

**Note:** **Yellow text** – this is intended to remain in this document pending the making of an Access Offer to a particular User.

# APA Port Hedland Network

## Reference Service Agreement

[insert date]

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APA DEWAP Pty Ltd ABN 78 058 070 689 (**ADEWAP**)

[Name of User] ABN [insert] (**User**)

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# APA Port Hedland Network Reference Service Agreement

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<b>Details</b>	<b>7</b>
<b>Agreed terms</b>	<b>8</b>
<b>1. Defined terms &amp; interpretation</b>	<b>8</b>
1.1 Defined terms	8
1.2 Interpretation	16
1.3 Headings	17
1.4 Interpretation Act applies	17
<b>2. Conditions Precedent</b>	<b>17</b>
2.1 Conditions	17
2.2 Reasonable endeavours	17
2.3 Notification	17
2.4 Termination	17
<b>3. Duration</b>	<b>18</b>
3.1 Commencement and Term	18
3.2 Option to extend Term	18
<b>4. Reference Service</b>	<b>18</b>
4.1 Meaning of Reference Service	18
4.2 Provision and use of Reference Service	18
4.3 User must comply with the Eligibility Criteria	19
4.4 Reference Service Standard	19
4.5 Changes to Reference Service or Agreement	19
4.6 Amendment to Connection Point Details	20
4.7 Metering Equipment	20
4.8 Metering data and information	20
4.9 Metering Database	20
<b>5. Curtailment</b>	<b>21</b>
5.1 ADEWAP may Curtail Reference Service	21
5.2 Extent of Curtailment	21
5.3 Notification of Curtailment	21
5.4 User must comply with Curtailment	21
5.5 Agreement does not limit other powers and rights	21
5.6 No limitation	22
<b>6. PN Rules' constrained access acknowledgements</b>	<b>22</b>
6.1 Acknowledgements	22
6.2 No liability	22
<b>7. Forecasts</b>	<b>22</b>
7.1 Provision by User	22
7.2 Form and content	23
7.3 Updates	23
7.4 Standing forecast	23
<b>8. Maintenance</b>	<b>23</b>
8.1 Maintenance Plan	23
8.2 No liability when Maintenance Plan adhered to	24
8.3 Curtailment outside of a Maintenance Plan	24
<b>9. Title to electricity</b>	<b>24</b>
9.1 Transfer into the Network	24

9.2	Transfer out of the Network	25
<b>10.</b>	<b>Controllers</b>	<b>25</b>
10.1	User must nominate Controller if User is not the Controller	25
10.2	Where User is not the Controller	25
10.3	ADEWAP may enter into Access Contracts	26
10.4	Liability and Force Majeure not limited	27
<b>11.</b>	<b>Tariffs, Charges and Pass-Through Amounts</b>	<b>27</b>
11.1	Tariff(s)	27
11.2	Charges	27
11.3	Pass-Through Amounts	27
11.4	Excess Network Usage Charge	28
11.5	Change Events	28
11.6	No limitation	29
<b>12.</b>	<b>Invoicing and payment</b>	<b>29</b>
12.1	ADEWAP invoices	29
12.2	Payment of invoices	29
12.3	Disputed invoices	29
12.4	Under and over payments	29
12.5	Interest on overdue payment	30
12.6	GST	30
<b>13.</b>	<b>Bank Guarantee</b>	<b>31</b>
13.1	Recourse by ADEWAP	31
13.2	User's obligations	31
13.3	Suspension of performance of obligations by ADEWAP	31
13.4	Return of Bank Guarantee	31
<b>14.</b>	<b>Good Electricity Industry Practice</b>	<b>31</b>
14.1	ADEWAP must comply with Good Electricity Industry Practice	31
14.2	User must comply with Good Electricity Industry Practice	32
<b>15.</b>	<b>PN Rules and PHT Rules</b>	<b>32</b>
15.1	ADEWAP and User must comply	32
15.2	Bearing of costs	32
15.3	Actions of third parties	32
<b>16.</b>	<b>Technical information and characteristics</b>	<b>32</b>
16.1	Recording of information	32
16.2	No modifications	33
<b>17.</b>	<b>Cooperation</b>	<b>33</b>
<b>18.</b>	<b>Access to premises</b>	<b>33</b>
18.1	Parties must allow reasonable rights of entry	33
18.2	Entry made at risk of Accessing Party	33
18.3	Accessing Party obligations	34
18.4	Third person's premises	34
<b>19.</b>	<b>Directions from ISO</b>	<b>34</b>
<b>20.</b>	<b>Removal of equipment</b>	<b>34</b>
<b>21.</b>	<b>Representations and warranties</b>	<b>34</b>
21.1	User's representations and warranties	34
21.2	ADEWAP's representations and warranties	35
21.3	No implied warranties	35
21.4	Applicable Laws and limitations on liability	35
<b>22.</b>	<b>Liability and indemnity</b>	<b>35</b>
22.1	Liability for Direct Losses	35

22.2	Exclusion of Indirect Losses	36
22.3	Damage to Network	36
22.4	Fraud	36
22.5	Limitation of liability	36
22.6	Procedure for Party seeking to rely on indemnity	36
22.7	Obligation to pay and right to indemnities survives termination	37
22.8	Apportionment of liability	37
22.9	Mitigation of losses	37
<b>23.</b>	<b>Personal injury</b>	<b>37</b>
<b>24.</b>	<b>Insurances</b>	<b>37</b>
24.1	User's insurances	37
24.2	ADEWAP's insurances	37
24.3	Names of insured	38
24.4	Cross liability	38
24.5	Notice of cancellation	38
24.6	Further obligation	38
<b>25.</b>	<b>Force Majeure</b>	<b>38</b>
25.1	Affected Person's obligations are suspended	38
25.2	Affected Person's obligations	38
25.3	In case of breach	39
25.4	Failure to minimise delays	39
25.5	Settlement of a labour dispute	39
25.6	When the Reference Service is Curtailed	39
<b>26.</b>	<b>User does not acquire interest in Network</b>	<b>39</b>
<b>27.</b>	<b>Payments and recoveries under the Contributions Policy</b>	<b>39</b>
<b>28.</b>	<b>Default</b>	<b>39</b>
28.1	Default	39
28.2	Default by User	39
28.3	ADEWAP's rights not affected	40
28.4	Default by ADEWAP	40
28.5	User's rights not affected	40
<b>29.</b>	<b>Termination</b>	<b>40</b>
29.1	Termination	40
29.2	Rights of Parties not affected	41
<b>30.</b>	<b>Disputes</b>	<b>41</b>
30.1	Rules Disputes	41
30.2	Non-Rules Disputes – first stage Dispute resolution	41
30.3	Non-Rules Disputes – reference to and appointment of Independent Expert	41
30.4	Non-Rules Disputes – role of Independent Expert	41
30.5	Non-Rules Disputes – representation and evidence	42
30.6	Non-Rules Disputes – rules of evidence and power	42
30.7	Non-Rules Disputes – determination	42
30.8	Non-Rules Disputes – costs	42
30.9	Method of Meetings	43
30.10	Disputes generally	43
30.11	Obligations must be performed	43
<b>31.</b>	<b>Confidentiality</b>	<b>43</b>
31.1	Confidential information	43
31.2	Non-disclosure and exceptions	43
31.3	Obligations	44

31.4	Disclosure by User	44
31.5	Compliance with Chapter 8 and 9 of the Code	44
31.6	Return or destruction of materials	44
31.7	Survival of obligations	44
<b>32.</b>	<b>Assignment</b>	<b>44</b>
32.1	By ADEWAP	44
32.2	By User	45
<b>33.</b>	<b>Notices</b>	<b>45</b>
33.1	Requirements for Notices	45
33.2	Operational and urgent Notices	45
33.3	Notice takes effect	45
33.4	Deemed receipt	46
33.5	Change to address for Notices	46
<b>34.</b>	<b>Change in Applicable Law</b>	<b>46</b>
34.1	Interpretation of Agreement	46
34.2	Negotiation	46
34.3	Disputes	47
<b>35.</b>	<b>Miscellaneous</b>	<b>47</b>
35.1	Entire agreement	47
35.2	Amendment	47
35.3	Waiver	47
35.4	Continuing performance	47
35.5	Further action	47
35.6	Subcontracting	47
35.7	Relationship	48
35.8	Costs and duty	48
35.9	Governing law and jurisdiction	48
35.10	Counterparts	48
35.11	No third party benefit	48
35.12	Severance	48
35.13	Further assurance	48
35.14	Authorised officers	48
35.15	Merger	48
35.16	Remedies	49
	<b>Schedule 1 – Contract Details</b>	<b>50</b>
	<b>Schedule 2 – Conditions Precedent</b>	<b>51</b>
	<b>Schedule 3 – Details of Connection Points</b>	<b>52</b>
<b>1.</b>	<b>Commercial Details</b>	<b>52</b>
<b>2.</b>	<b>Technical Details</b>	<b>52</b>
<b>3.</b>	<b>Electrical Losses</b>	<b>52</b>
	<b>Schedule 4 – Contributions</b>	<b>54</b>
	<b>Schedule 5 – Reference Service Availability Standard</b>	<b>55</b>
<b>1.</b>	<b>Definitions</b>	<b>55</b>
<b>2.</b>	<b>Calculation of Reference Service Actual Availability and Availability Adjustment Amount</b>	<b>55</b>
2.1	Reference Service Actual Availability	55
2.2	Availability Adjustment Amount	56
<b>3.</b>	<b>Payment of Availability Adjustment Amount</b>	<b>57</b>
	<b>Schedule 6 – Metering, metering data, quality and communications</b>	<b>58</b>
	<b>Schedule 7 – Technical requirements relating to the PN Rules and PHT Rules</b>	<b>59</b>

<b>Schedule 8 – Insurances</b>	<b>60</b>
1. <b>User insurances</b>	<b>60</b>
2. <b>ADEWAP insurances</b>	<b>60</b>
<b>Schedule 9 – Notices</b>	<b>62</b>
1. <b>ADEWAP</b>	<b>62</b>
2. <b>User</b>	<b>62</b>
<b>Schedule 10 – Form of Bank Guarantee</b>	<b>63</b>
<b>Signing page</b>	<b>65</b>

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Draft for comment

# Details

## Date

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## Parties

Name	<b>APA DEWAP Pty Ltd</b>
ABN	78 058 070 689
Short form name	<b>ADEWAP</b>
Notice details	As set out in Item 1 of Schedule 9

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Name	As set out in Item 1 of Schedule 1
ABN	As set out in Item 1 of Schedule 1
Short form name	<b>User</b>
Notice details	As set out in Item 2 of Schedule 9

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## Background

- A User has made an Access Application requesting the provision by ADEWAP on the Network of the Reference Service.
- B ADEWAP has made an Access Offer in accordance with the User Access Guide to provide the Reference Service to User.
- C User has duly executed the Access Offer, which has become this Access Contract.

# Agreed terms

## 1. Defined terms & interpretation

### 1.1 Defined terms

In this Agreement, unless a contrary intention appears:

**Access Application** has the meaning given to 'access application' in the Code.

**Access Contract** has the meaning given to 'access contract' in the Code.

**Access Offer** has the meaning given to 'access offer' in the Code.

**Accessing Party** has the meaning given to it in clause 18.1.

**Act** means the *Electricity Industry Act 2004* (WA).

**ADEWAP Planning Standards** means the 'Planning Standards' published by ADEWAP and available on the ADEWAP website (as amended from time to time).

**ADEWAP's Default** means an event of Default by ADEWAP.

**Affected Obligation** has the meaning given to it in clause 25.1.

**Affected Person** has the meaning given to it in clause 25.1.

**Agreement** means this agreement between ADEWAP and User.

**Applicable Law** means a Law, guideline, code (including the Code), rules (including the PN Rules and the PHT Rules), Directive, licence condition and other regulatory instrument which:

- (a) is directly or indirectly binding on, or is expressed to apply to, ADEWAP or User (or both) from time to time; or
- (b) relates to the Network, the Network Assets, the Facilities and Equipment, the Metering Equipment, or the provision or receipt of the Reference Service.

**Augmentation** in relation to the Network, means an increase in the capability of the Network to provide Services, including by the development, construction, acquisition or commissioning of new Network Assets.

**Authorised Officer** means the authorised officer of a Party as specified in Schedule 9 to whom any Notice may be given.

**Authority Fee** has the meaning given to 'Authority fee' in the PN Rules.

**Bank Guarantee** means an unconditional and irrevocable demand guarantee:

- (a) in the form set out in Schedule 10;
- (b) issued by a bank or other financial institution acceptable to ADEWAP (in its absolute discretion);
- (c) for an amount equal to, or not less than, the Security Amount; and
- (d) which is indefinite with no expiry date or, if having an expiry date, that date must be no earlier than the date that is 90 days after the expiration of the Term.

**Bidirectional Point** means a point on the Network at which electricity is to be transferred either:

- (a) into the Network by, on behalf of, or for the account of, User under this Agreement; or
- (b) out of the Network to, or for the account of, User under this Agreement,

and identified as such in the Connection Point Details.

**Business Day** means a day that is not a Saturday, Sunday or public holiday in Western Australia.

**Capacity** in relation to a Connection Point, means the maximum rate at which the Network can transfer electricity to and at the Connection Point in accordance with Good Electricity Industry Practice.



**Change Event** means a:

- (a) Change in Applicable Law Event; or
  - (b) Change in Relevant Taxes Event,
- that occurs after the Commencement Date.

**Change in Applicable Law Event** means:

- (a) a change in (or a change in the application or interpretation of) an Applicable Law;
- (b) the repeal of an Applicable Law; or
- (c) the introduction of an Applicable Law.

**Change in Relevant Taxes Event** means:

- (a) a change in (or a change in the application or official interpretation of) a Relevant Tax or the way in which a Relevant Tax is calculated;
- (b) the removal of a Relevant Tax; or
- (c) the imposition of a Relevant Tax,

to the extent that the change, removal or imposition directly or indirectly applies to the provision of the Reference Service by ADEWAP or any goods or other services or other things to be supplied or provided under or in connection with this Agreement or to goods or services supplied to ADEWAP in respect of the provision of the Reference Service.

**Charge** for the Reference Service for an Invoice Period, means (subject to clause 11.5) the amount that is payable by User to ADEWAP for the Reference Service, calculated by applying the Tariff for the Reference Service and the methodology specified in, or determined in accordance with, the Services and Pricing Policy for that Tariff, during that Invoice Period.

**Claim** means any claim, demand, action or proceeding made or instituted against a Party.

**Code** means the *Pilbara Networks Access Code 2021*.

**Commencement Date** means the date that the last of the Parties to execute this Agreement does so.

**Condition Precedent** means a condition precedent specified in Schedule 2.

**Confidential Information** has the meaning given to it in clause 31.1.

**Connect** has the meaning given to 'connect' in the Code.

**Connection Agreement** means, at the option of ADEWAP:

- (a) a contract containing provisions materially equivalent to those in this Agreement; or
- (b) some other agreement in writing to be bound by provisions materially equivalent to such terms and conditions of this Agreement as are satisfactory to ADEWAP,

but omitting clauses 4 to 13 of this Agreement.

**Connection Assets** has the meaning given to 'connection assets' in the PHT Rules.

**Connection Point** means, depending on the context, an Entry Point, Exit Point or Bidirectional Point.

**Connection Point Details** means:

- (a) Item 1 of Schedule 3; or
- (b) a separate database or databases containing information relating to this Agreement and maintained by ADEWAP as agreed between the Parties,

as applicable.

**Constraint Direction** has the meaning given to 'constraint direction' in the PN Rules.

**Constraint Rule** has the meaning given to 'constraint rule' in the PN Rules.

**Consumer** has the meaning given to 'consumer' in the Code.

**Contracted Capacity** for a Connection Point, means the maximum rate at which User is permitted to transfer electricity to or from (as applicable) the Network at that Connection Point that is specified in the Connection Point Details and is measured in MW or MVA.

**Contribution** means any contribution made under the Contributions Policy.

**Contributions Policy** means the 'contributions policy' (as defined in the Code) which forms part of the 'network development policy' (as defined in the Code) published by ADEWAP in accordance with sections 36(1)(c) and 41(2) of the Code.

**Controller** has the meaning given to 'controller' in the PN Rules, and includes the Personnel and Visitors of a 'controller'.

**Coordinator Fee** has the meaning given to 'Coordinator fee' in the PN Rules.

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

**CP Sunset Date** means, in relation to a Condition Precedent, the date specified as such in relation to that Condition Precedent in Schedule 2.

