CONTRACT FOR SPOT PURCHASE/SALE OF ENVIRONMENTAL PRODUCTS

**CONTRACT DETAILS**

|  |  |
| --- | --- |
| 1. Seller: | [\*\**Insert details*\*\*] |
| 1. Buyer: | [\*\**Insert details*\*\*] |
| 1. Commodity: |  ESCs  GRECs   STCs  LGCs  VEECs   ACCUs  KACCUs  NKACCUs |
| 1. Quantity: | [\*\**Insert number* \*\*] |
| 1. Unit Price: | [\*\**Insert price\*\**]per unit of the Commodity, exclusive of GST. |
| 1. Creation Period: |  ESCs: Created in relation to energy savings that occurred before the end of [\*\**insert year*\*\*].   LGCs and STCs: Created before the end of [\*\**insert year*\*\*].   GRECs: [\*\**Created before the end of* [\*\**insert year*\*\*] or [\*\**No creation period applies*.\*\*]   VEECs: Created before 31 January in the year following [\*\**insert year*\*\*].   ACCUs, KACCUs and NKACCUs: No creation period applies. |
| 1. Payment Date: | [\*\**Insert number*\*\*] Business Days [\*\**before/after*\*\*] the Transfer Date. [\*\**or\*\* On the Transfer Date\*\**] |
| 1. Transfer Date: | [\*\**Insert date on which the Sold Commodity must be transferred to the Buyer*\*\*] and if this date is not a Business Day the next Business Day after that date. |
| 1. Registry Account: | [\*\**Insert details of the Buyer’s account at the relevant registry*\*\*] |
| 1. Seller’s Account: | [\*\**Insert details*\*\*] |
| 1. Excluded Source: | [\*\**Insert any excluded source*\*\*] |
| 1. Buyer Default Interest Rate: | [*\*\*Insert the following or other agreed rate\*\**] 4% above the RBA Cash Rate |
| 1. Delivery Default Replacement Cost (per unit): | *[\*\*Insert the following text or other method to determine the unit replacement cost\*\*]* The market value of the Commodity (satisfying the Creation Period requirement, and not generated or created from an Excluded Source) on the Transfer Date, as determined by the Buyer. |
| 1. Trade Date: | [\*\**insert today’s date*\*\*] |
| 1. Jurisdiction: | [*\*\*insert jurisdiction for governing law\*\**] |

This Contract comprises the Contract Details above and the Environmental Products Spot Physical Terms and Conditions (March 2021 edition) published by the Australian Financial Markets Association Ltd, which are deemed to be incorporated in this Contract.

|  |  |  |
| --- | --- | --- |
| **SIGNED** for and on behalf of **SELLER**  by its authorised representative: |  | **SIGNED** for and on behalf of **BUYER**  by its authorised representative: |
| Name *(print)* |  | Name *(print)* |

Environmental Products Spot Physical Terms and Conditions

(March 2021 edition)

published by the Australian Financial Markets Association Ltd.

## Definitions

Defined terms shall have the meaning set out in the Contract Details and as set out below and in the case of any inconsistency the meaning in the Contract Details prevails. Reference to legislation or rules includes reference to that legislation or rules as amended or replaced from time to time, and any applicable regulations made thereunder.

“**ACCU**” means an Australian carbon credit unit within the meaning of the CFI Act, issued under Division 2 of Part 11 of the CFI Act and transferable under Division 3 of Part 11 of the CFI Act.

“**Business Day**” means a day on which commercial banks and foreign exchange markets settle payments and are open for general business in the cities in which the Australian offices of the Seller and Buyer as noted in the Contract Details are located.

“**CFI Act**” means the Carbon Credits(Carbon FarmingInitiative)Act2011 (Cth).

#### “**ESC**” means a certificate created under Division 7 and registered under Division 9 of Part 9 of the Electricity Supply Act 1995 (NSW) in units of one certificate per unit and transferable under that Act.

“**GREC**” means an LGC created in respect of a generator accredited under the Program and which is capable of being used to claim eligible Green Power generation in accordance with the Program.

“**Green Power**” has the meaning apparent from the Program.

“**KACCU**” means a Kyoto Australian carbon credit unit within the meaning of the CFI Act issued under Division 2 of Part 11 of the CFI Act and transferable under Division 3 of Part 11 of the CFI Act.

