal impediment to the use or operation of the Facility; and
- (c) any other requirements that must be satisfied or completed before Construction Completion can be achieved, as set out elsewhere in this agreement, are satisfied or completed,

all in accordance with this agreement (including the Functional Specifications and Good Industry Practice).

Construction Period means the period:

- (a) commencing on and from the Execution Date; and
- (b) ending on the earlier of the date on which this agreement terminates in accordance with its terms and the Services Commencement Date.

Construction Phase Security means an unconditional and irrevocable undertaking which complies with the Security Requirements for an amount required under clause 6.1.

Construction Plant means apparatus, equipment, machinery, plant, tools and vehicles and each other thing that is required by or used by the Contractor or Subcontractors for or in carrying out the Works, but not forming part of the Facility.

Construction Program means a comprehensive program setting out the steps to be taken by the Contractor to ensure it complies with the Construction Timetable and the requirements of this agreement relating to the quality and standard of the Works.

Construction Timetable means the timetable set out in Annexure C, as amended in accordance with this agreement.

Contract Payments means the payments, credits and adjustments to be made by the SA Party or the Contractor (as the case may be) set out in Schedule 2.

Contract Year means the period of 12 months commencing from (and including) the Services Commencement Date, and each 12 month period after that in the Services Period.

Contractor Associate means any:

- (a) Personnel of the Contractor; and
- (b) Related Body Corporate of the Contractor, and Personnel of such Related Body Corporate.

Contractor IPP means the Industry Participation Plan contained in Annexure D.

Contractor Representative means a natural person appointed by the Contractor as its representative for the purposes of this agreement, under and in accordance with clause 7.2.

Contractor Responsible Party means:

- (a) the Contractor and Contractor Associates; and
- (b) each Subcontractor and the Personnel of each Subcontractor.

Control is defined in clause 33.1.

Controller has the meaning set out in section 9 of the Corporations Act and, for the avoidance of doubt, includes a person or persons (jointly or jointly and severally) appointed under or pursuant to any charge as a receiver or receiver and manager or as an attorney for the chargee or as the chargee's agent.

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

Credit Rating means, in respect of an entity, the published rating then assigned by a ratings agency referred to in the definition of Acceptable Security Provider to the unsecured, senior long term debt obligations of the entity.

Date for Services Commencement is defined in Schedule 1, as may be extended under clause 8.3.

Default means an Insolvency Default, a Financial Default or a Non-Financial Default.

Default Notice means a notice served by a Non-Defaulting Party on a Defaulting Party in accordance with clause 29.1(a).

Default Rate means the Interest Rate plus 2%.

Defaulting Party means the party which has committed a Default.

Defect means:

- (a) any error, deficiency, omission, non-conformity, fault, failure, malfunction, irregularity or other defect in the Works or the Facility or the performance of the Facility; or
- (b) any other aspect of the Works, Equipment and Materials or the Facility which is not in accordance with the requirements of this agreement.

Defect Notice is defined in clause 18.4(b).

Delay Liquidated Damages means liquidated damages payable by the Contractor to the SA Party under clause 12.1.

Delay Liquidated Damages Cap is defined in Schedule 1.

Delay Liquidated Damages Rate is defined in Schedule 1.

Development Authorisation means any consent to or approval of the Project required under and in accordance with the *Development Act 1993* (SA), or any exemption from the requirements for such consent or approval, but does not include any consents required under the *Development Act 1993* (SA) in relation to compliance with the Building Rules (as that term is defined in that Act).

Direct Costs means direct costs properly incurred and does not include depreciation, mark ups, overhead or profit.

Dispose is defined in clause 33.1.

Documents means documentation required for the undertaking of the Works or the use, operation and/or Maintenance of the Facility which is required to be prepared by the Contractor as part of the Works, including the documentation specified in the Functional Specifications.

Encumbrance is defined in clause 33.1.

End Date is defined in Schedule 1.

Energy Storage Capacity means the capacity of the Facility to charge, store and discharge energy in MWh as determined and calculated in accordance with the Functional Specifications.

Environment has the meaning given to that expression in section 3(1) of *Environment Protection Act 1993* (SA).

Equipment and Materials means the apparatus, equipment, machinery, materials, plant, systems and any other thing, which is procured or used by a Contractor Responsible Party in connection with the Works or the Services, and which is intended to become or becomes part of the Facility, or which is to be used for operating, maintaining or repairing the Facility, including spare parts and special tools, but excluding Construction Plant.

Execution Date means the date of this agreement, being the date the last of the parties to sign this agreement has executed the agreement.

Expert means an expert appointed in accordance with clause 34.

Expert Dispute is defined in clause 34.1.

Extension Event means any delay in the performance of the Works by the Contractor or to Performance Validation to the extent that it results from:

- (a) a breach of this agreement by the SA Party;
- (b) an act or omission of the SA Party, the SA Party Representative, any of the SA Party's employees, agents, consultants or contractors (excluding the Contractor and its Personnel), which impedes or prevents the Contractor in or from carrying out the Works, unless due to:
 - (i) a breach of this agreement by the Contractor;
 - (ii) an act of the SA Party in the performance of a duty or requirement imposed by Law, or in the proper exercise of a right under this agreement; or
 - (iii) the occurrence of an event or the existence of circumstances the risk of which has been accepted, or the occurrence of a matter or event, the responsibility for which has been accepted, by the Contractor under this agreement;

- (c) a Modification directed by the SA Party under clause 19;
- (d) a Project Specific Change Event;
- (e) a Project Authorisation Delay;
- (f) a Network Connection Delay; or
- (g) a Force Majeure Event where the Contractor is the Affected Party.

Facility is defined in Schedule 1.

Financial Default means:

- (a) a failure by one party to pay an amount due to the other party under and in accordance with this agreement, where such an amount is not the subject of a bona fide dispute; or
- (b) a failure to provide or maintain a Security in accordance with this agreement.

Financier means a lender or syndicate of lenders providing debt financing in relation to the Facility (whether during or after its construction) or any agent or security trustee acting on behalf of such lender or lenders.

Force Majeure Event is defined in clause 27.1.

Functional Specifications means the specifications set out in Annexure A.

Good Construction Industry Practice means the exercise of that degree of skill, care, diligence, efficiency, prudence and foresight that would be expected from skilled and experienced and internationally recognised designers, engineers and constructors of facilities of a similar type, size and value under conditions comparable to the Project and the Site consistent with applicable Laws, Authorisations, industry codes, standards, reliability, safety and environmental protection and carried out with due expedition.

Good Electricity Industry Practice means the exercise of that degree of care, diligence, efficiency, prudence and foresight that would be expected from skilled and experienced and internationally recognised operators of facilities of a similar type, size and value under conditions comparable to the Project and the Site consistent with applicable Laws, Authorisations, industry codes, standards, reliability, safety and environmental protection and carried out with due expedition.

Good Industry Practice means Good Construction Industry Practice or Good Electricity Industry Practice, as the case may be.

Governmental Agency means any government, governmental or semi-government or judicial entity, any body politic, any ministry, department, commission, tribunal, agency, inspectorate, official, public or statutory person or other statutory, administrative, supervisory or regulatory entity, domestic or foreign, federal, state or local.

Greenhouse Gas is defined in clause 22.3.

Greenhouse Law is defined in clause 22.3.

GST is defined in clause 23.7(a).

Guaranteed Capacity is defined in clause 13.1(a).

Incentive means employment or consultancy, any gift, reward, gratuity or other valuable consideration of any kind.

Indemnified Parties means the SA Party and its Personnel, the SA Party Representative and any delegate appointed by the SA Party Representative, and **Indemnified Party** has a corresponding meaning.

Independent Engineer is defined in clause 7.3(a).

Industry Participation Advocate means the person who from time to time has been appointed to the position of Industry Participation Advocate within the Office of the Industry Advocate of the Government of South Australia.

Industry Participation Reporting Period is defined in clause 46(e).

Insolvency Default means any of the following events or circumstances occurring in relation to a person:

- (a) a receiver, manager, receiver and manager, trustee, administrator, Controller or similar officer is appointed in respect of the person or any asset of the person;
- (b) a liquidator or provisional liquidator is appointed in respect of the person;
- (c) any application (not being an application withdrawn or dismissed within 10 Business Days) is made to a court for an order, or an order is made, or a meeting is convened, or a resolution is passed, for the purpose of:
 - (i) appointing a person referred to in paragraph (a) or (b);
 - (ii) winding up of the person; or
 - (iii) proposing or implementing a scheme of arrangement in respect of the person (other than as part of a solvent reconstruction, amalgamation, merger or consolidation);
- (d) a moratorium of any debts of the person or any official assignment or a composition or an arrangement (formal or informal) with the person's creditors or any similar proceeding or arrangement by which the assets of the person are subjected conditionally or unconditionally to the control of the person's creditors is ordered, declared or agreed to, or is applied for and the application is not withdrawn or dismissed within 10 Business Days (unless this takes place as part of a solvent reconstruction, amalgamation, merger or consolidation);
- (e) the person takes any step to obtain protection, or is granted protection, from its creditors under any applicable Law;

- (f) the person becomes, admits in writing that it is, is declared or is deemed under any applicable Law to be, insolvent or unable to pay its debts;
- (g) any writ of execution, garnishee order, mareva injunction or similar order, attachment, distress or other process is made, levied or issued against or in relation to any asset of the person which is material in the context of this agreement (and which is not withdrawn or dismissed within 10 Business Days); or
- (h) any act is done or event occurs which under the Laws from time to time of a country other than Australia has an analogous or similar effect to any of the events in paragraphs (a) – (g).

Intellectual Property Rights means any and all current and future intellectual and industrial property rights and interests, including any:

- (a) patents, trade marks, service marks, rights in designs, trade names, copyrights, utility models, eligible layout rights and topography rights, inventions, discoveries, trade secrets, know how, software and improvements;
- (b) applications for, or right to apply for, registration of any of them;
- (c) rights under licences and consents in relation to any of them; and
- (d) other forms of protection of a similar nature or having equivalent or similar effect to any of them,

in Australia and the world, whether registered or unregistered, for the duration of the rights and interests.

Interest Rate means 2% per annum plus the average bid rate displayed at or about 10.30am (Sydney time) on the first Business Day of each month on the Reuters screen BBSY page (or any page or service which replaces it) for bills of exchange with tenor of 90 days. Should this rate no longer be available, then an equivalent rate as agreed by the parties acting reasonably and, if the parties cannot agree such equivalent rate within 20 Business Days after it is no longer available, as determined by the Expert.

Interruption is defined in clause 18.3(a).

Law means:

- (a) the common law;
- (b) all Acts of South Australia or Commonwealth Parliament;
- (c) all regulations, codes, ordinances, local laws, by-laws, legislative instruments, orders, judgments, licences, rules, and permits; and
- (d) legally binding requirements of all Governmental Agencies.

Loss means a loss, liability, cost, charge (including advisers' costs, charges and expenses) or expense of any kind and however arising (whether in contract, negligence, another tort, the general law, under statute or otherwise), including damages, penalties, fines and interest and

including those that are prospective or contingent and those the amount of which for the time being is not ascertained or ascertainable, and includes any legal fees and amounts paid in settlement of a Claim or satisfaction of a judgement.

Maintenance means inspection, testing, maintenance and repair of the Facility.

Management Plan is defined in clause 42(c).

Market Capacity is defined in clause 13.1(c).

Market Charges means any fees and charges payable by a market participant under the National Electricity Rules from time to time, including 'market fees', 'system operation fees', 'regulator fees', 'service fees', 'security deposits' and 'application fees' (as those fees are defined in the National Electricity Rules).

Metered Electricity means the quantity of electric energy (in MWh) exported from the Facility at the Connection Point.

Metering Data means kWh and kVAh readings in respect of Metered Electricity for each Trading Interval, measured by the Metering Equipment (as applicable).

Metering Equipment means plant, equipment and facilities (including meters, current transformers and voltage transformers) to measure and record the rate and the quantity of active and reactive electricity generated from the Facility and exported at the Connection Point.

Milestone means an event specified in the Construction Timetable as a "Milestone".

Minimum Energy Storage Capacity means the Minimum Energy Discharge Guarantee Level set out in item 4 of Schedule 3.

Minimum Power Output Capacity means the Minimum Real Power Output Capacity Guarantee Level set out in item 4 of Schedule 3.

Modification means:

- (a) during the Construction Period:
 - (i) any material change to the Functional Specifications; or
 - (ii) material increase, decrease or omission to or from any part of the Works; and
- (b) during the Services Period:
 - (i) a material change to the Facility including as to capacity, technology or type of Equipment and Materials (not already contemplated by or provided for in this agreement); or
 - (ii) a material change to the Services (not already contemplated by or provided for in this agreement).

Modification Costs is defined in clause 19(a)(i).

Modification Quotation is defined in clause 19(a).

Modification Quotation Request is defined in clause 19(a).

Modification Savings is defined in clause 19(a)(ii).

MW means megawatt(s).

MWh means megawatt-hour(s).

National Electricity Law means the National Electricity Law as that term is defined in the *National Electricity (South Australia) Act 1996 (SA)*.

National Electricity Market means the market conducted pursuant to the National Electricity Law and the National Electricity Rules.

National Electricity Rules or **NER** means the "*National Electricity Rules*" made under the National Electricity Law.

Neoen SAS means Neoen SAS (RCS 508 320 017), a company duly organized and existing under the laws of France, with its head office situated at 4 rue Euler 75008 Paris.

Net Financial Effect means the net effect in financial terms of the Change Event on the Contractor's Relevant Costs, including any offsetting benefits or adverse effects directly or indirectly connected to the Change Event.

Network means the Transmission Network (as that term is defined in the National Electricity Law) to which the Facility will be connected at the Connection Point.

Network Connection Agreement means an executed agreement between the Contractor and the Network Service Provider in respect of the connection of, and access by, the Facility to the Network which gives the Contractor the right to import and export electricity from and to (as the case may be) the Network so as to allow the Contractor to meet its obligations under this agreement.

Network Connection Delay means a delay in or failure of the Contractor to enter into a Network Connection Agreement, provided that the Contractor has used all reasonable endeavours to enter into such an agreement and has complied in all respects with the requirements of the Network Service Provider in relation to obtaining access to the Network (including providing any and all information required by the Network Service Provider within the time required by the Network Service Provider). The Contractor will be deemed to not have used all reasonable endeavours where the Network Service Provider has offered the Contractor access to the Network which would allow the Contractor to meet its obligations under this agreement on terms and conditions which are similar (having regard to this agreement and the Services) to any published standard terms and conditions of the Network Service Provider or terms and conditions generally offered to other applicants.

Network Charges means all charges imposed by the Network Service Provider from time to time in respect of the Facility (including annual charges, network usage charges, intermittency charges, standby charges and relevant metering charges and regulatory charges).

Network Service Provider means ElectraNet Pty Limited ACN 094 482 416.

Neutral Event means any event not caused or contributed to by the Contractor or a Contractor Responsible Party including Force Majeure Event.

New Service Notice is defined in clause 14.3(d).

Non-Defaulting Party means the party not in Default.

Non-Financial Default means a party's failure to perform or comply with any of its obligations under this agreement, other than a Financial Default or an Insolvency Default.

Operating Protocol means the protocol for the dispatch of the Services agreed by the parties or issued by the SA Party in accordance with clause 15.1, as amended from time to time in accordance with clause 16.2.

Parent Guarantee means a guarantee of the obligations of the Contractor under this agreement substantially in the form set out in Annexure E.

Performance Guarantees means the guarantees that are set out in item 4 of Schedule 3.

Performance Tests means the tests specified in item 1(a) of Schedule 3 in respect of the Facility.

Performance Validation means:

- (a) Construction Completion has occurred; and
- (b) the Performance Tests have been run and passed; and
- (c) the Services Period Security has been provided.

Personnel means, in relation to a person, its directors, officers, employees, agents, consultants and contractors.

Power Output Capacity means the real power capacity of the Facility in MW as determined and calculated in accordance with the Functional Specifications.

Power System Security Services is defined in clause 14.3(b).

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

Project means the project for the design, construction, commissioning and performance validation of the Facility, the connection of the Facility to the Network, the operation and Maintenance of the Facility and the provision of the Services by the Contractor, all pursuant to or as contemplated by this agreement.

Project Authorisation Delay means a delay in the SA Party obtaining the Development Authorisation.

Project Document means:

- (a) lease agreement between the Contractor and Hornsdale Asset Co Pty Ltd ACN 605 943 137 for the Site or such other land agreements entered into by the Contractor

for the Site as agreed between the Contractor and the SA Party to be a Project Document;

- (b) the engineering, procurement and construction contract between Tesla and the Contractor in respect of the Facility;
- (c) the Network Connection Agreement;
- (d) any Third Party Contract; or
- (e) any operations and maintenance agreement entered into by the Contractor in respect of the Facility.

Project Specific Change Event means a Change Event that expressly and exclusively applies to the Project, the Facility or the Contractor, but only in its capacity as the entity contracting with the SA Party to implement the Project.

Related Body Corporate has the meaning given to that term in the Corporations Act.

Relevant Cost means the actual direct costs, exclusive of GST, which are incurred by the Contractor in performing its obligations under this agreement, excluding:

- (a) any costs already payable by the SA Party under this agreement;
- (b) depreciation, mark ups or overheads; and
- (c) any fine, penalty or interest in respect of any Relevant Taxes or any income tax, fringe benefits tax, capital gains tax, import duty, payroll tax, land tax or municipal rates or charges.

Relevant Date is defined in clause 28.3(b).

Relevant Proportion means the proportion that the Reserve Capacity (being either the Reserved Energy Storage Capacity or the Reserved Power Output Capacity the SA Party nominates having regard to the nature of the Relevant Costs incurred) bears to the relevant total capacity of the Facility as at the date of the Change Event.

Relevant Tax means any Tax:

- (a) which is specific to the Project; or
- (b) relating specifically to the production, acquisition, conveyance, supply or sale of electricity,

but does not include any fines, penalties or interest in respect of any such Taxes or any GST, income tax, fringe benefits tax, capital gains tax, import duty, payroll tax, stamp duty, land tax or municipal rates or charges or any Taxes that are similar or equivalent to any of the foregoing.

Reliability Tests means the tests specified in item 2(a) of Schedule 3 in respect of the Facility.

Reserved Capacity means the Reserved Power Output Capacity and the Reserved Energy Storage Capacity.

Reserved Energy Storage Capacity is defined in Schedule 1, as amended from time to time in accordance with this agreement.

Reserved Power Output Capacity is defined in Schedule 1, as amended from time to time in accordance with this agreement.

Resolution Institute Rules is defined in clause 34.2.

SA Party Representative means a natural person appointed by the SA Party as its representative for the purposes of this agreement, under and in accordance with clause 7.1.

Scheduled Maintenance means planned Maintenance of the Facility which is set out in an approved Scheduled Maintenance Plan.

Scheduled Maintenance Plan is defined in clause 18.3(e).

Security means a Construction Phase Security or a Services Period Security, and includes any replacement to them required under clause 6.5.

Security Invalidation Event means one of the following:

- (a) the issuer of a Security ceases to be an Acceptable Security Provider;
- (b) the issuer of a Security is subject to an Insolvency Default;
- (c) the issuer of a Security repudiates its obligations under the Security;
- (d) the issuer of a Security claims that the Security is no longer valid, binding or enforceable; or
- (e) for any other reason a Security ceases to be valid, binding or enforceable.

Security of Payment Act means the *Building and Construction Industry Security of Payment Act 2009* (SA).

Security Requirements means that a security is an unconditional and irrevocable undertaking to pay on demand which:

- (a) is issued by an issuer who is an Acceptable Security Provider;
- (b) does not have a specified expiry date;
- (c) specifies a location within Adelaide, South Australia where demand may be given and where payment will be made by the issuer on receipt of the demand; and
- (d) is substantially in the form set out in Schedule 5 or such other form acceptable to the SA Party.

Services means any services required to be provided by the Contractor as described in the Functional Specifications and otherwise in accordance with this agreement and includes any Power System Security Services.

Services Commencement Date means the date of Performance Validation, as certified in the Certificate of Performance Validation.

Services Period means the period of time defined in clause 2.2.

Services Period Security means an unconditional and irrevocable undertaking which complies with the Security Requirements for an amount required under clause 6.2.

Site means the site on which the Facility is to be constructed and located, as generally described in Schedule 6.

Statement is defined in clause 23.1(a).

Subcontractor means a person engaged to perform any part of the Works or Services:

- (a) by the Contractor directly; or
- (b) indirectly, by a series of subcontracts,

including consultants, vendors and suppliers, but excluding employees.

Sunset Date is defined in Schedule 1.

