

# Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and  
Consumer Act 2010* (Cth) by Jasmin Solar Pty  
Ltd ACN 158 644 225 and Diamond Energy Pty  
Ltd ACN 107 516 334

## 1. Persons giving the Undertaking

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- 1.1. This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by:
- (a) Jasmin Solar Pty Ltd ACN 158 644 225 (**Jasmin Solar**); and
  - (b) Diamond Energy Pty Ltd ACN 107 516 334 (**Diamond Energy**),
- (together, **the Parties**).

## 2. Background

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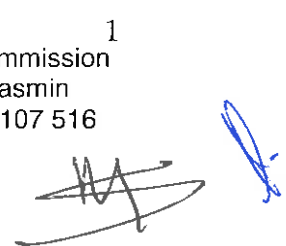
### The Parties

- 2.1. Jasmin Solar is a retailer of Solar Systems to residential customers located in Queensland. Jasmin Solar supplies and installs the various components that constitute a Solar System or arranges for installation to be undertaken by a third party.
- 2.2. Diamond Energy supplies electricity on a retail basis and has an integrated renewable energy generation business in Australia primarily in order to support its retail operations. Diamond Energy offers retail services in Victoria, South Australia, New South Wales and South East Queensland.

### The Notified Conduct

- 2.3. Jasmin Solar lodged two notifications with the ACCC:
- (a) Notification N96232 was lodged on 31 October 2012. Under this notification, Jasmin Solar proposes to supply domestic Solar Systems to customers in South East Queensland for \$1 on condition that Jasmin Solar Customers use Diamond Energy as their energy retailer. Statutory protection for this conduct commenced on 14 November 2012; and
  - (b) Notification N96653 was lodged on 12 March 2013. Under this notification, Jasmin Solar proposes to supply domestic Solar Systems to customers in South East Queensland for \$999 on condition that the Jasmin Solar Customers uses Diamond Energy as their energy retailer and that the Jasmin Solar Customer has been approved for the Queensland Government's 44c/kWh rebate scheme. Statutory protection for this conduct commenced on 26 March 2013,
- (together, the **Notified Conduct**).
- 2.4. The Jasmin Solar Customer Agreements have a term of up to 16 years (**16 Year Term**) which means that the customer may be required to acquire energy from Diamond Energy or another energy retailer of Jasmin Solar's nomination for that entire period.
- 2.5. During productive daylight hours, Jasmin Solar Customers are able to consume energy free of charge, up to the amount generated by their Solar System. However, Jasmin Solar Customers are required to use Diamond Energy as their energy retailer for:

Undertaking given to the Australian Competition and Consumer Commission<sup>1</sup>  
under section 87B of the *Competition and Consumer Act 2010* by Jasmin  
Solar Pty Ltd ACN 158 644 225 and Diamond Energy Pty Ltd ACN 107 516  
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- (a) all energy consumption above / beyond the energy generated by their Solar System during the day (if any); and
  - (b) all energy consumption outside of productive daylight hours such as during the evening and night.
- 2.6. The Queensland Government provides a feed-in tariff as an incentive for residential consumers to purchase and install solar systems. Customers eligible for the feed-in tariff receive an amount per kWh of energy exported to the electricity grid. Under the Jasmin Solar Customer Agreement, Jasmin Solar Customers agree to assign their rights to the feed-in tariff to Jasmin Solar for the term of their Jasmin Solar Customer Agreement. Jasmin Solar entered into an agreement with Diamond Energy to enable the Jasmin Solar Customer's feed-in tariff payments to be paid directly to Jasmin Solar.

#### **Queensland electricity retail market**

- 2.7. The Queensland electricity retail market operates within the parameters of the regulated retail pricing determinations issued by the Queensland Competition Authority (**QCA**). At the time this Undertaking was accepted there were two types of electricity residential contracts in Queensland: Standard Retail Contracts and Market Contracts.
- 2.8. If a customer has not actively negotiated a contract for energy supply with a retailer they are likely to be on a Standard Retail Contract. Customers who are on a Standard Retail Contract are charged for their electricity usage based on the regulated rate set by the QCA (**Regulated Rate**). As at the date of this Undertaking the terms and conditions of Standard Retail Contracts are also regulated.
- 2.9. Market Contracts involve negotiation between the energy retailer and customer. Some of the terms and conditions that may be negotiated include price, service standards, fees and charges, billing and payment arrangements and penalties for early termination. Market Contracts generally offer a discount below the Regulated Rate and are often offered where the customer pays their energy bill on time or pays through a direct debit transaction.

#### **The public benefit test applied by the ACCC**

- 2.10. The ACCC made an initial assessment of the notifications and considered whether to issue a draft notice revoking the notifications pursuant to s 93(3A) of the Act. Under s 93(3A), if the ACCC is satisfied that the likely benefit to the public from the proposed conduct will not outweigh the likely detriment to the public from the proposed conduct, the ACCC may give the corporation a written notice stating that it is so satisfied. The notice has the effect of removing the statutory protection conferred by the notifications.
- 2.11. As at the date on which this Undertaking is given, the ACCC has decided that it has a number of concerns in relation to the Notified Conduct. These concerns are outlined below.

#### **The ACCC's concerns regarding pricing**

- 2.12. Whilst the ACCC recognises the potential for the Notified Conduct to result in reduced consumption of externally generated electricity, the ACCC is not satisfied that such reductions will outweigh the cost increases for such electricity that

Undertaking given to the Australian Competition and Consumer Commission<sup>2</sup> under section 87B of the *Competition and Consumer Act 2010* by Jasmin Solar Pty Ltd ACN 158 644 225 and Diamond Energy Pty Ltd ACN 107 516 334



customers might incur in the future as a result of the Notified Conduct. The ACCC considers that, in the absence of this Undertaking, the likely detriment to the public from the Notified Conduct would exceed the likely benefit to the public.

- 2.13. Residential electricity customers in South East Queensland are generally able to choose from a number of energy retailers. These customers may pay a default tariff set by the QCA or may pay a price established by a Market Contract. Prices established in Market Contracts may be below or in excess of the default tariff. Other things being equal, where a customer is able to choose its retailer, the customer would be expected to pay a market price that is less than the default tariff.
- 2.14. In these circumstances, customers would only be likely to agree to prices higher than the default tariff in return for some other additional benefit or inducement. The ACCC accepts that Jasmin Solar's customers agree to become customers of Diamond Energy, in return for obtaining Solar Systems from Jasmin Solar at a discount. However, the ACCC understands that the prices initially offered by Diamond Energy to Jasmin Solar Customers only apply for the initial one or two year term of the customer's contract with Diamond Energy.
- 2.15. While a default tariff was set by the QCA at the time this Undertaking was accepted, it is not necessarily the case that such a tariff will be set in the future. That is, the level of regulation of retail energy prices in Queensland may change during the 16 Year Term.
- 2.16. The ACCC considers that there is potential for prices to exceed the default tariff through the Market Contract mechanism. Further, the level of regulation of retail energy prices in Queensland may change during the 16 Year Term. Accordingly, the ACCC does not consider there is sufficient assurance that Jasmin Solar Customers will not be exposed to prices significantly in excess of the prices that they would be free to obtain in the absence of the Notified Conduct.
- 2.17. The ACCC therefore considers that, in the absence of this Undertaking, Jasmin Solar Customers may be required by Diamond Energy to pay energy prices that are significantly in excess of the prices that would be available to those customers, in the future, were they free to make their own choice of energy retailer.