“**LGC**” means a large-scale generation certificate created under Subdivision A of Division 4, Part 2 of the REC Act registered under Division 5, Part 2 of the REC Act and transferable under Division 6, Part 2 of the REC Act and also includes certificates created under the REC Act which are to be treated as LGCs under the transitional provisions.

“**NKACCU”** means a non-Kyoto Australian carbon credit unit within the meaning of the CFI Act issued under Division 2 of Part 11 of the CFI Act and transferable under Division 3 of Part 11 of the CFI Act.

“**Program**“meansthe National GreenPower Accreditation Program in force from time to time established by various government agencies collectively known as the **“**National GreenPower Steering Group**”*.***

“**RBA Cash Rate**” means on any day, the rate most recently published by the Reserve Bank of Australia as its “Cash Rate Target”.

“**REC Act**” means the Renewable Energy (Electricity) Act 2000 (Cth).

#### “**Settlement Disruption Event**” means an event beyond the control of the parties as a result of which the Sold Commodity cannot be transferred, or transfer of the Sold Commodity cannot be registered in accordance with the Scheme Rules, or otherwise in accordance with the relevant legislation or scheme rules.

“**Scheme Rules**” means, in the case of ESCs, the Electricity Supply Act 1995 (NSW) and the Electricity Supply (General) Regulation 2014 (NSW); in the case of LGCs or STCs, the REC Act; in the case of VEECs, the VEET Act; in the case of GRECs, the REC Act and the Program; and in the case of ACCUs, KACCUs and NKACCUs the CFI Act.

“**Sold Commodity**” means the Quantity of the Commodity, satisfying the Creation Period requirement, and not generated or created from an Excluded Source.

“**STC**” means a small-scale technology certificate created under Subdivision B or BA of Division 4, Part 2 or under section 30P of Division 4, Part 2A of the REC Act registered under Division 5, Part 2 of the REC Act and transferable under Division 6, Part 2 of the REC Act.

“**VEEC**” means a certificate created under Division 3, Part 3 of the VEET Act and registered and transferable under Division 3, Part 3 of the VEET Act.

“**VEET Act**”means the Victorian Energy Efficiency Target Act 2007 (Vic).

## Sale and Purchase

The Seller sells the Sold Commodity to the Buyer. The Seller shall take all actions required by the Scheme Rules to transfer the Sold Commodity to the Buyer by 2.00pm Australian Eastern Daylight Time on the Transfer Date, for which time is of the essence. If the Seller is unable to transfer the Sold Commodity on the Transfer Date because of a Settlement Disruption Event, the Transfer Date will be the next Business Day on which the Settlement Disruption Event is no longer subsisting, and the Payment Date will be extended by a corresponding number of days. Prior to the Transfer Date, the Seller must issue to the Buyer a tax invoice setting out the Sold Commodity to be transferred from the Seller to the Buyer on the Transfer Date, the Unit Price and the total amount payable.

## Transfer Fees

The Buyer shall pay any transfer fees imposed by the Scheme Rules or applicable registrar in respect of the transfer of the Sold Commodity, including stamp duty, and if the Seller is required by the Scheme Rules to pay any transfer fee or other similar expense associated with the transfer of the Sold Commodity, the Buyer shall reimburse such expense on demand.

## Payment

If the Contract Details provide for payment before the Transfer Date, the Buyer shall pay the Unit Price multiplied by the Sold Commodity, by transferring that sum to the Seller’s Account on the Payment Date. If the Contract Details provide for payment on or after the Transfer Date, the Buyer shall pay the Unit Price multiplied by the quantity of Sold Commodity actually delivered for transfer on the Transfer Date, by transferring that sum to the Seller’s Account on the Payment Date. For the avoidance of doubt, if the tax invoice issued under clause 2 does not correctly reflect the quantity of the Sold Commodity actually delivered for transfer on the Transfer Date, the amount required to be paid under this clause shall be adjusted so that the Buyer pays the Seller the Unit Price multiplied by the quantity of the Sold Commodity actually delivered for transfer, and the Seller shall adjust the tax invoice accordingly.

## Interest

The Buyer shall pay the Seller interest, compounded daily, at the Buyer Default Interest Rate on any late payment, from the Payment Date to the date that payment is made.