Tax means any present or future tax, levy, impost, deduction, charge, duty, or withholding of whatever kind and whether direct or indirect imposed by a Governmental Agency.

Term is defined in clause 2.1(a).

Tesla Inc means Tesla Inc, a company incorporated in Delaware, the United States of America with its principal place of business at 3500 Deer Creek Road, Palo Alto, CA 94304, USA.

Tesla Performance Guarantee means the guarantee substantially in the form set out in Annexure F.

Testing Stage means each of the following stages of the Works and Services:

- (a) factory acceptance tests;
- (b) pre-commissioning tests;
- (c) commissioning tests;
- (d) functional tests;
- (e) Performance Tests; and
- (f) Annual Test,

and at which stage, the SA Party has the right to attend and observe each test as further described in the Functional Specifications.

Third Party Buyer is defined in clause 14.3(e)(iv).

Third Party Contract is defined in clause 14.3(e)(iv).

Threshold Amount is defined in Schedule 1.

TLE Notice is defined in clause 28.1.

TLE Proportion means the proportion which the Capacity of the Facility affected by a Total Loss Event immediately before the Total Loss Event occurred bears to the Capacity of the Facility immediately before the Total Loss Event occurred.

TLE Trigger Percentage is defined in Schedule 1.

Total Loss Event means the total loss or destruction of the whole or part of the Facility or its total loss for insurance purposes.

Trading Interval has the meaning given in the National Electricity Rules.

Transaction Costs means Market Charges and Network Charges.

Uninsurable Event is defined in clause 28.5.

Works means all activities and works required to design, procure, construct, commission, test and validate the performance of the Facility in accordance with this agreement, including in relation to any Modifications and the rectification of Defects both as required in accordance with this agreement.

1.2 Interpretation

In this agreement, unless a contrary intention appears:

- (a) words or expressions importing the singular include the plural and vice versa and words or expressions importing a gender include the other gender;
- (b) words or expressions denoting individuals include corporations, firms, unincorporated bodies, partnerships, joint ventures, government authorities and instrumentalities;
- (c) a reference to a party includes that party's successors and permitted assigns;
- (d) where a word or expression is defined or given meaning, another grammatical form has a corresponding meaning;
- (e) any heading, index, table of contents or marginal note is for convenience only and does not affect the interpretation of this agreement;

- (f) a provision of this agreement will not be construed to the disadvantage of a party merely because that party was responsible for the preparation of this agreement or the inclusion of the provision in this agreement;
- (g) a reference to this agreement or another agreement includes that agreement as amended, varied, novated, supplemented or replaced from time to time;
- (h) a reference to legislation or a provision of legislation includes:
 - (i) all regulations, orders or instruments issued under the legislation or provision; and
 - (ii) any modification, consolidation, amendment, re-enactment, replacement or codification of such legislation or provision;
- (i) any schedule or annexure forms part of this agreement and has effect as if set out in full in the body of this agreement;
- (j) a reference to **dollars** or **\$** is a reference to Australian dollars;
- (k) where an act would be required to be done, or a time limit or period would expire, on a day which is not a Business Day, the act may be done, or the limit or period will expire, on the following Business Day;
- (l) a reference to time is to South Australia Standard Time;
- (m) references to **day**, **month**, **quarter** and **year** mean a calendar day, month, quarter and year respectively;
- (n) references to **include** and **including** are to be construed without limitation;
- (o) all numerical information used and calculations made under this agreement will be, as far as practicable, to an accuracy of 4 decimal places, or such greater accuracy as may be necessary to ensure that financial calculations are correct to the nearest cent;
- (p) all references to units of measurement are references to the units of measurement defined in or for the purposes of the *National Measurement Act 1960* (Cth); and
- (q) where an amount is referable to a Contract Year which comprises less than 365 days, that amount will be prorated accordingly.

1.3 **Priority**

Any inconsistency, ambiguity or discrepancy between any documents forming part of this agreement will be resolved using the following order of priority:

- (a) the operative clauses of this agreement;
- (b) Schedule 1 – Agreement Details;
- (c) Schedule 2 – Contract Payments;

- (d) Annexure A – Functional Specifications; followed by
- (e) the remainder of the Schedules or Annexures to this agreement.

1.4 Termination

If a notice of termination is given by the SA Party to the Contractor under this agreement, then this agreement automatically terminates as between all parties to this agreement.

2 Term and Services Period

2.1 Term

- (a) This agreement commences on the Execution Date and ends on the earlier of the End Date and the date this agreement is terminated or otherwise ends in accordance with its terms (**Term**).
- (b) The Contractor will commence undertaking the Works on the Execution Date.

2.2 Services Period

The Services Period starts on the Services Commencement Date and ends on the earlier of the End Date and the date this agreement is terminated or otherwise ends in accordance with its terms.

3 Contractor's representations and warranties

3.1 Performance and standard warranties

The Contractor warrants as follows in respect of the Works and the Services (which warranties are deemed to be made on the Execution Date and then repeated on each day of the Term):

- (a) the Contractor is well able and qualified to undertake the Works and provide the Services in accordance with the requirements of this agreement and has access to all necessary resources to ensure that it is able to do so;
- (b) the Works will be undertaken and the Services will be provided with all due care and skill and in accordance with Good Industry Practice;
- (c) the Works will be undertaken and the Services will be provided by personnel who have appropriate qualifications and experience and who are, and will remain, sufficiently qualified, careful, skilful, diligent and efficient to enable the Works and Services to be performed in accordance with the requirements of this agreement;
- (d) the Works will be undertaken and the Services will be provided in accordance with the highest professional and ethical standards;
- (e) the Works will be undertaken and the Services will be provided using Construction Plant and Equipment and Materials (as applicable) which is in good, safe and serviceable order and free from Defects;

- (f) the Works and the Services will not infringe the Intellectual Property Rights of any person;
- (g) the SA Party will not have to pay any licence fee, royalty or other amount to any person as a result of the undertaking of the Works or the receipt of the Services or use of any product created through the Works or the Services other than the Contract Payments and other amounts payable by the SA Party pursuant to an express provision of this agreement;
- (h) all information about the Works, the Facility and the Services provided by a Contractor Responsible Party to the SA Party is true and correct in all material respects; and
- (i) all Equipment and Materials incorporated into the Facility, at any time during the Term, will be new or unused (but maintained in accordance with Good Industry Practice) and of merchantable quality (including Equipment and Materials incorporated into the Facility during the Services Period).

3.2 Site

- (a) The Contractor warrants that on and from the Construction Start Date (as set out in the Construction Timetable) and for the balance of the Term it has or will have:
 - (i) all necessary rights of access to the land on which the Site is located; and
 - (ii) the right of quiet enjoyment in respect of the land on which the Site is located for the purposes of undertaking the Works and performing the Services.
- (b) The Contractor acknowledges (without limiting clause 3.2(c)) that it assessed and selected the Site and agrees that it has sole responsibility for, and must at its cost and risk prepare, develop and improve the Site to the extent required for carrying out and completing the Works in accordance with this agreement.
- (c) The Contractor warrants that it has, and is deemed to have, inspected and tested the Site prior to the Execution Date and has fully informed itself of all local and other conditions affecting the performance of this agreement and the Works including the investigation of meteorological, geological, labour, accommodation, fuel, power, water and transport conditions. Any failure of the Contractor to do so will not relieve the Contractor of its liability to perform its obligations under this agreement.

3.3 Mutual representations and warranties

Each party warrants and represents to the other party at the Execution Date that each of the following statements is true and accurate in respect of the party giving the warranty or making the representation:

- (a) the party's execution and delivery of this agreement has been properly authorised by all necessary corporate or other action;
- (b) the party has full power and lawful authority to execute and deliver this agreement and to perform or cause to be performed its obligation under this agreement;

- (c) this agreement constitutes a legal, valid and binding obligation of the party enforceable in accordance with its terms by appropriate legal remedy; and
- (d) to the party's knowledge there are no actions, claims, proceedings or investigations pending or threatened against it or by, against or before any person which may have a material effect on the subject matter of this agreement.

3.4 Reliance

Each party acknowledges that the other party has executed this agreement and agreed to take part in the transactions that this agreement contemplates in reliance on the representations and warranties in this clause 3.

3.5 Continuing warranties

The warranties contained in this clause 3 are continuing representations and warranties, and will not merge on, and will remain in full force and are binding after, the Execution Date.

3.6 Separate warranties

Each warranty in this clause 3 is independent of the other warranties and any other representation or warranty made under or in respect of this agreement and accordingly is not affected by any of them.

4 Fundamental requirements

4.1 The Works

- (a) The Contractor must carry out the Works:
 - (i) diligently and expeditiously and in accordance with Good Industry Practice so that each Milestone is achieved by the applicable date in the Construction Timetable and Construction Completion is achieved in time to carry out and complete commissioning and the Performance Tests and achieve Performance Validation so that the Services can be provided by the Date for Services Commencement; and
 - (ii) in all other respects in accordance with this agreement and so that the Facility will:
 - (A) meet the Functional Specifications and Performance Guarantees;
 - (B) achieve the Minimum Power Output Capacity and the Minimum Energy Storage Capacity;
 - (C) be fit for its intended purposes; and
 - (D) be fully compliant with all applicable Laws and Authorisations.
- (b) The Contractor acknowledges and accepts that the SA Party is relying on the Contractor, as an experienced, skilled and well-resourced contractor, to perform the

Works in accordance with Good Construction Industry Practice so as to satisfy the fundamental requirements stated in this clause 4.1.

4.2 Network Connection

The Contractor must:

- (a) ensure that the Facility is connected to the Network at the Connection Point so that commissioning and the Performance Tests can be conducted in accordance with the Construction Timetable and otherwise so as to achieve Performance Validation prior to the Date for Services Commencement; and
- (b) in respect of the Network Connection Agreement:
 - (i) consult with, and use its best endeavours to accommodate the reasonable requirements of, the SA Party;
 - (ii) not, without the prior written consent of the SA Party, finalise the terms of the Network Connection Agreement (such consent not to be unreasonably withheld);
 - (iii) ensure that the Network Connection Agreement is executed and in force prior to the Milestone date for the commencement of the Performance Tests;
 - (iv) provide to the SA Party a copy of the Network Connection Agreement upon its execution;
 - (v) make all payments required to be made by it on the dates they are due, and otherwise comply with its obligations, under the Network Connection Agreement; and
 - (vi) take all reasonable steps to enforce its rights under the Network Connection Agreement.

4.3 Authorisations

- (a) Subject to clause 4.3(b), the Contractor must ensure that it obtains, maintains and complies with all Authorisations required for:
 - (i) it to perform the Works and provide the Services and otherwise perform all of its obligations in accordance with this agreement; and
 - (ii) the Facility to operate and participate in the National Electricity Market in accordance with this agreement.
- (b) The SA Party is responsible for procuring the Development Authorisation required for the Project, provided that such obligation does not derogate from the Contractor's obligation under clause 4.3(a) to comply with the Development Authorisation. The Contractor must provide all information and assistance necessary for the SA Party to procure and maintain the Development Authorisation. The Contractor is

responsible for any consents required under the *Development Act 1993* (SA) in relation to compliance with the Building Rules (as defined in that Act).

4.4 The Services

During the Services Period, the Contractor must provide the Services in accordance with the Operating Protocol and the other requirements of this agreement and in a manner that meets the Performance Guarantees and otherwise in accordance with Good Electricity Industry Practice.

4.5 No exclusivity

The SA Party may purchase or procure services equivalent to or similar to the Services from other persons at its discretion but such purchase or procurement shall not relieve the SA Party from paying the Contract Payments under this agreement.

4.6 Safety requirements

In carrying out the Works and providing the Services, the Contractor will at all times:

- (a) have the highest possible regard for the health and safety of all persons;
- (b) exercise all necessary precautions for the safety of all persons performing Works or Services; and
- (c) exercise all necessary precautions for the safety of the general public.

4.7 No duty of care or liability imposed

No review, comment, approval, consent, rejection, refusal, permission to use, deemed permission to use, permission to proceed, expression of satisfaction or dissatisfaction with, supervision or superintendence by or on behalf of the SA Party (whether before or after the Execution Date) concerning any work, service, program, plan or other document provided by the Contractor or any of its Subcontractors or any aspect of the Works or the Services, nor any failure by the SA Party to do any of those things, will:

- (a) limit or exclude any obligation or liability of the Contractor;
- (b) prejudice any of the SA Party's rights against the Contractor;
- (c) impose on the SA Party any duty of care to the Contractor (whether in contract, tort (including negligence) or otherwise);
- (d) result in the SA Party assuming any responsibility or liability for the adequacy, quality, compliance or fitness for purpose of the Works or the Services or for any document provided by the Contractor, or for any errors in or omissions from any such document, the Works or the Services; or
- (e) constitute an admission that the SA Party or any of its agents or employees have checked any document, work or service for errors, omissions or compliance with the requirements of this agreement.

4.8 SA Party Supplied Information

The Contractor acknowledges that, unless expressly provided in this agreement to the contrary, any information provided to the Contractor by or on behalf of the SA Party is provided to the Contractor for the convenience of the Contractor only and it is the Contractor's responsibility to verify the accuracy, appropriateness and sufficiency of that information. Such information does not form part of this agreement unless expressly provided otherwise in this agreement. Unless expressly provided otherwise in this agreement, the SA Party does not warrant or guarantee the accuracy, sufficiency or otherwise of such information.

5 Risk and ownership

5.1 Acceptance of Project risk

The Contractor:

- (a) accepts all risks and costs associated with:
 - (i) its rights to occupy the Site and the adequacy and suitability of the Site for the development of the Project and the construction, commissioning and operation of the Facility in accordance with the requirements of this agreement;
 - (ii) carrying out and completing the Works;
 - (iii) connection of the Facility to the Network;
 - (iv) the operation and Maintenance of the Facility;
 - (v) the performance of the Services; and
 - (vi) its participation in the National Electricity Market; and
- (b) acknowledges and agrees that the Functional Specifications are not a definitive or comprehensive statement of the requirements for the Works or the Facility which the Contractor must satisfy for the purpose of fulfilling the Contractor's obligations under this agreement, and nothing described in the Functional Specifications will (or is to be construed to) limit or reduce any liabilities, obligations or responsibilities assumed, or risks accepted or retained, by the Contractor elsewhere under this agreement.

5.2 Costs of the Project

- (a) The Contractor will be solely responsible for and will fund the payment of all costs, expenses and liabilities incurred by the Contractor in the course of, or in connection with, the Works and the Services, and the Contractor's other obligations under this agreement.
- (b) Except as expressly provided for elsewhere in this agreement, the sole obligation of the SA Party to pay any monies to the Contractor is to pay the Contract Payments, subject to and in accordance with this agreement.

5.3 No Claim

The Indemnified Parties are not liable for, or in connection with, any Claim (and the Contractor is not entitled to make any Claim against any Indemnified Party (including for additional costs or adjustment to the Contract Payments) arising out of, or in connection with, any of the risks or costs referred to under this clause 5.

5.4 Ownership of Facility

- (a) The Contractor warrants that it has, or will have at the Services Commencement Date, all necessary leasehold rights to the land on which the Facility is located for the purposes of this Agreement.
- (b) Nothing in this agreement transfers to the SA Party any right or title to or risk in the Facility or the Site. As between the SA Party and the Contractor, all rights, title and ownership in each part of the Facility remains with the Contractor.

6 Security**6.1 Construction Phase Security**

Within 14 days after the Execution Date, the Contractor must procure and provide to the SA Party a Construction Phase Security equal to \$2,000,000.

6.2 Services Period Security

As a condition to Performance Validation, the Contractor must procure and provide to the SA Party a Services Period Security equal to \$1,000,000.

6.3 Purpose of Securities

The Securities required under this clause 6 are to be provided and maintained by the Contractor for the purpose of ensuring the due and proper performance by the Contractor of all of its obligations under this agreement, and to allocate to the Contractor the risk in respect of claimed entitlements of the SA Party under or in connection with this agreement pending resolution of any Claim or dispute in relation to such entitlement.

6.4 Recourse

- (a) The SA Party is entitled to deduct from or set-off against any amount payable to the Contractor and have recourse to the Security (including converting security into money) to recover:
 - (i) any amounts the SA Party in good faith claims are due from the Contractor to the SA Party pursuant to this agreement but unpaid, including any amount specified to be a debt due from the Contractor to the SA Party;
 - (ii) any liquidated damages the SA Party in good faith claims are payable by the Contractor;
 - (iii) any Losses the SA Party in good faith claims it has incurred or suffered due to the Contractor's breach of this agreement;

- (iv) any amounts which the SA Party has paid to a Subcontractor, which amounts the SA Party in good faith claims were required to be paid by the Contractor; and
 - (v) any other amounts paid or payable by the SA Party in respect of matters for which the SA Party in good faith claims the Contractor is liable or responsible pursuant to this agreement.
- (b) The Contractor must not take any steps to injunct or otherwise restrain:
- (i) the issuer of any Security from paying the SA Party under that Security;
 - (ii) the SA Party from taking any steps for the purposes of making a demand under any Security or receiving payment under any Security; or
 - (iii) the SA Party using the money received under any Security.
- (c) Each Security held or utilised by the SA Party in accordance with this clause 6 is not held by the SA Party as trustee and the Contractor will have no beneficial interest in any Security or the proceeds of any Security. The SA Party will not be obliged to invest any proceeds or to account for any advantage derived from holding or retaining such proceeds or to hold such proceeds in a separate or particular account. Any interest earned on any Security or the proceeds of any Security will be to the benefit of the SA Party.

6.5 Replacement of Security

- (a) If the SA Party draws on any Security, the Contractor must, within 5 Business Days after the Security being drawn upon, provide a replacement Security complying with the requirements of this agreement, so that the total value of the Securities held by the SA Party is equal to the amount specified in clause 6.1 or 6.2 (as applicable).
- (b) If the SA Party in its absolute discretion approves a Security with an expiry date and that Security is due to expire or terminate, then at least 10 Business Days prior to the time at which that existing Security is due to expire or terminate, the Contractor must procure a replacement Security that will become effective upon expiry of the existing Security such that it meets the requirements of this agreement. If the Contractor fails to provide the replacement Security in accordance with this clause 6.5(b), the SA Party may make a demand on and convert to cash the entire amount of the existing Security at any time after the replacement Security is due to be provided.

6.6 Return of Securities

The SA Party will return the:

- (a) Construction Phase Security to the Contractor (or, at the nomination of the Contractor, to the issuer) if the SA Party has been provided with the Services Period Security in accordance with clause 6.2, provided that the SA Party is not required to return the Construction Phase Security if it is enforcing its rights under the Construction Phase Security or intends to do so; and

- (b) the Services Period Security to the Contractor (or, at the nomination of the Contractor, to the issuer), within 30 Business Days after the expiry of the Term, unless the SA Party is enforcing its rights under the Services Period Security or intends to do so.

6.7 Security Invalidation Event

- (a) If a Security Invalidation Event occurs in respect of a Security, the Contractor must, within 5 Business Days of that event, provide replacement Security, complying with the requirements of this agreement, so that the amount of Security equals the amounts required under clause 6.1 or 6.2 (as applicable).
- (b) If the Contractor fails to provide the replacement Security in accordance with clause 6.7(a), the SA Party may make a demand on and convert to cash the entire amount of the existing Security at any time after the replacement Security is due to be provided and may hold such cash until such time as the Contractor provides replacement Security complying with the requirements of this agreement. The SA Party may use the proceeds held by it to recover any amounts referred to in clause 6.4.

7 Representatives and Independent Engineer

7.1 SA Party Representative

- (a) Except as otherwise provided in this agreement, in discharging its obligations under this agreement and communicating with the SA Party, the Contractor will deal with the SA Party Representative.
- (b) The SA Party Representative is the person set out in Schedule 1 or such replacement as appointed by the SA Party, by notice to the Contractor, from time to time.
- (c) The SA Party Representative is an agent of the SA Party and not an independent party or person and the Contractor waives any rights or actions against the SA Party or the SA Party Representative arising solely from any inherent conflict or alleged impartiality or bias by reason of such agency relationship, provided that the SA Party Representative nevertheless must comply with all obligations imposed on the SA Party Representative under this agreement.
- (d) The SA Party may by notice to the Contractor appoint delegates of the SA Party Representative. Those delegates will have the functions and powers notified by the SA Party to the Contractor.
- (e) The SA Party may, by notice to the Contractor, change the identity of delegates of the SA Party Representative and/or powers and/or functions of delegates from time to time.