#### **Other ACCC concerns**

- 2.18. The ACCC is concerned that Jasmin Solar Customers may be exposed to a number of contingencies during the course of the 16 Year Term. In particular, the ACCC is concerned that Jasmin Solar Customers may be exposed to onerous costs or the application of the Termination Amount (up to \$7000) where the Solar System fails or is damaged beyond the control of the Jasmin Solar Customer. The ACCC also wishes to ensure that Jasmin Solar Customers are adequately informed about their rights and responsibilities arising from the Notified Conduct.

#### **The Undertaking remedy**

- 2.19. The objective of this Undertaking is to:
  - (a) address the ACCC's concerns that Jasmin Solar Customers may be exposed to prices significantly in excess of the prices that they would be free to obtain in the absence of the Notified Conduct;



- (b) address the ACCC's concerns that Jasmin Solar Customers may be exposed to other risks as a result of the Notified Conduct during the 16 Year Term; and
- (c) ensure, to the greatest extent possible, that the potential benefits of the Notified Conduct continue to outweigh the potential detriments associated with the Notified Conduct for the duration of the 16 Year Term.

2.20. This Undertaking addresses the ACCC's concerns by:

- (a) requiring the Jasmin Solar Energy Retailer to supply electricity to Jasmin Solar Customers at prices that are reflective of those that would be available to those customers in the absence of the Notified Conduct;
- (b) requiring Jasmin Solar to obtain ACCC approval in the event that Jasmin Solar wants another entity or person to become an energy retailer supplying electricity to Jasmin Solar Customers, which may include that entity or person giving a section 87B undertaking to the ACCC, including in the event that Diamond Energy is replaced as the Jasmin Solar Energy Retailer;
- (c) requiring Jasmin Solar to comply with the retailer pricing commitments if Jasmin Solar replaces the Jasmin Solar Energy Retailer as an energy retailer supplying electricity to some or all Jasmin Solar Customers;
- (d) requiring Jasmin Solar to obtain ACCC approval in the event that a Change of Control of Jasmin Solar's business to another person or entity is expected to occur before the withdrawal of this Undertaking in accordance with clause 4.1, which may include that entity or person giving a section 87B undertaking to the ACCC;
- (e) requiring Jasmin Solar to provide Jasmin Solar Customers with a minimum three year retail warranty on the Solar System and in some circumstances, assisting Jasmin Solar Customers in making warranty claims outside of this period where the Jasmin Solar Customer has consumer guarantee rights under the Australian Consumer Law or rights under a manufacturer's warranty;
- (f) preventing Jasmin Solar from requiring Jasmin Solar Customers to pay the Termination Amount if the Solar System fails during the period under which the Jasmin Solar Customer has consumer guarantee rights under the Australian Consumer Law or rights under a manufacturer's warranty for any reason other than wilful action, neglect or negligence by the Jasmin Solar Customer;
- (g) providing an effective dispute resolution mechanism in the event of a dispute between Jasmin Solar and a Jasmin Solar Customer relating to the payment of the Termination Amount;
- (h) requiring Jasmin Solar and the Jasmin Solar Energy Retailer to inform customers of their rights arising from the obligations contained in this Undertaking; and
- (i) providing effective oversight of Jasmin Solar's and the Jasmin Solar Energy Retailer's compliance with this Undertaking.

2.21. This Undertaking is given in respect of the Notified Conduct only.

Undertaking given to the Australian Competition and Consumer Commission under section 87B of the *Competition and Consumer Act 2010* by Jasmin Solar Pty Ltd ACN 158 644 225 and Diamond Energy Pty Ltd ACN 107 516 334



### 3. Commencement of this Undertaking

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#### Commencement

- 3.1. This Undertaking comes into effect when:
- (a) this Undertaking is executed by the Parties; and
  - (b) this Undertaking so executed is accepted by the ACCC,
- (the **Commencement Date**).

### 4. Cessation of Ongoing Obligations

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#### Withdrawal

- 4.1. This Undertaking is taken to be withdrawn on the date the ACCC consents in writing to the withdrawal of this Undertaking in accordance with section 87B of the Act.

#### Revocation

- 4.2. The ACCC may, at any time, revoke its acceptance of this Undertaking if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.

#### Waiver

- 4.3. The ACCC may, at any time, expressly waive in writing any of the obligations contained in this Undertaking or amend the date by which any such obligation is to be satisfied.

### 5. Pricing

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#### Residential electricity pricing by the Jasmin Solar Energy Retailer

- 5.1. Jasmin Solar and the Jasmin Solar Energy Retailer must ensure that pricing by the Jasmin Solar Energy Retailer for electricity, rates, fees and charges (applied only to electricity supplied from the grid to the customer) is structured in accordance with the procedure set out in clauses 5.2 to 5.7 of this Undertaking.

#### Electricity consumption rate

- 5.2. In the period between 1 July and 15 August each year, or upon any Significant Change in the Sample Market Rates (as defined in clause 5.2 (b) below), the Jasmin Solar Energy Retailer must:

#### Identify

- (a) identify either the 6 largest electricity retailers by customer numbers or retailers that account for at least 75% of the residential customers in



Queensland based upon the most current data released by the Australian Energy Regulator (**Sample Retailers**);

*Adjust*

(b) calculate an electricity consumption rate for each of the Sample Retailers. For each Sample Retailer, that rate is to be a Market Contract rate available, in the then current Financial Year, to residential retail energy customers with a Solar PV system of 5 kilowatts or less, for the applicable distributor supply tariff, including any discount available to those customers that:

- (i) is expressed as a discount off the Regulated Rate (other than a discount referred to in subclauses (iii) or (iv) below); or
- (ii) is given for on time payment or for paying by direct debit;

but excluding any:

- (iii) cross product or product bundling discounts; or
- (iv) contract sign-on discounts or similar sign-on inducements

**(Sample Market Rate)**; and

*Average*

(c) calculate the simple arithmetic average of those Sample Market Rates (**Average Market Rate**).