## Seller Delivery Default

If the Seller fails to transfer all of the quantity of the Sold Commodity to the Buyer in accordance with clause 2, the Seller must pay to the Buyer, if demanded by the Buyer, an amount equal to the Delivery Default Replacement Cost multiplied by the quantity of the Sold Commodity that was not transferred less, if the Payment Date is on or after the Transfer Date, the amount that would have been payable by the Buyer to the Seller for that quantity under clause 4 but has not been paid by the Buyer.

## Title

Title to the Sold Commodity transferred in accordance with this Contract will transfer to the Buyer on the Transfer Date (as extended under clause 2, if relevant) or the date determined in accordance with the requirements of the Scheme Rules.

## Warranties

The Seller warrants that, at the time of transfer to the Buyer, the Sold Commodity transferred to the Buyer under this Contract:

#### satisfies the Creation Period requirement;

#### has been created in accordance with the requirements of the Scheme Rules;

#### has not been generated or created from an Excluded Source;

#### is owned by the Seller with full legal and beneficial title; and

#### is free and clear of any security interest, claim, lien or encumbrance of any kind.

At the time of transfer of the Sold Commodity the Buyer and Seller each warrant to the other that they will comply with the Scheme Rules as regards the Sold Commodity transferred to the Buyer under this Contract.

## GST

If a party (the "supplier"):

#### is liable to pay goods and services tax (“GST”) on a supply made by it under this Contract;

#### certifies to the recipient that it has not priced the supply to include GST; and

#### issues a valid tax invoice to the recipient,

#### then the recipient agrees to pay to the supplier an additional amount equal to the consideration provided for the supply multiplied by the prevailing GST rate:

#### if the tax invoice is issued prior to the Payment Date, on the Payment Date; or

#### if the tax invoice is issued on or after the Payment Date, within 10 days after the issue of the tax invoice.

The supplier agrees to issue a valid adjustment note within 7 days of becoming aware that the actual amount of GST payable by it on the supply differs from the amount paid by the recipient. Payment adjustments must then be made between the parties within two Business Days to reflect the actual amount of GST payable.

All references have the same meaning as provided in the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth).

## Withholding tax

If the Buyer is required by law to withhold an amount in respect of tax from a payment to be made to the Seller because the Seller has not quoted its ABN, the withholding and payment to the relevant taxing authority will be a good discharge of its obligation to pay the relevant amount to the Seller. In the event that the Buyer pays an amount to the Seller without withholding an amount in respect of tax, the Seller indemnifies the Buyer for any loss suffered as a result of failing to withhold.

## Governing law and jurisdiction

This contract is governed by the law of the jurisdiction specified in the Contract Details. Each party submits to the non-exclusive jurisdiction of the courts in the jurisdiction and courts of appeal from those courts.

**Explanatory Notes**

Environmental Products Spot Physical Contract

(March 2021 edition)

published by the Australian Financial Markets Association Ltd.

The Environmental Products Spot Physical Contract is intended as a short form contract for the spot physical purchase of environmental products such as energy savings certificates (ESCs), large-scale generation certificates (LGCs), Green Power accredited LGCs (GRECs), small-scale technology certificates (STCs), Victorian energy efficiency certificates (VEECs), Australian Carbon Credit Units (ACCUs) issued under the Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth) which fall into two sub-categories, Kyoto ACCUs (KACCUs) and non‑Kyoto ACCUs (NKACCUs) (collectively referred to as “Environmental Products").

“Spot” transactions would normally be due for completion on the same day as the trade is negotiated, or within a few Business Days after the trade date. AFMA does not recommend using the contract for transactions with longer periods before settlement.

The contract is designed for “physical” transactions which are settled by actual transfer of the underlying product. The contract is not appropriate for cash settlement.

# Completing the Contract Details

1. Insert the Seller’s name, ABN, address, facsimile, trade reference identifier and contact.
2. Insert the Buyer’s name, ABN, address, facsimile, trade reference identifier and contact.
3. Tick the appropriate commodity (in this edition, ESCs, GRECs, LGCs, STCs, VEECs, ACCUs, KACCUs and NKACCUs are the only commodities).

KACCUs and NKACCUs are both types of ACCU. This contract treats ACCUs, KACCUs and NKACCUs as separate categories of Commodity to enable the parties to specify which type must be delivered, or to allow delivery of either type.

1. Insert the number of units of the commodity. For example, the number of Environmental Products being sold.
2. Insert the price per unit of the commodity, exclusive of GST.
3. Insert the Creation Period. This relates to the period for which the commodity is intended to be used for compliance. Legislative requirements may dictate that the acquitter of a certificate only use certificates created prior to a particular date or created for activities undertaken prior to a particular date. By way of overview:

ESCs can only be surrendered in an annual energy savings statement if the certificate was created in relation to energy savings that occurred before the end of the year to which the energy savings statement relates.