7.2 **Contractor Representative**

- (a) The Contractor Representative is the person set out in Schedule 1. The Contractor may change the identity of the Contractor Representative, but only with the written consent of the SA Party.
- (b) The Contractor Representative may appoint delegates and change the identity of those delegates from time to time, but only with the written consent of the SA Party.
- (c) The Contractor Representative is responsible for representing the Contractor in any dealings with the SA Party. Any communication made to the Contractor Representative will be regarded as made to the Contractor. The Contractor is bound by all acts or omissions of the Contractor Representative.
- (d) If the performance of the Contractor Representative or a delegate thereof is deficient in any respect or the Contractor Representative or a delegate thereof is not co-operating with the SA Party in a manner which results in an efficient working relationship under this agreement, the SA Party may direct the Contractor to replace the Contractor Representative, or the delegate, with a person acceptable to the SA Party. The Contractor must ensure such replacement is made within 5 Business Days after request by the SA Party.

7.3 **Independent Engineer**

- (a) The SA Party will appoint an appropriately qualified independent engineer (**Independent Engineer**) for the purposes of witnessing and certifying the Performance Tests in accordance with clause 11.
- (b) Each party agrees to co-operate with the Independent Engineer in respect of the functions of the Independent Engineer.
- (c) The SA Party will not be liable to the Contractor for the acts or omissions of the Independent Engineer. If there is a dispute in relation to the Independent Engineer's performance of the tasks assigned to it under this agreement, it will be resolved by an Expert in accordance with clause 34.

8 **Construction Period**

8.1 **Compliance with Construction Timetable**

- (a) The Contractor must carry out the Works in accordance with the Construction Timetable.
- (b) The Contractor must complete each Milestone by the time specified in the Construction Timetable.
- (c) The Contractor will prepare and submit to the SA Party Representative for approval a Construction Program. The Construction Program will include, unless otherwise specified by the SA Party:
 - (i) a critical path method bar chart;

- (ii) a description of each location at which the Works will be performed, and the Works to be performed at that location;
 - (iii) a procurement schedule, setting out the times at which each category of Equipment and Materials required for the Works will be procured and the source from which they will be procured;
 - (iv) a labour utilisation schedule, setting out the labour required for each part of the Works, the times at which that labour will be required and the sources from which that labour will be procured; and
 - (v) such other matters as the SA Party may reasonably require to enable it to monitor and evaluate the Contractor's compliance with the Construction Timetable and whether the Contractor is, and will continue to be, able to comply with its obligations under this agreement relating to undertaking the Works.
- (d) The Construction Program must be submitted to the SA Party Representative for approval within 7 days after the Execution Date. The SA Party Representative will either approve the Construction Program or direct the Contractor to make such changes to the Construction Program as the SA Party Representative considers appropriate having regard to the purpose of the Construction Program. The Contractor must make such changes within the time specified by the SA Party Representative and resubmit the Construction Program for approval in accordance with the procedures set out in this clause 8.1.
- (e) Once the Construction Program is approved, the Contractor must comply with it.

8.2 Construction Timetable Fixed

- (a) The Construction Timetable (including the date for each Milestone and the Date for Services Commencement) and Construction Program are fixed and are not subject to adjustment except:
- (i) as agreed by the SA Party (which agreement may be withheld at the absolute discretion of the SA Party); or
 - (ii) where an Extension Event occurs, in accordance with clause 8.3.
- (b) Subject to clause 8.3, a failure by the Contractor to achieve a Milestone by the date set out in the Construction Timetable will be a Non-Financial Default.

8.3 Construction Timetable Adjustment

- (a) Where an Extension Event occurs, the Contractor may serve a notice on the SA Party Representative requesting an adjustment to the Date for Services Commencement, Construction Timetable and Construction Program to reflect any delay caused to the Contractor by that Extension Event.
- (b) Such notice must set out full details of the Extension Event, the extent of the delay it has caused or is expected to cause the Contractor, the measures taken and planned to be taken by the Contractor to overcome or mitigate the effects of the

event, the adjustment to the Date for Services Commencement, the Construction Timetable and the Construction Program claimed by the Contractor and a full explanation of how the Contractor has determined the terms of the requested adjustment.

- (c) The notice under clause 8.3(a) must be served within 7 days after the earlier of the Contractor becoming aware of the occurrence of the Extension Event or the actual occurrence of the event. If the notice is not served within this time, the Contractor has no further right to, or Claim in respect of, an adjustment to the Date for Services Commencement, the Construction Timetable and the Construction Program due to the occurrence of the Extension Event.
- (d) The Contractor must provide such additional information in respect of its request to adjust the Date for Services Commencement, the Construction Timetable and Construction Program as requested by the SA Party Representative.
- (e) Within 15 Business Days after receipt of a notice from the Contractor under clause 8.3(a) which complies with clause 8.3(b) and clause 8.3(c), the SA Party Representative must notify the Contractor whether the Construction Timetable, Construction Program and/or the Date for Services Commencement is to be adjusted or not and if to be adjusted the amount of the adjustment. The SA Party Representative will adjust the Date for Services Commencement, the Construction Timetable and the Construction Program to reflect the delay caused to the Contractor by the Extension Event. Such adjustment will:
 - (i) be no greater than necessary to reflect the delay caused to the Contractor by the Extension Event;
 - (ii) be determined on the basis the Contractor must use all due diligence in accordance with Good Industry Practice to overcome the effect of the Extension Event;
 - (iii) be determined on the basis that the Contractor must have made such reasonable alterations in the scheme of the Contractor's work which could obviate or could have obviated (as applicable) in whole or in part any delay in the performance of the Works notwithstanding the Extension Event;
 - (iv) be determined on the basis the Contractor has no entitlement to an adjustment of the Construction Timetable and the Date for Services Commencement for any period in which a delay is caused concurrently by an event or circumstance which is not an Extension Event and by an Extension Event; and
 - (v) be determined having regard to any direction to accelerate the progress of the Works given by the SA Party and the effect that compliance with that direction will have on the need to adjust the Date for Services Commencement, Construction Timetable and the Construction Program (but only to the extent it is possible for the Contractor to comply with the direction).

- (f) Unless the Contractor has applied for an adjustment within the period and in the manner provided for in this clause 8.3 and unless and until the SA Party has adjusted the Construction Timetable and Construction Program, the Contractor will not by reason of any Extension Event be relieved in any way or to any extent from its obligations to achieve a Milestone by the date set out in the Construction Timetable or achieve Performance Validation by the Date for Services Commencement.
- (g) Unless the Contractor can substantiate to the SA Party's satisfaction that an Extension Event will delay the critical path and delay achievement of Performance Validation by the Date for Services Commencement, the Contractor will not be entitled to any adjustment of the Date for Services Commencement.

8.4 Reporting on Compliance with Timetable

- (a) The Contractor must provide the SA Party with a report setting out its progress in undertaking the Works and the extent of its compliance with the Construction Timetable and the Construction Program. Such report must be provided on Monday of each week for the period from the Execution Date until the Services Commencement Date, unless the SA Party directs the Contractor to provide reports on a less frequent basis, in which case reports will be provided at such times directed by the SA Party.
- (b) Nothing in this clause 8.4 relieves the Contractor of its obligation to comply with the Construction Timetable and the Construction Program and achieve Performance Validation by the Date for Services Commencement.

8.5 Delay

- (a) The Contractor must as soon as possible, and in any event within two (2) Business Days, notify the SA Party if the Contractor may, or has been, delayed in undertaking the Works.
- (b) The Contractor must provide the SA Party with such additional information as the SA Party requests in respect of the delay, its cause and the measures being taken to overcome it.
- (c) The Contractor must, if required by the SA Party, produce to the SA Party, within such time nominated by the SA Party, a plan for overcoming the cause of a delay notified to the SA Party under this clause 8.5 or any other potential delay of which the SA Party is aware. The Contractor must make, within such time directed by the SA Party Representative, such modifications to the plan required by the SA Party and then comply with the plan.
- (d) Nothing in this clause 8.5 relieves the Contractor of its obligation to comply with the Construction Timetable and Construction Program and achieve Performance Validation by the Date for Services Commencement.
- (e) Where a plan shows that the Contractor cannot achieve Performance Validation by the Date for Services Commencement, nothing in that plan, or the approval of it, relieves the Contractor of its liability for failing to achieve Performance Validation by the Date for Services Commencement.

- (f) The Contractor must at all times use all reasonable endeavours in accordance with Good Industry Practice to minimise any delay in the performance of its obligations under this agreement, whatever may be the cause of such delay.

8.6 Acceleration

- (a) Without limiting the SA Party's other rights under this agreement, where the SA Party reasonably considers that Performance Validation will not be achieved by the Date for Services Commencement for any reason, the SA Party may direct the Contractor to supply such additional resources to achieve Performance Validation by the Date for Services Commencement as the SA Party may specify. Additional resources may include, without limitation, working additional shifts, overtime work and the provision of additional labour and Construction Plant.
- (b) The Contractor must comply with any such direction, unless it is not possible for the Contractor to do so.
- (c) The Contractor must update any Construction Program which has been prepared to reflect the effect of the direction and submit it to the SA Party Representative for approval. The SA Party Representative will either approve the Construction Program or direct the Contractor to make such changes to the Construction Program as the SA Party Representative considers appropriate having regard to the purpose of the Construction Program. The Contractor must make such changes within the time specified by the SA Party Representative and resubmit the Construction Program for approval in accordance with the procedures set out in this clause 8.6(c).
- (d) If the SA Party directs the Contractor to accelerate the performance of the Works under this clause 8.6, the Contractor will be entitled to Claim from the SA Party the reasonable Direct Costs necessarily incurred by the Contractor in complying with such a direction but only if the potential delay in achieving Performance Validation by the Date for Services Commencement was due to an Extension Event.

8.7 Claiming costs of an acceleration

- (a) This clause 8.7 sets out the process for payment of Direct Costs Claimed by the Contractor under clause 8.6(d) as a result of an acceleration directed by the SA Party under clause 8.6.
- (b) If the Contractor wishes to make a Claim for payment of Direct Costs, it must serve a notice on the SA Party Representative setting out:
 - (i) the acceleration in respect of which the Direct Costs are claimed;
 - (ii) how the acceleration has caused, or will cause, the Contractor to incur the Direct Costs; and
 - (iii) full substantiation of each Direct Cost incurred.
- (c) A notice under clause 8.7(b) must be given within 14 days after the Direct Costs are actually incurred by the Contractor. If such a notice is not served within this time, the Contractor has no further right to Claim the relevant Direct Costs.

- (d) The Contractor must provide such additional information in respect of a notice given under clause 8.7(b) as is requested by the SA Party Representative.
- (e) The SA Party Representative will make a determination as to the Direct Costs incurred by the Contractor and as to the amounts required to be paid to the Contractor to reimburse it for those costs. Such determination will be made on the following basis:
 - (i) the Contractor must take all reasonable steps to minimise its Direct Costs and will not be entitled to be reimbursed costs which would not have been incurred had the Contractor complied with this requirement;
 - (ii) a Direct Cost which reflects an amount charged to the Contractor by another party is only claimable if incurred on an arm's length basis and where a cost is not so incurred then it is only claimable to the extent it would have been incurred had it been on an arm's length basis; and
 - (iii) where a Direct Cost is not charged by a third party, then the amount of that cost recoverable will be only such part as is a reasonable cost.
- (f) The Direct Costs to be paid to the Contractor (as determined in accordance with clause 8.7(e)) will be payable by the SA Party within 30 days after the later of making of that determination and the date of issue by the Contractor of a tax invoice to the SA Party for those costs.

8.8 *Nothing sets the Construction Timetable at large*

No delay or failure by the SA Party Representative to adjust the Construction Timetable or Construction Program, direction by the SA Party to accelerate the Works or failure by the SA Party to comply with its obligations under this agreement sets the Date for Services Commencement, any Milestone or any other timeframe in this agreement at large. However nothing in this clause 8.8 relieves the SA Party of liability for breach of this agreement.

9 Additional costs

Except in the case of:

- (a) any negligence of, or breach of this agreement by, the SA Party;
- (b) a direction given by the SA Party to the Contractor under clause 8.6 to accelerate the Works but only where the purpose of the direction is to overcome a delay caused by an Extension Event; or
- (c) a Modification directed by the SA Party under clause 19,

the Contractor's sole and exclusive remedy for a delay in the performance of the Works caused by an Extension Event is an adjustment to the Construction Timetable and/or the Date for Services Commencement under clause 8.3 and the SA Party is not liable for any Loss suffered or incurred by the Contractor in respect of any delay arising in connection with an Extension Event.

10 Documents

- (a) The Contractor must:
 - (i) prepare the Documents in accordance with the standards and other requirements of this agreement and submit them to the SA Party progressively, in accordance with the Construction Program;
 - (ii) provide to the SA Party a reasonable opportunity to review and comment on the Documents; and
 - (iii) have reasonable regard to any request, comment or suggestion put forward by the SA Party in relation to the Documents.
- (b) Within 5 Business Days of the submission to the SA Party of an electronic version (in native format where available, otherwise in PDF) of the Documents for review, the SA Party may in its discretion return 1 copy to the Contractor with the SA Party's comments, if any, marked up either electronically or by hand (as may be determined by the SA Party) on the documents provided that, where the documents are not supplied in electronic form, the SA Party will have 7 Business Days to comment.
- (c) If the SA Party comments on the Documents in accordance with clause 10(b), the Contractor must give due and reasonable consideration to the SA Party's comments.
- (d) The SA Party's review of Documents submitted by the Contractor will not relieve the Contractor of full responsibility for the adequacy and fitness for purpose of the Contractor's design of the Facility. By giving its suggestions, the SA Party does not assume any responsibility for the adequacy or fitness for purpose of the Documents.

11 Performance Validation and Testing

11.1 Testing Stages

- (a) At least 14 days' prior to the Contractor performing a test the subject of each Testing Stage, the Contractor must give the SA Party Representative notice of its intention to do so and provide an opportunity for the SA Party Representative or its nominee to attend the relevant testing.
- (b) If the SA Party Representative informs the Contractor that it wishes to attend and observe the testing in respect of any Testing Stage, the Contractor must allow the nominated persons to attend and observe the relevant testing.
- (c) Irrespective of whether or not the SA Party Representative attends any Testing Stage, the Contractor must provide to the SA Party any results or data relating to or generated from the testing of each Testing Stage in accordance with the Functional Specifications.
- (d) The attendance of the SA Party or its nominee at a Testing Stage in no way whatsoever relieves the Contractor from any of its obligations under this agreement.

11.2 *Commissioning and the Performance Tests*

- (a) The Contractor must:
 - (i) carry out the Performance Tests:
 - (A) at a time acceptable to both parties but in any event so that Performance Validation will be achieved by the Date for Services Commencement; and
 - (B) in the presence of the SA Party Representative and the Independent Engineer and other nominated representatives of the SA Party; and
 - (ii) provide the results of the Performance Tests to the SA Party Representative and the Independent Engineer.
- (b) The Contractor must complete and pass the Performance Tests in accordance with this clause 11 and to the satisfaction of the Independent Engineer such that Performance Validation occurs by the Date for Services Commencement.
- (c) If the Contractor believes that the Performance Tests have been passed and Performance Validation has occurred, the Contractor must serve notice in writing on the Independent Engineer, requesting that the Independent Engineer issue a Certificate of Performance Validation.
- (d) Promptly following notice from the Contractor under clause 11.2(c), the Independent Engineer will determine whether the Facility has achieved Performance Validation and will notify the Contractor and the SA Party of its conclusion in writing within 2 Business Days of the Contractor's notice under clause 11.2(c), including the reasons for that conclusion.
- (e) If the Independent Engineer determines that the Facility has achieved Performance Validation, the Independent Engineer must, within 2 Business Days from the date it receives the Contractor's notice of request under clause 11.2(c), issue a certificate (**Certificate of Performance Validation**) confirming that Performance Validation has been achieved and specifying the date on which Performance Validation was achieved.
- (f) The determination of the Independent Engineer under clause 11.2(d) will be, in the absence of manifest error, final and binding upon the parties.

11.3 *Failure to pass the Performance Tests*

- (a) If the Independent Engineer notifies the parties under clause 11.2(d) that Performance Validation has not been achieved, the Contractor must, within 5 Business Days after receiving the Independent Engineer's notice, at its cost:
 - (i) investigate and identify the reasons for the failure to satisfy the Performance Tests; and

- (ii) prepare and submit a report to the SA Party Representative and the Independent Engineer which describes the Contractor's investigation and identifying and explaining the reasons for failure to meet the Performance Tests and providing a rectification plan for overcoming the failure.
- (b) Without limiting any of the SA Party's other rights under this agreement or at Law, if the Contractor fails the first Performance Tests run, the Contractor must reimburse any costs incurred by the SA Party in relation to procuring the services of the Independent Engineer for all subsequent re-performances of the Performance Tests.
- (c) Within 5 Business Days after receipt of the report required under clause 11.3(a)(ii), the SA Party Representative shall give notice to the Contractor either approving the rectification plan or disapproving the rectification plan with reasons for such disapproval and the Contractor shall, within a further 5 Business Days, address the reasons for disapproval and re-submit a revised rectification plan for approval.
- (d) The process set out in clause 11.3(c) shall repeat until the rectification plan is approved.
- (e) Following approval of a rectification plan, the Contractor must:
 - (i) carry out and complete the rectification plan within the time specified in the rectification plan (or if no time is specified, as soon as practicable); and
 - (ii) on completion of the rectification plan, conduct further Performance Tests runs and, subject to clause 11.3(f), the processes in clauses 11.2(c) to 11.2(e) (inclusive) and clauses 11.3(a) to 11.3(e) (inclusive) will apply to each further Performance Tests run.
- (f) Subject to clause 11.3(g), if, after 3 Performance Tests runs have been conducted by the Contractor, the Independent Engineer has not issued a Certificate of Performance Validation, the SA Party is entitled to:
 - (i) step-in and carry out Modifications so that the Performance Tests are satisfied, and the costs of the step-in and Modifications will be a debt due from the Contractor to the SA Party; or
 - (ii) reject the Works for failure to meet the fundamental requirements of this agreement, and terminate this agreement.
- (g) The SA Party may, in its absolute discretion, elect to instruct the Independent Engineer to issue a Certificate of Performance Validation notwithstanding that the Contractor has failed to pass the Performance Tests for the Facility. The SA Party is not in any way obliged to exercise its right under this clause 11.3(g) and the issue of a Certificate of Performance Validation under this clause 11.3(g) does not in any way relieve the Contractor from meeting the Performance Guarantees or the payment of liquidated damages during the Services Period.

11.4 Reliability Tests

- (a) Immediately upon the Independent Engineer issuing a Certificate of Performance Validation, the Contractor must commence the Reliability Tests.

- (b) The Contractor must:
 - (i) perform the Reliability Tests in accordance with this clause 11.4 and the Functional Specifications to the satisfaction of the Independent Engineer such that the Reliability Tests are passed no later than the Reliability Tests Date; and
 - (ii) provide the results of the Reliability Tests to the SA Party Representative and the Independent Engineer.
- (c) If the Contractor believes that the Reliability Tests have been passed in accordance with this agreement, the Contractor must serve a notice in writing on the Independent Engineer, requesting that the Independent Engineer issue a certificate under clause 11.4(e).
- (d) Promptly following notice from the Contractor under clause 11.4(c), the Independent Engineer will determine whether the Reliability Tests have been passed in accordance with this agreement and will notify the Contractor and the SA Party of its conclusion in writing within 2 Business Days after the Contractor's notice under clause 11.4(c), including the reasons for that conclusion.
- (e) If the Independent Engineer determines that Reliability Tests have been passed in accordance with this agreement, the Independent Engineer must, within 2 Business Days from the date it receives the Contractor's notice of request under clause 11.4(c), issue a certificate confirming that the Reliability Tests have been passed in accordance with this agreement and specifying the date on which the Reliability Tests were passed.
- (f) The determination of the Independent Engineer under clause 11.4(d) will be, in the absence of manifest error, final and binding upon the parties.

11.5 Annual Test

- (a) The SA Party may by written notice to the Contractor request that the Contractor conduct the Annual Test to verify that the relevant Performance Guarantee is being met.
- (b) The SA Party can only request that the Contractor conduct the Annual Test once each Contract Year, unless an issue revealed by a previous conduct of the Annual Test appears to the SA Party (acting reasonably) to be unrectified and ongoing, in which case the limitation in this clause 11.5(b) does not apply.
- (c) The Contractor must comply with clause 11.1 in carrying out the Annual Test and must perform the Annual Test no later than 30 days after receiving SA Party's request to conduct that test.