**Curtail** means, at a point in time, not commencing the provision of the Reference Service or, if provision of the Reference Service has commenced at that time, curtailing, interrupting or otherwise limiting the provision of the whole or any part of the Reference Service.

**De-energise** in respect of a Connection Point, means to operate, modify or remove switching or other equipment to prevent the transfer of electricity through that Connection Point.

**Default** in relation to a Party, has the meaning given to it in clause 28.1.

**Direct Losses** suffered by a person means losses, costs, damages or expenses suffered by the person which are not Indirect Losses.

**Directive** means any present or future requirement, instruction, direction, condition or order of a Governmental Authority (whether formal or informal) which is binding on or expressed to apply to ADEWAP or User (or both) or relates directly or indirectly to the Reference Service or the design, construction, operation or maintenance of the Network, the Network Assets or the Facilities and Equipment.

**Disconnect** in respect of a Connection Point, means physically detach Network Assets from assets owned by another person at that Connection Point.

**Dispute** means any dispute or difference concerning:

- (a) construction of;
- (b) anything contained in or arising out of; or
- (c) rights, obligations, duties or liabilities of a Party under,

this Agreement.

**Due Date** means, in respect of a Tax Invoice, the date that is 20 Business Days after ADEWAP issues that Tax Invoice.

**Electrical Losses** means, in relation to a Connection Point, the loss factor allocated to that Connection Point as set out in Item 3 of Schedule 3.

**Eligibility Criteria** means that:

- (a) the Facilities and Equipment comply with:
  - (i) the ADEWAP Planning Standards;
  - (ii) the PHT Rules;
  - (iii) the Act;
  - (iv) all applicable regulations made under the Act;
  - (v) the *WA Electrical Requirements*;
  - (vi) all applicable Australian Standards for high voltage equipment including:

- (A) *Guidelines for the Safe Management of High Voltage Electrical Installations* issued under the *Electricity Act 1945* (WA);
- (B) *AS/NZS 3000: 2018 Wiring Rules*;
- (C) *AS 2067: 2016 Power Installations exceeding 1kV a.c.*;
- (D) *AS/NZS 3007: 2013 Electrical Installations – Surface Mines and Associated Processing Plant*; and
- (E) *WA Distribution Connections Manual*,

each as amended or replaced from time to time;

- (b) the Meter at an Exit Point or a Bidirectional Point is properly configured to measure the transfer of electricity out of the Network; and
- (c) the Meter at an Entry Point or a Bidirectional Point is properly configured to measure the transfer of electricity into the Network.

**Emergency** means any accident, emergency, potential or actual danger or other unavoidable cause or extraordinary circumstance.

**Entry Point** means a point on the Network at which electricity is to be transferred into the Network by, on behalf of, or for the account of, User under this Agreement and identified as such in the Connection Point Details.

**Essential System Service** has the meaning given to 'essential system service' in the PN Rules.

**Excess Network Usage Charge** has the meaning given to it in the Services and Pricing Policy.

**Exit Point** means a point on the Network at which electricity is to be transferred out of the Network to, or for the account of, User under this Agreement, and identified as such in the Connection Point Details.

**Expiration Date** means, subject to clause 3.2, the date specified in Item 2 of Schedule 1.

**Extension Period** means the period specified in Item 3 of Schedule 1.

**Facilities and Equipment** means, in relation to a Connection Point, the apparatus, equipment, plant and buildings used for or in connection with generating, consuming or transporting electricity at the Connection Point for or on behalf of User.

**Facility** has the meaning given to 'facility' in the PN Rules.

**FM Period** has the meaning given to it in clause 25.1.

**Force Majeure Event** means in respect of a Party:

- (a) an event or circumstance, or series of events or circumstances, beyond that Party's reasonable control, and which that Party, acting as a Reasonable and Prudent Person, is not able to prevent or overcome, including (where the foregoing conditions are satisfied):
  - (i) any act of God, lightning, earthquake, storm, fire, flood, subsidence, land slide, mud slide, wash-out, explosion or natural disaster;
  - (ii) any insurrection, revolution or civil disorder, terrorism, act of public enemies, malicious damage, sabotage, vandalism, war (whether declared or undeclared) or a military operation, blockade or riot;
  - (iii) any determination, award or order of any court or tribunal, or any regulatory authority or the award of any arbitrator arising after the Commencement Date;
  - (iv) any act or omission of government or any government or regulatory department, body, instrumentality, ministry, agency, fire brigade or any other Governmental Authority other than a Party (including restraint, expropriation, prohibition, intervention, direction or embargo);
  - (v) any inability or delay in obtaining any governmental, quasi-governmental or regulatory approval, consent, permit, licence or any other authority;
  - (vi) any industrial disputes of any kind, strike, lock-out, ban, limitation or other industrial disturbances;

- (vii) any significant plant or equipment failure which could not have been avoided by the exercise of Good Electricity Industry Practice;
  - (viii) any act or omission of any person (other than a Party) with facilities or equipment connected to the Network which prevents the Party's ability to perform its obligations under this Agreement;
  - (ix) any application of any law of the Commonwealth, any Commonwealth authority, the State of Western Australia, any authority of the State of Western Australia, or any Western Australian local government; or
  - (x) accidents, weather and acts of third parties (such as generators or Consumers) that affect the quality, frequency and continuity of the supply of electricity; and
- (b) any epidemic, pandemic or other widespread disease or public health emergency, including the disease commonly known as coronavirus disease (COVID-19) and any related virus, including the effects of:
- (i) any local, domestic or foreign government actions taken in response to such a disease or emergency; and
  - (ii) any delays or shortages in the supply of materials, parts or labour directly or indirectly caused by such a disease or emergency (including where such delay or shortage is caused by any government intervention).

**Good Electricity Industry Practice** has the meaning given to 'good electricity industry practice' in the Code.

**Governmental Authority** means:

- (a) any government or regulatory department, body, instrumentality, minister, agency or other authority; or
- (b) the ISO or any other person exercising a regulatory function under an Applicable Law.

**GST** means goods and services tax or similar value added tax levied or imposed in Australia on a taxable supply under the GST Act or otherwise.

**GST Act** means the *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth.

**Host Party** has the meaning given to it in clause 18.1.

**Indemnified Party** has the meaning given to it in clause 22.6.

**Indemnifying Party** has the meaning given to it in clause 22.6.

**Independent Expert** has the meaning given to it in clause 30.3(a).

**Indirect Losses** suffered by a Party means any one or more of:

- (a) any consequential losses, consequential damage or special damages however caused or suffered by that Party, including:
  - (i) loss of (or loss of anticipated) opportunity, use, production, revenue, income, profits, business and savings;
  - (ii) loss due to business interruption;
  - (iii) increased costs; and
  - (iv) punitive or exemplary damages, whether or not the consequential losses or damage or special damages were foreseeable; or
- (b) in respect of contractual damages, damages which would fall within the second limb of the rule in *Hadley v Baxendale* [1854] 9 Exch. 341; or
- (c) any liability of the Party to any third party, or any Claim brought against the Party by any third party, and the costs and expenses connected with the Claim.

**Information Provider** in relation to Confidential Information, means the Party providing that Confidential Information.

**Information Recipient** has the meaning given to it in clause 31.2.

**Insolvency Event** in respect of a Party, means any one or more of:

- (a) the Party is insolvent within the meaning of section 95A of the Corporations Act;
- (b) any execution or other process of any court or authority being issued against or levied upon any material part of that Party's property or assets;
- (c) a petition or application being presented (and not being withdrawn within 10 Business Days) or an order being made or a resolution being passed for the winding up or dissolution without winding up of that Party otherwise than for the purpose of reconstruction or amalgamation under a solvent scheme;
- (d) a receiver or a receiver and manager of the undertaking or any material part thereof of that Party being appointed;
- (e) that Party proposing to enter into or enters into any arrangement, reconstruction or composition with or for the benefit of its creditors;
- (f) an administrator of that Party being appointed or the board of directors of that Party passing a resolution to the effect that is specified in section 436A(1) of the Corporations Act;
- (g) that Party failing (as defined by section 459F of the Corporations Act) to comply with a statutory demand;
- (h) a controller (as defined in the Corporations Act) being appointed in respect of that Party or the whole or a material part of that Party's undertaking, property or assets;
- (i) an application being made to a court for an order in respect of that Party under part 2F.1 of the Corporations Act;
- (j) an event referred to in section 459C(2) of the Corporations Act occurring in respect of that Party; or
- (k) anything analogous or having a substantially similar effect to any of the events specified above occurring under the Law of any applicable jurisdiction.

**Invoice Period** means a Month.

**ISO** has the meaning given to 'Pilbara ISO' in the Act and includes any delegate of the 'Pilbara ISO'.

**ISO Fee** has the meaning given to 'ISO fee' in the PN Rules.

**Law** means 'written laws' and 'statutory instruments' as defined in the Code, orders or directions given or made under a written law or statutory instrument as so defined or by a government agency or other Governmental Authority, Codes of Practice and Australian Standards deemed applicable under a written law and rules of the general law including the common law and equity.

**Light Regulation Network** has the same meaning given to 'light regulation network' in the Code.

**Limit Advice** has the meaning given to 'limit advice' in the PN Rules.

**Maintenance Operations** includes maintenance, repairs, testing, calibrating, adding to, altering, replacing, updating and cleaning.

**Maintenance Plan** has meaning the given in clause 8.1(c) and includes any amendments that may be made under clause 8.1(d).

**Meter** has the meaning given to 'meter' in the Metering Code.

**Metering Code** has the meaning given to 'metering code' in the PN Rules, but only to the extent that that code applies to the Network pursuant to the PN Rules taking into account any exemptions granted to ADEWAP in respect of any of the provisions, or the application of any of the provisions, of that code.

**Metering Database** means the metering database (if any) operated by ADEWAP under the Metering Code.

**Metering Equipment** means a Meter or Meters and associated equipment complying with the Metering Code used to measure and record electricity as transferred to or from the Network at a Connection Point, which may include the measurement of the rate of transfer and the quantity and quality of the transferred electricity.

**Month** means calendar month.

**Network** has the same meaning given to 'Alinta Port Hedland network' in the Code (and being a Light Regulation Network).

**Network Access Contract** has the meaning given to 'network access contract' in the PN Rules.

**Network Assets** in relation to the Network, means the apparatus, equipment, plant and buildings used to provide or in connection with providing Services on the Network.

**Network Element** has the meaning given to 'network element' in the PN Rules.

**NMI**, or **National Market Identifier** means, in relation to a Connection Point, the unique identifier assigned to that Connection Point.

**Non-Rules Dispute** has the meaning given to it in clause 30.2(a).

**Notice** has the meaning given to it in clause 33.1.

**NSP** has the meaning given to 'NSP' in the PN Rules.

**Other User** means a person (other than User under this Agreement) with whom ADEWAP has an agreement to provide a Service on the Network.

**Party** means ADEWAP or User (as applicable).

**Pass-Through Amount** has the meaning given to it in clause 11.3(a).

**Payment Error** means:

- (a) any underpayment or overpayment by User of any amount in respect of a Tax Invoice; or
- (b) any error in a Tax Invoice (including the omission of amounts from that Tax Invoice, the inclusion of incorrect amounts in that Tax Invoice, calculation errors in the preparation of a Tax Invoice or a Tax Invoice being prepared on the basis of data which is later established to have been inaccurate).

**Personnel** means the directors, officers, employees, agents and contractors of a Party or a Controller or Relevant Party, as the case requires.

**PHT Rules** means the *Pilbara Harmonised Technical Rules* set out in Appendix 5 of the PN Rules and having effect as part of the PN Rules pursuant to rule 59(1) of the PN Rules, but read and construed in accordance with clause 15.1(b).

**PN Rules** means the *Pilbara Network Rules* made under the Act, but read and construed in accordance with clause 15.1(b).

**Power System** has the meaning given to 'power system' in the PN Rules.

**Prescribed Rate** means, at any point in time, the interest rate (expressed as a rate per cent per annum) equal to the aggregate of 3 annual percentage points and the interest rate (expressed as a rate per cent per annum) then published by the Reserve Bank of Australia as the large business variable indicator lending rate.

**Proposed Maintenance Plan** has the meaning given in clause 8.1(a).

**Quarter** means a period of 3 consecutive Months commencing on the first day of each of the Months of January, April, July and October.

**Reasonable and Prudent Person** means a person acting in good faith and, where applicable, in accordance with Good Electricity Industry Practice.

**Receipt Date** has the meaning given to it in clause 30.2(a)(i).

**Reference Service** means:

- (a) the service described in clause 4.1; and
- (b) being the 'reference service' (as defined in the Code) specified in the Services and Pricing Policy.

**Reference Service Actual Availability** means, for a Reference Service Year, the amount calculated in accordance with clause 2.1 of Schedule 5 for that Reference Service Year.

**Reference Service Availability Standard** means a Reference Service Actual Availability of not less than 0.98.

**Reference Service End Date** means the date specified as such in Item 5 of Schedule 1, or such earlier date as this Agreement may be terminated in accordance with its terms.

**Reference Service Start Date** means the date specified as such in Item 4 of Schedule 1.

**Reference Service Term** means the period from the Reference Service Start Date to the Reference Service End Date.

**Reference Service Year** means:

- (a) the period from the Reference Service Start Date until the date ending the day before the first anniversary of the Reference Service Start date; and
- (b) each subsequent period of 365 or 366 (as applicable) days commencing on the relevant anniversary of the Reference Service Start Date,

during the Reference Service Term.

**Registered Controller** has the meaning given to 'registered controller' in the PN Rules.

**Related Body Corporate** has the meaning given to 'Related Body Corporate' in section 50 of the Corporations Act.

**Relevant Party** has the meaning given to it in clause 10.2(a).

**Relevant Tax** means any tax imposed by or payable directly or indirectly to any Governmental Authority (including a goods and services tax), but excluding any:

- (a) income tax (or State equivalent income tax), fringe benefits tax or capital gains tax;
- (b) payroll tax;
- (c) stamp duty, financial institutions duty, bank accounts debits tax or similar taxes and duties;
- (d) penalties and interest for late payments relating to any tax; or
- (e) any tax that replaces any of the taxes referred to in paragraphs (a) to (d) of this definition.

**Representatives' Meeting** has the meaning given to it in clause 30.2(a)(i).

**Rules Dispute** has the meaning given to 'rules dispute' in the PN Rules.

**Security Amount** means such amount as ADEWAP estimates will be, or is likely to be, payable by User under this Agreement over a period of three Months during the Reference Service Term as Notified by ADEWAP to User.

**Senior Executives Meeting** has the meaning given to it in clause 30.2(b)(i).

**Services** has the meaning given to 'services' in the Code.

**Services and Pricing Policy** means the 'services and pricing policy' (as defined in the Code) published by ADEWAP in accordance with sections 36(1)(b) and 40 of the Code, as amended, adjusted, reviewed or replaced from time to time.

**Tariff** for the Reference Service, means a tariff specified in clause 11.1.

**Tax Invoice** has the meaning given to 'Tax Invoice' in the GST Act.

**Term** means, from time to time, the term of this Agreement which commences on the Commencement Date and ends on the date which is the then Expiration Date.

**Unscheduled Maintenance** means any Maintenance Operations undertaken due to the breakdown or failure (or, in ADEWAP's opinion, imminent breakdown or failure) of any part(s) of

the plant or equipment comprising the Network where the relevant breakdown or failure was not attributable to ADEWAP's failure to maintain the Network in accordance with Good Electricity Industry Practice.

**User Access Guide** means the 'user access guide' (as defined in the Code) published by ADEWAP in accordance with sections 36(1)(d) and 42 of the Code.

**User's Default** means an event of Default by User.

**User's Premises** means the land on which the Facilities and Equipment are located.

**Visitors** means the customers, invitees, licensees and visitors of a Party or a Controller or Relevant Party, as the case requires.

**Week** means a period of 7 consecutive days commencing on Monday.

**Wilful Default** means a deliberate and purposeful act or omission carried out with:

- (a) a calculated regard for the consequences of the act or omission; or
- (b) a reckless or wilful disregard for the consequences of the act or omission,

but does not include any error of judgment, mistake, act or omission, whether negligent or not, which is made in good faith, or any act or omission which is expressly permitted by the terms of this Agreement.

