Supporting Lease (Customer is tenant of Site)

Guidance Notes

| **Toolkit guidance** |  |
| --- | --- |
| This template Lease is: |  |
| * suitable for use where the Lessee is the community solar organisation | **✓** |
| * suitable for use where the Lessor owns the Premises | **✓** |
| * suitable for use where the Lessee intends to execute a Power Purchase Agreement with the Tenant of the Premises | **✓** |
| * not suitable, and should be revised, for use where a third party owns the Solar Power System | ✘ |
| * not suitable, and should be revised, for use where the Site is outside Victoria | ✘ |
| * not suitable, and should be revised, for use where either party is a natural person (i.e. not a corporation) | ✘ |
| Two models are commonly used on community solar projects:  **PPA Model** – Operator (being the Community Solar Organisation) operates and maintains the system and the Customer pays for the electricity actually generated by the Solar Power System.  *PPA Model A -* If the Customer owns the Premises, the Customer grants the Operator a leasehold interest in the Premises.  *PPA Model B -* If the Customer does not own the Premises (i.e. the roof space), the Operator must separately execute a lease with the land owner with respect to the Premises.  **Solar Equipment Lease Model** - CSO (being the lessor) operates and maintains the system and the Owner (being the customer/lessee) pays a nominal rental amount for the Solar Power System and may freely use the electricity generated by the Solar Power System.  This Lease supports the arrangements under the PPA Model B. A solar equipment lease should be used under the Solar Equipment Lease Model. | |
| Under this Lease:   * the Lessor obtains no proprietary interest in the Solar Power System; and * the Lessee owns and operates the Solar Power System. | |

May 2018

Party 1(ACN ###) (Lessee)

Party 2 (ACN ###) (Lessor)

Lease

Community Solar Project

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**Date**

# Parties

**Party 1** ACN 1 of Address 1 (**Lessee**)

**Party 2** ACN 2 of Address 2 (**Lessor**)

# Background

1. On or about the date of this Lease, the Lessee entered into a Power Purchase Agreement with the Tenant for the purchase of electricity generated by the Solar Power System.
2. The Lessee owns the Solar Power System.
3. The Lessor owns the Premises.
4. The Lessor has agreed to grant a lease of the Premises, and the associated Licence, to the Lessee for the purpose of performing its obligations, and exercising its rights, in connection with the Solar Power System on the terms and conditions of the Power Purchase Agreement.

# Agreed terms

## **Lease**

#### The Lessor agrees to grant to the Lessee, and the Lessee agrees to take on, the Lease of the Premises for the Lease Period on the terms of this Lease for the purpose of:

##### the Lessee performing the Lessee’s obligations; and

##### the Lessee exercising the Lessee’s rights,

##### in connection with the Power Purchase Agreement.

#### The Lessor:

##### must not, other than in the exercise of its rights or performance of its obligations under this Lease or applicable Laws, and with reasonable notice to the Lessee, enter onto the Premises or interfere with the Lessee’s quiet enjoyment of the Premises during the Lease Period;

##### hereby consents to the Lessee installing the Solar Power System at the Premises;

##### hereby consents to the Lessee lodging a caveat to protect the Lessee’s interests under the Lease;

##### must do all things necessary, including giving reasonable assistance and required consents to the Lessee, to enable the Lessee to protect the Lessee’s interests under the Lease (including the lodging of a caveat as contemplated in 1(b)(iii));

##### must use its reasonable endeavours to obtain the consent of any mortgagee of the Site (**Mortgagee**) to this Lease on such terms and conditions as the Mortgagee reasonably requires;

##### hereby grants to the Lessee, and the Lessee’s Representative, a licence to enter the Site for the purpose of accessing the Premises in accordance with the Lease (**Licence**); and

##### must ensure such access to the Premises is safe, convenient and unhindered.

#### The Lessee must, for each Billing Interval, pay to the Lessor the Rent which shall be the Lessee’s maximum financial liability to the Lessor in connection with this Lease and the Licence.

#### On each anniversary of the date on which this Lease commenced, the Lessor may review and increase the Rent by no more than CPI for that year.

## **Title and Risk**

#### The Lessor acknowledges and agrees that although the Solar Power System will be attached to buildings at the Site, it shall not become a fixture.

#### The Solar Power System will at all times remain the property of the Lessee, and the Lessor shall have no right, title or interest in or to the Solar Power System.