12 Delay Liquidated Damages

12.1 *Right to Delay Liquidated Damages*

- (a) If Performance Validation is not achieved by the Date for Services Commencement, the Contractor must pay to the SA Party liquidated damages at the Delay Liquidated Damages Rate for every day after the Date for Services Commencement up to and including the earlier of:
- (i) the Services Commencement Date;
 - (ii) the date the Delay Liquidated Damages Cap is reached; and
 - (iii) the date this agreement is terminated in accordance with its terms.
- (b) Delay Liquidated Damages become due immediately upon the issue of a notice by the SA Party Representative setting out the amount of Delay Liquidated Damages payable.
- (c) The payment of Delay Liquidated Damages does not relieve the Contractor of its obligations to perform the Works, Services or any of its other obligations under this agreement.
- (d) The SA Party may recover the amount of Delay Liquidated Damages:
- (i) on demand from the Contractor;
 - (ii) by deducting the amount from any amount otherwise payable by the SA Party under clause 23; or
 - (iii) without limiting the unconditional nature of the Construction Phase Security, by deducting the amount from or calling on the Construction Phase Security.
- (e) The Contractor acknowledges and agrees that:
- (i) Delay Liquidated Damages are a genuine pre-estimate of the Loss that will be suffered by the SA Party for failure of the Contractor to achieve Performance Validation by the Date for Services Commencement; and
 - (ii) the Delay Liquidated Damages Rate and Delay Liquidated Damages Cap have been the subject of negotiation between the parties and are intended to be liquidated damages that constitute the maximum amount to be paid, which amount, a reasonable and good faith pre-estimate, only constitutes a portion of the anticipated or actual loss or damage which could conceivably be incurred by the SA Party and is not a penalty.
- (f) Except as provided in clause 31.4, but otherwise without limiting the SA Party's rights under this agreement, payment of Delay Liquidated Damages by the Contractor will be the SA Party's sole and exclusive monetary remedy for costs incurred by the SA

Party for the Contractor's failure to achieve Performance Validation by the Date for Services Commencement.

12.2 Termination for failure to meet Sunset Date

- (a) The Sunset Date is not subject to extension under this agreement for any reason other than:
- (i) the occurrence of a Force Majeure Event affecting the Contractor; or
 - (ii) a breach by the SA Party of its obligations under this agreement,
- that directly and materially hinders the ability of the Contractor to achieve Performance Validation by the Sunset Date.
- (b) If an event or occurrence mentioned in clause 12.2(a) occurs, subject to the Contractor complying with the procedure in clause 8.3 as if the reference to the Date for Services Commencement in that clause were a reference to the Sunset Date and subject to the Contractor complying with clause 8.5(f), the SA Party must grant an adjustment claim by extending the Sunset Date by a reasonable period as determined and notified by the SA Party.
- (c) If Performance Validation is not achieved by the Sunset Date (as may have been extended under clause 12.2(b)) for any reason, the SA Party may by notice to the Contractor given at any time before Performance Validation is achieved, terminate this agreement with effect from the time specified in the notice and the SA Party is not required to give a separate Default Notice in order to exercise this right.
- (d) Notwithstanding any other provision in this agreement, the SA Party's right to terminate this agreement under clause 12.2(c) is the SA Party's sole and exclusive remedy for a failure by the Contractor to achieve Performance Validation by the Sunset Date.

13 Reservation of Capacity

13.1 Reservation of Capacity in the Facility

- (a) In consideration for the payment of the Contract Payments and subject to the express terms of this agreement, the Contractor agrees to grant to the SA Party the sole and exclusive right to, and make available to the SA Party, the Capacity of the Facility (**Guaranteed Capacity**) required to meet, at all times during the Services Period, the following:
- (i) the Minimum Power Output Capacity;
 - (ii) the Minimum Energy Storage Capacity; and
 - (iii) the Performance Guarantees.

- (b) The Contractor acknowledges that the Reserved Capacity may be increased or decreased by agreement of the parties during the Services Period in accordance with clause 16.2.
- (c) Any excess Capacity remaining in the Facility after meeting the Reserved Capacity (**Market Capacity**) may be used by the Contractor to generate revenue.
- (d) The Contractor must not trade, sell, grant any right to any person other than the SA Party or otherwise deal with the Guaranteed Capacity, including by using the Guaranteed Capacity to sell electricity from the Facility or to provide any other service to any person, except:
 - (i) to the extent permitted in respect of the Market Capacity; and
 - (ii) in accordance with the Operating Protocol.
- (e) If the Contractor uses any portion of the Reserved Capacity for a purpose other than the provision of Services, then the Contractor must account and pass through to the SA Party the full amount of any benefit (including revenue) received in connection with such use.

13.2 *Guaranteed Capacity*

The Contractor warrants and agrees that the Capacity of the Facility will be sufficient at all times during the Services Period to provide the Guaranteed Capacity so as to:

- (a) discharge and export electricity to the Network up to the Minimum Power Output Capacity;
- (b) meet the Minimum Energy Storage Capacity;
- (c) perform the Services; and
- (d) meet the Performance Guarantees.

13.3 *Expansion of Capacity*

The Contractor must not, during the Term, carry out any expansion of the Capacity of the Facility or any further development on the Site without the prior approval of the SA Party, such approval not to be unreasonably withheld where:

- (a) the SA Party is reasonably satisfied that such expansion or further development will not adversely affect the rights of the SA Party under this agreement or the ability of the Contractor to perform its obligations under this agreement; and
- (b) the Contractor consents to any variations or modifications to this agreement which the SA Party may reasonably require to secure its rights under this agreement having regard to such expansion or further development.

13.4 Priority of supply

The SA Party will at all times have priority of supply, up to the Reserved Capacity, in the event that:

- (a) there is insufficient Capacity in the Facility to meet the Reserved Capacity; or
- (b) there is any reduction in the Availability of the Facility to meet the level of service required under the Operating Protocol or an operating direction given under clause 15.2.

14 Services

14.1 Fundamental requirements

During the Services Period, the Contractor must:

- (a) make Capacity available from the Facility in accordance with clause 13 to provide the Services;
- (b) provide the Services in accordance with the Operating Protocol and any direction under clause 15.2 and in a manner that meets the Performance Guarantees;
- (c) ensure that the Facility is operated and maintained as required by this agreement and in accordance with:
 - (i) Good Industry Practice;
 - (ii) the terms of all relevant Authorisations;
 - (iii) the requirements of all applicable Laws (including the NER, all applicable technical requirements and performance standards under the NER and any Ministerial directions given under any Law); and
 - (iv) the Functional Specifications;
- (d) ensure that the Facility is operated and maintained so that the Facility meets the Guaranteed Capacity; and
- (e) ensure that, for the duration of the Services Period, it has connection and access to the Network and sufficient rights (subject to the terms of the Network Connection Agreement) to export and import at all times at least the Minimum Power Output Capacity of electricity to and from the Network at the Connection Point and to deliver the Services to the Network through the Connection Point to meet the requirements of this agreement.

14.2 NEM Registrations and compliance with NER

During the Services Period, the Contractor must obtain and maintain such registrations under the National Electricity Rules in order to provide the Services. As at the Services Commencement Date, the Contractor must be registered as a Scheduled Generator and an Ancillary Services Generator in respect of the Facility under the National Electricity Rules.

14.3 Power System Security Services

- (a) The parties acknowledge that as at the Execution Date, a range of changes are being investigated in respect of the National Electricity Market in relation to power system security measures. These measures include the potential introduction of new categories of ancillary services which could be either offered or bid in the National Electricity Market or procured through contracts with third parties such as the Network Service Provider and AEMO. Some of these measures being considered at the Execution Date are described in the Functional Specifications and include the "Fast Frequency Response" service.
- (b) In this agreement **Power System Security Services** refers to these future services and any existing ancillary services which have the intended purpose of maintaining and/or enhancing power system security, integrity and stability in the National Electricity Market.
- (c) The parties agree that one of the purposes of the Reserved Capacity being dedicated to the SA Party is so that the SA Party can make full use of the Facility up to the Reserved Capacity to provide or cause the provision of the Power System Security Services.
- (d) To that end, the SA Party may from time to time give notice (**New Service Notice**) to the Contractor that it nominates the Facility, using the Reserved Capacity, to provide any Power System Security Services that the Facility is not already providing at that time.
- (e) If the SA Party gives a New Service Notice, the parties must co-operate with each other to the fullest extent possible to enable the SA Party to use the Facility up to the Reserved Capacity to provide or cause the provision of the Power System Security Services as soon as practicable and the Contractor must do all things reasonably necessary to provide the Power System Security Services nominated by the SA Party to the relevant party procuring the Power System Security Services including:
 - (i) obtaining all necessary or appropriate Authorisations (such as registrations under the National Electricity Rules) in order to enable the Facility to provide the Power System Security Services;
 - (ii) installing and/or modifying any electronic communications system required in order to receive direct instructions from AEMO and/or the relevant Network Service Provider in respect of the Power System Security Services;
 - (iii) participating in any procurement process for the provision of any Power System Security Services on terms and conditions approved by the SA Party; and
 - (iv) entering into any contracts with AEMO, a Network Service Provider or any other person who is entitled to procure the Power System Security Services (**Third Party Contract**) such that the Contractor can provide the Power System Security Services nominated by the SA Party directly to that person (being a **Third Party Buyer**) from the Facility.

- (f) The Contractor must:
- (i) act diligently to provide the Power System Security Services as soon as practicable; and
 - (ii) keep the SA Party informed of the progress of any works, activities and negotiations being conducted by the Contractor with Third Party Buyers in order to meet its obligation under this agreement to provide the nominated Power System Security Services.
- (g) The SA Party is entitled to participate in any discussions or negotiations being held between the Third Party Buyer and the Contractor in relation to the provision of Power System Security Services nominated by the SA Party.
- (h) The Contractor must:
- (i) consult with, and use all reasonable endeavours to accommodate the reasonable requirements of, the SA Party in finalising; and
 - (ii) not, without the prior consent of the SA Party (which must not be unreasonably withheld or delayed), finalise,

the terms of any Third Party Contract to be entered into by the Contractor for the provision of the nominated Power System Security Services by the Facility.
- (i) If, within 3 months of the SA Party giving a New Service Notice, the Contractor fails to enter into a Third Party Contract, the Contractor appoints the SA Party as its attorney to conduct negotiations on its behalf and to execute in the Contractor's name the Third Party Contract which:
- (i) contains prices for services, payment for services and invoicing and payment terms which the SA Party in its absolute discretion determines;
 - (ii) provides for level of services and performance standards that the Facility is technically capable of providing and the Reserved Capacity and any payments for a failure to meet performance standards are no greater than the amounts payable under clause 17.1; and
 - (iii) which contains any other terms and conditions that the SA Party considers appropriate in relation to the relevant Power System Security Service, unless the Contractor can establish:
 - (A) the terms and conditions are more onerous than any published standard terms or conditions or readily ascertainable, usual or customary terms and conditions of the Third Party Buyer for similar types of services (if any); or
 - (B) if there are no such terms and conditions relevant to the service, they are not reasonable commercial terms that a provider of similar services acting reasonably would be likely to accept having regard, among other relevant factors, to the terms and conditions already accepted by the Contractor in connecting to

the Network and/or in providing another type of Power System Security Service.

- (j) If there is a dispute between the parties as to whether the terms of the proposed Third Party Contract meet the criteria in clause 14.3(i)(ii) or 14.3(i)(iii), either party may refer the dispute to an Expert for determination in accordance with clause 34.

14.4 Pass through of costs

If the Contractor is liable to pay any amount in the nature of fees or charges imposed by AEMO, the Network Service Provider or any other third party as a direct result of the provision of Power System Security Services under a Third Party Contract, the Contractor may pass through such amounts to the SA Party and for that purpose include the amounts in a statement under clause 23.1, provided it has actually incurred such amounts and given the SA Party all information reasonably requested by the SA Party in order to verify the amounts incurred.

14.5 Third Party Contracts

In respect of any Third Party Contract, the Contractor must:

- (a) make all payments required to be made by it on the dates they are due, and otherwise comply with its obligations, under the Third Party Contract;
- (b) take all reasonable steps to enforce its rights under the Third Party Contract;
- (c) not propose or agree any variation to the terms and conditions of the Third Party Contract without the prior written consent of the SA Party, which consent must not be unreasonably withheld; and
- (d) not extend the term of any Third Party Contract without the prior written consent of the SA Party.

14.6 Obligation to meet Performance Guarantees

The Contractor must ensure that during the Services Period the Facility is capable and available to provide the Services and meet the Performance Guarantees.

15 Operation of the Facility

15.1 Operating Protocol

- (a) The parties will meet and discuss the manner in which the Facility may be used in the first Contract Year within 20 Business Days of the Execution Date and any changes required to the draft Operating Protocol contained in Annexure B. The Contractor must, prior to that meeting, provide all information relevant to that discussion (including any modelling information provided to AEMO in relation to the Facility) to the SA Party.
- (b) If the parties are unable to agree on the changes to the draft Operating Protocol within 40 Business Days after the Execution Date, the State will issue to the

Contractor the final Operating Protocol which is based on the draft Operating Protocol and confirms the following matters:

- (i) the Services nominated by the SA Party to be provided for the first 12 months of the Services Period;
 - (ii) the portion of Reserved Capacity allocated for meeting each nominated Service; and
 - (iii) the standard mode of operation for the Facility in providing the Services, including the manner and prices in which the Contractor bids the Services for dispatch in the National Electricity Market.
- (c) Unless a contrary operating direction is given under clause 15.2, the Contractor must comply with the Operating Protocol (as amended from time to time) at all times during the Services Period.

15.2 Operating Direction

- (a) The SA Party may, from time to time, give an operating direction in respect of the Services which overrides the standard mode of operation in its absolute discretion provided that such operating direction does not require the Facility to operate in excess of the Reserved Capacity.
- (b) Without limiting the powers of the SA Party under clause 15.2(a), an operating direction under this clause 15.2 may:
 - (i) change the type of Service required to be provided by the Contractor; and
 - (ii) be for such period and duration as the SA Party nominates.
- (c) The Contractor must comply with the operating direction given by the SA Party in a manner that meets the Performance Guarantees.
- (d) Nothing in this clause 15.2:
 - (i) limits the ability of any Minister of the State of South Australia to give directions and exercise powers under any Law; or
 - (ii) relieves the Contractor from its obligation to comply with those directions.

15.3 Provision of real-time data

The Contractor must, if requested to do so from the SA Party, promptly provide real-time data relating to the Facility including information on the state of charge, storage and discharge of the Facility and any bids or offers submitted to AEMO in respect of the Facility in the National Electricity Market.

16 Performance reviews**16.1 Monthly reporting and meetings**

- (a) Within 10 Business Days after the end of each month during the Services Period, the Contractor must provide a written report to the SA Party setting out in sufficient detail, together with any supporting documentation or data:
 - (i) matters relating to the performance of the Facility in that month to be discussed at the meeting for that month under clause 16.1(b), including the performance, cycling duty and Availability of the Facility;
 - (ii) any scheduled and unscheduled Maintenance taken or proposed to be taken; and
 - (iii) any other matter reasonably requested by the SA Party.
- (b) Within 15 Business Days after the end of each month during the Services Period, the parties must meet to discuss:
 - (i) how the Facility has operated in that month;
 - (ii) what Services have been provided by the Facility in that month;
 - (iii) the Facility's performance against the Performance Guarantees in that month;
 - (iv) the level of Market Capacity used and the manner in which it was used for generating revenue in that month; and
 - (v) alternative ways of using the Facility going forward in light of the type of Power System Security Services required in the South Australian region of the National Electricity Market at that time.
- (c) The purpose of the monthly meeting is for the parties to review past performance and agree and implement any improvements. Each party must use reasonable endeavours to give effect to the agreed action items in the monthly meetings.

16.2 Annual review

- (a) No later than 3 months prior to each Contract Year during the Services Period (excluding the first Contract Year), the parties must meet and discuss:
 - (i) whether the SA Party requires an increase or decrease in the amount of the Reserved Power Output Capacity or the Reserved Energy Storage Capacity in the coming Contract Year from the amount in the previous Contract Year;
 - (ii) whether a level of Reserved Capacity could be released by the SA Party for an agreed period of time for use as Market Capacity instead, having regard to any changes, or proposed changes, in the National Electricity Market in relation to the Services;

- (iii) the allocation of any Reserved Capacity to the specific Services required by the SA Party for the forthcoming year; and
 - (iv) any other changes to the Operating Protocol proposed by a party.
- (b) The SA Party will consider the comments of the Contractor on the matters referred to in clause 16.2(a) and may, with written agreement of the Contractor:
 - (i) revise the amount of the Reserved Power Output Capacity and the Reserved Energy Storage Capacity; and/ or
 - (ii) revise the Operating Protocol,and such matters will take effect 20 Business Days after written agreement of the parties.

17 Failure to meet Performance Guarantees

17.1 *Liquidated damages payable during the Services Period*

If, during the Services Period, the Facility does not meet the Availability Guarantee, as set out in item 4 of Schedule 3, the Contractor must pay to SA Party liquidated damages at the rate and in the manner specified in Schedule 4.

17.2 *Liquidated damages not a penalty*

- (a) The parties agree and acknowledge that the liquidated damages payable in accordance with this clause 17 and Schedule 4 have been the subject of negotiation between the parties, are a genuine pre-estimate of the Loss that will be suffered by the SA Party and are reasonable in light of the anticipated harm and the difficulty of estimation or calculation of actual damages suffered by the SA Party. Each party waives the right to contest those payments as a penalty or otherwise.
- (b) The liquidated damages payable under this clause 17 and Schedule 4 do not relieve the Contractor from its obligation at all times to meet the Performance Guarantees and does not prevent the SA Party from exercising any other remedies available to it under this agreement.

17.3 *Provision of information*

Upon request by the SA Party, the Contractor must make available to the SA Party, or any person appointed by the SA Party, for examination, audit, inspection, transcription and copying at all times on an open book basis all information, data and records to allow the SA Party to verify:

- (a) the performance of the Facility; and
- (b) the amount of any liquidated damages the SA Party is entitled to under this agreement.

18 Maintenance and repair

18.1 Maintenance

The Contractor must ensure that at all times during the Services Period it carries out Maintenance of the Facility in accordance with Good Industry Practice and subject to all applicable Laws and Authorisations.

18.2 Asset Management Plan

- (a) The Contractor must:
 - (i) at all times during the Services Period comply with the Asset Management Plan; and
 - (ii) not amend the Asset Management Plan without the prior written consent of the SA Party.
- (b) Any review of or comment on the Asset Management Plan by the SA Party will not relieve the Contractor of full responsibility for the adequacy and fitness for purpose of the plan. The SA Party does not assume any responsibility for the adequacy or fitness for purpose of the Asset Management Plan.
- (c) The SA Party may conduct an audit of the Contractor's systems and procedures to ensure compliance with the Asset Management Plan and the Contractor must provide all information and assistance required for the SA Party to conduct such audit when requested to do so by the SA Party.

18.3 Scheduled maintenance

- (a) Maintenance of the Facility which necessitates or results in any interruption, outage or unavailability of the Facility or the Services (whether in whole or part) (**Interruption**) may only be undertaken in accordance with a Scheduled Maintenance Plan.
- (b) The parties acknowledge and agree that the Availability Guarantee set out in item 4 of Schedule 3 takes into account an allowance for Maintenance and no other allowance will be given under this agreement.
- (c) The Contractor must, to the extent consistent with Good Industry Practice, minimise the length of any Interruption due to the undertaking of Scheduled Maintenance.
- (d) The Contractor must not undertake Scheduled Maintenance:
 - (i) during the periods 1 November to 31 March and 1 June to 31 August; or
 - (ii) during such different periods for a Contract Year (if any) as notified by the SA Party to the Contractor by no later than 90 days before the commencement of that Contract Year (provided the aggregate length of such periods does not exceed 245 days).