## 1.2 Interpretation

In this Agreement, except where the context otherwise requires:

- (a) the singular includes the plural and vice versa, and a gender includes other genders;
- (b) another grammatical form of a defined word or expression has a corresponding meaning;
- (c) a reference to a clause, paragraph, schedule or annexure is to a clause or paragraph of, or schedule or annexure to, this agreement, and a reference to this agreement includes any schedule or annexure;
- (d) a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;
- (e) a reference to **A\$, \$A, dollar** or **\$** is to Australian currency;
- (f) a reference to time is to Perth, Australia time;
- (g) a reference to a party to this agreement, and a reference to a party to a document includes the party's executors, administrators, successors and permitted assigns and substitutes;
- (h) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
- (i) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (j) a word or expression defined in the Corporations Act has the meaning given to it in the Corporations Act;
- (k) the meaning of general words is not limited by specific examples introduced by **including, for example** or similar expressions;
- (l) any agreement, representation, warranty or indemnity by two or more Parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
- (m) any agreement, representation, warranty or indemnity in favour of two or more Parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- (n) a rule of construction does not apply to the disadvantage of a Party because the Party was responsible for the preparation of this agreement or any part of it;



- (o) if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day;

### **1.3 Headings**

In this Agreement, headings are for ease of reference only and do not affect interpretation.

### **1.4 Interpretation Act applies**

Unless the contrary intention is apparent, the rules of interpretation in the *Interpretation Act 1984* (WA) apply to the interpretation of this Agreement.

## **2. Conditions Precedent**

### **2.1 Conditions**

Except for clauses 1 (Defined terms & interpretation), 21 (representations and warranties), 22 (Liability and indemnity), 23 (Personal injury), 30 (Disputes), 31 (Confidentiality), 32 (Assignment), 33 (Notices), 34 (Miscellaneous) and this clause 2 (Conditions Precedent), the performance by a Party of its obligations under this Agreement is subject to and conditional in all respects upon:

- (a) each Condition Precedent being satisfied on or before the CP Sunset Date applicable to that Condition Precedent; or
- (b) if a Condition Precedent is:
  - (i) specified to be for the benefit of a particular Party, that Condition Precedent being waived by that Party; or
  - (ii) not specified to be for the benefit of a particular Party, that Condition Precedent being waived by agreement between all Parties,on or before the CP Sunset Date applicable to that Condition Precedent.

### **2.2 Reasonable endeavours**

- (a) If a Condition Precedent is specified to be for the benefit of a particular Party:
  - (i) that Party must use all reasonable endeavours to obtain the fulfilment of that Condition Precedent; and
  - (ii) the other Party must not, by wilful act or omission, prevent its fulfilment.
- (b) If a Condition Precedent is not specified to be for the benefit of a particular Party, each of the Parties must use all reasonable endeavours to obtain the fulfilment of that Condition Precedent.

### **2.3 Notification**

A Party must promptly Notify the other Parties if it:

- (a) discovers that a Condition Precedent is not satisfied by the CP Sunset Date applicable to that Condition Precedent;
- (b) discovers that a Condition Precedent has become incapable of being satisfied by the CP Sunset Date applicable to that Condition Precedent; or
- (c) waives any Condition Precedent.

### **2.4 Termination**

- (a) If all of the Conditions Precedent have not been:
  - (i) satisfied; or
  - (ii) waived in accordance with clause 2.1(b),by 5:00pm on the latest of the CP Sunset Dates (or such later date as the Parties may agree), either Party may terminate this Agreement by Notice to the other Parties.

- (b) If this Agreement is terminated under clause 2.4(a), neither Party will have any claim against the other Party (except in relation to any prior breach of this Agreement).

### 3. Duration

#### 3.1 Commencement and Term

- (a) Subject to clause 2, this Agreement commences on the Commencement Date.
- (b) This Agreement ends on the Expiration Date (unless terminated earlier in accordance with its terms).

#### 3.2 Option to extend Term

- (a) Subject to clause 3.2(b), User may, by Notice to ADEWAP given no later than 18 Months prior to the expiration of the Term as at the time the Notice is given, elect to extend the Term by the Extension Period, in which event the Expiration Date will be the last day of the Extension Period.
- (b) User will only be entitled to:
  - (i) give Notice under clause 3.2(a) if, at the date of giving Notice, User is not at that time in breach of any of its obligations under this Agreement; and
  - (ii) an extension of the Term under clause 3.2(a) if, at the beginning of the day that is the first day of the Extension Period, User is not at that time in breach of any of its obligations under this Agreement.

### 4. Reference Service

#### 4.1 Meaning of Reference Service

In this Agreement, **Reference Service** means:

- (a) the right to Connect the Facilities and Equipment to the Network at the Connection Points; and
- (b) the transfer of electricity into the Network by or on behalf of User at one or more Entry Points or Bidirectional Points at up to the applicable Contracted Capacity for the relevant Connection Point; and
- (c) the simultaneous transfer of the electricity referred to in clause 4.1(b) (as adjusted for Electrical Losses) out of the Network by or on behalf of User at one or more Exit Points or Bidirectional Points at up to the applicable Contracted Capacity for the relevant Connection Point; and
- (d) the metering, or procurement of metering, of electricity transferred:
  - (i) into the Network at an Entry Point or a Bidirectional Point; and
  - (ii) out of the Network at an Exit Point or a Bidirectional Point.

#### 4.2 Provision and use of Reference Service

- (a) On and from the Reference Service Start Date and up to and including the Reference Service End Date:
  - (i) ADEWAP will provide the Reference Service; and
  - (ii) User must pay the Charges for, and may use, the Reference Service, on and subject to the terms and conditions of this Agreement.
- (b) User must ensure that electricity is not transferred:
  - (i) out of the Network at a Connection Point unless it is an Exit Point or Bidirectional Point; or

- (ii) into the Network at a Connection Point unless it is an Entry Point or Bidirectional Point.
- (c) For clarity:
  - (i) the rate at which electricity is transferred:
    - (A) into the Network at an Entry Point or Bidirectional Point by or on behalf of User does not exceed the Contracted Capacity for the transfer of electricity into the Network for that Entry Point or Bidirectional Point (as applicable); and
    - (B) out of the Network at an Exit Point or Bidirectional Point by or on behalf of User does not exceed the Contracted Capacity for the transfer of electricity out of the Network for that Exit Point or Bidirectional Point (as applicable); and
  - (ii) all electricity that is transferred into the Network by or on behalf of User at Entry Points and/or Bidirectional Points is simultaneously transferred out of the Network (as adjusted for Electrical Losses) by or on behalf of User at Exit Points and/or Bidirectional Points.
- (d) If clause 4.2(c) is not satisfied for any reason and, as a result, ADEWAP directly or indirectly incurs any:
  - (i) charge, cost, expense, levy, fee, penalty or other amount of any kind (**Cost**), then ADEWAP may pass through the full amount of that Cost to User by including that amount in any Tax Invoice to be rendered by ADEWAP under this Agreement which amount must be paid at the same time and in the same manner as the remainder of that Tax Invoice is required to be paid under this Agreement by User; or
  - (ii) Direct Losses, then User must indemnify ADEWAP against those Direct Losses.

#### **4.3 User must comply with the Eligibility Criteria**

- (a) Subject to clause 4.3(b), User's right to use the Reference Service is subject to and conditional upon User complying with the Eligibility Criteria in relation to each Connection Point at all times on and from the Reference Service Start Date and up to and including the Reference Service End Date.
- (b) ADEWAP may, at its absolute and sole discretion, waive compliance by User with any one or more of the Eligibility Criteria for such period of time as ADEWAP determines.

#### **4.4 Reference Service Standard**

- (a) Subject to clause 4.4(b), in each Reference Service Year the Reference Service Actual Availability will not be less than the Reference Service Availability Standard.
- (b) User acknowledges and agrees that, despite anything to the contrary in this Agreement, if the Reference Service Actual Availability for a Reference Service Year is less than the Reference Service Availability Standard then the:
  - (i) sole right of User against ADEWAP; and
  - (ii) sole liability of ADEWAP to User,
 will be for User to receive from ADEWAP the Availability Adjustment Amount for that Reference Service Year as determined in accordance with clause 2.2 of Schedule 5.
- (c) Except to the extent that ADEWAP has a liability to User under clause 4.4(b) and despite anything to the contrary in this Agreement, ADEWAP will have no liability to User for any failure to provide User with the Reference Service.

#### **4.5 Changes to Reference Service or Agreement**

User acknowledges and agrees that it is not entitled to any modification(s) to any aspect of the Reference Service or otherwise to any of the terms and conditions of this Agreement (including an

increase or decrease in the Contracted Capacity at an existing Connection Point or the addition of a Connection Point) unless:

- (a) User makes an Access Application in respect of the modification(s) and an Access Offer is subsequently made by ADEWAP which is accepted by User; or
- (b) the Parties otherwise mutually agree to the modification(s).

#### **4.6 Amendment to Connection Point Details**

- (a) The Parties must Notify each other of any error discovered in the Connection Point Details as soon as reasonably practicable after becoming aware of the error.
- (b) ADEWAP will amend any error in the Connection Point Details as soon as reasonably practicable after becoming aware of that error, provided that if ADEWAP becomes aware of an error otherwise than by Notice from User under clause 4.6(a), no amendment will be made until ADEWAP has given Notice to User of that error.
- (c) Upon request by User for information referred to in the Connection Point Details, and otherwise as required by Law, ADEWAP will, as soon as reasonably practicable, provide to User the most up-to-date version of that information.

#### **4.7 Metering Equipment**

If the Metering Equipment at a Connection Point:

- (a) is not owned by ADEWAP, User is solely responsible for ensuring the accuracy of that Metering Equipment in accordance with all Applicable Laws and any applicable terms of this Agreement;
- (b) is owned by ADEWAP, User:
  - (i) must ensure that ADEWAP and its Personnel are provided with access to that Metering Equipment for all relevant purposes, including the conduct of annual testing; and
  - (ii) acknowledges and agrees that the cost of undertaking that testing will be a Pass Through Amount for the purposes of this Agreement;
- (c) fails, or the metering data from that Metering Equipment is considered by ADEWAP to be inaccurate then, without limiting clause 12.1(c) and subject to all Applicable Laws, the Parties must meet for the purpose of agreeing an appropriate methodology to recalculate and replace that data.

#### **4.8 Metering data and information**

Subject to all Applicable Laws, the Parties will implement the actions and procedures described in Schedule 6 in relation to metering, metering data and quality, and communications in relation to metering data and quality.

#### **4.9 Metering Database**

- (a) This clause 4.7 applies only if, and to the extent that, ADEWAP is required by Applicable Law to comply with the Metering Code.
- (b) In addition to maintaining and updating the Connection Point Details in accordance with clause 4.6, ADEWAP will maintain and update the Metering Database if, and to the extent, required by, and in accordance with, the Metering Code.
- (c) ADEWAP will provide User with access to the information in the Metering Database from time to time if, and to the extent, required by the Metering Code or otherwise by any Applicable Law.

## 5. Curtailment

### 5.1 ADEWAP may Curtail Reference Service

ADEWAP may, in accordance with Good Electricity Industry Practice, Curtail the provision of the Reference Service (including by Disconnecting the Network Assets if ADEWAP (acting reasonably) considers it to be necessary to do so), without liability to User:

- (a) in the event that ADEWAP considers, as a Reasonable and Prudent Person, that User is likely to exceed the Contracted Capacity at any Connection Point;
- (b) in the event that User exceeds the Contracted Capacity at any Connection Point or any limits specified in a Constraint Direction;
- (c) in the event that electricity transferred to an Exit Point or Bidirectional Point by ADEWAP as referred to in clause 4.1(b) is not simultaneously taken from that Exit Point or Bidirectional Point by or on behalf of User;
- (d) in the event of User breaching clause 4.2(b) and/or clause 4.2(c);
- (e) if and to the extent that any other breach by User of its obligations under this Agreement prevents or restricts ADEWAP from providing the Reference Service;
- (f) to carry out Maintenance Operations in accordance with a Maintenance Plan;
- (g) to carry out Unscheduled Maintenance in the circumstances described in clause 8.3;
- (h) to carry out any planned Augmentation to the Network;
- (i) if there is any breakdown of or damage to the Network that affects ADEWAP's ability to provide the Reference Service;
- (j) if a Force Majeure Event occurs affecting ADEWAP's ability to provide the Reference Service, for so long as ADEWAP's ability to provide the Reference Service is affected by that Force Majeure Event;
- (k) in order to maintain the security and stability of the Network;
- (l) in the event of an Emergency; and
- (m) to the extent necessary for ADEWAP to comply with any Applicable Law.

### 5.2 Extent of Curtailment

ADEWAP will keep the extent and duration of any Curtailment under clause 5.1 to the minimum reasonably required in accordance with Good Electricity Industry Practice.

### 5.3 Notification of Curtailment

ADEWAP will:

- (a) give the User as much prior Notice as is practicable of any planned Augmentation to the Network that will, or is likely to, result in any Curtailment to the provision of the Reference Service; and
- (b) Notify the User of any other Curtailment under clause 5.1 as soon as practicable.

### 5.4 User must comply with Curtailment

If ADEWAP notifies User of a Curtailment under clause 5.1 in advance of a requirement for User to take any action, User (acting as a Reasonable and Prudent Person) must comply, or procure compliance, with any requirements set out in the Notice concerning the Curtailment.

### 5.5 Agreement does not limit other powers and rights

This Agreement does not limit any power or right conferred on ADEWAP by any other agreement between the Parties or by any Law.

## 5.6 No limitation

Nothing in this clause 5 is intended to, or does, limit, qualify or constrain in any way any right of ADEWAP elsewhere in this Agreement to Curtail the provision of the Reference Service.

## 6. PN Rules' constrained access acknowledgements

### 6.1 Acknowledgements

Without limiting any other circumstances in which ADEWAP may Curtail the Reference Service under this Agreement or an Applicable Law, User acknowledges and agrees that, in accordance with rule 263 of the PN Rules:

- (a) User's injection of electricity into the Network at a Connection Point, may be limited by or in accordance with a Constraint Direction;
- (b) User must comply with a Constraint Direction which applies to any of the Connection Points, and if User is not the Registered Controller at a Connection Point, must procure the Registered Controller's compliance with a Constraint Direction;
- (c) ADEWAP may give the ISO a Limit Advice, and may consult and agree with the ISO upon Constraint Rules, which may result in a limitation under rule 263(1)(a) of the PN Rules; and
- (d) for the purposes of rule 263(1)(a) of the PN Rules, a Limit Advice, a Constraint Rule and a Constraint Direction may take account of a thing which occurs anywhere in the Power System after the date of this Agreement, including:
  - (i) a Network Access Contract being entered into; and
  - (ii) a change in generation or load; and
  - (iii) the addition, modification, rerating, disconnection or removal of a Facility or Network Element; and
  - (iv) an NSP giving the ISO new or revised Limit Advice; and
  - (v) the ISO adopting a new or revised Constraint Rule.

### 6.2 No liability

User further acknowledges and agrees that ADEWAP has no liability to User or a Controller, under this Agreement or otherwise, in respect of a Constraint Direction issued by the ISO (including where a Constraint Direction arises in circumstances contemplated by clause 6.1(c)).

## 7. Forecasts

### 7.1 Provision by User

User must provide ADEWAP with indicative forecasts for each:

- (a) Month in each Reference Service Year, at least 30 days prior to the commencement of that Reference Service Year;
- (b) Week in each Quarter of each Reference Service Year, at least 30 days prior to the commencement of that Quarter;
- (c) each day in each Month of each Reference Service Year, at least 30 days prior to the commencement of that Month; and
- (d) each day in each Week of each Reference Service Year, at least 7 days prior to the commencement of that Week,

detailing User's estimated consumption of electricity and load shape at each Connection Point in each such period.

## 7.2 Form and content

Each forecast provided by User under clause 7.1 must:

- (a) be provided in good faith but will be non-binding;
- (b) be in such form and provided to ADEWAP, and through such medium, as ADEWAP notifies to User from time to time; and
- (c) set out such other information as ADEWAP may request from time to time in accordance with Good Electricity Industry Practice.

## 7.3 Updates

User must:

- (a) Notify ADEWAP as soon as it becomes aware that its good faith best estimate of its requirements for electricity provided to ADEWAP pursuant to clause 7.1 has changed; and
- (b) provide an updated forecast for the relevant period of time to ADEWAP.

## 7.4 Standing forecast

User may nominate a standing forecast in respect of any of the periods described in clause 7.1, which will apply at all times unless varied by Notice from User to ADEWAP.