#### The Lessee is entitled to all Environmental Credits or Solar Incentives created or produced from, or by reference to, the Solar Power System.

## **Termination**

#### This Lease terminates 20 Business Days after the termination or expiry of the Power Purchase Agreement.

#### The Lessee agrees to promptly notify the Lessor if the Power Purchase Agreement is terminated or expires before the expiry of the Lease Period.

#### The Lessee may terminate this Lease with immediate effect by giving written notice to the Lessor if:

##### the Lessor sells the land on which the Premises is located and the new owner of the land on which the Premises is located does not agree to promptly:

###### take on, by way of novation, the Lessor’s rights and obligations under this Lease; or

###### enter into a similar lease with the Lessee on terms that are acceptable to the Lessee;

###### or

##### a Total Loss occurs in relation to the Solar Power System.

#### Either party may terminate this Lease with immediate effect by giving the other party written notice if:

##### the other party commits a material breach of any other term of this Lease which breach is irremediable or, if such breach is remediable, fails to remedy that breach within a period of 10 Business Days after being notified to do so; or

##### the other party becomes Insolvent.

## **Consequences of termination**

#### Upon termination or expiry of this Lease, the Lessee must:

##### pay to the Lessor on demand any Rent that is outstanding as at the date of termination of this Lease;

##### unless otherwise agreed, procure that the Solar Power System is decommissioned and removed from the Site; and

##### make good any damage that is caused to any building or other property of the Lessor as a direct result of any decommissioning and removal of the Solar Power System by the Operator in accordance with clause 4(ii).

#### Termination or expiry of this Lease shall not affect any rights, remedies, obligations or liabilities of the parties that have accrued up to the date of termination or expiry, including the right to claim damages in respect of any breach of the Lease that existed at or before the date of termination or expiry.

#### Notwithstanding termination or expiry of this Lease, the Lessor acknowledges and agrees that:

##### the Solar Power System will at all times remain the property of the Lessee, and the Lessor shall have no right, title or interest in or to the Solar Power System in accordance with clause 2(b); and

##### the Licence and clause 1(b)(vii) survive termination or expiry of this Lease for the purpose of the Lessee decommissioning and removing the Solar Power System.

## Complaints and Dispute Resolution

#### If a dispute arises between the parties in connection with this Lease (**Dispute**), then either party may give the other party a notice of a dispute (**Dispute Notice**) specifying the nature of the Dispute (including the facts and circumstances giving rise to the Dispute).

#### Nothing in this clause shall prevent either party commencing court proceedings at any time to seek urgent interlocutory relief.

#### Despite the existence of a Dispute, and any process under this clause 5, each party must continue to perform its obligations under this agreement.

#### If either party has given a Dispute Notice to the other party, the Dispute must first be referred to the senior officers of each of the parties (**Senior Officers**).

#### The Senior Officers must meet within 10 Business Days after the serving of the Dispute Notice and undertake genuine and good faith negotiations with a view to resolving the Dispute.

#### If the Senior Officers cannot resolve the Dispute within 20 Business Days after the serving of the Dispute Notice, the Dispute must be submitted to the Expert for determination in accordance with this clause 5.

#### Within 30 Business Days after the serving of the Dispute Notice, the parties must attempt to agree on the appointment of an appropriate person to determine the dispute (**Expert**).

#### If the parties cannot agree on an Expert within 30 Business Days after the serving of the Dispute Notice, either party may request that the President of the Institute of Arbitrators and Mediators Australia appoint a person to be the Expert (which appointment shall be final and binding).

#### If an Expert is appointed under this clause 5, the parties must refer the Dispute to the Expert within 10 Business Days of the appointment.

#### The Expert is to act and make a decision as an expert and not as an arbitrator.

#### The Expert may proceed in any manner that the Expert thinks fit.

#### The Expert may direct the time in which the parties are to provide their submissions to the Expert.

#### Each of party is entitled to make written submissions to the Expert upon the matter the subject of the Dispute. The Expert is entitled to appoint other persons to assist in the determination.

#### The parties must make available to the Expert all facts and circumstances which the Expert may require in order to determine the Dispute and must use their reasonable endeavours to ensure that their associates are available to appear at any hearing or enquiry called for by the Expert.