- (e) By not less than 60 days before the commencement of each Contract Year the Contractor must serve a draft Scheduled Maintenance Plan on the SA Party setting out the Scheduled Maintenance which the Contractor proposes to undertake in that Contract Year (**Scheduled Maintenance Plan**).
- (f) The draft Scheduled Maintenance Plan must:
 - (i) be in such format (including as to content and detail) as may be reasonably requested by the SA Party;
 - (ii) not provide for any Scheduled Maintenance to be undertaken during a period referred to in clause 18.3(d);
 - (iii) set out a description of each item of Scheduled Maintenance to be undertaken during the Contract Year to which the Scheduled Maintenance Plan relates; and
 - (iv) set out the time required to undertake each such item of Scheduled Maintenance.
- (g) The Contractor must provide such information as is reasonably requested by the SA Party in respect of the draft Scheduled Maintenance Plan.
- (h) The SA Party may, by notice to the Contractor within 30 days after receipt of the draft Scheduled Maintenance Plan, request the Contractor to reschedule some or all of the Scheduled Maintenance set out in that draft plan and the Contractor must comply with that request to the extent the request may be accommodated without an adverse impact on the performance or integrity of the Facility.
- (i) Not later than 20 days prior to the commencement of each Contract Year the Contractor must serve upon the SA Party the final Scheduled Maintenance Plan for that Contract Year.
- (j) After receipt of the final Scheduled Maintenance Plan for a Contract Year, the SA Party may request the Contractor to reschedule the timing of the Scheduled Maintenance set out in that Scheduled Maintenance Plan and the Contractor will vary the Scheduled Maintenance Plan to comply with that request to the extent that:
 - (i) it is practicable for the Contractor to do so given the resources available to the Contractor;
 - (ii) the SA Party agrees to reimburse the Contractor any additional costs reasonably incurred by the Contractor due to the rescheduling; and
 - (iii) the rescheduling will not adversely impact the performance or integrity of the Facility.
- (k) As soon as reasonably practicable and in any event within no later than 7 days after receipt of a request from the SA Party under clause 18.3(j), the Contractor must notify the SA Party of the additional costs which would be reasonably incurred by the Contractor if the Contractor varied the Scheduled Maintenance Plan in accordance with the SA Party's request and whether the Contractor will vary the Scheduled

Maintenance Plan (if the SA Party agrees to pay those reasonable costs). The Contractor must provide such information reasonably requested by the SA Party to substantiate the additional costs claimed by the Contractor which information must be provided within 7 days after the SA Party's request. Before, on or after the receipt of that information the SA Party may withdraw its request or may notify the Contractor that it agrees to reimburse the Contractor for the additional reasonable costs in which case the Contractor must proceed to vary the Scheduled Maintenance Plan.

- (l) The Contractor must include any additional reasonable costs payable by the SA Party under clause 18.3(k) in respect of a variation of the Scheduled Maintenance Plan in the Statement for the month in which the rescheduled Scheduled Maintenance is completed.
- (m) To avoid doubt, more than one request may be made by the SA Party under clause 18.3(j) in respect of a Contract Year.

18.4 Defects

- (a) The Contractor must rectify at its cost and risk all Defects:
 - (i) whether or not the subject of a notice under this clause 18.4; and
 - (ii) whether occurring during the Construction Period or the Services Period.
- (b) If the SA Party Representative is of the reasonable opinion that there is a Defect, then the SA Party Representative may (without limiting any other rights of the SA Party under this agreement or at Law) give a written notice to the Contractor (**Defect Notice**).
- (c) A Defect Notice must include a description of the Defect and may, at the election of the SA Party Representative, include a completion time by which the Contractor must rectify the Defect (which completion time must take into account the nature of the Defect and otherwise allow for a reasonable period of time for the execution of any rectification works).
- (d) If the SA Party Representative issues a Defect Notice and the Defect is not rectified by the Contractor by the completion time specified in the Defect Notice, then the SA Party is entitled to rectify the Defect itself or engage a third party to rectify the Defect and the cost of any:
 - (i) such rectification work; and
 - (ii) damage to the Facility caused by or arising from the Defect,will be a debt due from the Contractor to the SA Party.
- (e) The parties agree that any breach of this agreement arising in a Defect will be addressed in this clause 18.4 prior to being treated as a Non-Financial Default.

19 Modifications

- (a) At any time and from time to time during the Term, the SA Party may by notice (**Modification Quotation Request**) to the Contractor request the Contractor to provide the SA Party with a written quotation (**Modification Quotation**) of (as applicable):
- (i) the actual additional cost plus a margin of 5% for overheads and profit (**Modification Costs**); or
 - (ii) the actual cost savings plus a margin of 5% for overheads and profit (**Modification Savings**),
- to be incurred by the Contractor in respect of carrying out the Modification described in the Modification Quotation Request.
- (b) The Contractor must provide its Modification Quotation to the SA Party within 10 Business Days after receipt of the Modification Quotation Request.
- (c) A Modification Quotation must include:
- (i) the effect (if any) of the Modification described in the Modification Quotation Request on the Works or the Services (or both);
 - (ii) the Modification Costs or Modification Savings to be incurred by the Contractor in respect of carrying out the Modification described in the Modification Quotation Request;
 - (iii) the amendments to the following matters that the Contractor considers necessary for it to carry out the Modification described in the Modification Quotation Request:
 - (A) the Contract Payments, provided that such amendments must reflect the Modification Costs or Modification Savings (as the case may be);
 - (B) the Date for Services Commencement, Construction Timetable and Construction Program;
 - (C) the Functional Specifications;
 - (D) the Performance Tests;
 - (E) the Minimum Power Output Capacity and Minimum Energy Storage Capacity;
 - (F) the Performance Guarantees and the Annual Test;
 - (G) the Operating Protocol; and
 - (H) any other provision of this agreement; and

- (iv) any other matter the Contractor considers relevant to carrying out the Modification described in the Modification Quotation Request.
- (d) Within 10 Business Days after receipt of a Modification Quotation, where the parties agree on the Modification, the SA Party may by notice to the Contractor direct the Contractor to carry out the Modification described in the Modification Quotation Request.
- (e) If the SA Party gives the Contractor a notice under clause 19(d), the matters set out in clauses 19(c)(iii)(A) to (H) (inclusive) are deemed to be amended as set out in the Modification Quotation given by the Contractor and the Contractor must carry out the Modification described in the Modification Quotation Request in accordance with this agreement (as amended in accordance with this clause 19(e)).
- (f) The Contractor acknowledges that the SA Party is not liable for, or in connection with, any Claim (and the Contractor is not entitled to make any Claim) arising out of or in connection with any Modification except where it is expressly directed pursuant to a notice given by the SA Party under clause 19(d).

20 Metering

20.1 Metering Equipment

The Contractor must, at its cost, ensure at all times that the Metering Equipment specified in the Functional Specifications is provided, installed and maintained at the Connection Point in accordance with the National Electricity Rules.

20.2 Access to Metering Data

The Contractor must give the SA Party access to all Metering Data collected from the Metering Equipment.

21 Contract Payments

- (a) In consideration for the Contractor dedicating and making available the Guaranteed Capacity for the provision of Services and the Contractor providing the Services under this agreement from the Facility, the SA Party must pay the Contractor the Contract Payments as required by this agreement.
- (b) The Contractor's entitlement to any Contract Payments payable for the period on and from the Services Commencement Date until the date of the Reliability Tests certificate issued by the Independent Engineer under clause 11.4(e) is deferred and that amount shall not be payable by the SA Party until such time as that Reliability Tests certificate is issued. Upon the Independent Engineer issuing that certificate, all amounts so deferred shall be payable in full in accordance with clause 23.
- (c) The Contractor is liable to pay all Transaction Costs imposed on the Contractor by AEMO or the Network Service Provider (as the case may be) in connection with generating electricity from the Facility, and, notwithstanding clause 22, the

Contractor must not pass Transaction Costs through to the SA Party in any circumstances whatsoever except as provided in clause 14.4.

22 Change in Law

22.1 Change to National Electricity Market or National Electricity Rules

- (a) If:
- (i) there is a temporary discontinuance of the National Electricity Market for a period greater than 60 days;
 - (ii) the design of the National Electricity Market changes from that which operated on the Execution Date; or
 - (iii) the National Electricity Rules are changed in a way that materially affects the operations of a party or any provisions of this agreement or the commercial effect of this agreement (excluding a change to the boundaries of a region, the length of the Trading Interval or to the market price cap),

the parties must negotiate (at either party's request) variations to this agreement which reflect as much as possible the commercial effect of the original provisions and which were inserted into this agreement on the basis of the design of the National Electricity Market as it operated on the Execution Date and are no longer operational or no longer operate as originally intended by the parties.

- (b) If the parties fail to reach agreement within 20 Business Days after a notice is given under clause 22.1(a), then the matter is to be referred to an Expert for determination and, for the purpose of that determination:
- (i) the Expert must determine the terms of the variations to be made to this agreement;
 - (ii) each party must submit to the Expert the variations proposed by that party and the other party must be given an opportunity to respond;
 - (iii) the Expert may adopt for its determination the variations proposed by either party or may determine the variations itself; and
 - (iv) the variations must give effect to clause 22.2 where the change to the National Electricity Market or National Electricity Rules is also a Change Event.

22.2 Change Events

- (a) If a Change Event occurs at any time after the Execution Date and as a result the Relevant Costs of the Contractor are increased or decreased as a direct result of the Change Event by more than the Threshold Amount per month during the Services Period, then:

- (i) where it is an increase, the Contractor is entitled to an adjustment to the Contract Payments; and
- (ii) where it is a decrease, the SA Party is entitled to an adjustment to the Contract Payments,

(as the case may be) as may be necessary to account for the Relevant Proportion of the Net Financial Effect to the extent resulting from the Change Event, with any adjustment to be applied to the Contract Payments.

- (b) The Contractor must act reasonably and consistent with prudent business practices with respect to any costs it incurs as a result of a Change Event.
- (c) If there is a Change Event in respect of which clause 22.2(a) applies, the Contractor must promptly, but no later than 3 months after the Change Event, give the SA Party notice of the Change Event under this clause 22.2. The notice must:
 - (i) specify the Change Event and the date when the Change Event is expected to effect the Contractor's Relevant Costs;
 - (ii) establish the connection between the Change Event and its effect on the Contractor's Relevant Costs;
 - (iii) include details of the nature of the Net Financial Effect of the Change Event (including, where relevant, the component of the costs to which it relates and whether it is fixed or variable);
 - (iv) outline all of the options and alternatives identified by the Contractor available to comply with the Change Event, the associated Net Financial Effect for each option and the Contractor's recommended option; and
 - (v) propose the nature, extent and effective date of any adjustment to the Contract Payments necessary to account for the Net Financial Effect including full details of the calculations and all information required to support and verify those calculations.
- (d) The SA Party must consider the notice under clause 22.2(c) promptly and in good faith.
- (e) If requested by the SA Party, the parties must meet to discuss the options identified in the notice and any others proposed by the SA Party.
- (f) The SA Party may require the Contractor to implement an option that does not require any capital investment in the Facility or addition or modification to the Facility where the option is consistent with construction, operation and Maintenance of the Facility in accordance with Law (for example where the SA Party's preferred option is the lowest overall cost option for the SA Party over the remaining Term).
- (g) If the SA Party agrees with the option proposed by the Contractor and the adjustment to the Contract Payments proposed in the notice under clause 22.2(c), the SA Party must notify the Contractor and the change will take effect in accordance with that agreement.

- (h) If the SA Party does not agree with the Contractor's proposal in a notice under clause 22.2(c), the SA Party must notify the Contractor of its preferred option and the adjustment to the Contract Payments it considers is required. If this clause 22.2(h) applies, the parties must negotiate in good faith to reach agreement on the option to be adopted, the corresponding adjustment to the Contract Payments and the time from which the adjustment is to take effect. If the parties do not reach agreement under this clause 22.2(h) within 10 Business Days of a notice from either party requiring agreement to be reached, then there is a dispute for the purposes of clause 35. For the purposes of that clause, the dispute is required to be referred to an Expert for determination.

22.3 *Change in Greenhouse Gas Laws*

- (a) If a Change Event involves a change in or repeal of any existing Greenhouse Law or the imposition of a new Greenhouse Law, the SA Party will have the benefit of any Carbon Benefits and, where relevant, the Carbon Benefits will be offset against the Relevant Costs for which the SA Party is liable under clause 22.2.
- (b) In this clause 22.3:

Baseline and Credit ETS means a Greenhouse Gas emissions trading scheme under which credits, rights, units, permits, certificates or other rights (however called) are created or issued on the basis of a reduction in Greenhouse Gas emissions below a defined level.

Carbon Benefits means any legal, commercial or other benefits (whether present or future) arising under a Greenhouse Law. The term includes any tradeable credit, right, unit, permit, certificate or other right (however called) created in respect of the Facility under a Baseline and Credit ETS, intensity based emissions trading scheme or any other emissions trading scheme. The term does not include any funding or other assistance available to the Contractor (or a Related Body Corporate of the Contractor) to implement changes to plant and equipment or to install technology or other measures designed to reduce Greenhouse Gas emissions.

Greenhouse Gas means any gas currently defined as a greenhouse gas under the *National Greenhouse and Energy Reporting Act 2007* (Cth) and any other gas which is identified by a Greenhouse Law or by an international treaty to which Australia is a party as a gas which contributes to the greenhouse effect or anthropogenic climate change.

Greenhouse Law means any Law which has the objective of regulating, limiting, reducing, controlling, offsetting or mitigating the emission of Greenhouse Gas and imposes, creates or results in a cost on the emission of Greenhouse Gas or is intended to create incentives or price signals to reduce Greenhouse Gas emissions.

23 **Invoicing**

23.1 **Statements**

- (a) Within 10 Business Days after the end of each month of the Services Period, the Contractor must issue a statement (**Statement**) to the SA Party setting out:

- (i) the Contract Payments payable in respect of that month;
 - (ii) any other amount that is payable by the SA Party to the Contractor under this agreement;
 - (iii) any amount that is payable by the Contractor to the SA Party under this agreement;
 - (iv) any corrections or adjustments in respect of that month or any prior periods; and
 - (v) the net amount owing by either party to the other (after netting off the respective amounts referred to in the preceding subparagraphs).
- (b) Each Statement must contain information reasonably required by the SA Party to determine the calculation of the charges and other amounts claimed and include a tax invoice in respect of the net amount payable by the SA Party. In respect of any net amount due to the SA Party by the Contractor, the SA Party may issue a tax invoice to the Contractor for that amount.
- (c) Metering data, including Metering Data, check and back up metering data and other data as reasonably required, will be made available to the SA Party for the purposes of verifying the quantities in a Statement and the accuracy of measurements.

23.2 Payment

- (a) A party must pay:
- (i) the net amount payable as set out in the Statement; and
 - (ii) any other amount invoiced to it by the other party under this agreement, within 30 days after issue of the relevant invoice except that in relation to any Contract Payments deferred under clause 21(b) whilst the Facility is undergoing Reliability Tests, such deferred Contract Payments will be payable on the later of:
 - (iii) 30 days after the issue of the relevant invoice; or
 - (iv) 30 days after the date of the Reliability Tests certificate issued under clause 11.4(e).
- (b) All payments must be in Australian dollars by electronic funds transfer to the bank account nominated from time to time by the party for the purposes of this agreement.
- (c) If a party fails to pay the amount owing under this agreement when due it must pay interest on the amount to the other party notwithstanding the exercise by the other party of any other remedy available to it.

- (d) The interest:
 - (i) accrues daily at the Interest Rate for each day from the day on which the amount became due and payable until but excluding the day on which that amount (together with accrued interest) is paid to the other party; and
 - (ii) is payable on the first Business Day of each month, is calculated on actual days elapsed on a 365 day year and is capitalised on the first Business Day of each month after the due date for payment of such interest if not paid when due.

23.3 Disputed amounts

- (a) If a party bona fide disputes any amount payable by it to the other party, it must:
 - (i) pay by the due date any amount not in dispute; and
 - (ii) notify the other party of that dispute identifying the amount in dispute, the reasons why it is in dispute and that there is a dispute for the purposes of clause 35.
- (b) If the parties do not reach agreement in respect of an amount in dispute within the period referred to in clause 35.2(b), then either party may refer the dispute to an Expert.
- (c) After settlement of the dispute, any amount agreed or determined to be payable by a party (including by way of a refund) must be paid by that party together with interest at the Interest Rate from and including the date the disputed amount fell due (or was overpaid) to (but excluding) the date of payment.
- (d) Despite any dispute as to the amount owed by a party to the other party under this agreement, the parties must continue to perform their obligations and discharge their liabilities under this agreement.

23.4 Corrections

- (a) If an error is discovered in a Statement, the Contractor must provide for an appropriate adjustment payment in the next Statement or, if no further Statement would ordinarily be issued, issue a further statement providing for an appropriate adjustment payment.
- (b) If either party detects an underpayment or overpayment of the amounts owing under this agreement then it must notify the other party promptly and the Contractor must provide for an appropriate adjustment payment in the next Statement or, if no further Statement would ordinarily be issued, issue a further statement providing for an appropriate adjustment payment.
- (c) A party has no liability to the other party in respect of a Claim for payment under this clause 23.4 that is first made after the expiry of 24 months from the date of the relevant Statement.

23.5 Audit

- (a) Subject to clause 23.5(b), the SA Party may appoint an independent auditor agreed by the Contractor (acting reasonably) to examine the books and records of the Contractor relevant to this agreement to the extent necessary to verify the accuracy of any Statement, invoice or computation provided that the examination is conducted within 24 months from the date of the relevant invoice, statement (including a Statement) or computation.
- (b) The SA Party may appoint an auditor under clause 23.5(a) no more than once every 12 months, unless an issue revealed by a previous audit under this clause 23.5 appears to the SA Party (acting reasonably) to be unrectified and ongoing, in which case the limitation in this clause 23.5(b) does not apply.
- (c) If the SA Party appoints an auditor under clause 23.5(a):
 - (i) the auditor will be instructed to only determine the following matters and provide a written report to the parties stating only:
 - (A) that the invoice, statement or computation is accurate and consistent with the terms of this agreement; or
 - (B) if not, the amount that the Contractor should credit or debit in the next Statement or further statement by way of the appropriate reimbursement or adjustment to correct the discrepancy; and
 - (ii) the Contractor will provide the auditor with all information necessary to allow the auditor to make the determination on a strictly confidential basis. The Contractor is not required to disclose that information to the SA Party and the auditor must be instructed not to disclose such information to the SA Party.
- (d) If the audit reveals a discrepancy which requires a reimbursement or adjustment in the SA Party's favour, of an amount greater than \$10,000, the Contractor must promptly reimburse the SA Party for the SA Party's reasonable costs of the audit.

23.6 GST

- (a) If a party (the **supplier**) is required to pay GST in respect of a supply made under or in connection with (including by reason of a breach of) this agreement, the recipient of the supply must (in addition to any other payment for, or in connection with, the supply) pay to the supplier an amount equal to such GST (**GST gross-up**).
- (b) If a GST gross-up is payable, the supplier must give the recipient a tax invoice for the supply.
- (c) Provided a tax invoice has been given, the GST gross-up must be paid by the recipient:
 - (i) if any monetary consideration is payable for the supply, at the same time and in the same manner as such monetary consideration; or

- (ii) if no monetary consideration is payable for the supply, within 10 Business Days after the day on which the tax invoice is given.
- (d) If any payment to be made to a party under or in connection with this agreement is a reimbursement or indemnification of an expense or other liability incurred or to be incurred by that party, then the amount of the payment must be reduced by the amount of any input tax credit to which that party is entitled for that expense or other liability, such reduction to be effected before any increase in accordance with clause 23.6(a).
- (e) If an adjustment event has occurred in respect of a supply made under or in connection with this agreement, any party that becomes aware of the occurrence of that adjustment event must notify the other party as soon as practicable, and the parties agree to take whatever steps are necessary (including to issue an adjustment note), and to make whatever adjustments are required, to ensure that any GST or additional GST on that supply, or any refund of GST (or part thereof), is paid no later than 20 Business Days after the supplier first becomes aware that the adjustment event has occurred.

23.7 Specific Definitions

- (a) **GST, tax invoice, supply** and other terms used in clause 23.6 which are defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) have the meaning given to them in that Act.
- (b) In clause 23.6, a reference to a payment includes any payment of money and any form of consideration other than payment of money.
- (c) In this agreement, all references to payments and obligations to make payments, including all references to compensation (including by way of reimbursement or indemnity), are, but for the operation of clause 23.6, exclusive of GST.

24 Care of persons and property

24.1 Damage to Property

If the Contractor by its act or omission causes any damage to or destruction of property the Contractor must either, as elected by the owner of that property, repair or replace the property or reimburse the owner the costs incurred by the owner in repairing or replacing such property and, in addition, pay to the owner (and any other person (including the SA Party) who has a Claim due to the loss or damage) any other compensation which the Contractor is required by Law to pay. To avoid doubt, a reference to an owner of property extends to the SA Party where the property damaged or destroyed is that owned by the SA Party.

24.2 Injury to Persons

If the Contractor by its act or omission causes an injury to, or the death of, any person then the Contractor must pay all such persons who have a Claim due to that injury or death such compensation as the Contractor is required by Law to pay.