# 8. Maintenance

## 8.1 Maintenance Plan

- (a) As soon as practicable prior to, or after, the beginning of the first Reference Service Year, and at least 30 days prior to the start of each subsequent Reference Service Year, ADEWAP will, after having regard to the forecasts and nominations of User for the Reference Service and all Other Users for Services, deliver to User a draft plan for that Reference Service Year which sets out:
  - (i) all Maintenance Operations which ADEWAP proposes to carry out during that Reference Service Year;
  - (ii) the times at which such Maintenance Operations are proposed to be carried out; and
  - (iii) the maximum reduction to ADEWAP's ability to provide the Reference Service for each day on which such Maintenance Operations are proposed to be carried out, during that Reference Service Year (each a **Proposed Maintenance Plan**).
- (b) After delivery of a Proposed Maintenance Plan to User, ADEWAP will:
  - (i) use reasonable endeavours to consult with User in relation to the proposals set out in that plan; and
  - (ii) use reasonable endeavours (but having regard to the costs of rescheduling proposed Maintenance Operations, the requirements of Other Users and the potential impact of that rescheduling on the safety and integrity of the Network or any part(s) of it) to reschedule any Maintenance Operations set out in that Proposed Maintenance Plan with a view to minimising the impact of those Maintenance Operations on User's operations.
- (c) As soon as practicable prior to, or after, the beginning of the first Reference Service Year, and prior to the start of each subsequent Reference Service Year to which a Proposed Maintenance Plan relates, ADEWAP will issue to User a final (subject to clause 8.1(d)) plan setting out:
  - (i) all the Maintenance Operations to be carried out by ADEWAP during that Reference Service Year;
  - (ii) the times at which ADEWAP may carry out those Maintenance Operations; and

- (iii) the maximum reduction to the Reference Service that may occur on each day on which those Maintenance Operations are to be carried out,

**(a Maintenance Plan).**

- (d) Where ADEWAP considers it necessary to do so, ADEWAP may amend any aspect of a Maintenance Plan by:
  - (i) adding Maintenance Operations to that Maintenance Plan and identifying the times at which ADEWAP may carry out those additional Maintenance Operations; and/or
  - (ii) removing any of the Maintenance Operations identified in that Maintenance Plan; and/or
  - (iii) changing the nature of any of the Maintenance Operations identified in that Maintenance Plan and the times at which ADEWAP may carry out those changed Maintenance Operations; and/or
  - (iv) changing the maximum reduction to the Reference Service that may occur on each day on which Maintenance Operations are to be carried out,

provided that ADEWAP uses reasonable endeavours to make any such amendments with at least 7 days prior Notice to User.

## **8.2 No liability when Maintenance Plan adhered to**

ADEWAP may Curtail the Reference Service without incurring any liability to User to the extent that:

- (a) such Curtailment is caused by, or results from, Maintenance Operations specified in a Maintenance Plan; and
- (b) those Maintenance Operations were otherwise carried out at the times and within the Curtailment limits set out in that Maintenance Plan.

## **8.3 Curtailment outside of a Maintenance Plan**

- (a) ADEWAP may Curtail the provision of the Reference Service to carry out Maintenance Operations not set out in a Maintenance Plan, without incurring any liability to User, if and to the extent that:
  - (i) those Maintenance Operations constitute Unscheduled Maintenance;
  - (ii) subject to clause 8.3(b), ADEWAP provides as much Notice to User as is reasonably practicable in the circumstances of:
    - (A) the timing of such Unscheduled Maintenance; and
    - (B) the extent of any Curtailment in the provision of the Reference Service due to such Unscheduled Maintenance; and
  - (iii) at the time of preparation of the most recent Maintenance Plan, ADEWAP had no reasonable basis to expect that Unscheduled Maintenance would need to be carried out during the period to which the Maintenance Plan relates.
- (b) User acknowledges and agrees that, if the need to undertake Unscheduled Maintenance arises as the result of an Emergency, it may not be reasonably practicable for ADEWAP to provide Notice to User of that Unscheduled Maintenance.

## **9. Title to electricity**

### **9.1 Transfer into the Network**

Title to electricity that is transferred into the Network at a Connection Point by User passes from User to ADEWAP at the time it passes through the Connection Point.



## 9.2 Transfer out of the Network

Title to electricity that is transferred out of the Network at a Connection Point by ADEWAP passes from ADEWAP to User at the time it passes through the Connection Point.

## 10. Controllers

### 10.1 User must nominate Controller if User is not the Controller

- (a) If User is not the Controller of a Connection Point then User must, by Notice to ADEWAP before the Reference Service Start Date, or as soon as reasonably practicable thereafter (but in all cases no later than 20 Business Days after the Reference Service Start Date), nominate a person as the Controller for a Connection Point.
- (b) User may, from time to time, by Notice to ADEWAP, change the person User nominates as the Controller of a Connection Point.
- (c) The Parties must amend the Connection Point Details following any variation made under this clause 10.1.
- (d) ADEWAP, acting as a Reasonable and Prudent Person, may at any time on reasonable technical or commercial grounds object to a person nominated by User as a Controller under this clause 10.1, in which case User must either:
  - (i) Dispute ADEWAP's objection; or
  - (ii) nominate a different person as a Controller.
- (e) If ADEWAP requires, User must use reasonable endeavours to procure that the person nominated by User as a Controller enters into a Connection Agreement with ADEWAP in respect of the Connection Point.
- (f) If User requests ADEWAP to do so, ADEWAP must use reasonable endeavours and act in good faith to enter into a Connection Agreement with a Controller (validly nominated by User under clause 10.1(a)) in respect of the Connection Point.

### 10.2 Where User is not the Controller

- (a) Subject to clause 10.2(f), if:
  - (i) User is not:
    - (A) the Controller of a Connection Point; or
    - (B) the sole user of electricity delivered to the Facilities and Equipment through a Connection Point,(in this clause 10.2 called a **Relevant Party**); and
  - (ii) the Relevant Party has not entered into a Connection Agreement with ADEWAP in respect of that Connection Point,then User must ensure that the Relevant Party complies, and will continue to comply, with the obligations set out in this Agreement, to the extent that such compliance is reasonably necessary for the Parties to satisfy their obligations under this Agreement, including:
  - (iii) clause 5 (Curtailment);
  - (iv) clause 6 (PN Rules' constrained access acknowledgements);
  - (v) clause 14 (Good Electricity Industry Practice);
  - (vi) clause 15 (PN Rules and PHT Rules);
  - (vii) clause 16 (Technical information and characteristics);
  - (viii) clause 17 (Cooperation);
  - (ix) clause 18 (Access to premises);
  - (x) clause 19 (Directions from ISO);

- (xi) clause 20 (Removal of equipment); and
  - (xii) clause 32 (Notices).
- (b) If a Relevant Party has not entered into a Connection Agreement with ADEWAP in respect of that Connection Point, then User must ensure that it enters into a contract with the Relevant Party obliging the Relevant Party to comply with the obligations set out in this Agreement (to the extent set out in clause 10.2(a)) and that such contract entered into between User and that Relevant Party contains a provision:
- (i) that neither User nor ADEWAP is in any circumstances liable for Indirect Losses suffered by the Relevant Party, however arising, excluding any damage caused by, consequent upon, or arising out of fraud; and
  - (ii) under which the Relevant Party covenants in favour of ADEWAP (which covenant is expressed to be enforceable by ADEWAP in accordance with section 11 of the *Property Law Act 1969* (WA)) that it will not bring a claim against ADEWAP for such Indirect Losses and will not bring a claim which will result in ADEWAP's aggregate liability to the Relevant Party and User, under or in connection with this Agreement or the Reference Service provided under or in connection with this Agreement, exceeding the monetary cap on ADEWAP's liability in clause 22.5.

The exclusion of liability for Indirect Losses on the part of User in clause 22.2 does not apply if User fails to ensure that its contract with the Relevant Party contains the provisions referred to above.

- (c) On reasonable request from ADEWAP, User must (unless the Relevant Party has already entered into a Connection Agreement with ADEWAP) provide evidence to ADEWAP's satisfaction as a Reasonable and Prudent Person that User is complying, and will continue to comply, with clause 10.2(a).
- (d) If User does not satisfy ADEWAP under clause 10.2(c), ADEWAP may refuse to commence the Reference Service or may Curtail the provision of the Reference Service in respect of the relevant Connection Point unless and until:
  - (i) the Relevant Party has entered into a Connection Agreement with ADEWAP in respect of the Connection Point; or
  - (ii) User satisfies ADEWAP under clause 10.2(c).
- (e) For the avoidance of doubt, if User is in breach of clause 10.2(a), then User is liable for, and must indemnify ADEWAP pursuant to clause 22.1 against any Direct Losses caused by, consequent upon or arising out of the acts and omissions, negligent or otherwise, of the Relevant Party to the extent that the acts or omissions, negligent or otherwise, of the Relevant Party are attributable to that breach, unless the Relevant Party has entered into a Connection Agreement with ADEWAP.
- (f) Subject to clause 10.2(g), User is required to commence, maintain or continue legal proceedings to procure compliance of the Relevant Party with the obligations set out in this Agreement, to the extent that such compliance is reasonably necessary for the Parties to satisfy their obligations under this Agreement.
- (g) For a Connection Point other than as referred to in clause 10.1, User is not required to comply with clause 10.2(f) unless ADEWAP provides an indemnity to User for all of User's costs of and incidental to the proceedings.
- (h) Nothing in clause 10.2(f) or clause 10.2(g):
  - (i) limits User's obligations under the remainder of this clause 10.2; or
  - (ii) derogates from ADEWAP's other rights under this Agreement including its rights under clause 10.2(d), or requires ADEWAP to pay any compensation to User for exercising any of those rights.

### 10.3 ADEWAP may enter into Access Contracts

Nothing in clause 10.2 is to be taken to prevent ADEWAP from entering into an Access Contract with any person, including a person who is a Controller.

#### 10.4 Liability and Force Majeure not limited

Nothing in clause 10.2 limits the operation of clauses 22.1 or 25.1.

### 11. Tariffs, Charges and Pass-Through Amounts

#### 11.1 Tariff(s)

- (a) The tariff(s) payable under this Agreement for provision of the Reference Service in an Invoice Period is / are the tariff(s) specified in, or determined in accordance with, the Services and Pricing Policy applying to that Invoice Period for the provision of, or in relation to, the Reference Service or any aspect of the Reference Service.
- (b) For the purposes of calculating Tariffs and Charges for the Reference Service:
  - (i) ADEWAP is entitled to rely on the information contained in the Connection Point Details (as updated from time to time in accordance with this Agreement); and
  - (ii) where information contained in the Connection Point Details is updated, or is to be updated, in accordance with this Agreement, the updated information:
    - (A) will not apply to any period before; and
    - (B) will not be used to calculate a Tariff or Charge until, the date that the information is actually updated in accordance with this Agreement.

#### 11.2 Charges

User must pay to ADEWAP the Charges for the provision of, or in relation to, the Reference Service or any aspect of the Reference Service calculated using the applicable:

- (a) Tariff(s) determined under clause 11.1; and
- (b) methodology specified in, or determined in accordance with, the Services and Pricing Policy for that Tariff and Invoice Period.

#### 11.3 Pass-Through Amounts

- (a) If, and to the extent, permitted by Law:
  - (i) any charge, cost, expense, levy, fee, liability, penalty or other amount of any kind is payable or incurred by ADEWAP in an Invoice Period as a result of, or in connection with:
    - (A) the provision by ADEWAP at any time of the Reference Service;
    - (B) the operation of the Network or the transfer of electricity to, through or out of the Network (including, for example, the maintenance of Power System security and/or reliability of the Power System or the provision or receipt of any Essential System Service);
    - (C) the delivery of electricity into or out of the Network by or for User; or
    - (D) any act or omission by or on behalf of User at any time in relation to, or in connection with, the Reference Service; and
  - (ii) that charge, cost, expense, levy, fee, liability, penalty or other amount:
    - (A) has not been taken into account in fixing the Tariff applying to that Invoice Period; and
    - (B) is not otherwise to be paid or reimbursed to ADEWAP under any other provision of this Agreement,

**(Pass Through Amount)** then, subject to clause 11.3(b), ADEWAP may pass through the full amount of that Pass-Through Amount to User by including that amount in any Tax Invoice to be rendered by ADEWAP under this Agreement which amount must be paid at

the same time and in the same manner as the remainder of that Tax Invoice is required to be paid under this Agreement by User.

- (b) If a particular Pass-Through Amount is attributable, in part, to:
- (i) the provision by ADEWAP of a Service on the Network to one or more Other Users;
  - (ii) the operation of the Network or the transfer of electricity to, through or out of the Network (including, for example, the maintenance of Power System security and/or reliability of the Power System or the provision or receipt of any Essential System Service);
  - (iii) the delivery of electricity into or out of the Network by or for one or more Other Users; or
  - (iv) any act or omission by or on behalf of an Other User in relation to, or in connection with, a Service on the Network,

then ADEWAP will apportion that Pass-Through Amount between User and each such Other User on a basis to be determined by ADEWAP (acting fairly and reasonably).

- (c) Without limiting the generality of clause 11.3(a), the following will be deemed to be Pass-Through Amounts:
- (i) the Authority Fee;
  - (ii) the Coordinator Fee; and
  - (iii) the ISO Fee,
- payable from time to time by ADEWAP pursuant to the PN Rules.

#### **11.4 Excess Network Usage Charge**

For clarity, but without limiting the provisions of this clause 11, User acknowledges and agrees that, if User exceeds its Contracted Capacity at any Connection Point during any Invoice Period, an Excess Network Usage Charge will be payable by User.

#### **11.5 Change Events**

- (a) To the extent that a Change Event directly or indirectly:
- (i) affects the direct or indirect costs of or to ADEWAP in respect of the provision of the Reference Service or any goods or other services or other things to be supplied or provided under or in connection with this Agreement; or
  - (ii) leads to a change in the benefits gained by ADEWAP from the activities described in clause 11.5(a)(i) (except by operation of this clause 11.5),
- and the increase or decrease in those costs, or that change in benefits, is not to be paid or reimbursed (or is not taken into account) under any other provision of this Agreement, the Charge payable by User under this Agreement for the provision of the Reference Service will be adjusted by ADEWAP to reflect the impact on ADEWAP of the increase or decrease in costs, or the change in benefits, as the case may be, attributable to the Change Event.
- (b) Any variation to the Charge as a result of the operation of clause 11.5(a) will be effective as from the date of the relevant Change Event.
- (c) ADEWAP will give Notice to User of any variation to the Charge payable pursuant to clause 11.5(a) as a result of the operation of this clause 11.5 as soon as practicable after any variation takes effect under clause 11.5(b).

## **11.6 No limitation**

Nothing in clauses 11.2 and 11.3 prevents or restricts in any way ADEWAP from recovering any other moneys otherwise payable by User to ADEWAP under this Agreement (including under clause 4.2(d)) or at Law.

## **12. Invoicing and payment**

### **12.1 ADEWAP invoices**

- (a) After the end of each Invoice Period, ADEWAP will issue to User a Tax Invoice for that Invoice Period showing:
  - (i) all amounts payable by User to ADEWAP under this Agreement for that Invoice Period;
  - (ii) all outstanding amounts as at the end of that Invoice Period and interest payable on those amounts; and
  - (iii) GST payable on those amounts under clause 12.6.
- (b) When issuing a Tax Invoice under clause 12.1(a), ADEWAP will, subject to clause 12.1(c), provide to User, in electronic form or otherwise, the metering information (if any) used to calculate the relevant amounts shown on the Tax Invoice.
- (c) If actual information necessary for invoicing is unavailable to ADEWAP in sufficient time to permit the preparation of a Tax Invoice for an Invoice Period, ADEWAP may, subject to any requirements of the Metering Code, use estimated information based on prior invoices issued to User to prepare that Tax Invoice. Where estimated information is used, the next Tax Invoice rendered by ADEWAP after the actual information becomes available will be adjusted to reflect the difference between the amount that would have been invoiced had the actual information been available to ADEWAP and the amount that was invoiced based on the estimated information. No interest will be payable on the amount of any such adjustment for the period between the relevant Tax Invoices.

### **12.2 Payment of invoices**

- (a) Subject to clause 12.3, User must, on or before the Due Date of a Tax Invoice, pay to ADEWAP all amounts shown on the Tax Invoice.
- (b) If User fails to comply with clause 12.2(a) then, without prejudice to ADEWAP's other rights, User must pay interest on any unpaid amount, calculated daily at the Prescribed Rate from the Due Date of that Tax Invoice until payment.