LGCs can only be surrendered in an annual energy acquisition statement for a year if the LGC was created before the end of that year. (The ‘year’ refers to the compliance year, not the year in which the statement is submitted.)

STCs (other than those purchased through the clearing house) can only be surrendered for a quarter if the certificate was created before the end of the year in which the quarter occurs.

GRECs are submitted for voluntary surrender. The “Settlement Period” under the Program is generally a calendar year. There is a 3-month reconciliation period after the end of the Settlement Period within which GreenPower providers can transfer GRECs to their GreenPower designated account. However, if the Buyer wishes to use the GREC for mandatory surrender as an LGC for a particular year then the Creation Period requirement should be the same as for LGCs.

A VEEC can only be surrendered in an annual acquisition statement if the certificate was created before 31 January in the year following the year to which the energy acquisition statement relates.

1. If you wish payment to occur on the same date as transfer of the commodity, insert “On the Transfer Date”. If you wish payment to occur one Business Day after the Transfer Date, insert “One Business Day after the Transfer Date”. If you wish payment to occur one Business Day prior to the Transfer Date, insert “One Business Day before the Transfer Date”. If the Buyer is making payment by electronic transfer the Buyer will need to issue the payment instruction the day before the Payment Date in order that the payment will reach the Seller’s Account on the Payment Date as required by clause 4.
2. Specify the Transfer Date, (e.g. “15 August 2021” ). Time is of the essence. That is, the contract may be terminated if the transfer does not occur on the due date (unless a Settlement Disruption Event applies).
3. Specify the account at the relevant registry to which the Commodity is to be transferred.
4. Specify the details of the Seller’s account to which payment should be made.
5. Insert details of any excluded source from which the commodity must not be created (e.g. “wood waste” in the case of LGCs or GRECs). If you wish to have only one permitted source such as wind you could define the excluded source as “all sources other than wind”.
6. Consider whether the Buyer Default Interest Rate is appropriate, and amend if not.
7. Insert the Delivery Default Replacement Cost (per unit). This would normally be the “Market value of the Commodity (satisfying the Creation Period requirement, and not generated or created from an Excluded Source) on the Transfer Date, as determined by the Buyer”. This is because in the event that a Seller fails to deliver the agreed quantity to the Buyer, the Buyer will either acquire, or calculate the value to acquire, from other parties a quantity of the Commodity up to the amount of the shortfall. However, the parties may wish to specify some other value such as $40 for STCs.
8. Insert the date on which the transaction is agreed.
9. Insert the governing law jurisdiction. This would normally be the head office of one of the parties.

If trading orally, you will have a binding contract once you agree to use this contract format and the contract details have been agreed, unless you expressly agree to the contrary (such as by expressly agreeing orally that the contract is not binding until signed by both parties).

Clause 2 requires the Seller to take all actions required by the Scheme Rules to transfer the Sold Commodity to the Buyer on the Transfer Date. Clause 7 provides that title to the Sold Commodity will transfer on the Transfer Date or the date determined in accordance with the requirements of the Scheme Rules. In the case of ESCs the Seller is required to consent to the transfer on the ESC registry and the Seller can either give this consent when the Seller first inputs the transfer details or following the Buyer's acceptance of the transfer. If the Seller elects the former, title will pass at the time the Seller inputs the transfer details. If the Seller elects the latter title will pass only when the Seller confirms the transfer.

# Matters not covered by the short form

This contract form was developed by the Environmental Products Committee of the Australian Financial Markets Association Ltd (AFMA). Industry participants wished to have a short form contract with as few written terms as possible. Users of the contract are balancing the convenience of a short form contract, that is quickly negotiated, with the risk of not addressing comprehensively every risk and circumstance that may arise. As a short form contract, this contract does not include all of the terms commonly included in a long form contract and in particular does not address the following terms which are commonly included in either an ISDA® form of contract or in other long form contracts for these commodities:

#### Credit support - Sellers will have a credit risk against the Buyer’s payment of the purchase price, and Buyers will have a credit risk against the Seller’s performance of the delivery obligation and warranty obligations. In this contract there are no provisions calling for initial credit support, or further credit support if a party to the contract subsequently becomes less creditworthy than it was at the time of entering into the contract. Parties should consider their trading limits and exposures against the counterparty, and whether to use some form of collateral credit support.