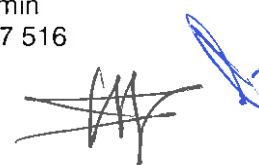
5.3. To Jasmin Solar Customers:

(a) on a Market Contract, from 1 July each year (or upon any Significant Change in the Sample Market Rate) the Jasmin Solar Energy Retailer must charge the lower of the:

- (i) Average Market Rate for that Financial Year (as determined in accordance with clause 5.2); and
- (ii) the Regulated Rate for that Financial Year, and

(b) on a Standard Retail Contract, from 1 July each year (or upon any change in the Regulated Rate) the Jasmin Solar Energy Retailer must charge the Regulated Rate.

**(Contract Rate)**.



### Other allowable fees

- 5.4. The Jasmin Solar Energy Retailer must not charge any fees to Jasmin Solar customers other than those:
- (a) specified in the Standard Retail Contract (Annexure B to the Electricity Industry Code);
  - (b) charged by the Sample Retailers; and/or
  - (c) required by State Government or Commonwealth Government legislation, **(Other Allowable Fees)**.
- 5.5. Jasmin Solar and the Jasmin Solar Energy Retailer must not charge the Jasmin Solar Customer an amount for any individual Other Allowable Fee that is above the simple arithmetic average of the amounts that the Sample Retailers charge for that particular fee or comparable fee.
- 5.6. The Jasmin Solar Energy Retailer may also charge Jasmin Solar Customers Distribution Non-Network Charges:
- (a) which the relevant Distribution Entity is entitled to charge under the applicable connection contract; and
  - (b) which have been charged by the relevant Distribution Entity to the Jasmin Solar Energy Retailer on the Jasmin Solar Customer's account.
- 5.7. The Jasmin Solar Energy Retailer may also charge Jasmin Solar Customers Network Charges charged to the Jasmin Solar Energy Retailer by the Distribution Entity.

### Rebate offer by Jasmin Solar

- 5.8. In the event that the Jasmin Solar Energy Retailer charges a Jasmin Solar Customer electricity rates during the term of the Jasmin Solar Customer's Agreement with Jasmin Solar that exceeds the Contract Rate(s), Jasmin Solar will pay to the Jasmin Solar Customer a rebate calculated and paid in accordance with clauses 5.8(a) to 5.8(c):
- (a) Jasmin Solar will on 1 January, 1 May and 1 September in each year of a Jasmin Solar Customer's contract with Jasmin Solar (**Review Date**), review the energy price charged to Jasmin Solar Customers by the Jasmin Solar Energy Retailer against the Contract Rate(s) that applied for the previous quarter (**Comparison**).
  - (b) If the Comparison indicates that the Jasmin Solar Customer has been charged by the Jasmin Solar Energy Retailer an electricity price greater than the Contract Rate(s) that applied for the previous quarter, Jasmin Solar will pay to the Jasmin Solar Customer a rebate to fully reimburse the Jasmin Solar Customer for the difference (**Rebate**). For the avoidance of doubt, Jasmin Solar will pay to the Jasmin Solar Customer any amount charged by the Jasmin Solar Energy Retailer greater than the Contract Rate(s) for the previous quarter.





- (c) The Rebate will be paid to the Jasmin Solar Customer by Jasmin Solar by direct transfer into the Jasmin Solar Customer's bank account, or by another method as agreed between Jasmin Solar and the Jasmin Solar Customer, within 30 days of the Review Date.

## **6. Jasmin Solar**

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- 6.1. Jasmin Solar must procure that the Jasmin Solar Energy Retailer complies with this Undertaking.

### **Additional energy retailers**

- 6.2. In the event that Jasmin Solar intends to:
- (a) enter into an Agreement with another entity or person for that other entity or person to become an energy retailer supplying electricity to Jasmin Solar Customers, and
  - (b) require some or all Jasmin Solar Customers who are customers of the Jasmin Solar Energy Retailer to become customers of that other person or entity,

then Jasmin Solar must comply with clause 6.3 of this Undertaking.

- 6.3. Prior to Jasmin Solar entering into an Agreement with another entity or person as described in clause 6.2 above, Jasmin Solar must:
- (a) notify the ACCC of this intention;
  - (b) seek the ACCC's written approval; and
  - (c) only enter into such an Agreement with another entity or person if that entity or person has given a section 87B undertaking to the ACCC that requires it to comply with the same obligations as are imposed on the Jasmin Solar Energy Retailer pursuant to this Undertaking, or on terms that are otherwise acceptable to the ACCC, unless the ACCC has notified Jasmin Solar in writing that a section 87B undertaking under this clause is not required.
- 6.4. If Jasmin Solar replaces the Jasmin Solar Energy Retailer as the energy retailer supplying electricity to some or all Jasmin Solar Customers, then Jasmin Solar must comply with this Undertaking, including the obligations on the Jasmin Solar Energy Retailer in relation to pricing, as if references to the Jasmin Solar Energy Retailer were references to Jasmin Solar. This includes continuing to charge those Jasmin Solar Customers the Contract Rate previously determined by the Jasmin Solar Energy Retailer, under clause 5.3 of this Undertaking, until the end of the Financial Year in which the replacement occurs.

### **Change of Control of Jasmin Solar's business**

- 6.5. In the event that a Change of Control of Jasmin Solar's business is expected to occur before the withdrawal of this Undertaking in accordance with clause 4.1 Jasmin Solar must:
- (a) notify the ACCC of this expectation; and



- (b) only implement a Change of Control to another person or entity if that person or entity has given a section 87B undertaking to the ACCC that requires it to comply with the same obligations as are imposed on Jasmin Solar pursuant to this Undertaking, or on terms that are otherwise acceptable to the ACCC, unless the ACCC has notified Jasmin Solar in writing that a section 87B undertaking under this clause is not required.

### Solar System obligations

- 6.6. Jasmin Solar must provide Jasmin Solar Customers with a minimum retailer warranty period of three years on the operation and performance of the whole Solar System including workmanship and products (**Retailer Warranty Period**) in addition to the Jasmin Solar Customers' rights under the Australian Consumer Law.
- 6.7. After the expiration of the Retailer Warranty Period and during the period under which the Jasmin Solar Customer has consumer guarantee rights under the Australian Consumer Law or rights under a manufacturer's warranty (**ACL/Manufacturer Warranty Period**), Jasmin Solar:
  - (a) must assist the Jasmin Solar Customer in making a warranty claim (if the Jasmin Solar Customer wishes to make a claim), which may include Jasmin Solar:
    - (i) providing the Jasmin Solar Customer with a remedy to resolve the claim; and
    - (ii) making a claim directly with the manufacturer of the Solar System, and
  - (b) must not require Jasmin Solar Customers to pay the Termination Amount if the Solar System fails during the ACL/Manufacturer Warranty Period for any reason other than wilful action, neglect or negligence by the Jasmin Solar Customer.