### **12.3 Disputed invoices**

- (a) If User Disputes any amount set out in a Tax Invoice issued by ADEWAP, User must:
  - (i) pay that portion of the Tax Invoice that is not Disputed on or prior to the Due Date of that Tax Invoice; and
  - (ii) prior to the Due Date of that Tax Invoice, give Notice to ADEWAP of the Disputed amount and provide in that Notice full details of the Dispute.
- (b) Without prejudice to ADEWAP's other rights, any amount withheld by User under clause 12.3(a) but subsequently found to have been payable, attracts interest calculated daily at the Prescribed Rate from the Due Date of the Tax Invoice until payment.

### **12.4 Under and over payments**

- (a) Subject to clause 12.4(e), if a Party detects a Payment Error of any amount within 18 Months after the Payment Error:
  - (i) that Party must as soon as reasonably practicable give Notice to the other Party of the Payment Error; and

- (ii) an adjusting payment must be made by the appropriate Party within 10 Business Days of the Notice.
- (b) Except where clause 12.4(c) applies, the adjusting payment must, without prejudice to the Party's other rights, include interest calculated daily at the Prescribed Rate from the date of the Payment Error until the date of the adjusting payment.
- (c) An adjusting payment by a Party will not attract interest under clause 12.4(b) if it is made in relation to an underpayment and the underpayment was the result of an error by the other Party.
- (d) Subject to clause 12.4(e), a Party is not entitled to an adjusting payment for a Payment Error Notified to the other Parties after the expiry of 18 Months after the Payment Error.
- (e) Notwithstanding clauses 12.4(a) and 12.4(d), where:
  - (i) Payment Errors have occurred as a result of an error in the data used to calculate an amount; and
  - (ii) the Payment Errors occurred in one or more Invoice Periods,
 the Party that was underpaid or that made an overpayment (as applicable) is entitled to an adjusting payment only for the Payment Errors that occurred in the Invoice Periods that were within the 12 Month period preceding the date that the Payment Errors were Notified by one Party to the other.
- (f) Where a Payment Error is an error as a result of which the amount set out in a Tax Invoice is less than what it would have been had the error not been made, the Payment Error will be taken to have occurred on the Due Date of the Tax Invoice.
- (g) Where a Payment Error is an error as a result of which the amount set out in a Tax Invoice is more than what it would have been had the error not been made, the Payment Error will be taken to have occurred on the date User has paid the total amount of the Tax Invoice in full.

## 12.5 Interest on overdue payment

If User Defaults in due and punctual payment of a Tax Invoice:

- (a) clauses 28.1 to 29.1(d)(i) apply; and
- (b) the overdue payment attracts interest payable at the Prescribed Rate from the Due Date of the Tax Invoice until the Default is remedied.

## 12.6 GST

- (a) Unless expressly included, the consideration for any supply under or in connection with this Agreement (including any Charge or Tariff derived from the Services and Pricing Policy and any Contribution) is GST exclusive.
- (b) To the extent that any supply made under or in connection with this Agreement is a taxable supply and the price for it (including any Charge or Tariff derived from the Services and Pricing Policy and any Contribution) is stated to be GST exclusive, the consideration for that supply is increased by an amount determined by the supplier, not exceeding the amount of the consideration (or its market value) multiplied by the rate at which GST is imposed in respect of the supply.
- (c) Without limiting the obligation to provide a Tax Invoice under clause 12.1, the supplier must issue a Tax Invoice to the recipient of a supply to which clause 12.6(b) applies before the payment of the GST inclusive consideration determined under that clause.
- (d) If a Party is entitled under this Agreement to be reimbursed or indemnified by another Party for a cost or expense incurred in connection with this Agreement, the reimbursement or indemnity payment must not include any GST component of the cost or expense for which an input tax credit may be claimed by the Party entitled to be reimbursed or indemnified, or by its representative member.
- (e) If a Party becomes aware of an adjustment event, that Party agrees to Notify the other Party as soon as practicable after becoming so aware, and the Parties agree to take

whatever steps are necessary, including the issue of 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 any GST (or part of GST) is paid as soon as is practicable but no later than 10 Business Days after the Party has satisfied itself that the adjustment event has occurred.

- (f) Terms defined in the GST Act have the same meaning when used in this clause 12.6, unless the context indicates otherwise.

## 13. Bank Guarantee

### 13.1 Recourse by ADEWAP

ADEWAP may, at any time, have recourse to the Bank Guarantee:

- (a) to recover any amount owed by User under this Agreement which has not been paid when due;
- (b) if an Insolvency Event occurs with respect to User; or
- (c) to pay for any costs, expenses, liability, and/or damages which ADEWAP has suffered or incurred, or considers on reasonable grounds will suffer or incur, as a consequence of a breach of this Agreement by, or negligence of, User (except to the extent (if any) that this Agreement expressly excludes or limits User's liability in relation to that breach or negligence).

### 13.2 User's obligations

User must, within 5 Business Days after ADEWAP has recourse to the Bank Guarantee under clause 13.1, either:

- (a) procure an increase to the Bank Guarantee so as to restore the Bank Guarantee to the Security Amount; or
- (b) procure and provide to ADEWAP a replacement Bank Guarantee for the Security Amount and, upon receipt of the replacement Bank Guarantee, ADEWAP must return to User the Bank Guarantee which is being replaced.

### 13.3 Suspension of performance of obligations by ADEWAP

If User does not provide ADEWAP with:

- (a) an increase to the Bank Guarantee to the Security Amount; or
- (b) a replacement Bank Guarantee for the Security Amount,

in accordance with clause 13.2, ADEWAP may suspend the performance of any or all of its obligations under this Agreement (including the provision of the Reference Service) until User has increased or replaced the Bank Guarantee.

### 13.4 Return of Bank Guarantee

If, following the termination of this Agreement and receipt by ADEWAP of all amounts due by User to it under this Agreement, all or any part of the Bank Guarantee has not been applied by ADEWAP pursuant to clause 13.1, ADEWAP will promptly return the Bank Guarantee to User.

## 14. Good Electricity Industry Practice

### 14.1 ADEWAP must comply with Good Electricity Industry Practice

ADEWAP must comply with Good Electricity Industry Practice when providing the Reference Service and performing its obligations under this Agreement.

## **14.2 User must comply with Good Electricity Industry Practice**

User must comply with Good Electricity Industry Practice in using the Reference Service and performing its obligations under this Agreement.

## **15. PN Rules and PHT Rules**

### **15.1 ADEWAP and User must comply**

- (a) Without limiting clause 14 but subject to clauses 15.1(b) and 15.3, ADEWAP and User must each comply with the PN Rules and the PHT Rules.
- (b) For the purposes of this Agreement, the PN Rules and the PHT Rules are to be read and construed in accordance with Schedule 7.

### **15.2 Bearing of costs**

- (a) Subject to the remainder of this clause 15.2, each Party must bear its own costs in relation to compliance with the PN Rules and the PHT Rules.
- (b) Where an act or omission of User in breach of this Agreement causes ADEWAP to incur costs or expenses in order to ensure ADEWAP complies with the PN Rules or the PHT Rules, User must bear ADEWAP's reasonable costs and expenses so incurred to the extent that such costs are not already recovered from User or any other person under any other arrangement, including the Contributions Policy.
- (c) Without limiting clause 15.2(b), where User's Facilities and Equipment increases the fault levels in the Network, User must bear ADEWAP's reasonable costs and expenses of any upgrades to the Network required under the PN Rules or the PHT Rules to the extent that such costs are not already payable by User under the Contributions Policy.
- (d) For the avoidance of doubt, User is not liable for any costs and expenses incurred by another user of the Network arising from compliance, or non-compliance, by the other user with the PN Rules or the PHT Rules unless that is related to a failure of User to comply with the PN Rules and PHT Rules.
- (e) If ADEWAP recovers costs or expenses referred to in clause 15.2(b) from another person in circumstances where User has already paid them to ADEWAP, ADEWAP will refund those costs or expenses without interest to User.

### **15.3 Actions of third parties**

- (a) Subject to clause 10.2(e), if the actions of a third party cause a Party to breach the PN Rules or the PHT Rules, then that Party is not in breach of clause 15.1 unless that Party has:
  - (i) been negligent; or
  - (ii) has not acted as a Reasonable and Prudent Person.
- (b) Nothing in this clause 15.3 limits the operation of clauses 22.1 or 25 in respect of either Party.

## **16. Technical information and characteristics**

### **16.1 Recording of information**

- (a) The Parties must record in Item 2 of Schedule 3 any technical information that User was required to provide to ADEWAP under the User Access Guide.
- (b) Each Party must record any other information required to be recorded in this Agreement by the PN Rules or the PHT Rules within a database maintained by that Party, and provide the other Parties with reasonable access to the information upon request by that Party.



## 16.2 No modifications

- (a) User must not materially modify any Facilities and Equipment unless:
  - (i) User makes an Access Application in accordance with the User Access Guide; and
  - (ii) the Access Application is assessed and approved by ADEWAP resulting in an Access Offer for the change, which User accepted.
- (b) Subject to clause 16.2(c), the replacement of like for like parts within Facilities and Equipment or the replacement of like for like parts in the ordinary course of maintenance and repair is not a material modification for the purposes of clause 16.2(a) unless the replaced part materially changes the performance of the Facilities and Equipment relative to any technical requirement applying to the Facilities and Equipment under this Agreement or an Applicable Law, as determined by ADEWAP in its sole and absolute discretion.
- (c) Nothing in this clause 16.2 derogates from User's responsibility to ensure compliance with the requirements of this Agreement including the obligations to comply with the PN Rules and the PHT Rules.

## 17. Cooperation

User and ADEWAP (each acting as a Reasonable and Prudent Person) must cooperate and coordinate with each other where reasonably necessary in relation to the planning, development, inspection, testing and commissioning of Facilities and Equipment for a Connection Point and Network Assets for the Network.

## 18. Access to premises

### 18.1 Parties must allow reasonable rights of entry

Each Party (**Host Party**) must allow, or use reasonable endeavours to procure for, the other Party (**Accessing Party**) all reasonable rights of entry to the Host Party's premises:

- (a) for the purposes of constructing, installing, operating, maintaining and verifying the accuracy of any Metering Equipment or other equipment or thing;
- (b) to inspect for safety or other reasons the construction, installation, operation, maintenance and repair of any Metering Equipment or other equipment or thing;
- (c) where the Accessing Party is ADEWAP, for the purposes of:
  - (i) effecting a Disconnection that cannot reasonably be effected remotely; and
  - (ii) exercising any of its rights of inspection under the PHT Rules; and
- (d) for any other reasonable purpose connected with or arising out of this Agreement.

### 18.2 Entry made at risk of Accessing Party

Any entry under clause 18.1 is made in all respects at the expense and risk of the Accessing Party, who must, subject to clauses 22.2 and 22.5, make good any damage occasioned by or resulting from the entry, other than to the extent the damage is caused by:

- (a) fair wear and tear; or
- (b) the negligence or Default of the Host Party or any of its Personnel or Visitors; or
- (c) a Force Majeure Event.

### 18.3 Accessing Party obligations

An Accessing Party must:

- (a) before exercising a right of entry under clause 18.1, give reasonable Notice to the Host Party specifying the purpose, proposed time and estimated duration of entry, except where it is not practicable to do so due to any Emergency; and
- (b) while exercising a right of entry under clause 18.1:
  - (i) act as a Reasonable and Prudent Person; and
  - (ii) without limiting clause 18.3(b)(i), take steps that are reasonable in the circumstances to ensure that, during the entry, its Personnel and Visitors cause as little inconvenience to the Host Party as possible, except to the extent that it is not practicable to do so due to any Emergency; and
- (c) at all times comply with:
  - (i) all reasonable health and safety standards, induction and supervision requirements and other requirements of the Host Party; and
  - (ii) all reasonable and lawful directions by or on behalf of the Host Party.

### 18.4 Third person's premises

To the extent that any equipment or thing relevant to the obligations or rights of a Party under this Agreement is located on the premises of a third person, the Parties must use reasonable endeavours to secure for either or both of the Parties a reasonable right of entry to the third person's premises.

## 19. Directions from ISO

Without limiting clause 6, or the generality of clause 17, ADEWAP and User must each comply with any Directives given by the ISO.

## 20. Removal of equipment

On the permanent Disconnection of Facilities and Equipment at any Connection Point:

- (a) ADEWAP may dismantle, decommission and remove the Network Assets and any Metering Equipment installed on User's Premises; and
- (b) under ADEWAP's reasonable instructions, User must dismantle and decommission or remove any of User's Works at or connected to the Connection Point.

## 21. Representations and warranties

### 21.1 User's representations and warranties

- (a) User represents and warrants to ADEWAP that:
  - (i) User's obligations under this Agreement are valid and binding and are enforceable against User under their terms;
  - (ii) this Agreement and any transaction under it does not:
    - (A) contravene User's constituent documents or any Law or any of User's obligations or undertakings by which User or any of User's assets are bound; or
    - (B) cause to be exceeded any limitation on User's powers or the powers of User's directors; and
  - (iii) neither User nor any of its Related Bodies Corporate have immunity from the jurisdiction of a court or from legal process (whether through service of notice,

attachment prior to judgment, attachment in aid of execution, execution or otherwise).

- (b) The representations and warranties in clause 21.1(a) are to be taken to be made on each day on which:
  - (i) this Agreement is in effect; and
  - (ii) any amount payable by User to ADEWAP under this Agreement is or may be outstanding.

## **21.2 ADEWAP's representations and warranties**

- (a) ADEWAP represents and warrants to User that:
  - (i) ADEWAP's obligations under this Agreement are valid and binding and are enforceable against ADEWAP under their terms;
  - (ii) this Agreement and any other transaction under it does not:
    - (A) contravene ADEWAP's constituent documents or any Law or any of ADEWAP's obligations or undertakings by which ADEWAP or any of ADEWAP's assets are bound; or
    - (B) cause to be exceeded any limitation on ADEWAP's powers or the powers of ADEWAP's directors; and
  - (iii) neither ADEWAP nor any of its Related Bodies Corporate have immunity from the jurisdiction of a court or from legal process (whether through service of notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise).
- (b) The representations and warranties in clause 21.2(a) are to be taken to be made on each day on which:
  - (i) this Agreement is in effect; and
  - (ii) any amount payable by ADEWAP to User under this Agreement is or may be outstanding.

## **21.3 No implied warranties**

- (a) To the maximum extent permitted by Law, the only warranties given by and terms which apply to ADEWAP under this Agreement are those expressly contained in this Agreement, and all warranties and terms implied by Law, including those on the part of a Party implied by the *Competition and Consumer Act 2010* of the Commonwealth or the *Fair Trading Act 2010* (WA) or any other Law to similar effect do not apply to this Agreement.
- (b) If at Law the exclusion of any warranty or term is prohibited, then ADEWAP's liability in respect of a breach of such warranty or term is limited to the maximum extent permitted by Law. For example, where any Law permits ADEWAP to limit its liability in respect of a breach of an implied warranty or condition to the replacement or resupply of equivalent goods and services, then ADEWAP's liability will be so limited.

## **21.4 Applicable Laws and limitations on liability**

Nothing in this Agreement is intended to, nor does, limit any exclusion from, or limitation on, liability that a Party may be entitled to claim the benefit of under an Applicable Law.

## **22. Liability and indemnity**

### **22.1 Liability for Direct Losses**

Subject to the terms of this Agreement, if an act or omission of User causes or contributes to ADEWAP suffering or incurring Direct Losses, User is liable for, and must indemnify ADEWAP from and against all Direct Losses arising out of such act or omission.

## 22.2 Exclusion of Indirect Losses

- (a) Subject to clause 22.2(b), a Party is not in any circumstances liable to the other Party for any Indirect Losses suffered by that other Party, however arising.
- (b) Where this Agreement states that 'the exclusion of liability for Indirect Losses in clause 22.2 does not apply', or words to a similar effect, in relation to a matter:
  - (i) the exclusion of liability for Indirect Losses in clause 22.2 does not apply in relation to that matter; and
  - (ii) the relevant Party's liability in relation to that matter is to be determined by Law and, to avoid doubt, the definition of Indirect Losses in this Agreement is to be disregarded for the purposes of that determination.

## 22.3 Damage to Network

If, by User's act or omission, damage is caused to the Network:

- (a) User is liable to ADEWAP for, and must indemnify ADEWAP against, any loss, cost, damage or expense caused by, or consequent upon or arising out of, that damage; and
- (b) the exclusion of liability for Indirect Losses in clause 22.2 does not apply.