24.3 *Indemnity from Contractor*

The Contractor, to the extent permitted by Law, is liable for, and indemnifies the Indemnified Parties against, any Loss or Claim incurred or suffered by an Indemnified Party arising under, out of, or in connection with:

- (a) any breach by the Contractor of any of its obligations under this agreement;
- (b) the negligence or wilful misconduct of any Contractor Responsible Party in connection with this agreement or the performance of the Works or the Services;
- (c) loss of, or damage to, any real or personal property of any person, caused by, arising out of, or in connection with, the performance of the Works or the Services or any other activity for which the Contractor is directly or indirectly responsible;
- (d) personal injury (which includes illness) or death of any person caused by, arising out of, or in connection with, the performance of the Works or the Services or any other activity for which the Contractor is directly or indirectly responsible;
- (e) the Site; or
- (f) a breach of clause 40 (Protection of the Environment).

25 **Reinstatement**

Subject to clause 28, if the Works or the Facility is damaged or destroyed, the Contractor must:

- (a) subject to allowing reasonable time for inspection by insurers, take immediate steps to clear any debris and begin initial repair work as soon as reasonably practicable;
- (b) promptly consult with the SA Party to agree on steps to be taken to ensure the prompt repair or replacement of the damage so that:
 - (i) it complies with this agreement; and
 - (ii) there is minimal disruption to the Project;
- (c) manage all repair and replacement activities so as to minimise the impact on the Project;
- (d) apply all insurance proceeds towards the repair or reinstatement of the Facility, unless otherwise agreed by the SA Party; and
- (e) repair and reinstate the Works or the Facility (as applicable) within the time notified by the SA Party (acting reasonably) or where no time is notified, as soon as possible.

The parties agree that any breach of this agreement arising in or relating to damage or reinstatement of the Facility will be addressed in this clause 25 prior to being treated as a Non-Financial Default.

26 Insurance**26.1 Insurance of Employees**

- (a) The Contractor must:
 - (i) maintain any registration and insurance required by statute in respect of its employees, including as required by any compulsory statutory workers' compensation scheme; and
 - (ii) to the extent permitted by Law, maintain insurance against any common law liability to its employees to a limit of not less than \$10,000,000 in relation to any one occurrence and unlimited as to the number of occurrences.
- (b) To the extent permitted by Law, the Contractor must ensure that the insurance maintained under clause 26.1(a)(ii) is extended to indemnify the SA Party against any Claims by the Contractor's employees against the SA Party and provide a waiver of subrogation in favour of the SA Party.
- (c) The Contractor must ensure that each Subcontractor maintains, in respect of its employees, registration and insurance complying with the requirements of clause 26.1(a) for the duration of each Subcontractor's undertaking of the Works or performance of the Services.

26.2 Public Liability

- (a) The Contractor must maintain third party public and product liability insurance covering liability to any third party for death or bodily injury (including illness) and loss of, damage to and loss of use of property arising out of anything done or omitted to be done by the Contractor for a liability of not less than \$20,000,000 in respect of any one occurrence and unlimited as to the number of occurrences.
- (b) The Contractor must ensure that each Subcontractor maintains or is covered as an insured under, for the duration of each Subcontractor's performance of the Works or the Services, third party public and product liability insurance covering liability to any third party for death or bodily injury (including illness) and loss of, damage to and loss of use of property arising out of anything done or omitted to be done by that Subcontractor for a liability of not less than \$20,000,000 in respect of any one occurrence and unlimited as to the number of occurrences.

26.3 Works and Facility Insurance

- (a) The Contractor must obtain and maintain until the Services Commencement Date:
 - (i) contract works insurance; and
 - (ii) marine transit insurance,

to cover loss, destruction or damage to the Works and the Facility and anything to be incorporated into the Facility (whether while in transit to the Site, while on the Site

or otherwise) for an amount not less than its full replacement value at the time of the loss, destruction or damage.

- (b) The Contractor must obtain and maintain at all times during the Services Period, an industrial special risks insurance policy covering the whole of the Facility to cover loss, destruction or damage to the Facility for an amount not less than its full replacement value at the time of the loss, destruction or damage.

26.4 Motor Vehicles

The Contractor must ensure that all vehicles used in connection with the provision of the Works or the Services are licensed in accordance with all applicable Laws and insured against third party claims under a comprehensive motor vehicle third party liability policy for an amount of not less than \$10,000,000 per occurrence and unlimited as to the number of occurrences.

26.5 Contractor Insurances Primary

The Contractor must ensure that the insurances it maintains under this clause 26 are primary to, and without contribution from, any insurance maintained by the SA Party.

26.6 Insurance Company

Except to the extent the Law requires the use of a particular insurer, the insurances required to be maintained under this clause 26 must be maintained with a major, reputable Australian resident insurance company approved by the SA Party.

26.7 Proof of Insurance

- (a) Within 5 Business Days after the Execution Date, the Contractor must provide to the SA Party certificates of currency evidencing that all insurances required to be maintained under this clause 26 are in force.
- (b) Within 7 days after the appointment of a Subcontractor, the Contractor must provide to the SA Party certificates of currency evidencing that the insurances required to be maintained by that Subcontractor in accordance with this clause 26 are in force.
- (c) On each anniversary of the Execution Date, and otherwise on request by the SA Party, the Contractor must provide to the SA Party certificates of currency evidencing that all insurances required to be maintained under this agreement are then in force.

26.8 Insurance does not limit contractual responsibilities

No insurance whether maintained by the Contractor, a Subcontractor or the SA Party limits the obligations or liabilities of the Contractor under this agreement.

26.9 No act or omission that may prejudice insurance

The Contractor must not commit, and must ensure its Subcontractors do not commit, any act or omission which is in contravention of an insurance policy maintained by the Contractor or a Subcontractor or which may result in that insurance policy becoming void or voidable or which may result in the insurer refusing liability under the policy.

26.10 *Contractor's failure to insure*

If the Contractor fails to effect or maintain or ensure there is effected and maintained any insurance which the Contractor or a Subcontractor is required to effect and maintain under this agreement (whether at all or on the terms of this agreement), the SA Party may at its sole option and without being under an obligation to do so effect and maintain such insurance and the costs incurred thereby shall be a debt due from the Contractor to the SA Party. No such effecting of insurance by the SA Party affects any obligations of the Contractor under this agreement.

27 **Force Majeure Event**

27.1 *Definition*

Force Majeure Event means (subject to the conditions and exclusions in this definition) any one or more, or a combination, of the following:

- (a) hurricane, cyclone, tornado, earthquake, natural disaster, landslide, tsunami, or mudslide;
- (b) civil riot, civil rebellion, revolution, terrorism, insurrection, militarily usurped power, act of sabotage or act of a public enemy and war (declared or undeclared) or other like hostilities;
- (c) ionising radiation, contamination by radioactivity, or nuclear, chemical or biological contamination not caused or contributed to by any Contractor Responsible Party; or
- (d) fire, flood at or transgressing onto the Site or explosion at the Site caused by any of the events described in paragraphs (a) or (b), not caused or contributed to by any Contractor Responsible Party where the Contractor can demonstrate that all reasonable preventative measures were taken to minimise the cause and effect of the fire, flood or explosion on the performance of its obligations under this agreement;
- (e) subject to paragraph (i), strikes, lockouts, industrial or other labour disputes, work bans, blockades, picketing or other industrial action;
- (f) inability of the Facility to operate or provide the Services due to the Network being unable to receive and transmit energy at the Connection Point due to an event beyond the Contractor's control and not caused or contributed to by any Contractor Responsible Party;
- (g) lightning strikes on the Facility except where the lightning protection systems at the Facility have not responded or functioned correctly,

which causes the SA Party or the Contractor to be unable to perform all or a material part of its obligations under this agreement, where the event or its consequences could not have been prevented by the party claiming to be affected by it (the **Affected Party**) exercising due diligence (and, where the Contractor is the Affected Party, applying Good Industry Practice), provided that the following are not Force Majeure Events in any circumstances:

- (h) a lack of funds or inability to satisfy an obligation to pay money when due;
- (i) strikes, lockouts, industrial or other labour disputes, work bans, blockades, picketing or other industrial action which is specific to, or only affects;
 - (i) the Site;
 - (ii) the Contractor; or
 - (iii) the Contractor Responsible Parties;
- (j) a lack of or shortage of goods, services or labour;
- (k) wet or inclement weather which does not amount to an event referred to in paragraph (a) or to a flood referred to in paragraph (d) of this definition; and
- (l) inability of the Facility to operate or provide the Services due to the Network being unable to receive and transmit energy at the Connection Point due to the occurrence of any Credible Contingency Event or any Network Constraint (as these terms are defined in the National Electricity Rules) or the occurrence of any Network congestion under the National Electricity Rules.

27.2 Notice to be provided by the Affected Party

- (a) A party claiming to be an Affected Party must give the other a written notice no later than 5 Business Days after it forms the opinion that a Force Majeure Event has occurred, which notice must include full particulars of all relevant matters including:
 - (i) details of the Force Majeure Event including details of the basis on which the Affected Party has formed the opinion that the event does constitute a Force Majeure Event;
 - (ii) details of the obligations affected;
 - (iii) details of the action that the Affected Party has taken and proposes to take to avoid or minimise the consequences of the Force Majeure Event;
 - (iv) to the extent practicable, an estimate of the timing during which the Affected Party will be unable to carry out the affected obligations due to the Force Majeure Event; and
 - (v) an estimate of the costs that the Affected Party would incur to cure the impact of the Force Majeure Event were it able to do so.
- (b) Compliance with this clause 27.2 is a condition precedent to any relief to which an Affected Party may otherwise be entitled to under clause 27.4 or 27.5.

27.3 Other obligations of the Affected Party

- (a) The Affected Party must:
- (i) promptly after the occurrence of the Force Majeure Event, use and continue to use all reasonable endeavours, in accordance with Good Industry Practice, to cure, avoid or minimise the consequence of the Force Majeure Event;
 - (ii) after giving the notice required under clause 27.2, continue to provide the other party with all relevant information relating to the Force Majeure Event; and
 - (iii) resume performance of its obligations under this agreement as soon as reasonably practicable after the Force Majeure Event has ceased to have effect, or its effects have been cured or overcome.
- (b) Compliance with this clause 27.3 is an ongoing condition of any relief to which an Affected Party may otherwise be entitled to under clause 27.4 or 27.5.

27.4 Relief prior during the Construction Period

Subject to and without limiting clause 27.2 or 27.3:

- (a) if the Contractor is prevented in whole or in part from performing its obligations under this agreement by a Force Majeure Event occurring during the Construction Period, the Contractor may be entitled to an adjustment under clause 8.3 but is not otherwise entitled to relief; and
- (b) if the Contractor claims an adjustment under clause 8.3, the requirements of this clause 27 apply to that claim in addition to the requirements of clause 8.

27.5 Relief during the Services Period

Subject to and without limiting clause 27.2 or 27.3, an Affected Party that is prevented in whole or in part from performing its obligations under this agreement by a Force Majeure Event occurring during the Services Period is excused from performance of the affected obligations (and is not liable for damages in respect of failure to perform the affected obligations) from the time that the Force Majeure Event first prevented the Affected Party from performing the affected obligations to the time that the Affected Party must resume performance of the affected obligations under clause 27.3(a)(iii).

27.6 Impact of Force Majeure Event during Services Period on Contract Payments

The SA Party is not obliged to pay the Contractor the Contract Payments to the extent and during the period in which the Contractor is relieved from its obligations to provide the Services by reason of the Contractor being affected by a Force Majeure Event.

27.7 Extended Force Majeure

If the performance of the obligations of the Contractor is suspended by reason of any Force Majeure Event during the Services Period and:

- (a) the SA Party is materially adversely affected by the suspension; and
- (b) such suspension of obligations continues for a continuous period exceeding 6 months,

the SA Party may, by notice to the Contractor, terminate this agreement and the Contractor will not be entitled to any compensation including any Loss incurred as a result of the termination of this agreement.

28 Total Loss Event

28.1 Notice of Total Loss Event

The Contractor must give notice (**TLE Notice**) to the SA Party as soon as it becomes aware that a Total Loss Event has occurred during the Services Period in respect of the whole or part of the Facility specifying the circumstances giving rise to the Total Loss Event and the TLE Proportion.

28.2 Termination

- (a) If a Total Loss Event occurs and the TLE Proportion is equal to or greater than the TLE Trigger Percentage, the SA Party may terminate this agreement by giving the Contractor at least 30 days' notice.
- (b) The SA Party must give a notice under clause 28.2(a) within 90 days after receipt of the relevant TLE Notice.

28.3 Reduction in Total Contract Capacity

- (a) If a Total Loss Event occurs and the TLE Proportion is less than the TLE Trigger Percentage, the SA Party may, by notice to the Contractor, elect that the affected parts of the Facility not be rebuilt. The SA Party must give such a notice within 90 days after receipt of the relevant TLE Notice.
- (b) If the SA Party gives a notice under clause 28.3(a), then, with effect from the date on which the next Contract Payments falls due (**Relevant Date**):
 - (i) the Minimum Power Output Capacity and the Minimum Energy Storage Capacity will be reduced in proportion to the TLE Proportion; and
 - (ii) each of the remaining Contract Payments instalments will be reduced by the TLE Proportion.
- (c) If the reduction in the Minimum Power Output Capacity or the Minimum Energy Storage Capacity in accordance with clause 28.3(b)(i) will result in (as applicable):
 - (i) the Minimum Power Output Capacity being less than the Reserved Power Output Capacity as at the Relevant Date; or
 - (ii) the Minimum Energy Storage Capacity being less than the Reserved Energy Storage Capacity as at the Relevant Date,

then in the notice given by the SA Party under clause 28.3(a) the SA Party must specify the Reserved Power Output Capacity and/or the Reserved Energy Storage Capacity to apply from the Relevant Date (such amount to be less than the Minimum Power Output Capacity or Minimum Energy Storage Capacity applying from the Relevant Date) and the Reserved Power Output Capacity and the Reserved Energy Storage Capacity will be deemed to be amended in accordance with such notice.

28.4 Reinstatement

If:

- (a) a Total Loss Event occurs in respect of the whole or a part of the Facility; and
- (b) the SA Party does not exercise its rights under clause 28.2(a) or 28.3(a) (whichever is applicable) within the period prescribed in clause 28.2(b) or 28.3(a) (whichever is applicable),

then, subject to clause 28.5, the Contractor must rebuild and reinstate the affected parts of the Facility in accordance with clause 25 and:

- (c) if the Total Loss Event constitutes a Force Majeure Event, each party will be relieved of its obligations to the extent provided in clause 27.5; or
- (d) if clause 28.4(c) does not apply, then pending rebuilding and reinstatement:
 - (i) clause 29 will apply as if the Contractor had committed a Non-Financial Default; and
 - (ii) the SA Party will be relieved of its obligations to pay the Contract Payments on account of the Total Loss Event.

28.5 Uninsurable Events

(a) If:

- (i) a Neutral Event occurs; and
- (ii) that Neutral Event is an event for which the Contractor cannot obtain insurance cover in the market on commercially reasonable terms despite the Contractor having used commercially reasonable endeavours to obtain such insurance such that no insurance proceeds are available in respect of the Total Loss Event,

(a Total Loss Event meeting the foregoing paragraphs being an **Uninsurable Event**), then the Contractor is relieved from its obligation to rebuild and reinstate the Facility under clause 28.4.

- (b) If the Contractor wishes to claim the benefit of this clause 28.5, the Contractor must give written notice to the SA Party as soon as practicable after obtaining confirmation that the relevant Total Loss Event is an Uninsurable Event. If the Contractor gives a notice under this clause 28.5(b), then notwithstanding any other provision of this agreement, the SA Party may, by notice to the Contractor, immediately terminate

this agreement and the Contractor will not be entitled to any compensation including any Loss incurred as a result of the termination of this agreement.

28.6 Disputes

If there is a dispute between the parties as to whether a Total Loss Event has occurred in respect of the whole or any part of the Facility, either party may refer the dispute to an Expert for determination in accordance with clause 34.

29 Default

29.1 Default Notice

(a) At any time after the occurrence of a Default, the Non-Defaulting Party may serve a Default Notice on the Defaulting Party, specifying the nature of the Default and requiring it to be remedied:

- (i) for an Insolvency Default, immediately;
- (ii) for a Financial Default, within 5 Business Days; and
- (iii) for a Non-Financial Default, subject to clauses 29.1(b), within 20 Business Days,

of the date of receipt of the Default Notice.

(b) In respect of a Non-Financial Default:

- (i) the Defaulting Party must prepare a detailed cure plan and provide that plan to the Non-Defaulting Party within 20 Business Days of the date of the Default Notice;
- (ii) the cure plan must specify the cause of the Default, how the Defaulting Party proposes to cure the Default and the shortest period of time that is reasonably expected to be required to allow the Defaulting Party to cure the Default acting in accordance with Good Industry Practice and actions which the Defaulting Party propose be taken to prevent a repeat of the Default occurring in the future;
- (iii) the Non-Defaulting Party may provide comments on the cure plan and if it does so, the Defaulting Party must make such amendments as are reasonable and consistent with Good Industry Practice and the Non-Defaulting Party's comments and resubmit the cure plan within 3 Business Days of receiving the Non-Defaulting Party's comments; and
- (iv) if the Defaulting Party has complied with the foregoing requirements in this clause 29.1(b) and the cure plan specifies a cure period in excess of the cure period set out in clause 29.1(a)(iii), then the Non-Defaulting Party must grant an extension of the cure period for an additional period to be reasonably determined by the Non-Defaulting Party but in any event not more than 60 days.

- (c) During the cure period specified in clause 29.1(a) or as extended under clauses 29.1(b), the Defaulting Party must diligently seek to cure the Default.
- (d) The cure period will immediately terminate if the Defaulting Party fails to diligently pursue and implement the cure plan.

29.2 Interest for Financial Default

- (a) The Defaulting Party must pay to the Non-Defaulting Party interest on any amount which is the subject of a Financial Default. Such interest will accrue daily at the Default Rate for each day from the date on which the amount became due and payable until such Default is cured. Interest will be payable in arrears on the first Business Day of each month and be calculated on the actual days elapsed and a 365-day year. When payable, interest will be capitalised on the 1st Business Day after the due date for payment of such interest.
- (b) The Defaulting Party's obligation to pay the outstanding amount in relation to a Financial Default on the date it becomes due for payment will not be affected by clause 29.2(a).

29.3 Remedies for Contractor's Default

If the Contractor is the Defaulting Party and fails to cure the Default within the applicable cure period in clause 29.1, the SA Party may exercise any one or more of the following remedies (without prejudice to any of its other rights in this agreement):

- (a) by giving at least 10 Business Days' notice, terminate this agreement;
- (b) suspend the obligations of the SA Party under this agreement until the Default is cured; or
- (c) sue the Contractor for damages for that Default and exercise any other available legal and equitable remedies, including, without limitation, suing for specific performance, injunctive relief or such other relief as it deems appropriate.

29.4 Remedies for the SA Party's Default

- (a) If the SA Party is the Defaulting Party and fails to cure the Default within the applicable cure period in clause 29.1, the Contractor may exercise any one or more of the following remedies (without prejudice to any of its other rights in this agreement):
 - (i) by giving at least 10 Business Days' notice, terminate this agreement;
 - (ii) suspend the obligations of the Contractor under this agreement until the Default is cured; or
 - (iii) subject to clause 29.4(b), sue the SA Party for damages for that Default and exercise any other available legal and equitable remedies, including, without limitation, suing for specific performance, injunctive relief or such other relief as it deems appropriate.

- (b) If the Contractor terminates this agreement under this clause 29.4(b), the Contractor will be entitled to be paid the amounts referred to in Schedule 8, provided that:
 - (i) the Contractor must use all reasonable endeavours to minimise and mitigate all costs and Losses incurred by it in connection with termination of this agreement; and
 - (ii) the SA Party may reduce the amount of the termination payment by the amount of any debt or damages or other amount due by the Contractor to the SA Party.
- (c) The payments required to be made pursuant to clause 29.4(b) represent the Contractor's sole entitlements to payments by virtue of the termination of this agreement for the SA Party's Default and the Contractor has no entitlement to damages in the event of termination of this agreement for the SA Party's Default.

29.5 Accrued rights

Termination of this agreement operates without prejudice to any rights which may have accrued to either the SA Party or the Contractor prior to termination.

29.6 Default and disputes

Unless otherwise agreed, clause 35 (Disputes) and clause 34 (Expert) will not apply to the resolution of any dispute which arises in relation to the operation of this clause 29.