### Information to Jasmin Solar Customers

- 6.8. Jasmin Solar must, within one month of the Commencement Date, provide to the Jasmin Solar Customers who are Jasmin Solar Customers at the time this Undertaking was accepted, a plain English summary of the obligations contained within this Undertaking (which is to be approved by the ACCC prior to distribution).
- 6.9. The Jasmin Solar Energy Retailer must include a statement on or with Jasmin Solar Customer electricity bills that:
  - (a) the Jasmin Solar Energy Retailer's pricing is subject to the terms of a section 87B undertaking to the ACCC; and
  - (b) the Undertaking and a plain English summary is available upon request and via the ACCC's website.
- 6.10. The obligation to provide a copy of the plain English summary extends to the provision of that document to new Jasmin Solar Customers within one month of them becoming Jasmin Solar Customers.



## 7. Independent Audit

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### Obligation to appoint an Approved Independent Auditor

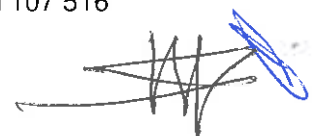
- 7.1. Jasmin Solar must appoint and maintain an Approved Independent Auditor to audit and report up on Jasmin Solar's and the Jasmin Solar Energy Retailer's compliance with this Undertaking.
- 7.2. Without limiting its obligations in this Undertaking, Jasmin Solar must:
- (a) comply with and enforce the Approved Terms of Appointment for the Approved Independent Auditor;
  - (b) maintain and fund the Approved Independent Auditor to carry out his or her functions including:
    - (i) indemnifying the Approved Independent Auditor for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Approved Independent Auditor of his or her functions as the Approved Independent Auditor except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Approved Independent Auditor;
    - (ii) providing and paying for any external expertise, assistance or advice required by the Approved Independent Auditor to perform his or her functions as the Approved Independent Auditor, andwithout limiting its obligations under this clause 7.2(b), Jasmin Solar may, by agreement with the Jasmin Solar Energy Retailer, obtain an apportioned amount of the funding of the Approved Independent Auditor from the Jasmin Solar Energy Retailer; and
  - (c) not appoint the Approved Independent Auditor, or have any Agreements with the Approved Independent Auditor, to utilise the Approved Independent Auditor's services for anything other than compliance with this Undertaking until at least 12 months after the Approved Independent Auditor ceases to act in the role of the Approved Independent Auditor.
- 7.2A. Without limiting their obligations under this Undertaking, Jasmin Solar and the Jasmin Solar Energy Retailer must not interfere with, or otherwise hinder, the Approved Independent Auditor's ability to carry out his or her functions as the Approved Independent Auditor, including:
- (a) directing Jasmin Solar and the Jasmin Solar Energy Retailer's personnel, including directors, contractors, managers, officers, employees and agents, to act in accordance with this clause 7;
  - (b) providing to the Approved Independent Auditor any information or documents requested by the Approved Independent Auditor that he or she considers necessary for carrying out his or her functions as the Approved Independent Auditor or for reporting to or otherwise advising the ACCC; and



- (c) not requesting any information relating to the compliance audit from the Approved Independent Auditor without such a request having been approved by the ACCC.

#### **Approval of proposed independent auditor as the Approved Independent Auditor**

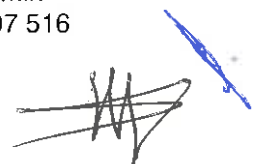
- 7.3. Within 15 Business Days of the Commencement Date, Jasmin Solar must provide the ACCC with a notice for a Proposed Independent Auditor in the form prescribed in Schedule 2 to this Undertaking (**Proposed Independent Auditor Notice**).
- 7.4. After receiving a Proposed Independent Auditor Notice, the ACCC must decide whether to:
  - (a) approve the appointment of the person named in the Proposed Independent Auditor Notice as the Approved Independent Auditor which includes approving the:
    - (i) terms of appointment attached to the Proposed Independent Auditor Notice; and
    - (ii) draft audit plan attached to the Proposed Independent Auditor Notice; or
  - (b) not approve the person named in the notice as the Proposed Independent Auditor.
- 7.5. If clause 7.4(b) applies, the ACCC may, at its absolute discretion:
  - (a) direct Jasmin Solar to submit a Proposed Independent Auditor Notice that:
    - (i) names a person identified by the ACCC as the Proposed Independent Auditor; and/or
    - (ii) includes attachments that:
      - (A) relate to the person identified by the ACCC under clause 7.5(a)(i) (if applicable); and/or
      - (B) address any issues identified by the ACCC in relation to the terms of appointment and/or draft audit plan; or
  - (b) identify and approve a person as the Approved Independent Auditor together with the:
    - (i) terms of appointment; and
    - (ii) draft audit plan.
- 7.6. As soon as practicable, and within two Business Days of any direction by the ACCC under clause 7.5(a), Jasmin Solar must submit a Proposed Independent Auditor Notice in accordance with the direction.



- 7.7. Without limiting the ACCC's discretion, in making the decisions described in clause 7.4 or 7.5, the factors to which the ACCC may have regard include whether the:
- (a) person named in the Proposed Independent Auditor Notice or identified by the ACCC has the qualifications and experience necessary to carry out the functions of the Approved Independent Auditor;
  - (b) person named in the Proposed Independent Auditor Notice or identified by the ACCC is sufficiently independent of the Jasmin Solar Energy Retailer and Jasmin Solar;
  - (c) terms of appointment and the draft audit plan are consistent with this Undertaking; and
  - (d) terms of appointment and the draft audit plan are otherwise acceptable to the ACCC.
- 7.8. Within 10 Business Days after receiving a Proposed Independent Auditor Notice, the ACCC must notify Jasmin Solar in writing of its decisions and any direction made pursuant to clause 7.4 and/or 7.5.
- 7.9. The ACCC may extend the period within which it will provide notice of the decision or direction (if applicable) described in clause 7.8 by notifying Jasmin Solar in writing of the extension within 10 Business Days after receiving the Proposed Independent Auditor Notice.
- 7.10. If the Approved Independent Auditor has not been appointed:
- (a) within 17 Business Days of the Commencement Date,
  - (b) within 17 Business Days after the Approved Independent Auditor resigns or otherwise ceases to act as the Approved Independent Manager pursuant to clause 7.19, 7.20 or 7.21; or
  - (c) if the ACCC has not received a Proposed Independent Auditor Notice pursuant to clause 7.22;
- then the provisions of clause 7.11 apply.
- 7.11. If clause 7.10 applies, the ACCC at its absolute discretion may:
- (a) identify and approve a person as the Approved Independent Auditor;
  - (b) approve the terms of appointment of the Approved Independent Auditor; and
  - (c) approve the draft audit plan.