#### Regulatory risk – Long form contracts may contain provisions dealing with regulatory risk, for example addressing the situation where Environmental Products are replaced with a national emissions trading certificate.

#### Dispute resolution – Long form contracts may contain provisions specifying how disputes are to be resolved.

#### Netting between transactions - Under the ISDA format of agreement, the parties are usually expressly able to net payments due on the same date under all transactions entered into under the ISDA Agreement. This would permit multiple transactions to be satisfied by a single payment that deducted payments owed in the opposite direction under other transactions. This short form of agreement does not provide for that.

#### Netting on insolvency – Under the ISDA format on insolvency the parties are commonly able to net their obligations under all transactions entered into under the ISDA Agreement, preventing liquidators or administrators from “cherry picking” between contracts which are favourable to the insolvent party from those which are not. Unlike the ISDA Master Agreement format, this contract does not operate as a close-out netting arrangement. This can have accounting and capital adequacy consequences for parties, in addition to the credit risk that arises.

#### Cross default – The ISDA format commonly includes provisions under which a payment default by a party above a specified amount under other agreements, whether with the same counterparty or other creditors, can trigger a default under the ISDA agreement.

#### Representations – Under the ISDA format the parties make several representations such as their capacity to enter the contract and the absence of litigation which might affect the contract. There are no representations under this contract, although there are five warranties in relation to the commodity.

#### Financial information – There are no obligations to provide ongoing financial information about the counterparty to assist in the assessment of trading limits and credit risks.

#### Comply with laws – Under the ISDA format the parties agree to comply with laws and maintain authorisations necessary to perform the agreement, which would give rise to damages or a right of early termination where the other party fails to comply.

#### Events of default – The ISDA format specifies various events of default and termination events (including payment default, insolvency and credit weakening following a consolidation or merger) which entitle the non-defaulting party to terminate the contract within a specified period, realise a net position and replace the terminated transactions with an equivalent position.

#### Cash settlement – The ISDA format provides for calculation of a reference price and permits cash settlement. It also contains fall-backs for unavailability or disruption of the reference price. This contract is not designed for cash-settlement against a reference price or statutory price, but instead obliges physical delivery of the commodity.

#### Close-out – The ISDA format specifies how the termination payment will be determined following early termination of the contract. There is no equivalent close-out mechanism under the spot contract. The Seller delivery default mechanism in clause 6 of the spot contract is intended to reflect the common law position. At common law, the non-defaulting party (if a buyer) will ordinarily be entitled to damages if the cost of replacing the transaction exceeds the original contract price.

#### Transfer/assignment – The ISDA format restricts a party assigning their rights and obligations under the Agreement without the other party’s consent except in a limited range of circumstances. There are no restrictions on assignment imposed in this short form contract. The common law rules will apply to this contract. Typically, this will permit assignment of the benefit of the trade, but require consent and novation in order to transfer the obligation or burden of the trade.

#### Confidentiality – other longer form contracts may contain restrictions on disclosure of confidential information. There are no restrictions on trades under this short form.

#### Notices – The ISDA format specifies how notices are to be served and includes the time periods in which notices are treated as being received. There are no procedures in this contract for the giving of notices – common law rules (and the provisions of the Corporations Act in relation to corporations) will apply.

#### Legal costs and stamp duty – The ISDA format contains provisions dealing with payment of legal costs and stamp duty. This contract obliges the buyer to pay stamp duty, and fees associated with the transfer (but not the creation) of the commodity imposed by the Scheme Rules. Recovery of legal costs upon a default will be governed by the usual principle of damages, and will usually be restricted to party-party costs rather than full indemnity costs.

# Other comments

#### Parties will need to agree between them whether they will require the contract to be signed, or just exchanged by email correspondence. If signed, they will also need to agree whether the exchange of a fax or scanned copy, rather than the original signed instrument, will be sufficient execution.

#### This edition of the Environmental Products Spot Physical Contract deals only with the circumstance where the commodity is ESCs, GRECs, LGCs, STCs, VEECs, ACCUs, KACCUs or NKACCUs .

#### The Environmental Products Committee of AFMA has published agreed Market Conventions in relation to use of this contract and trade of the products governed by it.

# Australian Financial Markets Association Ltd.

**March 2021**