30 Termination for Convenience

- (a) The SA Party may at any time, and at its absolute discretion and without cause, terminate this agreement for convenience by giving at least 12 months' prior notice.
- (b) In the event of termination by the SA Party for convenience, the Contractor will be entitled to be paid the amounts referred to in Schedule 8, provided that:
 - (i) the Contractor must use all reasonable endeavours to minimise and mitigate all costs and Losses incurred by it in connection with termination of this agreement; and
 - (ii) the SA Party may reduce the amount of the termination payment by the amount of any debt or damages or other amount due by the Contractor to the SA Party.
- (c) The payments required to be made pursuant to this clause 30 represent the Contractor's sole entitlements to payments by virtue of the termination of this agreement for convenience and the Contractor has no entitlement to damages in the event of termination of this agreement for convenience.

31 Liability

31.1 Exclusion of consequential loss

Subject to clause 31.2, no party is liable to the other party under or in connection with this agreement in any circumstances for any Consequential Loss however arising (including, without limitation, as a result of breach of contract, warranty, indemnity, tort (including negligence), breach of statutory duty, statutory liability or otherwise) and all such liability is excluded.

31.2 Limitation on Exclusions

The exclusion in clause 31.1 does not apply to limit or exclude any:

- (a) amounts payable under clause 21(a);
- (b) Claim, damage or Loss in respect of third party property damage by a person other than the SA Party or the Contractor (or a Related Body Corporate of the SA Party or the Contractor);
- (c) Claim in respect of personal injury or death of any person;
- (d) amounts payable under clauses 12 or 17 or any damages at Law payable under clause 31.4;
- (e) termination payments payable under clauses 29.4 and 30; or
- (f) liability arising from any wilful default or fraudulent act or omission by a party, its employees and agents.

31.3 Definition of Consequential Loss

Consequential Loss means any:

- (a) indirect loss, damage, cost, liability or expense;
- (b) special, indirect, consequential, incidental or punitive damages;
- (c) damages for economic loss, loss of profits, loss of opportunity, loss of market, loss of contract, loss of revenue, goodwill, bargain, anticipated savings or loss or corruption of data; or
- (d) loss incurred by a third party of the nature referred to in paragraphs (a) to (c) above,

whether or not such loss or damage was foreseeable and even if advised of the possibility of the loss or damage.

31.4 Damages at Law

If it is determined by a court of competent jurisdiction that the Contractor's liability for any liquidated damages payable by the Contractor under clauses 12 or 17 is deemed to be or

becomes void, voidable or unenforceable in any way so as to disentitle the SA Party from claiming such liquidated damages, then:

- (a) the SA Party is entitled to claim against the Contractor damages at Law as an alternative to such liquidated damages; and
- (b) any limitation on the Contractor's liability to pay such liquidated damages under this agreement will apply to any amount recovered by the SA Party under this clause 31.4.

32 Intellectual Property

32.1 Grant of Intellectual Property Rights

- (a) The Contractor must ensure that all Intellectual Property Rights required to enable the SA Party to use the Facility and to use any written or electronic material (including drawings and diagrams) prepared by the Contractor and provided to the SA Party are licensed to the SA Party for the purposes of this agreement. Any such licence must be granted on the basis that it is non-exclusive, perpetual (and to avoid doubt survives termination or expiration of this agreement), irrevocable, transferable and royalty free and includes a right to sub-licence and for a sub- licensee to grant further sub-licences.
- (b) The Contractor shall do everything necessary, including executing such documents required by the SA Party, to ensure the valid and effective grant of such licence and the valid and effective vesting of Intellectual Property Rights in the SA Party.

32.2 Indemnity

- (a) The Contractor must indemnify and keep the Indemnified Parties indemnified against any Loss suffered by the Indemnified Parties due to any claim that the Works or Services or any thing done by a Contractor Responsible Party as part of the undertaking of the Works or providing the Services infringes the Intellectual Property Rights of any third party.
- (b) The indemnity in clause 32.2(a) does not apply to the extent that the infringement arises due to a document provided by the SA Party to the Contractor.

32.3 Moral Rights

- (a) The Contractor must ensure it obtains written and unconditional consents which comply with the *Copyright Act 1968* (Cth) from each individual who creates or develops any part of any written or electronic material (including drawings and diagrams) prepared by the Contractor and provided to the SA Party as part of the Works to permit the SA Party and any persons authorised by the SA Party to use, or to do any act or omission in relation to, such materials, anywhere in the world whether or not such act or omission would, but for such consent, infringe any moral rights that the individual may have in respect of such materials, including:
 - (i) any use of such materials including their alteration and variation in any manner; and

- (ii) the use of such materials without any attribution of authorship.
- (b) The Contractor must provide such evidence requested by the SA Party to substantiate that it has complied with its obligations clause 32.3(a).
- (c) The Contractor must indemnify and keep the SA Party indemnified against any Loss incurred by the SA Party due to the Contractor's failure to comply with this clause 32.3.

33 Disposal and Encumbrances

33.1 Specific Definitions

The following definitions apply in this clause 33:

Change of Control occurs in relation to the Contractor where:

- (a) an entity that Controls the Contractor ceases to Control the Contractor; or
- (b) an entity that does not Control the Contractor comes to Control the Contractor,

provided that a Change of Control will be deemed not to occur where it occurs as a result of a change or changes in ownership of the issued shares in:

- (c) an entity listed on a relevant stock exchange; or
- (d) Neoen SAS.

For the purpose of this definition of **Change of Control**, "entity" has the meaning given in section 64A of the Corporations Act (as that provision is in force as at 1 May 2017).

Control has the meaning given in section 50AA of the Corporations Act (as at 1 May 2017) except that, in addition, an entity controls a second entity if:

- (a) the first entity would be taken to control the second entity but for sub-section 50AA(4) (as that provision is in force as at 1 May 2017); or
- (b) the first entity has voting power (as defined in section 610 of the Corporations Act as at 1 May 2017) of at least 50% in the second entity.

Dispose means assign, novate, transfer or otherwise dispose of any legal or equitable interest, either in whole or in part, whether by sale, lease, declaration or creation of a trust, or otherwise, and **Disposal** will be construed accordingly.

Encumbrance means:

- (a) a security interest, as defined in the PPSA;
- (b) any other mortgage, pledge, lien or charge;
- (c) an easement, restrictive covenant, caveat or similar restriction over property; or

- (d) any other interest or arrangement of any kind that in substance secures the payment of money or the performance of an obligation, or that gives a creditor priority over unsecured creditors in relation to any property.

33.2 Restrictions on Disposal by Contractor

- (a) Subject to clause 33.2(b), the Contractor must not Dispose of its interests under this agreement or its right, title and interest in the Facility, the Site or any Project Document to any person without the prior written consent of the SA Party, such consent not to be unreasonably withheld or delayed.
- (b) The Contractor may grant a security interest over the Contractor's interests under this agreement or its right, title and interest in the Facility, the Site or any Project Document in favour of its Financiers or Tesla (or a Related Body Corporate of Tesla).
- (c) The Contractor must not permit a Change of Control to occur in respect of the Contractor unless the SA Party has given its prior written consent to the Change of Control.
- (d) Any consent to a proposed Disposal under paragraph (a) being considered or given by the SA Party will, at a minimum, be subject to:
 - (i) the Contractor demonstrating to the satisfaction of the SA Party that the assignee is financially and technically capable of observing and performing the Contractor's obligations under this agreement, including the Contractor's obligations under the Contractor IPP;
 - (ii) the Contractor demonstrating that the assignee holds all Authorisations necessary to perform the purportedly transferred obligations and liabilities of the Contractor under this agreement; and
 - (iii) the assignee and the Contractor entering into with the SA Party a binding deed of covenant pursuant to which the assignee undertakes to perform the obligations and liabilities of the Contractor under this agreement which are to be transferred and the SA Party releases the Contractor from all its obligations under this agreement and acknowledges the SA Party's continuing obligations under this agreement.

33.3 Termination right for Change of Control default

If a Change of Control occurs in respect of the Contractor in breach of clause 33.2(c), the SA Party may give the Contractor notice specifying the relevant breach and allowing the Contractor 30 days to establish to the SA Party's reasonable satisfaction (including by providing credit support satisfactory to the SA Party if there has been a material decline in the creditworthiness of the Contractor) that the SA Party will not be materially disadvantaged by the Change of Control of the Contractor. If the Contractor fails to do so, notwithstanding any other provision of clause 29, the SA Party may immediately exercise its rights in clauses 29.3(a) to (iii) (inclusive).

33.4 *Disposal by the SA Party*

The SA Party may at any time Dispose of its interests under this agreement to any person that remains a South Australian government owned entity ('assignee') if the assignee executes and delivers to the Contractor a deed of covenant pursuant to which the assignee:

- (a) undertakes to perform the obligations and liabilities of the SA Party under this agreement which are to be transferred;
- (b) warrants that it is financially and technically capable of performing those obligations and meeting those liabilities; and
- (c) demonstrates that it holds all Authorisations necessary to perform those obligations and liabilities.

The SA Party may not otherwise Dispose of its interest under this agreement to any other person without prior consent of the Contractor.

33.5 *Encumbrances*

- (a) Subject to clause 33.2(b), the Contractor must not grant any Encumbrance over or in respect of the Facility, the Site, or its interests under this agreement or under a Project Document without the prior written consent of the SA Party.
- (b) Any Encumbrance consented to by the SA Party under this clause 33.5 will not be effective unless the Contractor, the SA Party and third party security holder have executed a binding deed of covenant under which the third party security holder agrees that its rights are subject to the provisions of this agreement (and which deed will otherwise contain provisions customarily found in a tripartite agreement with a third party security holder).
- (c) Where the Contractor has granted a security interest in accordance with clause 33.2(b), the SA Party agrees to enter into a tripartite agreement with either the Financiers or Tesla (or Related Body Corporate of Tesla) or both which contains customary and standard market terms for the purposes of project financing (including recognising step-in rights of the Financiers or Tesla).

34 **The Expert**

34.1 *Application*

This clause 34 applies to any dispute between the parties which is required by a provision of this agreement to be referred to expert determination and any other dispute under this agreement which the parties agree to refer to expert determination (**Expert Dispute**).

34.2 *Resolution Institute Rules*

Except to the extent inconsistent with the remaining provisions of this clause 34 the expert determination and resolution of the Expert Dispute will be governed by the Expert Determination Rules of the Resolution Institute (**Resolution Institute Rules**).

34.3 Reference to Expert

- (a) Where an Expert Dispute is referred to determination under this clause 34 either party may serve a notice requiring the appointment of an Expert.
- (b) The parties must endeavour to agree upon an Expert within 3 Business Days of the service of the notice. If the parties have not agreed upon an Expert within this time period, then the Expert will be appointed in accordance with the Resolution Institute Rules.
- (c) Immediately upon the appointment of the Expert the Expert Dispute will be referred to the Expert.

34.4 No conflicts of interest

An Expert must not (unless otherwise agreed):

- (a) be an officer or employee, or former officer or employee, of a party or a Related Body Corporate of a party; nor
- (b) at the time of appointment, have any financial relationship or other direct or indirect association with a party which might jeopardise the Expert's impartiality.

34.5 Presentation of evidence

Each party:

- (a) will be entitled to produce to the Expert any materials or evidence which that party believes is relevant to the Expert Dispute;
- (b) will make available to the Expert all materials requested by him or her and all other materials which are relevant to his or her determination; and
- (c) may be represented by a legal representative (or any other person nominated by the party) before the Expert.

34.6 Role of Expert

The Expert will:

- (a) act as an expert and not as an arbitrator;
- (b) not be bound by the rules of evidence; and
- (c) have the power to inform himself or herself independently as to the facts to which the Expert Dispute relates and to take such measures as he or she thinks fit to expedite the determination of the Expert Dispute.

34.7 Legal Assistance

Where the Expert's determination requires them to draft amendments to this agreement, the Expert may retain a senior legal practitioner with at least 10 years' experience in energy or infrastructure law to assist the Expert draft those changes.

34.8 Determination

The Expert will make a determination on the Expert Dispute and will determine what, if any, adjustments may be necessary between the parties. Except to the extent otherwise required by Law, the determination of the Expert will be, in the absence of manifest error of fact or error of law, final and binding upon the parties.

34.9 Costs

Unless the parties otherwise agree, the Expert will determine which party will bear the costs of the determination (including, without limitation, the remuneration of the Expert and the costs of any legal practitioner engaged under clause 34.7), and in what proportion, having regard to the degree to which he or she considers that party was at fault or unreasonable in failing to agree to the matter under reference, and that party will bear those costs accordingly.

34.10 Replacement of Expert

- (a) If, prior to resolution of an Expert Dispute, an Expert appointed under this clause 34 dies, or is, due to some other cause (including illness, bankruptcy or death or illness of family members), unable to commence acting, or to continue acting, to determine the Expert Dispute under this clause 34 (or refuses to commence acting or to continue acting to determine the dispute) then the parties must endeavour to agree upon a new Expert within 3 Business Days of the service of notice by a party requiring the appointment of a replacement Expert.
- (b) If the parties are unable to agree upon a replacement Expert within the time period specified in clause 34.10(a), then a new Expert will be appointed in accordance with the Resolution Institute Rules. Immediately upon the appointment of the replacement Expert the Expert Dispute will be referred to that Expert.

34.11 Obligations and rights not affected

- (a) During the period of any resolution of an Expert Dispute in accordance with this clause 34 the parties must continue to perform their obligations under this agreement.
- (b) The existence of an Expert Dispute does not prevent a party exercising any rights it has under this agreement, including a right of termination.

34.12 Urgent relief

Nothing in this clause 34 will prevent a party from seeking urgent injunctive or declaratory relief from a court where, in that party's opinion, such action is necessary to protect that party's rights.

34.13 Arbitration

If for any reason this clause 34 is not enforceable (either generally or in respect of a particular matter referred to determination under it) then the matters unable to be resolved under this clause 34 will be referred to arbitration under the *Commercial Arbitration Act 2011* (SA). In such case any references in this agreement to the determination of the Expert will be read as a reference to the determination of the arbitrator.

35 Disputes**35.1 Notice of dispute**

If any dispute arises between the parties under or in connection with this agreement, the party requiring it to be resolved must promptly give the other party written notice identifying the dispute including reasonable details of it.

35.2 Good faith negotiation

- (a) Within 5 Business Days of a party receiving the notice referred to in clause 35.1, or such longer period agreed upon by the parties, the chief executive officer of the Contractor and the chief executive of the South Australian Department of Premier and Cabinet or their respective nominee having authority to resolve the dispute must meet and, in good faith, use reasonable endeavours to attempt to resolve the dispute by negotiation.
- (b) In the event that the parties are unable to reach a resolution of the dispute by negotiation within 10 Business Days of a party receiving the notice referred to in clause 35.1 or such longer period agreed by the parties, then unless this agreement requires the dispute to be referred to an Expert (in which case clause 34 applies), either party may take such steps as it considers appropriate in relation to the dispute.

35.3 Injunctive and other relief

- (a) Except as provided in clause 6.4(b), nothing contained in this agreement will deny any party the right to seek injunctive or declaratory relief from an appropriate court.
- (b) The dispute resolution procedures in this clause 35 do not apply to impair, delay or otherwise prejudice the exercise by a party of its rights provided in this agreement (including without limitation any right of termination).

36 Confidentiality and announcements**36.1 Confidential Information**

Each party will treat and keep confidential:

- (a) all information disclosed to that party, under this agreement, pursuant to the transactions contemplated by this agreement or during the negotiations preceding the execution of this agreement by the other party; and

- (b) Schedule 1, Schedule 2, Schedule 3, Schedule 4, Schedule 6, Schedule 8, Annexure A (including all attachments), Annexure B, Annexure C, Annexure D, Annexure E and Annexure F,

(Confidential Information) irrespective of the form in which that information was provided.

36.2 Permitted disclosures

- (a) Despite clause 36.1, Confidential Information may be disclosed by a party receiving that information in the following circumstances:
- (i) to its employees, its professional advisers or its financiers who require that information for the purpose of carrying out the functions assigned to them by the party;
 - (ii) to its insurers;
 - (iii) with the consent of the party who provided the information, which consent may not be unreasonably withheld;
 - (iv) where the information was already known to it at the time it received it in the manner contemplated by clause 36.1;
 - (v) the information is known publicly other than as a consequence of a breach of clause 36.1 by that party;
 - (vi) to a bona fide prospective purchaser of its share capital or of any relevant part of its business undertaking;
 - (vii) when required by Law or by the requirements of any stock exchange on which the shares of the party or any of its Related Bodies Corporate are listed;
 - (viii) in connection with the refinancing of any debt of that party;
 - (ix) to any Related Body Corporate;
 - (x) as required to discharge a party's obligations under this agreement or to exercise its rights under this agreement; or
 - (xi) as required to exercise rights or obligations under a Third Party Contract.
- (b) Except in the case of clause 36.2(a)(iii), clause 36.2(a)(iv), clause 36.2(a)(v) and clause 36.2(a)(vii), a party disclosing Confidential Information under clause 36.2 must use its reasonable endeavours to ensure that the persons to whom it discloses that information undertake to keep the information confidential.

36.3 Government Disclosures

- (a) The preceding provisions of this clause 36 apply subject to this clause 36.3.

- (b) The Contractor acknowledges that the SA Party may disclose Confidential Information to any agency, authority, instrumentality, a Minister or officer of the State of South Australia or to Cabinet, Parliament or any Parliamentary committee where it is customary for the SA Party to disclose information such as the Confidential Information (whether or not the SA Party is legally obliged to do so).
- (c) The Contractor acknowledges that the SA Party and other South Australian Governmental Agencies are subject to the *Freedom of Information Act 1991 (SA)* and that this agreement or documents relating to this agreement may become the subject of an application under that Act and access to them may need to be given to a third party in accordance with that Act. Neither the SA Party nor any other South Australian Governmental Agency has any liability to the Contractor whatsoever for giving access to a document in accordance with the *Freedom of Information Act 1991 (SA)*.

36.4 Announcements

Except for securities exchange announcements required by Law, the Contractor must not make any public announcement or issue any media release relating to this agreement or its subject matter or exploit the fact that it has entered into this agreement, without the prior written approval of the SA Party. The parties shall, where appropriate, endeavour to issue joint public announcements and media releases in relation to this agreement.

36.5 Survival

This clause 36 survives the termination or expiration of this agreement by 5 years.

37 Subcontractors

37.1 Requirements for Subcontracting

- (a) The Contractor must not engage any Subcontractor without the prior written approval of the SA Party. For this purpose, the SA Party approves the engagement of the Subcontractors specified in Schedule 7.
- (b) The Contractor must apply to the SA Party in writing for approval to appoint a Subcontractor and the application must include details of the name of the proposed Subcontractor and the tasks that the Contractor proposes that it performs.
- (c) The SA Party may request other information about the proposed Subcontractor.
- (d) If the SA Party grants its approval then the approval may be given on such conditions as the SA Party reasonably considers appropriate.
- (e) Despite any other provision of this agreement:
 - (i) any subcontract entered into by the Contractor with a Subcontractor does not relieve the Contractor from any obligation under this agreement and does not create or impose any obligation or liability on the SA Party;

- (ii) the Contractor remains responsible for obligations performed by Subcontractors to the same extent as if such obligations were performed by the Contractor;
- (iii) the Contractor will not be relieved of any liability or obligation under this agreement because the Contractor subcontracts any part of the Project; and
- (iv) the SA Party will have no liability to a Subcontractor arising from their subcontract with the Contractor.

37.2 Security of Payment Act

If the Security of Payment Act applies to any agreement with a Subcontractor:

- (a) the Contractor must ensure that, within:
 - (i) 4 Business Days after any notice under the Security of Payment Act is given to, or received by, the Contractor from any Subcontractor; or
 - (ii) 3 Business Days after notice of a Subcontractor's intention to suspend work under a Subcontract pursuant to the Security of Payment Act is given to, or received by, the Contractor from any of its Subcontractors, a copy of that notice is given to the SA Party; and
- (b) if a Subcontractor becomes entitled to suspend work under a Subcontract pursuant to the Security of Payment Act because of a failure by the Contractor or any Contractor Associate to pay moneys due and payable to the Subcontractor, the SA Party may (in its absolute discretion) pay to the Subcontractor the amount owing to the Subcontractor in respect of that work, and any amount paid by the SA Party will be a debt due from the Contractor to the SA Party.

38 Contractor Responsible Parties

- (a) The Contractor must ensure that each Contractor Responsible Party employed or engaged in respect of any activities connected with the Project possesses the appropriate skill, expertise, Authorisations and qualifications.
- (b) Despite any other provision of this agreement:
 - (i) the Contractor is liable to the SA Party for the acts or omissions of any Contractor Responsible Party, as if they were acts or omissions of the Contractor;
 - (ii) any matter within the control of any Contractor Responsible Party will be taken to be within the reasonable control of the Contractor; and
 - (iii) the SA Party will have no obligation or liability to the Contractor for any act, omission, default, breach of contract or insolvency of any Contractor Responsible Party.