#### **Appointment of the Approved Independent Auditor**

- 7.12. After receiving notice from the ACCC of its decisions pursuant to clause 7.4, 7.5(b) or 7.11, Jasmin Solar must, within two Business Days:
- (a) appoint the person approved by the ACCC as the Approved Independent Auditor on the Approved Terms of Appointment; and



- (b) forward to the ACCC a copy of the executed Approved Terms of Appointment within one Business Day of execution.

### Obligations and powers of the Approved Independent Auditor

- 7.13. Jasmin Solar must procure that any proposed terms of appointment for the Approved Independent Auditor include obligations on the Approved Independent Auditor to:
- (a) maintain his or her independence from the Jasmin Solar Energy Retailer and Jasmin Solar, apart from appointment to the role of Approved Independent Auditor, including not to form any relationship of the types described in paragraph 2(c) of Schedule 2 to this Undertaking with the Jasmin Solar Energy Retailer or Jasmin Solar for the period of his or her appointment;
  - (b) conduct compliance auditing according to the Approved Audit Plan;
  - (c) provide the following reports directly to the ACCC:
    - (i) a scheduled written Audit Report as described in clause 7.15; and
    - (ii) an immediate report of any issues that arise in relation to the performance of his or her functions as Approved Independent Auditor or in relation to compliance with this Undertaking by any person named in this Undertaking; and
  - (d) follow any direction given to him or her by the ACCC in relation to the performance of his or her functions as Approved Independent Auditor under this Undertaking.
- 7.14. Jasmin Solar must procure that any proposed terms of appointment for the Approved Independent Auditor provide the Approved Independent Auditor with the authority to:
- (a) access the facilities, sites or operations of Jasmin Solar's and the Jasmin Solar Energy Retailer's business as required by the Approved Independent Auditor;
  - (b) access any information or documents that the Approved Independent Auditor considers necessary for carrying out his or her functions as the Approved Independent Auditor or for reporting to or otherwise advising the ACCC; and
  - (c) engage any external expertise, assistance or advice required by the Approved Independent Auditor to perform his or her functions as the Approved Independent Auditor.

### Compliance Audit

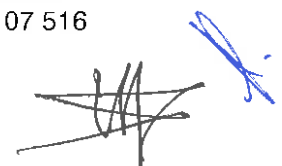
- 7.15. The Approved Independent Auditor must conduct an audit and prepare a detailed report (**Audit Report**) on:
- (a) Jasmin Solar Energy Retailer's compliance with this Undertaking or if there is more than one retailer, all Jasmin Solar Energy Retailers;



- (b) Jasmin Solar's compliance with this Undertaking;
  - (c) all of the reasons for the conclusions reached in the Audit Report;
  - (d) any qualifications made by the Approved Independent Auditor in forming his or her views;
  - (e) any recommendations by the Approved Independent Auditor to improve:
    - (i) the Approved Audit Plan;
    - (ii) the integrity of the auditing process;
    - (iii) the Jasmin Solar Energy Retailer's processes or reporting systems in relation to compliance with this Undertaking;
    - (iv) the Jasmin Solar Energy Retailer's compliance with this Undertaking;
    - (v) Jasmin Solar's processes or reporting systems in relation to compliance with this Undertaking; and
    - (vi) Jasmin Solar's compliance with this Undertaking, and
  - (f) the implementation and outcome of any prior recommendations by the Approved Independent Auditor.
- 7.16. Each year, the Approved Independent Auditor is to provide an Audit Report to the ACCC, Jasmin Solar and the Jasmin Solar Energy Retailer for the year ending 30 June (or an alternate annual reporting period as approved in writing with the ACCC). The Approved Independent Auditor is to provide the Audit Report to the ACCC, Jasmin Solar and the Jasmin Solar Energy Retailer no later than 3 months after the end of each annual reporting period.
- 7.17. Jasmin Solar and the Jasmin Solar Energy Retailer must implement any recommendations of the Approved Independent Auditor made in the Audit Report, and notify the ACCC of the implementation of the recommendations, within 10 Business Days after receiving the Audit Report or such other period as agreed in writing with the ACCC.
- 7.18. Jasmin Solar and the Jasmin Solar Energy Retailer must comply with any direction of the ACCC in relation to matters arising from the Audit Report within 10 Business Days after being so directed (or such other period as agreed in writing with the ACCC).

#### **Resignation, revocation or termination of the Approved Independent Auditor**

- 7.19. Jasmin Solar must immediately notify the ACCC in the event that the Approved Independent Auditor resigns or otherwise stops acting as the Approved Independent Auditor before the ACCC has provided the written confirmation pursuant to clause 4.1, 4.2 or clause 4.3.
- 7.20. The ACCC may revoke an Approved Independent Auditor's status as the Approved Independent Auditor if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.





- 7.21. The ACCC may approve any proposal by, or alternatively may direct, Jasmin Solar to terminate the appointment of the Approved Independent Auditor if in the ACCC's view the Approved Independent Auditor acts inconsistently with the provisions of this Undertaking or the Approved Terms of Appointment.
- 7.22. If clause 7.19, 7.20 or 7.21 applies, Jasmin Solar must provide the ACCC with a Proposed Independent Auditor Notice within five Business Days after the relevant event occurs, otherwise clause 7.11 applies.

## 8. Termination and Dispute resolution

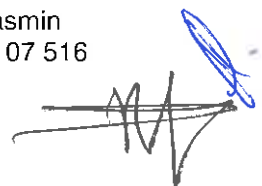
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- 8.1. Jasmin Solar must act reasonably and in good faith in relation to the termination, or contemplated termination, of the Jasmin Solar Customer Agreement in circumstances where termination will occur prior to the end of the term of the Jasmin Solar Customer Agreement.
- 8.2. If the Jasmin Solar Customer agrees to pay the Termination Amount, Jasmin Solar must have regard to the Jasmin Solar Customer's ability to pay in determining the term over which the Termination Amount is to be paid, including by providing the Jasmin Solar Customer with the option of making payments over a period as agreed between Jasmin Solar and the Jasmin Solar Customer.
- 8.3. If, by operation of any law, a Jasmin Solar Customer is deemed or taken to have entered into an energy supply agreement with an energy retailer other than the Jasmin Solar Energy Retailer, Jasmin Solar must not terminate the Jasmin Solar Customer Agreement with that Jasmin Solar Customer until that law permits that Jasmin Solar Customer to replace that energy supply agreement with another energy supply agreement.
- 8.4. In the event of a failure to reach agreement between Jasmin Solar and a Jasmin Solar Customer in relation to the termination, or contemplated termination, of the Jasmin Solar Customer Agreement including payment of the Termination Amount, Jasmin Solar must notify the ACCC that a dispute has arisen and lodge a claim with the Queensland Civil and Administrative Tribunal (**QCAT**).
- 8.5. Jasmin Solar must comply with any order made by QCAT and must not take any steps (except with the agreement of the Jasmin Solar Customer) to enforce the terms of the Jasmin Solar Customer Agreement in respect of the termination, or contemplated termination, until QCAT has made a final decision in relation to the claim and that decision is not subject to any appeal or appeal period.