## 22.4 Fraud

If a Party is fraudulent in respect of its obligations to the other Party under this Agreement that Party :

- (a) is liable to that other Party for, and is to indemnify that other Party against, any loss, cost, damage or expense caused by, consequent upon or arising out of that fraud; and
- (b) the exclusion of liability for Indirect Losses in clause 22.2 does not apply.

## 22.5 Limitation of liability

- (a) The maximum liability of ADEWAP to User under and in connection with this Agreement is limited in respect of all events or circumstances giving rise to liability in a Reference Service Year, in the aggregate, to an amount of [\$1 million], except that the liability described in clauses 4.4(b), 12, 22.4 and 23 are not to be counted for the purposes of ADEWAP's maximum liability under this Agreement.
- (b) The maximum liability of User to ADEWAP under and in connection with this Agreement is limited in respect of all events or circumstances giving rise to liability in a Reference Service Year, in the aggregate, to an amount of [\$1 million], except that the liabilities described in, or arising out of, clauses 10.2(b), 11, 12, 22.3, 22.4, and 23 are not to be counted for the purposes of User's maximum liability under this Agreement.

## 22.6 Procedure for Party seeking to rely on indemnity

If any Claim is made or instituted against:

- (a) User in respect of which User (**Indemnified Party**) may seek to claim indemnity under this Agreement against ADEWAP (**Indemnifying Party**); or
- (b) ADEWAP in respect of which ADEWAP (**Indemnified Party**) may seek to claim indemnity under this Agreement against User (**Indemnifying Party**),

the following procedure applies:

- (c) the Indemnified Party must give Notice of the Claim to the Indemnifying Party as soon as reasonably practicable;
- (d) the Indemnified Party must not admit, compromise, settle or pay any Claim or take any other steps which may in any way prejudice the defence or challenge of the Claim without the prior written consent of the Indemnifying Party (which must not be unreasonably withheld) except as may be reasonably required in order to defend any judgment against the Indemnified Party;

- (e) the Indemnified Party must permit the Indemnifying Party to take, at the Indemnifying Party's expense, any reasonable action in the name of the Indemnified Party to defend or otherwise settle the claim as the Indemnifying Party may reasonably require; and
- (f) the Indemnified Party must ensure that the Indemnifying Party and its representatives are given reasonable access to any of the documents, records, staff, premises and advisers of the Indemnified Party as may be reasonably required by the Indemnifying Party in relation to any action taken or proposed to be taken by the Indemnifying Party under clause 22.6(e).

## **22.7 Obligation to pay and right to indemnities survives termination**

- (a) A Party's obligation to pay an amount to another Party under this Agreement is a continuing obligation, separate and independent from the other obligations of that Party and survives termination (for any reason) of this Agreement.
- (b) Each indemnity in this Agreement is a continuing obligation, separate and independent from the other obligations of the Parties and survives termination (for any reason) of this Agreement. It is not necessary for a Party to incur expense or make payment before enforcing a right of indemnity conferred by this Agreement.

## **22.8 Apportionment of liability**

Where a Party (**Liable Party**) is liable to, or is to indemnify, the other Party (**Other Party**) under this Agreement, the liability or indemnity owed by the Liable Party is limited to the proportion of the damage suffered by the Other Party as a consequence of the Default, negligence or fraud of the Liable Party giving rise to the liability or indemnity.

## **22.9 Mitigation of losses**

A Party must take such action as is reasonably required to mitigate any loss or damage to it for which indemnity may be claimed under this Agreement or otherwise.

## **23. Personal injury**

The liability for any personal injury Claim will be determined under Law.

## **24. Insurances**

### **24.1 User's insurances**

- (a) User must obtain and maintain insurance, commencing from the Commencement Date, covering those matters, on the terms and basis, and for the amounts, referred to in Item 1 of Schedule 8.
- (b) For each Connection Point, prior to the Start Date of a Service at that Connection Point, and at such other times as ADEWAP may reasonably request in writing (such request not to be made more than once in any 12 Month period unless extraordinary circumstances apply), User must provide ADEWAP with certificates of currency for the insurances required under clause 24.1(a).

### **24.2 ADEWAP's insurances**

- (a) Subject to clause 24.2(b), ADEWAP must obtain and maintain insurance, commencing from the Commencement Date, covering those matters, on the terms and basis, and for the amounts referred to in Item 2 of Schedule 8.
- (b) To the extent that User consents (such consent not to be unreasonably withheld), ADEWAP may self-insure for some or all of the matters and amounts referred to in Item 2 of Schedule 8.
- (c) ADEWAP must, before the Commencement Date and at such other times as User reasonably requests in writing (such request not to be made more than once in respect of

any 12 Month period unless extraordinary circumstances apply), provide User with certificates of currency for the insurances required under clause 24.2(a).

### 24.3 Names of insured

In respect of the public and products liability insurance and the property, plant and equipment insurance referred to in Item 1 of Schedule 8, those insurances must afford cover to ADEWAP as an additional insured or by reference within the definition of the 'insured'.

### 24.4 Cross liability

Every policy of public and products liability insurance must include a cross liability clause in which the insurer expressly accepts that the term 'insured' applies to every person who is named or referred to in the policy as if there was a separate policy of insurance for each of them but not so as to increase the limit of liability.

### 24.5 Notice of cancellation

A Party must Notify the other Party immediately on being advised by its insurer of cancellation or non-renewal of any of the insurance policies in Schedule 8, and immediately use all reasonable endeavours to reobtain the insurance policies in Schedule 8.

### 24.6 Further obligation

Each Party must not do any act or make any omission that would be grounds for an insurer to refuse to pay a claim under any of the policies of insurance.

## 25. Force Majeure

### 25.1 Affected Person's obligations are suspended

If a Party (**Affected Person**) is unable wholly or in part to perform any obligation under this Agreement (other than an obligation to pay money, including under an indemnity) because of the occurrence of a Force Majeure Event (**Affected Obligation**), then, subject to this clause 25, the Affected Person's obligation to perform the Affected Obligation is suspended to the extent that, and for so long as, the Affected Person's ability to perform the Affected Obligation is affected by the Force Majeure Event (such period being the **FM Period**).

### 25.2 Affected Person's obligations

- (a) Subject to clauses 25.3 and 25.5, if a Force Majeure Event occurs, the Affected Person must:
- (i) Notify the other Party of the circumstances and of the obligations under this Agreement which have been or will be, or are likely to be, affected by the Force Majeure Event;
  - (ii) keep the other Party informed at reasonable intervals and upon request by the other Party, as soon as practicable following receipt of that request of:
    - (A) the Affected Person's estimate of the FM Period'
    - (B) the action taken and the action proposed to be taken by the Affected Person in complying with obligation under clause **Error! Reference source not found.**;
    - (C) the cessation of the Force Majeure Event or the successful mitigation or minimisation of the effects of the Force Majeure Event; and
    - (D) any other requests which the other party reasonably requests in connection with the occurrence of the Force Majeure Event and the matters referred to in sub-paragraphs (A) – (C); and
  - (iii) use reasonable endeavours (including incurring any reasonable expenditure of funds and rescheduling personnel and resources) to:

- (A) mitigate the consequences of the Force Majeure Event; and
  - (B) minimise any resulting delay in the performance of the Affected Obligation.
- (b) A Notice under clause **Error! Reference source not found.** must be given as soon as reasonably practicable and in any event within 2 Business Days of a Party becoming aware an event is or is likely to be a Force Majeure Event.

### 25.3 In case of breach

An Affected Person is not obliged to incur any expenditure in complying with clause 25.2(a)(iii) if the Force Majeure Event is constituted by a breach of, or failure to comply with, this Agreement by the other Party.

### 25.4 Failure to minimise delays

If an Affected Person fails to comply with clause 25.2(a)(iii)(B), then the only consequence of that failure is that the FM Period is reduced by the period of any delay in the performance of the Affected Obligation attributable to that failure.

### 25.5 Settlement of a labour dispute

The settlement of a labour dispute which constitutes a Force Majeure Event is a matter which is within the absolute discretion of the Affected Person.

### 25.6 When the Reference Service is Curtailed

Without limiting clause 25.1, ADEWAP's obligation to provide the Reference Service in respect of a Connection Point is suspended during any period that the provision of the Reference Service in respect of that Connection Point is Curtailed under clause 5, to the extent of the Curtailment.

## 26. User does not acquire interest in Network

To avoid doubt, nothing in, and nothing done under or in connection with, this Agreement causes User to acquire any right, title or interest in or to the Network or any part of it.

## 27. Payments and recoveries under the Contributions Policy

The Parties must comply with the provisions set out in Schedule 4 regarding any Contributions.

## 28. Default

### 28.1 Default

A Party is in **Default** if:

- (a) that Party defaults in the due and punctual payment, at the time and in the manner required for payment by this Agreement, of any amount payable under this Agreement; or
- (b) that Party defaults in the due and punctual performance or observance of any of its obligations contained or implied by operation of Law in this Agreement; or
- (c) an Insolvency Event occurs in respect of that Party; or
- (d) that Party materially breaches any representation or warranty given by that Party under this Agreement.

### 28.2 Default by User

In the event of a Default by User, ADEWAP may:

- (a) Notify User of the Default and require User to remedy that Default (**Default Notice**);
- (b) if the Default is a Default in the payment of any amount and has not been remedied by the end of the third Business Day after the Default Notice was given, De-energise, or Curtail

the provision of the Reference Service in respect of, all or any of User's Connection Points whilst the Default is continuing;

(c) if the Default is any other type of Default and at the end of the fifth Business Day after the Default Notice was given:

- (i) User's Default has not been remedied; or
- (ii) User has not to the reasonable satisfaction of ADEWAP begun remedying the Default or has begun remedying but is not, in the reasonable opinion of ADEWAP, diligently proceeding to remedy the Default,

De-energise, or Curtail the provision of the Reference Service in respect of, all or any of User's Connection Points whilst the Default is continuing; and

(d) if User's Default has not been remedied at the end of the 10th Business Day after the Default Notice was given, terminate this Agreement.

### **28.3 ADEWAP's rights not affected**

A Default by User does not prejudice the rights or remedies accrued to ADEWAP at the date of that Default.

### **28.4 Default by ADEWAP**

In the event of a Default by ADEWAP, User may:

- (a) Notify ADEWAP of ADEWAP's Default and require ADEWAP to remedy the Default (**Default Notice**); and
- (b) if the Default has not been remedied at the end of the 20th Business Day after the Default Notice was given:
  - (i) terminate this Agreement; or
  - (ii) withhold payment of any Charges payable by User from the date of that Default under this Agreement for so long as that Default continues unremedied (and no interest is payable by User on any amounts so withheld provided they are paid within 10 Business Days after the Default is remedied).

### **28.5 User's rights not affected**

A Default by ADEWAP does not prejudice the rights or remedies accrued to User at the date of ADEWAP's Default.

## **29. Termination**

### **29.1 Termination**

- (a) Subject to clause 29.1(b), this Agreement terminates on the Expiration Date.
- (b) This Agreement may be terminated before the Expiration Date by:
  - (i) written agreement between ADEWAP and User;
  - (ii) Notice by either Party at any time at which this Agreement does not include at least one Connection Point;
  - (iii) Notice by either Party where there is a Default by the other Party under this Agreement, subject to clause 28.2 or clause 28.4 (as applicable); or
  - (iv) Notice by either Party to an Affected Person if a Force Majeure Event occurs and:
    - (A) the Affected Person is unable wholly or in part to perform any obligation under this Agreement; and
    - (B) the FM Period continues for a period of greater than 180 days in aggregate in any period of 12 Months.



- (c) On termination of this Agreement ADEWAP may Disconnect any one or more of User's Connection Points, permanently (under clause 20) or otherwise.
- (d) On termination of this Agreement, unless otherwise agreed by the Parties:
  - (i) User must pay any unpaid amount owed to ADEWAP under this Agreement; and
  - (ii) ADEWAP must pay any unpaid amount owed to User under this Agreement.

## 29.2 Rights of Parties not affected

Termination of this Agreement under clause 29.1(b) does not prejudice the rights or remedies accrued to either Party at the date of termination.

## 30. Disputes

### 30.1 Rules Disputes

If any Rules Dispute arises between the Parties under or in relation to this Agreement, then the dispute resolution regime provided for in the PN Rules will apply to that Dispute.

### 30.2 Non-Rules Disputes – first stage Dispute resolution

- (a) If a Dispute other than a Rules Dispute (**Non-Rules Dispute**) arises between the Parties:
  - (i) either Party may give a Notice setting out the material particulars of the Dispute and requiring duly authorised representatives of each Party to meet at a place, to be agreed between the Parties, within 10 Business Days of the date of receipt of such Notice by the relevant Party (**Receipt Date**), to attempt in good faith by way of discussions and using all reasonable endeavours to resolve the Non-Rules Dispute (**Representatives' Meeting**); and
  - (ii) and the authorised representatives of the Parties must do so.
- (b) If a Non-Rules Dispute is not resolved (as evidenced by the terms of a written settlement signed by each Party's duly authorised representative) within 20 Business Days after the Receipt Date then:
  - (i) either Party may give a Notice requiring that senior executive officers of each Party meet at a place to be agreed between the Parties within 30 Business Days after the Receipt Date, to attempt in good faith by way of discussions and using all reasonable endeavours to resolve the Non-Rules Dispute within 35 Business Days after the Receipt Date (**Senior Executives Meeting**); and
  - (ii) the senior executive officers must do so.

### 30.3 Non-Rules Disputes – reference to and appointment of Independent Expert

- (a) If a Non-Rules Dispute remains unresolved at the end of the period referred to in clause 30.2(b)(i) then either Party may require that the Dispute be determined by an independent expert to be appointed in accordance with clause 30.3(b) (**Independent Expert**).
- (b) The Party wishing to have the Dispute determined by an Independent Expert must give Notice to that effect to the other Party. The Parties will meet and use all reasonable endeavours to agree upon the identity of the Independent Expert, but if they are unable to agree within 5 Business Days of receipt of the Notice, then either Party may refer the matter to the chair for the time being of the Resolution Institute (or, if that body no longer exists, then to the chair for the time being of such successor body or association as is then performing the function formerly carried out by the Resolution Institute), to nominate a suitably qualified person to act as the Independent Expert to determine the Non-Rules Dispute.

### 30.4 Non-Rules Disputes – role of Independent Expert

An Independent Expert:

- (a) will act as an expert and not as an arbitrator;

- (b) must have no interest or duty which conflicts, or which may conflict, with his or her function as the Independent Expert;
- (c) must not be a former or current employee or representative of either Party or of a Related Body Corporate of either of them; and
- (d) must disclose fully to the Parties, before being appointed, any interest or duty which may conflict with his or her position.

### **30.5 Non-Rules Disputes – representation and evidence**

Each Party:

- (a) may be legally represented at any hearing before an Independent Expert;
- (b) will be entitled to produce to the Independent Expert any materials or evidence which that Party believes is relevant to the Non-Rules Dispute; and
- (c) must make available to the Independent Expert all materials requested by the Independent Expert and all other materials which are relevant to the Independent Expert's determination.

### **30.6 Non-Rules Disputes – rules of evidence and power**

- (a) An Independent Expert will not be bound by the rules of evidence.
- (b) An Independent Expert will have the power to inform themselves independently as to the facts to which the Non-Rules Dispute relates and to take such measures as the Independent Expert thinks fit to expedite the determination of the Non-Rules Dispute.

### **30.7 Non-Rules Disputes – determination**

- (a) An Independent Expert must make a determination on a Non-Rules Dispute and must:
  - (i) determine what, if any, adjustments may be necessary between the Parties; or
  - (ii) if relevant, determine the amendments required to the terms of this Agreement.
- (b) The determination of an Independent Expert will be, in the absence of bias or manifest error, final and binding upon the Parties.
- (c) For the avoidance of doubt:
  - (i) if this Agreement requires the Parties to negotiate in good faith to reach agreement concerning an issue;
  - (ii) the Parties are unable to reach agreement within the time period allowed under this Agreement; and
  - (iii) the relevant clause of this Agreement requires that failure to agree to be resolved in accordance with this clause 30,  
the Independent Expert will have the power to resolve that failure to agree by specifying the terms and conditions which should apply between the Parties in relation to that issue.

### **30.8 Non-Rules Disputes – costs**

The costs in relation to a determination by an Independent Expert will be dealt with as follows:

- (a) the remuneration of the Independent Expert will be agreed by the Parties, and in default of agreement between the Parties, fixed by the person to whom a Party may refer a matter pursuant to clause 30.3(b);
- (b) unless the Parties otherwise agree, the Independent Expert will determine which Party will bear the costs of the determination and in what proportion, having regard to the degree to which the Independent Expert 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; and
- (c) the Parties will bear their own costs incurred in the preparation and presentation of any submissions or evidence to the Independent Expert.