39 Work Health and Safety

- (a) Throughout the Term, the Contractor must:
- (i) comply, and ensure that every Contractor Responsible Party complies, with all applicable Laws and Authorisations relating to occupational health and safety; and
 - (ii) comply, and ensure that every Contractor Responsible Party complies, with Good Industry Practice in so far as relevant to occupational health and safety matters.
- (b) The SA Party may at any time review, inspect, monitor, audit or otherwise observe the Contractor's practices and procedures in connection with the Project to ensure compliance with clause 39(a).

40 Protection of the Environment

- (a) Throughout the Term, the Contractor must:
- (i) comply, and ensure that every Contractor Responsible Party complies, with all applicable Laws and Authorisations relating to the protection and preservation of the Environment and avoidance of contamination and pollution; and
 - (ii) comply, and ensure that every Contractor Responsible Party complies, with Good Industry Practice in so far as relevant to the protection and preservation of the Environment and avoidance of contamination and pollution.
- (b) The SA Party may at any time review, inspect, monitor, audit or otherwise observe the Contractor's practices and procedures in connection with the Project to ensure compliance with clause 40(a).

41 Reporting of incidents

The Contractor must:

- (a) promptly notify (or in any event, within 24 hours) the SA Party of any:
- (i) accident, injury, death, near-miss incident or property damage;
 - (ii) damage to the Environment, contamination, pollution or incident which had the potential to cause, but did not in fact cause, damage to the Environment, pollution or contamination; or
 - (iii) notifiable incident (being an incident which is required to be notified to a Governmental Agency under any Law relating to occupational health and safety or the Environment),

- which occurs in connection with the Project;
- (b) within 2 Business Days after any such event, provide a written report to the SA Party giving complete details of the event, including the results of investigations into its cause, and outlining the measures to be taken to avoid the occurrence reoccurring;
 - (c) update that report as further information becomes available to the Contractor;
 - (d) regularly update the SA Party on the Contractor's progress in implementing measures to avoid the event reoccurring and provide such other information in respect of implementation of these measures as the SA Party requests; and
 - (e) provide such other information in respect of the event, its cause and effects as the SA Party reasonably requests.

42 Management Plans

- (a) As soon as practicable, and in any event not later than 28 days, after the Execution Date, the Contractor must prepare for the SA Party's approval:
 - (i) a "Health and Safety Management Plan";
 - (ii) an "Environmental Management Plan";
 - (iii) a "Quality Management Plan";
 - (iv) an "Emergency Response Plan"; and
 - (v) any other plan required by this agreement to be approved by the SA Party,

which complies in all respects with the requirements of this agreement and which sets out how the Contractor will discharge its obligations under this agreement and under all applicable Laws and Authorisations.

The Contractor must prepare and submit for the SA Party's approval an Asset Management Plan no later than 2 months after the Execution Date. The Asset Management Plan must comply in all respects with the requirements of this agreement and set out how the Contractor will discharge its obligations under this agreement and under all applicable Laws and Authorisations.

- (b) The SA Party will review each plan submitted by the Contractor in accordance with clause 42(a) and may approve it or may require changes where the SA Party reasonably considers that changes are required and, if so requested, the Contractor must amend and resubmit the plan for the SA Party's review and approval within the time specified by the SA Party. The process in this clause 42(b) will be repeated until such time as the SA Party has approved the relevant plan.
- (c) Once a plan submitted or re-submitted by the Contractor in accordance with this clause 42 has been approved by the SA Party in accordance with clause 42(b), it will be a **Management Plan**.

- (d) The Contractor must review and revise a Management Plan in accordance with Good Industry Practice, provided that the Contractor must not amend a Management Plan without the SA Party's prior written approval.
- (e) The SA Party's review or approval of a Management Plan will not relieve the Contractor of full responsibility for its adequacy and fitness for purpose. By giving its suggestions or approval, the SA Party does not assume any responsibility for the adequacy or fitness for purpose of a Management Plan.
- (f) The Contractor must comply, and must ensure that every Contractor Responsible Party complies, at all times with the Management Plans.

43 Audit

- (a) The Contractor acknowledges the provisions of the *Public Finance and Audit Act 1987 (SA)* and the Treasurer's instructions made under that Act.
- (b) The parties agree that nothing contained in this agreement or any action taken pursuant to this agreement limits the rights and responsibilities of the Auditor-General under the *Public Finance and Audit Act 1987 (SA)*.
- (c) The Contractor must provide the Auditor-General with such assistance, including the provision of information, as the Auditor-General may reasonably require in connection with any carrying out of his or her functions under the *Public Finance and Audit Act 1987 (SA)* without charge.

44 Acting Ethically

- (a) The Contractor must conduct itself in a manner that does not invite, directly or indirectly, the State of South Australia's officers, employees or agents or any public sector employee (as defined in the *Public Sector Act 2009 (SA)*) to behave unethically, to prefer private interests over the State of South Australia's interests or to otherwise contravene the Code of Ethics for the South Australian Public Sector.
- (b) The Contractor, if required by the SA Party, must give its consent to the conduct of a police check or any other enquiry and the Contractor, if required by the SA Party, must procure the consent of a Contractor Responsible Party to the conduct of a police check or any other enquiry.
- (c) If the SA Party gives the Contractor notice in writing requiring any one or more of the Contractor Responsible Parties to be withdrawn from the performance of the Contractor's obligations under this agreement, the Contractor must immediately comply with the notice and provide replacements acceptable to the SA Party.
- (d) The Contractor must not:
 - (i) offer an Incentive to any person involved in the procurement process for this agreement on behalf of the SA Party;

- (ii) engage in any practice such as collusion with other potential competitors, secret commission or any other deceptive practice; or
 - (iii) engage in any practice that would give the Contractor an improper advantage over competitors.
- (e) The Contractor warrants that it is not aware of any Conflict of Interest (or potential Conflict of Interest) that would preclude it from properly performing its obligations under this agreement.
- (f) The Contractor must disclose to the SA Party in writing, all actual Conflicts of Interest that exist or arise (either for the Contractor or a Contractor Responsible Party) in the course of performing its obligations under this agreement as soon as practical after it becomes aware of that conflict.
- (g) In performing its obligations under this agreement, the Contractor must not be a party to any act or thing which:
 - (i) is prejudicial to the goodwill, reputation or overall public image of the SA Party or the Crown in right of the State of South Australia; or
 - (ii) puts at risk the probity of any transaction conducted under this agreement.

45 Respectful Behaviour and Equal Opportunity

- (a) The Contractor acknowledges the State of South Australia's zero tolerance towards men's violence against women in the workplace and the broader community.
- (b) The Contractor must comply, and take all practicable steps to ensure that every Contractor Responsible Party complies, with all equal opportunity and anti-discrimination legislation applicable in South Australia and with the requirements of affirmative action legislation, including the *Affirmative Action (Equal Opportunity for Women) Act 1986 (SA)*.
- (c) The Contractor agrees that in performing this agreement, every Contractor Responsible Party will at all times:
 - (i) act in a manner that is non-threatening, courteous, and respectful; and
 - (ii) comply with any instructions, policies, procedures or guidelines issued by the SA Party regarding acceptable workplace behaviour.
- (d) If the SA Party believes that any Contractor Responsible Party is failing to comply with the behavioural standards specified in this clause 45, then the SA Party may in its absolute discretion:
 - (i) prohibit access by the relevant Contractor Responsible Party to the Site; and
 - (ii) direct the Contractor to withdraw the relevant Contractor Responsible Party from undertaking the Works or the provision of the Services.

46 Industry Participation Plan

- (a) The SA Party, the Contractor and Tesla agree that Tesla is a party to this Project Agreement only for the purposes of this clause 46.
- (b) The Contractor must implement the sections of the Contractor IPP applicable to Neoen Australia Pty Ltd or the Contractor.
- (c) Tesla must implement the sections of the Contractor IPP applicable to Tesla.
- (d) The Contractor and Tesla must provide an Industry Participation Report in respect of each Industry Participation Reporting Period within two weeks after the end of each period, in the format approved by the SA Party and containing sufficient detail to inform the SA Party and the Industry Participation Advocate of the progress each of Contractor and Tesla have made in relation to its obligations under the Contractor IPP.
- (e) The **Industry Participation Reporting Period** is each consecutive 6 month period from the Execution Date. However if this agreement ends on a day less than 6 months from the end of the previous Industry Participation Reporting Period (or less than 6 months from the Execution Date) the final Industry Participation Reporting Period is the period from the end of the previous reporting period (or from the Execution Date if applicable) to the date of termination or expiration of this agreement.
- (f) The Contractor and Tesla must attend any meeting scheduled by the Industry Participation Advocate during the Term to review how the Contractor IPP is being implemented and advanced, and for this purpose, the Contractor and Tesla must provide all information reasonably requested by the Industry Participation Advocate. The Industry Participation Advocate must give the Contractor and Tesla not less than 10 Business Days' notice of any such meeting.
- (g) In addition to the remedies available to the SA Party under this agreement, the Contractor and/or Tesla's failure to comply, in whole or in part, with the commitments contained within the Contractor IPP will be a factor taken into account in the award of future contracts for the Government of South Australia.

47 Notices

Except where otherwise provided in this agreement, any notice or other communication required of a party by this agreement (including for the purposes of this clause 47 any agreement, request, demand, consent or approval):

- (a) must be in writing in English and signed by the party or its agent; and
- (b) must be sent by priority post, email or facsimile, or delivered, to the address, email address or facsimile number of the recipient, and sent to the attention of the recipient's contact, each as set out in Schedule 1.

A party may replace its address and other details for receipt of communications set out in Schedule 1 by giving not less than 5 Business Days' notice to all other parties.

47.2 *Email communications*

Any communication required by this document that is sent by email must be in a format (such as a scanned pdf) that is an accurate and legible image of the original of the communication including the signature. Each such communication must be attached to an email that states that the attachment is a communication under this agreement. The party sending the communication by email must maintain an electronic or printed copy of the email and the attached communication.

47.3 *Time of receipt*

A notice or other communication will be taken to be received:

- (a) if hand-delivered, at the time of delivery;
- (b) if sent by pre-paid priority post, three days (if posted within Australia to an address in Australia) or 10 days (if posted from one country to another) after the date of posting;
- (c) if sent by facsimile, when the machine from which the facsimile was sent generates a transmission report indicating that the whole facsimile was sent to the recipient's facsimile number.

If due to this clause a communication would be taken to be received on a day that is not a Business Day, or after 5.00pm on a Business Day, the communication is taken to have been received at 9.00 am on the first Business Day after that day.

48 *Parent Guarantee*

48.1 *Provision of Parent Guarantee*

- (a) On the Execution Date, the Contractor must provide or procure the provision of the Parent Guarantee by Neoen SAS and Tesla Performance Guarantee by Tesla Inc.
- (b) Within 28 days of the Execution Date, the Contractor must provide or procure the provision of one or more customary legal opinions confirming the enforceability and due execution of the Parent Guarantee and the Tesla Performance Guarantee.
- (c) If the Contractor fails to provide or procure the provision of each of Parent Guarantee and Tesla Performance Guarantee to the SA Party in accordance with clause 48.1(a), the SA Party may by notice to the Contractor terminate this agreement immediately.
- (d) If the Contractor fails to provide or procure the provision of each of the legal opinions to the SA Party in accordance with clause 48.1(b), the SA Party may issue a Default Notice for a Financial Default except that the maximum cure period will be 20 Business Days.

- (e) If this agreement is terminated by the SA Party under clause 48.1(c), the SA Party is not liable for or in connection with any Loss of the Contractor or any Claim by the Contractor (and the Contractor is not entitled to make any Claim) against the SA Party arising out of or in connection with the termination of this agreement by the SA Party under clause 48.1(c).

48.2 Replacement of Parent Guarantee

- (a) The SA Party may, by notice to the Contractor, require the Contractor to provide a replacement Parent Guarantee if, in the reasonable opinion of the SA Party at any time, the creditworthiness of the provider of the Parent Guarantee previously provided to the SA Party is materially weaker than as at the date the Parent Guarantee was first provided to the SA Party.
- (b) If the SA Party gives a notice under clause 48.2(a), the Contractor will provide a replacement Parent Guarantee from another entity acceptable to the SA Party and a legal opinion confirming to the satisfaction of the SA Party the enforceability of such replacement guarantee within 10 Business Days after receiving such notice.
- (c) If the Contractor disputes the reasonableness of any determination by the SA Party under clause 48.2(a), it may refer the dispute to an Expert for determination in accordance with clause 34.

49 Miscellaneous

49.1 Role of the SA Party

- (a) Nothing in this agreement shall oblige the SA Party to grant or exercise any administrative or regulatory discretion, or to otherwise fetter, constrain or otherwise impair the due exercise of any administrative or regulatory discretion exercisable by any Governmental Agency.
- (b) The statutory rights, duties, powers and functions conferred on the State of South Australia by or under any Law are in addition to the rights, duties, powers and functions conferred on the SA Party by this agreement.
- (c) Nothing contained in or implied by this agreement has the effect of constraining the SA Party or placing any fetter on its statutory rights, duties, powers and functions conferred by or under any Law.
- (d) Without limiting clause 49.1(c), anything which a Governmental Agency does, fails to do or purports to do pursuant to its statutory rights, duties, powers and functions conferred by or under any Law will not be deemed to be an act or omission of the SA Party under this agreement.

49.2 Indemnities

Unless expressly provided otherwise:

- (a) each indemnity in this agreement is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion or expiration of this agreement;
- (b) it is not necessary for a party to incur expense or make any payment before enforcing a right of indemnity conferred by this agreement; and
- (c) the making of a Claim by a party under an indemnity contained in this agreement in respect of a particular event does not preclude that party from subsequently making further Claims under that indemnity in respect of any further loss arising out of the same event for which it has not previously been indemnified.

49.3 No waiver

A party waives a right under this agreement only by written notice that it waives that right. A waiver is limited to the specific instance to which it relates and to the specific purpose for which it is given.

49.4 Severance

If a provision of this agreement would, but for this clause 49.4, be unenforceable:

- (a) the provision will be read down to the extent necessary to avoid that result; and
- (b) if the provision cannot be read down to that extent, it will be severed without affecting the validity and enforceability of the remainder of this agreement.

49.5 This agreement

- (a) This agreement records the entire agreement between the parties as to its subject matter. It supersedes all prior contracts, requests for proposal documentation, obligations, representations, conduct and understandings. The agreement recorded in this agreement is immediately enforceable, subject to its own express terms. The parties have not relied on any promise, representation or conduct in deciding whether to enter into this agreement, other than as expressly set out in this agreement.
- (b) This agreement may be amended only by written agreement of all parties.

49.6 Counterparts

- (a) This agreement may be executed in any number of counterparts, and by the parties in separate counterparts, but is not effective until each party has executed at least one counterpart.
- (b) Each counterpart of this agreement constitutes an original of this agreement but the counterparts together constitute one and the same instrument.

49.7 Governing law and jurisdiction

- (a) The laws of South Australia govern this agreement.

- (b) Each party irrevocably submits to the non-exclusive jurisdiction of the courts of South Australia.
- (c) Each party irrevocably waives any objection to the venue of any legal process on the basis that the process has been brought in an inconvenient forum.
- (d) Each party irrevocably waives any immunity in respect of its obligations under this agreement that it may acquire from the jurisdiction of any court or any legal process for any reason including the service of notice, attachment before judgment, attachment in aid of execution or execution.

49.8 Relationship of parties

Nothing in this agreement is to be treated as creating a partnership or trust and except as specifically provided in this agreement no party may act as agent of a party or in any way bind another party to any obligation.

49.9 Costs

A party will bear its own costs in relation to the negotiation, preparation and execution of this agreement and any further document required.

49.10 Further acts

The parties must do all things reasonably required to facilitate the performance of the transactions contemplated by this agreement.

49.11 No merger

The rights and obligations of the parties will not merge on completion of any transaction under this agreement. They will survive the execution and delivery of any assignment or other agreement entered into for the purpose of implementing any transaction.

EXECUTED as an Agreement

Executed by HORNSDALE POWER)
RESERVE PTY LTD (ACN 619 311 983) in)
accordance with section 127 of the
Corporations Act 2001 (Cth) by:

ORIGINAL AGREEMENT SIGNED

ORIGINAL AGREEMENT SIGNED

Executed by TESLA MOTORS AUSTRALIA)
PTY LTD (ABN 68 142 889 816) in)
accordance with section 127 of the
Corporations Act 2001 (Cth) by:

ORIGINAL AGREEMENT SIGNED

ORIGINAL AGREEMENT SIGNED

THE COMMON SEAL of the **MINISTER FOR**)
MINERAL RESOURCES AND ENERGY was)
hereunto affixed in the presence of:)

ORIGINAL AGREEMENT SIGNED

ORIGINAL AGREEMENT SIGNED

The **Minister for Minerals Resources and Energy** hereby approves clause 36.1(b) of this agreement for the purposes of clause 13(2) of Schedule 1 of the *Freedom of Information Act 1991 (SA)*.

ORIGINAL AGREEMENT SIGNED

Schedule 5 – Form of Security

Demand Guarantee

[Name of issuing bank] ABN [#] (Bank) issues its Demand Guarantee (Instrument) as follows:

Type of Instrument: Performance/Financial Guarantee

Instrument No: [Insert the Bank's reference number]

Applicant: [Insert name and ACM] of [Insert address]

Beneficiary: [Insert name and address of Beneficiary]

Underlying Contract: [insert details]

Maximum Amount: [Insert currency and amount in words and (figures)]

Place of Presentation: [Insert the Bank issuing office address in Adelaide] or such other address in Adelaide as notified in writing to the Beneficiary by the Bank from time to time (**Bank's Office**)

Form of Presentation: Paper delivered personally, by courier or post only to the Bank's Office

Expiry: On the first to happen of (i) the Bank receiving written notice from the Beneficiary at the Bank's Office that this Instrument is no longer required, (ii) the Bank has paid the Maximum Amount or (iii) the return of this Instrument to the Bank's Office

Party liable for charges: All charges are for the account of the Applicant

Issue Date: [Insert DD/MM/YYYY]

The Bank irrevocably undertakes to pay the Beneficiary any sum or sums not exceeding in aggregate the Maximum Amount upon presentation in the form indicated above to the Bank of the Beneficiary's demand.

Demands can only be made by the Beneficiary and must: (i) be marked as drawn under this Instrument, (ii) request payment of all or part of the Maximum Amount and (iii) specify the bank account of the Beneficiary into which payment is to be made by the Bank.

Demands must be received at the Bank's Office on or before the Expiry of the Instrument and on a day when the Bank's Office is open for general banking business.

Other notices in connection with this Instrument must be signed and delivered personally, by courier or by post to the Bank's Office.

Payments under this Instrument will be made electronically to an account of the Beneficiary only, without the Bank giving prior notice of the payment to the Applicant, despite the Applicant giving any notice to the Bank not to pay the amount payable under this Instrument, without regard to the performance or non-performance of the Applicant or Beneficiary under the Underlying Contract in any respect and notwithstanding any alterations to the terms of the Underlying Contract or any extensions of time or any other forbearance or indulgence by the Beneficiary or Applicant to the other.

The Bank may rely entirely on the face alone of any demand or notice presented to it, without making any further enquiries or verifying the authenticity, correctness or completeness of a demand or notice.

The Bank may at any time, without being required to do so, pay the Beneficiary the Maximum Amount or, after having made a part payment of the Maximum Amount, the balance outstanding or any lesser amount that the Beneficiary may require and thereupon this Instrument expires.

The Beneficiary must return this Instrument to the Bank's Office immediately after it expires.

The Beneficiary may, by notice to the Bank, assign its rights under this deed to any person to whom the Beneficiary has assigned its rights under the Underlying Contract.

Executed as a deed

Signed Sealed and Delivered for and on behalf of

[Name of issuing Bank]

by: _____

[Name and title of signatory]

Schedule 7 – Approved Subcontractors

Subcontractor	Address	Role
Tesla Motors Australia	10 Herbert St, St Leonards, NSW 2065	<ul style="list-style-type: none"> • Engineering, construction and commissioning the Facility • Supply, deliver, commission and warrant the BESS for the Project • Manage and pay for the Balance of Plant Contractor (CPP) in the performance of the civil, installation and electrical works • Maintain the BESS for a term of 10 years
Consolidated Power Projects	205 Halifax Street, Adelaide SA 5000	Balance of Plant engineering and construction