## 9. Information

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- 9.1. The ACCC may direct Jasmin Solar and the Jasmin Solar Energy Retailer in respect of their compliance with this Undertaking to, and they must:
- (a) furnish information to the ACCC in the time and in the form requested by the ACCC;
  - (b) produce documents and materials to the ACCC within Jasmin Solar's or the Jasmin Solar Energy Retailer's custody, power or control in the time and in the form requested by the ACCC; and





- (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 9.2. Any direction made by the ACCC under clause 9.1 will be notified to both Jasmin Solar and the Jasmin Solar Energy Retailer, in accordance with clause 14 of this Undertaking.
- 9.3. In respect of Jasmin Solar's or the Jasmin Solar Energy Retailer's compliance with this Undertaking or an Independent Auditor's compliance with its Approved Terms of Appointment, the ACCC may request any Approved Independent Auditor to:
  - (a) furnish information to the ACCC in the time and in the form requested by the ACCC;
  - (b) produce documents and materials to the ACCC within the Approved Independent Auditor's custody, power or control in the time and in the form requested by the ACCC; and/or
  - (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 9.4. Jasmin Solar will use its best endeavours to ensure that the Approved Independent Auditor complies with any request from the ACCC in accordance with this clause 9.
- 9.5. Information furnished, documents and material produced or information given in response to any request or direction from the ACCC under this clause 9 may be used by the ACCC for any purpose consistent with the exercise of its statutory duties.
- 9.6. The ACCC may in its discretion to be exercised in good faith:
  - (a) advise the Approved Independent Auditor of any request made by it under this clause 9; and/or
  - (b) provide copies to the Approved Independent Auditor of any information furnished, documents and material produced or information given to it under this clause 9.
- 9.7. Nothing in this clause 9 requires the provision of information or documents in respect of which Jasmin Solar or the Jasmin Solar Energy Retailer has a claim of legal professional or other privilege.

## **10. Disclosure of this Undertaking**

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- 10.1. Jasmin Solar and the Jasmin Solar Energy Retailer acknowledge that the ACCC may provide the Approved Independent Auditor with a copy of this Undertaking.
- 10.2. Jasmin Solar and the Jasmin Solar Energy Retailer acknowledge that the ACCC may:
  - (a) make this Undertaking publicly available; and



- (b) publish this Undertaking on its Public Section 87B Undertakings Register;  
and
- (c) from time to time publicly refer to this Undertaking.

## 11. Obligation to procure

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- 11.1. Where the performance of an obligation under this Undertaking requires a Related Body Corporate of Jasmin Solar or the Jasmin Solar Energy Retailer to take or refrain from taking some action, the relevant entity (Jasmin Solar or the Jasmin Solar Energy Retailer) will procure that Related Body Corporate to take or refrain from taking that action, as the case may be.

## 12. No Derogation

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- 12.1. This Undertaking does not prevent the ACCC from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by Jasmin Solar or the Jasmin Solar Energy Retailer of any term of this Undertaking.
- 12.2. Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the Act for penalties or other remedies in the event that Jasmin Solar or the Jasmin Solar Energy Retailer does not fully implement and/or perform its obligations under this Undertaking or in any other event where the ACCC decides to take action under the Act for penalties or other remedies.

## 13. Costs

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- 13.1. Jasmin Solar and the Jasmin Solar Energy Retailer must pay all of their own costs incurred in relation to this Undertaking.

## 14. Notices

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### Giving Notices

- 14.1. Any notice or communication to the ACCC pursuant to this Undertaking must be sent to:

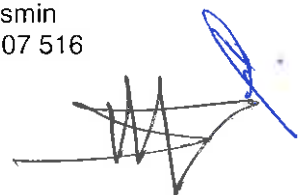
Email address: [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au)  
Attention: General Manager  
Adjudication Branch  
Mergers and Adjudication Group

With a copy sent to: [mergersucu@acc.gov.au](mailto:mergersucu@acc.gov.au)  
Director, Undertaking Compliance Unit  
Coordination and Strategy Branch  
Mergers and Adjudication Group

- 14.2. Any notice or communication to Jasmin Solar pursuant to this Undertaking must be sent to:

Name: Jasmin Solar Pty Ltd ACN 158 644 225

Undertaking given to the Australian Competition and Consumer Commission under section 87B of the *Competition and Consumer Act 2010* by Jasmin Solar Pty Ltd ACN 158 644 225 and Diamond Energy Pty Ltd ACN 107 516 334



Address: 2/98 Spencer Road, Carrara. QLD. 4211

Email Address: [matthew@jasminsolar.com](mailto:matthew@jasminsolar.com)

Fax number: 07 5578 1177

Attention: Dr. Matthew Starr

- 14.3. Any notice or communication to Diamond Energy pursuant to this Undertaking must be sent to:

Name: Diamond Energy Pty Ltd ACN 107 516 334

Address: Level 1, 695 Burke Road, Camberwell VIC 3124

Email Address: [tjsennitt@diamond-energy.com](mailto:tjsennitt@diamond-energy.com)

Fax number: 03 9006 9031

Attention: Tony Sennitt

- 14.4. If sent by post, notices are taken to be received three Business Days after posting (or seven Business Days after posting if sent to or from a place outside Australia).

- 14.5. If sent by email, notices are taken to be received at the time shown in the email as the time the email was sent.

#### **Change of contact details**

- 14.6. Jasmin Solar or the ACCC must notify the other party of a change to its contact details within three Business Days.

- 14.7. Any notice or communication will be sent to the most recently advised contact details and subject to clause 14.4 and 14.5, will be taken to be received.