### 30.9 Method of Meetings

- (a) A Representatives' Meeting or Senior Executives' Meeting may be conducted in person, by telephone, video conference or similar method of real time communication.
- (b) If the Parties are unable to agree on a meeting place under clause 30.2(a)(i) or clause 30.2(b)(i) in the allocated time frame, the meeting will take place at a place determined by ADEWAP (acting as a Reasonable and Prudent Person).

### 30.10 Disputes generally

- (a) Neither Party may have recourse to litigation in relation to a Dispute without first having complied with this clause 30.
- (b) This clause 30 does not prevent a Party seeking an urgent interlocutory injunction from a court of competent jurisdiction.

### 30.11 Obligations must be performed

A Party must continue to perform its obligations under this Agreement despite the existence of a Dispute, unless otherwise agreed.

## 31. Confidentiality

### 31.1 Confidential information

Each Party acknowledges and agrees that:

- (a) all data and information that is received by ADEWAP from User pursuant to this Agreement, or of which ADEWAP otherwise becomes aware in the course of performing its obligations, or exercising its rights, under this Agreement, that is specific to User's activities as a customer of ADEWAP and is reasonably likely to be commercially sensitive;
  - (b) all data and information that is received by User from ADEWAP pursuant to this Agreement, or of which User otherwise becomes aware in the course of performing its obligations, or exercising its rights, under this Agreement, and
  - (c) the terms (but not the existence) of this Agreement,
- (together, **Confidential Information**) is confidential.

### 31.2 Non-disclosure and exceptions

Subject to clauses 31.3, 31.4 and 31.5, a Party receiving Confidential Information (**Information Recipient**) must not disclose it to any other person for any purpose except:

- (a) with the prior written consent of the Party disclosing the Confidential Information (**Disclosing Party**); or
- (b) in the following circumstances and upon the following conditions:
  - (i) with the written consent of the Information Provider;
  - (ii) to the extent required by an Applicable Law or by any Governmental Authority which has jurisdiction over a Party or any of its Related Bodies Corporate or by the rules of a stock exchange which has jurisdiction over a Party or any of its Related Bodies Corporate;
  - (iii) to the extent that the information is at that time generally available to the public, otherwise than as a result of a breach of this Agreement;
  - (iv) to a Related Body Corporate (including its employees, directors, consultants, contractors, lawyers, accountants and auditors), provided such disclosure is for the purposes of this Agreement;
  - (v) to a bank or other financial institution (including its directors, employees, consultants, accountants and lawyers) in connection with the organisation of the financial affairs of the Information Recipient or its Related Body Corporate;

- (vi) to a bona fide proposed assignee, transferee or purchaser of some or all of the share capital of the Information Recipient or, in the case of ADEWAP, its Related Bodies Corporate (including its proposed financier and its respective directors, employees, consultants, accountants and lawyers);
- (vii) to the employees, directors, consultants, contractors, lawyers, accountants and auditors of the Information Recipient for the purposes of this Agreement and the transactions contemplated by this Agreement;
- (viii) to the extent required for the purposes of prosecuting or defending a Dispute or if otherwise required in connection with legal proceedings related to this Agreement.

### **31.3 Obligations**

Prior to making any disclosure permitted by clause 31.2(b)(iv), 31.2(b)(v), 31.2(b)(vi) or 31.2(b)(vii), the Information Recipient must require any person to whom it intends to make the disclosure to enter into a written undertaking in favour of, and in a form acceptable to, the Disclosing Party and the Information Recipient, to keep the Confidential Information to be disclosed confidential on terms identical to those in clauses 31.1 and 31.2.

### **31.4 Disclosure by User**

User may disclose or allow to be disclosed a copy of this Agreement to a Controller with whom User will enter, or has entered into, a contract as required by clause 10.

### **31.5 Compliance with Chapter 8 and 9 of the Code**

Nothing in clause 31.2(b) limits ADEWAP's obligations to comply with Chapters 8 and 9 of the Code.

### **31.6 Return or destruction of materials**

Subject to any obligation under any Law relating to records retention and subject to prudent recording – keeping procedures (including, in contemplation of potential legal action), a Party must return all documents containing the other Party's Confidential Information, including all copies, to the other Party on termination of this Agreement, or, upon request by the other Party, destroy all such documents.

### **31.7 Survival of obligations**

- (a) Clauses 31.1 to 31.6 survive the termination of this Agreement and remain enforceable for a period of 2 years from the date of such termination.
- (b) Any person who ceases to be a Party to this Agreement continues to be bound by this clause 31.

## **32. Assignment**

### **32.1 By ADEWAP**

- (a) ADEWAP may, without the consent of User, assign the whole or any part of its rights under this Agreement to any transferee of an interest in the Network. The assignment will not be effective until the assignee executes a deed of covenant in favour of User agreeing to be bound by this Agreement.
- (b) Where ADEWAP has made an assignment under clause 32.1(a), ADEWAP will be released from its obligations under this Agreement (other than accrued obligations) to the extent of the assignment as from the date of assignment.
- (c) ADEWAP may, with the consent of User (which consent will not be unreasonably withheld), assign the whole or any part of its rights under this Agreement to any person other than a transferee of an interest in the Network.

## 32.2 By User

- (a) Subject to clause 32.2(b)(i), User may assign all of its rights under this Agreement, or an undivided interest in all of its rights under this Agreement, in each case with the prior written consent of ADEWAP (which consent will not be unreasonably withheld).
- (b) Without limiting the generality of clause 32.2(a), ADEWAP will be entitled to withhold its consent if:
  - (i) User is in default of this Agreement (and the default has not been waived by ADEWAP); or
  - (ii) ADEWAP is not reasonably satisfied as to the ability of the assignee to meet all of the obligations of User under this Agreement.
- (c) An assignment by User will be conditional upon, and will not be binding until:
  - (i) the execution by the assignee of a deed of covenant in favour of ADEWAP agreeing to be bound by this Agreement which deed must be in a form reasonably acceptable to ADEWAP; and
  - (ii) the reimbursement by the assignee of ADEWAP's costs (including legal costs) reasonably incurred in assessing whether the assignee will be able to meet all of the obligations of User under this Agreement and in connection with its review and negotiation of the deed of covenant referred to in clause 32.2(c)(i).
- (d) Where User has made an assignment under clause 32.2(a), User will be released from its obligations under this Agreement (other than accrued obligations) to the extent of the assignment and as from the date of assignment.

## 33. Notices

### 33.1 Requirements for Notices

Subject to clause 33.2, each notice, notification, consent, approval, request, invoice and other communication (**Notice**) must be:

- (a) in writing and from a person duly authorised by the sender; and
- (b) subject to clause 33.5, delivered or sent to the address of the addressee as specified in Schedule 9 by one or more of the following means:
  - (i) electronically to the email address of the addressee;
  - (ii) by hand delivery; or
  - (iii) by priority post.

### 33.2 Operational and urgent Notices

Where this Agreement expressly provides:

- (a) Notices of a day to day operational nature; or
- (b) Notices given in an operational Emergency,  
may be given orally provided they are confirmed in writing within one Business Day.

### 33.3 Notice takes effect

Subject to clause 33.4, a Notice takes effect from the later of:

- (a) the time it is received; and
- (b) any later time specified in the Notice.

### **33.4 Deemed receipt**

For the purposes of this Agreement:

- (a) a Notice sent by email is deemed to be received 4 hours after the sender's system generates an electronic record of the email being sent;
- (b) a Notice delivered by hand to the address of a Party (including where a reputable courier service is used for that purpose) is deemed to be received if it is handed (with or without acknowledgment of delivery) to any person at the address who, in the reasonable judgment of the person making the delivery (upon making appropriate enquiries):
  - (i) appears to be; and
  - (ii) represents himself or herself as, a representative of the Party to whom the Notice is addressed; and
- (c) a Notice which is posted is deemed to be received by the Party to whom the Notice is addressed:
  - (i) where the Notice is sent from outside the country of the address to which it is sent – 10 Business Days after the day of posting; and
  - (ii) otherwise – three Business Days after the day of posting;

but if the delivery, receipt or transmission is not on a Business Day or is after 1700 hours (local time) on a Business Day in the place of receipt, the Notice is taken to be received at 0900 hours (local time) on the next Business Day in the place of receipt.

### **33.5 Change to address for Notices**

A Party may at any time, by Notice given to the other Parties, designate a different address, facsimile number or email address for the purposes of clauses 33.1 to 33.4.

## **34. Change in Applicable Law**

### **34.1 Interpretation of Agreement**

If after the Commencement Date, an Applicable Law:

- (a) is introduced or commences operation; or
- (b) is modified, re-enacted or substituted,

then subject to clauses 34.2 and 34.3, this Agreement will be interpreted (as far as possible) in such a way as to enable compliance with that Applicable Law.

### **34.2 Negotiation**

- (a) Despite clause 34.1, if at any time after the Commencement Date:
  - (i) a Change in Applicable Law Event occurs;
  - (ii) the manner in which an Applicable Law or a Governmental Authority regulates how a Tariff, Charge or Pass-Through Amount is to be calculated, varied or applied, or the Reference Service is to be provided, materially changes;
  - (iii) the activities comprised within, or the service standards applying to, the Reference Service materially change; or
  - (iv) any other event, circumstance or change occurs which materially affects the way in which the Reference Service is provided or ADEWAP operates its Network, the Network Assets or related facilities,

and that change, event or circumstance will result in a material change in the commercial position of ADEWAP, the Parties must consider and negotiate in good faith any specific amendments to this Agreement requested by ADEWAP to take account of that change, event or circumstance, so as to substantially return ADEWAP to its commercial position under this Agreement prior to that change, event or circumstance.

- (b) If the Parties are unable to agree upon any such amendments within 20 Business Days of commencing negotiations, either Party may refer that Dispute for resolution in accordance with clause 30.

### **34.3 Disputes**

In determining a Dispute relating to a matter arising under this clause 34 (in accordance with clause 30), the Independent Expert must take into account (among other things) the following factors:

- (a) that the contents of this Agreement must be fair and reasonable having regard to the commercial interests of the Parties;
- (b) that at all times, the Reference Service to be provided under this Agreement must be provided in accordance with Good Electricity Industry Practice and the other requirements of this Agreement and Applicable Laws; and
- (c) that this Agreement should be consistent with the prevailing practices and standards in the Western Australian electricity industry at that time.

## **35. Miscellaneous**

### **35.1 Entire agreement**

- (a) This Agreement constitutes the entire agreement between the Parties as to its subject matter.
- (b) In relation to that subject matter, this Agreement supersedes any prior understanding or agreement between the Parties and any prior condition, warranty, indemnity or representation imposed, given or made by a Party.

### **35.2 Amendment**

This Agreement may only be amended by another written agreement executed by the Parties.

### **35.3 Waiver**

Waiver of any provision of or right under this Agreement:

- (a) must be in writing signed by the Party entitled to the benefit of that provision or right; and
- (b) is effective only to the extent set out in any written waiver.

### **35.4 Continuing performance**

- (a) The obligations under this Agreement continue until satisfied in full and do not merge with any action performed or document executed by any Party for the purposes of performance of this Agreement.
- (b) Any representation in this Agreement survives the execution of any document for the purposes of, and continues after, performance of this Agreement.
- (c) Any indemnity given by any Party under this Agreement:
  - (i) constitutes a liability of that Party separate and independent from any other liability of that Party under this Agreement or any other agreement; and
  - (ii) survives and continues after performance of this Agreement.

### **35.5 Further action**

Each Party must use all reasonable efforts to do all things necessary or desirable to give full effect to this Agreement.

### **35.6 Subcontracting**

ADEWAP will be entitled to subcontract the performance of any of its obligations under this Agreement.

### **35.7 Relationship**

This Agreement does not create a relationship of employment, agency or partnership between the Parties.

### **35.8 Costs and duty**

- (a) Each Party must bear its own costs arising out of the negotiation, preparation, execution performance, amendment or registration of this Agreement.
- (b) User is liable for and must pay any duty that is assessed on this Agreement under the *Duties Act 2008 (WA)*. If it is dutiable, User must produce this Agreement to the Office of State Revenue for assessment.

### **35.9 Governing law and jurisdiction**

- (a) This Agreement is governed by the law of Western Australia.
- (b) The Parties submit to the non-exclusive jurisdiction of the courts of Western Australia and courts of appeal from them for determining any dispute concerning this Agreement.

### **35.10 Counterparts**

- (a) This Agreement may be executed in any number of counterparts.
- (b) All counterparts will be taken to constitute one instrument.
- (c) Where this Agreement has been executed in counterparts, the date of this Agreement will be taken to be the day on which the last of the Parties to give such Notice gives Notice to the other Parties that it has executed a counterpart, such Notice being accompanied by a copy, or a printable electronic image, of the whole of that counterpart.

### **35.11 No third party benefit**

This Agreement does not confer any right or benefit on a person other than User and ADEWAP, despite the person being named or identified, or belonging to a class of persons named or identified, in this Agreement.

### **35.12 Severance**

- (a) Subject to clause 35.12(b):
  - (i) if the whole or any part of this Agreement is void, unenforceable or illegal in a jurisdiction, it is severed for that jurisdiction; and
  - (ii) the remainder of this Agreement has full force and effect and the validity or enforceability of the provision in any other jurisdiction is not affected.
- (b) This clause 35.12 has no effect if the severance alters the basic nature of this Agreement or is contrary to public policy.

### **35.13 Further assurance**

Each Party agrees, at its own expense, on the request of another Party, to do everything reasonably necessary to give effect to this Agreement and the transactions contemplated by it, including, but not limited to, the execution of documents.

### **35.14 Authorised officers**

- (a) A Notice given under this Agreement may be given by an Authorised Officer of a Party specified in Schedule 9 to an Authorised Officer of another Party specified in Schedule 9.
- (b) A Party may at any time, by Notice given to the other Party, add or replace an Authorised Officer for the purposes of clause 35.14.

### **35.15 Merger**

The warranties, undertakings and indemnities in this Agreement do not merge on termination of this Agreement.



### **35.16 Remedies**

- (a) Subject to clause 35.16(b), the rights, powers and remedies provided in this Agreement are cumulative with and not exclusive of the rights, powers or remedies provided by Law independently of this Agreement.
- (b) A Party may only terminate this Agreement in circumstances permitted by express provisions of this Agreement. Any rights to terminate this Agreement at common law are excluded.

Draft for comment

# Schedule 1 – Contract Details

Item number	Description	Clause(s)	Details
1.	User name and ABN	Parties	Insert full name and ABN of User
2.	Expiration Date (subject to clause 3.2)	Clause 1.1	Insert date on which this Agreement will end.
3.	Extension Period	Clauses 1.1 and 3.2	Insert duration of Extension Period
4.	Reference Service Start Date	Clause 1.1	The later of: (a) the date that is [2 Business Days] after the last of the Conditions Precedent to be satisfied or waived has been satisfied or waived; and (b) [insert date]
5.	Reference Service End Date	Clause 1.1	The Expiration Date

Draft for comment

# Schedule 2 – Conditions Precedent

**(Notes:**

- The specific nature, content and extent of the Conditions Precedent that will be required to be satisfied before ADEWAP will provide the Reference Service will depend on the outcome of the steps, technical assessments, analyses and studies, and resulting capital works, arising out of, and required by, the User Access Guide process and which, in turn, led to the making of the relevant Access Offer to the relevant User.
- For example, as at the date the form and content of this Reference Service Agreement was formulated by ADEWAP, there was no spare capacity in the Network to provide the Reference Service to any potential User without capital works first being carried out. Accordingly, appropriate Conditions Precedent will be required to deal with that.
- Accordingly, the Conditions Precedent set out in the table below are merely for illustrative purposes only.)