#### The parties are entitled to be legally represented at any hearing or enquiry called for by the Expert.

#### The Expert's decision is final and binding upon the parties.

#### The costs of the Expert, including the expenses of providing the determination, must be borne by the parties in such shares as the Expert may determine.

## **Notices**

#### Any communication under this Lease must be in writing and signed by the sender or by an authorised representative of the sender and sent to or left at the address of the addressee in Schedule 1 or, if the addressee has previously notified the sender in writing of an alternative address for notices, that alternative address.

#### If the delivery or receipt occurs on a day which is not a Business Day or at a time after 5.00 pm (both the day and time being in the place of receipt) it is regarded as having been received at 9.00 am on the next following Business Day.

## **GST**

#### For the purpose of this clause unless the context otherwise requires:

##### ***Adjustment*** means each form of adjustment to consideration provided for in this clause;

##### ***GST*** means any tax imposed on Supply by or through the *New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act) and any related Tax Imposition Act. Where any other term is used in this clause which is defined in the GST Act it will have the meaning which it bears in the GST Act; and

##### ***Recipient, Supplier*** and ***Supply*** have the meaning they bear in the GST Act.

#### The parties acknowledge that the consideration under this Lease excludes GST.

#### The parties agree that in the case of a Supply which is a taxable Supply, in addition to the consideration payable under this Lease, the Recipient will pay an additional amount (**GST Amount**) equal to the GST payable on the Supply calculated in accordance with the GST Act and on the value stipulated in the GST Act in relation to the Supply.

#### The Recipient must pay the GST Amount at the same time and in the same way as any Rent to which the GST Amount relates and within [#] Business Days of receipt of a tax invoice and/or adjustment notes in relation to the Supply. The Supplier must do all things reasonably necessary to assist the Recipient to enable it to claim and obtain any input tax credit available to the Recipient in respect of the Supply.

## **General**

#### Each party will promptly execute all documents and do all things that the other party from time to time reasonably requires of it to effect, perfect or complete the terms and conditions of this Lease and any transaction contemplated by it.

#### If anything in this Lease is unenforceable, illegal or void then it is severed and the rest of this Lease remains in force.

#### A provision of this Lease that can and is intended to operate after its conclusion will remain in full force and effect.

#### This Lease constitutes the entire agreement and understanding between the parties concerning its subject matter.

#### This Lease may not be varied unless in writing signed by both parties.

#### Nothing in this Lease constitutes a partnership, joint venture or agency between the Lessee and the Lessor.

#### The rights and obligations of the Lessor under this Lease may not be assigned, novated or transferred without the prior written consent of the Lessee.

#### Each party must bear its own costs and expenses arising out of and in connection with the negotiation and execution of this Lease.

#### All duties and taxes which may be payable on or in connection with this Lease must be borne by the Lessor.

#### This Lease may be executed in counterparts, each of which when executed will be an original and all the counterparts together will constitute one and the same instrument.

#### Any provision of this Lease which requires a Party to use reasonable endeavours or exercise a function reasonably does not impose any obligation to:

##### commence any legal action or proceeding against any person;

##### perform any act that is uncommercial or unreasonable; or

##### procure absolutely that that thing is done or happens.

#### This Lease is governed by and construed in accordance with all applicable laws in force in Victoria from time to time and the parties submit to the non-exclusive jurisdiction of the courts of the State.

## **Definitions and Interpretation**

#### **Lease** means this Lease, and includes the Recitals and Schedules.

#### **Billing Interval** means the interval that the Lessor will invoice the Rent as set out in Schedule 1.

#### **Business Day** means a day (not being a Saturday or Sunday or public holiday) on which Australian banks (as defined in Section 9 of the Corporations Act) are open for general banking business in Melbourne, Victoria.

#### **CPI** means the All Groups Consumer Price Index number for the capital city in Victoria determined by the Australian Bureau of Statistics ABN 26 331 428 522 or the index officially substituted for it.

#### **Lease Period** means the period specified in Schedule 1.

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

#### **Environmental Credits** mean any and all rights, entitlements, credits, offsets, allowances, benefits or certificates of any kind that relate to renewable energy, greenhouse gas emissions or low-emission and which may be obtained by the Operator or the Customer, or to which either party is or becomes entitled to in relation to the generation of electricity by the Solar Power System.