## **15. Defined terms and interpretation**

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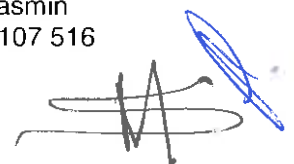
### **Definitions in the Dictionary**

- 15.1. A term or expression starting with a capital letter:

- (a) which is defined in the Dictionary in Part 1 of Schedule 1 (**Dictionary**), has the meaning given to it in the Dictionary; or
- (b) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

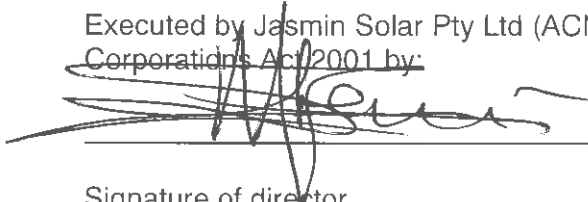
### **Interpretation**

- 15.2. Part 2 of Schedule 1 sets out rules of interpretation for this Undertaking.



**Executed as an Undertaking**

Executed by Jasmin Solar Pty Ltd (ACN 158 644 225) pursuant to section 127(1) of the Corporations Act 2001 by:



Signature of director

Signature of a director/company secretary

Dr. Matthew Star

Name of director (print)

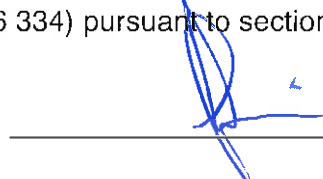
Name of director/company secretary (print)

Date 22/8/13

Date

Executed by Diamond Energy Pty Ltd (ACN 107 516 334) pursuant to section 127(1) of the Corporations Act 2001 by:





Signature of director

Signature of a director/company secretary

MARK BERIONCELLO

ANTHONY SENNITT

Name of director (print)

Name of director/company secretary (print)

Date 22/8/2013

Date 22/8/2013

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* on:



Date 4/9/13

And signed on behalf of the Commission:

Chairman

Date

# Schedule 1

## 1. Dictionary

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**16 Year Term** has the meaning given in clause 2.4 of this Undertaking.

**ACCC** means the Australian Competition and Consumer Commission.

**Australian Consumer Law (ACL)** is contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)

**ACL/Manufacturer Warranty Period** has the meaning given in clause 6.7 of this Undertaking.

**Act** means the *Competition and Consumer Act 2010* (Cth).

**Agreements** means any contract, arrangement or understanding, including any contract, arrangement or understanding to renew, amend, vary or extend any contract, arrangement or understanding.

**Approved Audit Plan** means the plan approved by the ACCC in accordance with the terms of this Undertaking, as amended from time to time by ACCC direction given under clause 7.13, by which the Approved Independent Auditor will audit and report upon compliance with this Undertaking.

**Approved Independent Auditor** means the person appointed under clause 7.12 of this Undertaking.

**Approved Terms of Appointment** means the terms of appointment for Approved Independent Auditor as approved by the ACCC in accordance with the terms of this Undertaking.

**Audit Report** has the meaning given to it in clause 7.15 of this Undertaking.

**Average Market Rate** means the electricity consumption rate determined by the procedure set out in clause 5.2 of this Undertaking.

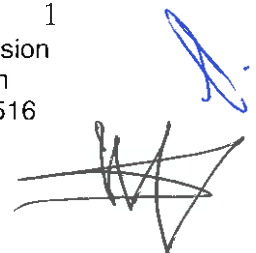
**Business Day** means a day other than a Saturday or Sunday on which banks are open for business generally in the Australian Capital Territory.

**Change of Control** means the assignment or other transfer of:

- (a) one or more Jasmin Solar Customer Agreements;
- (b) the legal or beneficial ownership of some or all of the share capital of Jasmin Solar;

by Jasmin Solar to any other person or entity.

**Commencement Date** means the date described in clause 3.1 of this Undertaking.



**Comparison** has the meaning given in clause 5.8(a)

**Contract Rate** has the meaning given in clause 5.3 of this Undertaking.

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

**Diamond Energy** means Diamond Energy Pty Ltd (ACN 107 516 334).

**Distribution Authority** means an authority issued under the *Electricity Act 1994 (Qld)* that authorises its holder to supply energy using a supply network within a geographic area specified in that authority.

**Distribution Entity** means an entity who holds a Distribution Authority.

**Distribution Non-Network Charges** means the charges of the Distribution Entity set out in the Distribution Entity's price list that:

- (a) are referable to a specific request by the Jasmin Solar Customer or the Jasmin Solar Energy Retailer; or
- (b) are referable to a requirement under relevant electricity legislation, and do not include Network Charges.

Examples of Distribution Non-Network Charges include disconnection fees, reconnection fees and meter test fees.

**Electricity Industry Code** means the rules for electricity retailers and distributors based in Queensland including service obligations to customers, marketing conduct and the provision of information to customers.

**Entity Connected** has the meaning given by section 64B of the Corporations Act.

**Financial Year** means the 12 month period ending on 30 June of any year.

**Jasmin Solar** means Jasmin Solar Pty Ltd (ACN 158 644 225).

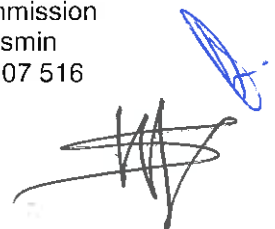
**Jasmin Solar Customer** means a person or entity who enters into, or has entered into, an agreement with Jasmin Solar for the supply of a Solar System by Jasmin Solar to that person or entity in Queensland at a discount on condition that the customer obtains electricity from an energy retailer, or from one of a limited number of energy retailers, nominated by Jasmin Solar.

**Jasmin Solar Customer Agreement** means an agreement between Jasmin Solar and a Jasmin Solar Customer for the supply of a Solar System by Jasmin Solar to that person or entity at a discount on condition that the customer obtains electricity from an energy retailer, or from one of a limited number of energy retailers, nominated by Jasmin Solar.

**Jasmin Solar Energy Retailer** means any licensed electricity retailer supplying retail electricity to any Jasmin Solar Customer.

**Market Contract** means an agreement between an energy customer and an energy retailer in Queensland. The price of market contracts is set by energy retailer and is not regulated by the Queensland Competition Authority. The terms and conditions vary between contracts and between retailers.

**Network Charges** means charges of a Distribution Entity for:



- (a) distribution use of system charges for the use of a shared supply network of the Distribution Entity; and
- (b) any transmission use of system charges payable by the Distribution Entity for use of a transmission grid to which the supply network is connected.

**Notified Conduct** has the meaning given in clause 2.3 of this Undertaking.

**Other Allowable Fees** has the meaning given in clause 5.4 of this Undertaking.

**Proposed Independent Auditor** means a person named in Proposed Independent Auditor Notice.

**Proposed Independent Auditor Notice** means a completed notice in the form of Schedule 2 to this Undertaking provided to the ACCC with all required attachments in relation to the Proposed Independent Auditor.