Condition Precedent	CP Sunset Date	Party with benefit
[Compliance by User with the following provisions of the Contributions Policy: <ul style="list-style-type: none"> <li>• [insert]</li> <li>• [insert]</li> <li>• [insert]]</li> </ul>	Insert latest date for this Condition Precedent to be satisfied	[ADEWAP]
[Both Parties executing a contract for the undertaking of the following works on terms and conditions acceptable to each of them: <ul style="list-style-type: none"> <li>• [insert]]</li> </ul>	Insert latest date for this Condition Precedent to be satisfied	[Both Parties]
[Practical completion occurring under the contract referred to immediately above]	Insert latest date for this Condition Precedent to be satisfied	[Both Parties]
[User demonstrating compliance with the PHT Rules prior to energisation]	Insert latest date for this Condition Precedent to be satisfied	[Both Parties]
[Provision by User of the Bank Guarantee]	Insert latest date for this Condition Precedent to be satisfied	[ADEWAP]
[Provision by User of any security required under the Contributions Policy and under any early works agreement]	Insert latest date for this Condition Precedent to be satisfied	[ADEWAP]

# Schedule 3 – Details of Connection Points

## 1. Commercial Details

1	Connection Point Name/Title	
	Type of Connection Point (i.e. Entry Point, Exit Point, Bidirectional Point)	
	Address of Premises	
	Name and contact details of Controller	
	NMI	
	Contracted Capacity (MW/ MVA)	
	Size of Generator (if applicable)	
	Make and model of Generator (if applicable)	
	Substation (if applicable)	
	Substation distance (if applicable)	

2	Connection Point Name/Title	
	Type of Connection Point (i.e. Entry Point, Exit Point, Bidirectional Point)	
	Address of Premises	
	Name and contact details of Controller	
	NMI	
	Contracted Capacity (MW/ MVA)	
	Size of Generator (if applicable)	
	Make and model of Generator (if applicable)	
	Substation (if applicable)	
	Substation distance (if applicable)	

**Note: To be completed in relation to the relevant User as part of the process under the User Access Guide following receipt of User's Access Application and which, in turn, led to the making of the relevant Access Offer to the relevant User.]**

## 2. Technical Details

	Connection Point	Description of Facilities and Equipment
1		
2		

**(Note: Attach plans, drawings and other documentation as necessary to fulfil the requirements of clause 16.1(a).)**

## 3. Electrical Losses

	Connection Point Name	Loss Factor
1		

2		
---	--	--

**(Note: The loss factors will be determined once a power system study and other technical work has been completed in relation to the relevant User as part of the process under the User Access Guide following receipt of User's Access Application and which, in turn, led to the making of the relevant Access Offer to the relevant User.)**

Draft for comment

# Schedule 4 – Contributions

**(Notes:**

- Referred to in clause 27.
- The specific nature, content and extent of this Schedule will depend on the outcome of the steps, technical assessments, analyses and studies, and resulting capital works, arising out of, and required by, the User Access Guide and which, in turn, led to the making of the relevant Access Offer to the relevant User.)

1	[Connection Point Title / NMI]	
	[Contribution provisions]	
2	[Connection Point Title / NMI]	
	[Contribution provisions]	

Draft for comment

# Schedule 5 – Reference Service Availability Standard

## 1. Definitions

In this Schedule:

- (a) **Available** means, in relation to a Reference Service Year, that the Reference Service is capable of being provided by the Network in accordance with the requirements of this Agreement excluding any period in respect of which:
- (i) the Reference Service was required by User (taking into account the latest nomination made, or deemed to have been made, by User under any Applicable Law or, in the absence of any such nomination, the latest forecast information provided by User under clause 7) but was not capable of being provided, or was required not to be provided, or was permitted to not be provided, by ADEWAP due to, resulting from, or as a consequence of, any:
    - (A) Permitted Unavailability; or
    - (B) other act by, or omission of, User; and
  - (ii) the Reference Service was not in fact required by User (despite the latest nomination made, or deemed to have been made, by User under any Applicable Law or, in the absence of any such nomination, the latest forecast information provided by User under clause 7).
- (b) **Permitted Unavailability** means any:
- (i) event or circumstance as a result of which ADEWAP is permitted by the terms of this Agreement to not provide the Reference Service even if User requires the Reference Service during that period including, for clarity and without limitation, pursuant to clauses 5.1, 8.2, 8.3 and 25;
  - (ii) event or circumstance affecting the whole or any part of the Network and caused by an act or omission of a third party (including a Controller or a Relevant Party);
  - (iii) fault in, of or at, or other event at or associated with, any third-party system;
  - (iv) Force Majeure Event affecting the whole or any part of the Network or ADEWAP's use of the Network or ADEWAP's ability to provide the Reference Service;
  - (v) breach by User of any one or more of its obligations under this Agreement, or any negligence or Wilful Default of User;
  - (vi) Emergency or risk of injury to any person or damage to any property until such time as that Emergency or risk has, in ADEWAP's reasonable opinion, passed or been resolved;
  - (vii) requirement, Directive or order given by any Governmental Authority that requires the Curtailment of the Reference Service or affects the ability of ADEWAP to provide the Reference Service; or
  - (viii) requirement, or obligation under, any Applicable Law.

## 2. Calculation of Reference Service Actual Availability and Availability Adjustment Amount

Promptly after the end of each Reference Service Year, ADEWAP will make the following two calculations in respect of that Reference Service Year:

### 2.1 Reference Service Actual Availability

$$RSAA = (A - B - C) / A$$

where:

**RSAA** is the Reference Service Actual Availability for the relevant Reference Service Year;

**A** is the total number of minutes in that Reference Service Year;

**B** is the aggregate of all of the minutes in that Reference Service Year in which the Reference Service was not Available at an Entry Point or at a Bidirectional Point intended to be used at the relevant time to transfer electricity into the Network (**Entry BP**) (excluding all minutes in which the Reference Service was not Available due to the Wilful Default of ADEWAP), divided by the total number of Entry Points and Entry BPs; and

**C** is the aggregate of all of the minutes in that Reference Service Year in which the Reference Service was not Available at an Exit Point or at a Bidirectional Point intended to be used at the relevant time to transfer electricity out of the Network (**Exit BP**) (excluding all minutes in which the Reference Service was not Available due to the Wilful Default of ADEWAP), divided by the total number of Exit Points and Exit BPs,

provided that:

- (a) for the purposes of determining the values of B and C, if the Reference Service was not Available in the same minute at both an Entry Point or an Entry BP and an Exit Point or an Exit BP, that minute will be taken into account in determining the value of B but will be disregarded in determining the value of C;
- (b) for the purposes of determining the values of B and C, a part of a minute will be counted as a full minute; and
- (c) if the value of RSAA is less than 0.80, it will be deemed to be 0.80.

## 2.2 Availability Adjustment Amount

$$AAA = [AAF \times RSC] + [(WDMEntry + WDMExit) \times RSC/A]$$

where:

**AAA** is the Availability Adjustment Amount (if any) for the relevant Reference Service Year;

**AAF** is the result of  $[1 - (RSAA/0.98)]$ , where RSAA is the result of the calculation under paragraph 2.1 of this Schedule for that Reference Service Year;

**RSC** is the sum of the Charges paid by User under this Agreement for the provision of the Reference Service by ADEWAP in that Reference Service Year (but excluding any Pass-Through Amounts paid or payable by User, any Excess Network Usage Charges paid or payable by User and any amounts paid or payable by User under clause 4.2(d));

**WDMEntry** is the aggregate of all of the minutes in that Reference Service Year in which the Reference Service was not Available at an Entry Point or an Entry BP due to the Wilful Default of ADEWAP (if any), divided by the total number of Entry Points and Entry BPs;

**WDMExit** is the aggregate of all of the minutes in that Reference Service Year in which the Reference Service was not Available at an Exit Point or an Exit BP due to the Wilful Default of ADEWAP (if any), divided by the total number of Exit Points and Exit BPs; and

**A** is A from the formula in paragraph 2.1 of this Schedule,

provided that:

- (a) for the purposes of determining the values of WDMEntry and WDMExit, if the Reference Service was not Available in the same minute at both an Entry Point or an Entry BP and an Exit Point or an Exit BP, that minute will be taken into account in determining the value of WDMEntry but will be disregarded in determining the value of WDMExit; and
- (b) for the purposes of determining the values of WDMEntry and WDMExit, a part of a minute will be counted as a full minute.



### 3. Payment of Availability Adjustment Amount

- (a) If the value of **[AAF x RSC]** within the Availability Adjustment Amount for a Reference Service Year as calculated by ADEWAP under paragraph 2.2 of this Schedule is a positive amount then:
- (i) subject to paragraph 3(a)(ii) of this Schedule, the amount of the Availability Adjustment Amount will be deducted by ADEWAP from the Charges payable by the User in the first Tax Invoice issued by ADEWAP to User for the next Reference Service Year; or
  - (ii) if the Reference Service Term expired at the end of the Reference Service Year to which the Availability Adjustment Amount relates, the amount of the Availability Adjustment Amount will be paid by ADEWAP to User within 20 Business Days after ADEWAP's determination of that Availability Adjustment Amount.
- (b) For clarity, if the value of **[AAF x RSC]** within the Availability Adjustment Amount for a Reference Service Year as calculated by ADEWAP under paragraph 2.2 of this Schedule is a negative amount, then:
- (i) User will not be entitled to receive any payment or any other form of compensation from ADEWAP whatsoever on account of that component of the calculation of the Availability Adjustment Amount; and
  - (ii) the amount represented by **[(WDMEntry + WDMExit) x RSC/A]** within the Availability Adjustment Amount calculation will:
    - (A) subject to paragraph 3(b)(ii)(B) of this Schedule, be deducted by ADEWAP from the Charges payable by the User in the first Tax Invoice issued by ADEWAP to User for the next Reference Service Year; or
    - (B) if the Reference Service Term expired at the end of the Reference Service Year to which that amount relates, be paid by ADEWAP to User within 20 Business Days after ADEWAP's determination of that amount.

## Schedule 6 – Metering, metering data, quality and communications

[Note: To be completed to address the specific requirements of User after the Parties have completed all steps under the User Access Guide and which, in turn, led to the making of the relevant Access Offer to the relevant User.]

Draft for comment

## Schedule 7 – Technical requirements relating to the PN Rules and PHT Rules

[Note: To be completed to address technical matters arising under, or in relation to, the PN Rules and/or the PHT Rules after the Parties have completed all steps under the User Access Guide and which, in turn, led to the making of the relevant Access Offer to the relevant User.]

Draft for comment

# Schedule 8 – Insurances

## 1. User insurances

- (a) From the Commencement Date, User must effect and maintain the following policies of insurance with an insurer acceptable to ADEWAP:
- (i) public and products liability:
    - (A) public liability insurance for a limit of not less than \$50 million per occurrence; and
    - (B) products liability insurance for a limit of not less than \$50 million per claim and in the aggregate, refreshed annually,  
covering User's liability to ADEWAP or any third party for death, bodily injury and loss or damage to property caused by any act, omission or negligence arising out of, or in relation to, this Agreement;
  - (ii) statutory workers' compensation insurance for all persons employed by User;
  - (iii) employer's liability at common law, with a limit of cover in respect of any one occurrence of not less than \$50 million;
  - (iv) motor vehicle third party property insurance for all loss or damage to property caused by any act, omission or negligence of User or its Personnel arising out of, or in relation to, this Agreement, for a limit of \$25 million per claim and unlimited in the aggregate of all claims made; and
  - (v) property, plant and equipment insurance covering all loss or damage to User's plant or equipment used in connection with this Agreement for its replacement value.
- (b) User must ensure that any Controller, Relevant Party and contractor used by User in connection with this Agreement also effects and maintains policies of insurance in accordance with paragraph 1.1(a) of this Schedule 8.

## 2. ADEWAP insurances

From the Commencement Date, ADEWAP must effect and maintain the following policies of insurance or procure that such policies of insurance are effected and maintained:

- (a) public and products liability:
  - (i) public liability insurance for a limit of not less than \$50 million per occurrence; and
  - (ii) products liability insurance for a limit of not less than \$50 million per claim and in the aggregate, refreshed annually,  
covering ADEWAP's liability to User or any third party for death, bodily injury and loss or damage to property caused by any unlawful act or omission, or negligence, arising out of, or in relation to, this Agreement;
- (b) statutory workers' compensation insurance for all persons engaged by ADEWAP from a Related Body Corporate of ADEWAP;
- (c) employer's liability at common law, with a limit of cover in respect of any one occurrence of not less than \$50 million;
- (d) motor vehicle third party property insurance for all loss or damage to property caused by any act, omission or negligence of ADEWAP or its Personnel arising out of, or in relation to, this Agreement, for a limit of \$25 million per claim and unlimited in the aggregate of all claims made; and
- (e) property, plant and equipment insurance covering all loss or damage to ADEWAP's plant or equipment used in connection with this Agreement for the following values:

- (i) buildings and fixed plant and equipment – replacement value
- (ii) transmission lines - an amount determined appropriate by ADEWAP taking into account the nature of the assets, industry practice, prevailing insurance market conditions, and terms and conditions that are reasonably available in the insurance market.

Draft for comment

# Schedule 9 – Notices

## 1. ADEWAP

Subject	Details
Address for service of Notices/ place of business	[insert]
Email	[insert]
Authorised Officers	[insert]

## 2. User

Subject	Details
Address for service of Notices/ place of business	[insert]
Email	[insert]
Authorised Officers	[insert]

**[Note: To be completed after the Parties have completed all steps under the User Access Guide which led to the making of the relevant Access Offer to the relevant User.]**

Draft for comment

# Schedule 10 – Form of Bank Guarantee

## Guarantee

### No. DG

#### Beneficiary:

APA DEWAP Pty Ltd

ABN: 78 058 070 689

#### Applicant:

[insert name of User]

ABN: [insert]

#### Date of issue:

[insert]

#### Guarantee Amount:

Not Exceeding Australian Dollars [insert amount]

#### Special Conditions:

##### **Description of Contract / Agreement:**

[insert name of bank] (XXX) asks the Beneficiary to accept this bank guarantee (**Undertaking**) in connection with a contract or agreement between the Beneficiary and Applicant for the provision of services on the Beneficiary's Port Hedland electricity network.

##### **Guarantee Amount**

In consideration of the Beneficiary accepting this Undertaking and its terms, XXX undertakes unconditionally to pay the Beneficiary on written demand from time to time any sum or sums up to an aggregate amount not exceeding:

Australian Dollars [insert amount] (Amount).

##### **Undertaking:**

XXX will pay the Amount or any part of it to the Beneficiary upon presentation of this original Undertaking (accompanied by a written demand) at [insert address] without reference to the Applicant and even if the Applicant has given XXX notice not to pay the money, and without regard to the performance or non-performance of the Applicant or Beneficiary under the terms of the contract or agreement.

By accepting this Undertaking, the Beneficiary acknowledges and agrees that XXX may rely entirely on any demand or notice as presented to it and has no responsibility or obligation to investigate the authenticity or correctness of the matters stated in a demand or notice, the signatures on the same, the positions of such signatories or the capacity or entitlement of the Beneficiary to give and execute the demand or notice.

Any alterations to the terms of the contract or agreement or any extensions of time or any other forbearance by the Beneficiary or Applicant will not impair or discharge XXX's liability under the Undertaking.

This Undertaking remains in force until the first to occur of:

- The Beneficiary notifies XXX in writing that the Undertaking is no longer required;
- This original Undertaking is returned to [insert address];
- XXX has paid to the Beneficiary the Amount or the balance outstanding of the Amount; or
- 4.00pm on [insert date] in the State or Territory of presentation (**Expiry Date**). If the Expiry Date is not a business day in the State or Territory, then the Expiry Date shall be deemed to occur on the next business day.

Notwithstanding anything stated in this Undertaking, XXX has the right to terminate it at any time by paying the Beneficiary the Amount or the balance outstanding of the Amount, or any lesser amount that the Beneficiary may require.

This Undertaking is personal to the Beneficiary. The Beneficiary cannot assign, transfer, charge or otherwise deal with its rights under this Undertaking and XXX will not recognise any purported assignment, transfer, charge or other dealing.

This Undertaking will be governed by the laws of the place of presentation.

**Executed** at [insert location] for and on behalf of XXX ABN [insert].

---

Authorised Signature(s)

Draft for comment



# Signing page

**EXECUTED** as an agreement.

**Executed by APA DEWAP Pty Ltd** (ABN 78 058 070 689) in accordance with section 127 of the *Corporations Act 2001*

\_\_\_\_\_  
Signature of director

\_\_\_\_\_  
Name of director (print)

\_\_\_\_\_  
Signature of director/company secretary  
(Please delete as applicable)

\_\_\_\_\_  
Name of director/company secretary (print)

**Executed by [insert name of User and ABN]** in accordance with section 127 of the *Corporations Act 2001*

\_\_\_\_\_  
Signature of director

\_\_\_\_\_  
Name of director (print)

\_\_\_\_\_  
Signature of director/company secretary  
(Please delete as applicable)

\_\_\_\_\_  
Name of director/company secretary (print)

Draft for comment