#### **Lessor’s Representative** is the person named in Schedule 1.

#### **Insolvent** means, in relation to a person, when the person is:

#### insolvent as that term is defined in Section 9 of the Corporations Act; or

#### the subject of an event described in Sections 459C(2) (a) to (f) or Section 585 of the Corporations Act (or it makes a statement from which another party to this Lease may reasonably deduce it is so subject); or

#### under administration or suffers the appointment of a controller, administrator, liquidator or provisional liquidator as those terms are defined in Section 9 of the Corporations Act; or

#### is otherwise unable to pay its debts as and when they become due and payable.

#### **Law** means any statute, regulation, rule, proclamation, ordinance, by-law or code.

#### **Lease** means the lease granted with respect to the Premises under this Lease.

#### **Lessee’s Representative** is the person named in Schedule 1.

#### **Licence** mas the meaning in clause 1(b)(vi).

#### **Personal Properties Security Register** means the same as in the PPSA.

#### **Power Purchase Agreement** means the agreement entered on or around the date of this Lease between the Lessee and the Tenant for the purchase of electricity generated by the Solar Power System.

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

#### **Premises** means the location of the Solar Power System on the Site shown in Schedule 2.

#### **Rent** has the meaning in clause 1(c) as specified in Schedule 1.

#### **Security Interest** has the meaning under the PPSA.

#### **Site** means the Lessor’s premises described in Schedule 1.

#### **Solar Incentives** mean any accelerated depreciation, installation or productions-based incentives, tax credits and subsidies or other incentives available in respect of the Solar Power System.

#### **Solar Power System** means a solar power system, which includes the items of equipment described in Schedule 1 to this Lease, all substitutions, replacements or renewals of such equipment and all related accessories, manuals and instructions provided for it.

#### **Tenant** means [#insert name and ABN].

#### **Total Loss** the Solar Power System is, in the Lessee’s reasonable opinion, damaged beyond repair, lost, stolen, seized or confiscated.

#### In this Lease unless specified to the contrary:

* + - 1. the background, the Schedules, the execution page and the annexures (if any) are each incorporated in and form part of this Lease;
      2. a reference to a party includes the party’s executors, administrators, successors and permitted assigns;
      3. if a period of time dates from a given day or the day of an act or event, it is to be calculated exclusive of that day; and
      4. if the time for performing an obligation under this Lease expires on a day which is not a Business Day, then time is extended until the next Business Day.

Execution

**Executed** as a deed.

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| |  |  |  | | --- | --- | --- | | **Executed** by [insert Lessor execution block] | )  ) |  | | ...........................................................  Company Secretary/Director  ...........................................................  Name of Company Secretary/Director (print) |  | ...........................................................  Director  ...........................................................  Name of Director (print) | | )  ) | ...........................................................  Director  ...........................................................  Name of Director (print) |

|  |  |  |
| --- | --- | --- |
| **Executed** by [insert Lessee execution block] | )  ) |  |
| ...........................................................  Company Secretary/Director  ...........................................................  Name of Company Secretary/Director (print) |  | ...........................................................  Director  ...........................................................  Name of Director (print) |

Schedule 1

Lease Details

|  |  |
| --- | --- |
| **Lease Period** | [insert] [#This should reflect the Contract Period in the PPA while allowing sufficient time to remove the Solar Power System if required. The Lease Period should be expressed clearly e.g. “dd.mm.yyyy [note: being the Commencement Date under the PPA] – dd.mm.yyyy [note: being 20 Business Days after the End Date under the PPA]] |
| **Lessor** | [insert Lessor name]  Address: [insert Lessor’s address]  Email: [insert Lessor’s email address] |
| **Lessor’s Representative** | [insert name]  Ph. [insert] / Mob. [insert]  Email: [insert] |
| **Lessee** | insert Lessee name]  Address: [insert Lessee’s address]  Email: [insert Lessee’s email address] |
| **Lessee’s Representative** | [insert name]  Ph. [insert] / Mob. [insert]  Email: [insert] |
| **Site** | [insert address and title reference] |
| **Premises** | [insert details] as marked [insert] on the Site plan in Schedule 2 |
| **Rent** | [$ insert] |
| **Solar Power System** | [insert details of Solar Power System] |

Schedule 2

1. Premises

***[Drafting note: Insert detailed description of the Premises. E.g. this Schedule should include an accurate map/image of the Site with the location of the Premises clearly marked.]***