**Public Section 87B Undertakings Register** means the ACCC's public register of section 87B undertakings, available at [www.accc.gov.au](http://www.accc.gov.au)

**QCA** means the Queensland Competition Authority.

**QCAT** means the Queensland Civil and Administrative Tribunal.

**Rebate** has the meaning given in clause 5.8(b).

**Regulated Rate** has the meaning given in clause 2.8 of this Undertaking.

**Related Bodies Corporate** has the meaning given to it by section 50 of the Corporations Act.

**Related Entities** has the meaning given to it by section 9 of the Corporations Act.

**Related Parties** has the meaning given to it by section 228 of the Corporations Act.

**Retailer Warranty Period** has the meaning given in clause 6.6 of this Undertaking.

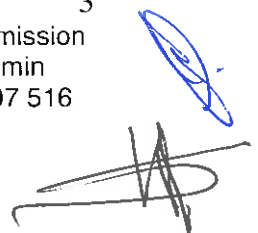
**Sample Market Rate** means, for a Sample Retailer, a rate determined in accordance with clause 5.2(b) of this Undertaking.

**Sample Retailer** has the meaning given in clause 5.2(a) of this Undertaking.

**Significant Change** means a change of 10% or more in the Average Market Rate.

**Solar System** means the photovoltaic solar system that Jasmin Solar has supplied or will supply to a Jasmin Solar Customer under the Notified Conduct.

**Standard Retail Contract** means an agreement that at the time this Undertaking was accepted is regulated by the Queensland Competition Authority, and available to all energy customers located in Queensland. The terms and conditions of these agreements are currently set out in the Electricity Industry Code and cannot be altered by energy retailers.

A handwritten signature in black ink is located at the bottom right of the page. Above the signature is a blue circular stamp or mark, possibly a seal or a stamp, which is partially obscured by the signature.

**Termination Amount** means an amount payable by a Jasmin Solar Customer under a Jasmin Solar Customer Agreement if that Jasmin Solar Customer Agreement is terminated.

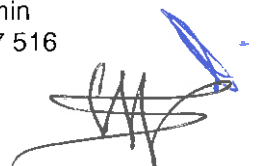
**Undertaking** is a reference to all provisions of this document, including its schedules and as varied from time to time under section 87B of the Act.

## 2. Interpretation

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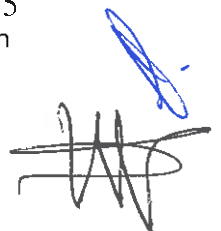
- 2.1 In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:
- (a) a reference to this Undertaking includes all of the provisions of this document including its schedules;
  - (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;
  - (c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
  - (d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
  - (e) a reference in this Undertaking to any company includes its Related Bodies Corporate;
  - (f) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
  - (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
  - (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
  - (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
  - (j) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
  - (k) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;
  - (l) a construction that would promote the purpose - or object - underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
  - (m) material not forming part of this Undertaking may be considered to:

Undertaking given to the Australian Competition and Consumer Commission under section 87B of the *Competition and Consumer Act 2010* by Jasmin Solar Pty Ltd ACN 158 644 225 and Diamond Energy Pty Ltd ACN 107 516 334





- (i) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question; or
  - (ii) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
- (n) in determining whether consideration should be given to any material in accordance with paragraph (m), or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to the:
- (i) effect that reliance on the ordinary meaning conveyed by the text of the clause would, have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and
  - (ii) need to ensure that the result of the Undertaking is to completely address any ACCC competition concerns;
- (o) the ACCC may authorise the Adjudication Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;
- (p) in performing their obligations under this Undertaking, Jasmin Solar and the Jasmin Solar Energy Retailer will do everything reasonably within their power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking;
- (q) a reference to:
- (i) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
  - (ii) a party includes its successors and permitted assigns; and
  - (iii) a monetary amount is in Australian dollars.



## Schedule 2 – Proposed Independent Auditor

This form sets out the information required by the ACCC in relation to proposed appointment of any Proposed Independent Auditor under the Undertaking. This form is to be used for the appointment of each Proposed Independent Auditor.

Please note in relation to information given on in relation to this form, giving false or misleading information is a serious offence.

### Method of Delivery to the ACCC

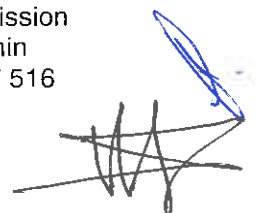
The completed appointment form, along with the additional requested information is to be provided to the ACCC with the subject line (*Proposed Independent Auditor Form – Jasmin Solar Pty Ltd and Diamond Energy Pty Ltd section 87B undertaking*) to the below email addresses:

- 1) [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au)  
Attention: General Manager  
Adjudication Branch  
Mergers and Adjudication Group
- 2) **With a copy sent to:**  
[mergersucu@acc.gov.au](mailto:mergersucu@acc.gov.au)  
Attention: Director  
Undertaking Compliance Unit  
Coordination and Strategy Branch  
Mergers and Adjudication Group

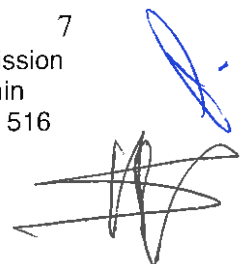
### Information Required

The ACCC requires the following information in order to assess a Proposed Independent Auditor

- 1) Proposed Independent Auditor Details:
  - (a) the name of the Proposed Independent Auditor; and
  - (b) the name of the Proposed Independent Auditor's employer and contact details including:
    - Address;
    - Contact name;
    - Telephone number;
    - Other contact details.
- 2) A submission containing the following information:
  - (a) details of Proposed Independent Auditor's qualifications and experience relevant to his or her proposed role pursuant to the Undertaking.



- (b) the names of the [owner/s and the directors (if any) apply) of the Proposed Independent Auditor's employer.
- (c) details of any of the following types of relationships between the Jasmin Solar Energy Retailer or Jasmin Solar and the Proposed Independent Auditor or the Proposed Independent Auditor's employer or confirmation that no such relationship exists whether within Australia or outside of Australia:
- (i) Jasmin Solar Energy Retailer / Jasmin Solar and the Proposed Independent Auditor's employer are Associated Entities.
  - (ii) Jasmin Solar Energy Retailer / Jasmin Solar is an Entity Connected with the Proposed Independent Auditor's employer.
  - (iii) The Proposed Independent Auditor's employer is an Entity Connected with Jasmin Solar Energy Retailer /Jasmin Solar.
  - (iv) Jasmin Solar Energy Retailer / Jasmin Solar and the Proposed Independent Auditor's employer are Related Entities.
  - (v) Jasmin Solar Energy Retailer /Jasmin Solar and the Proposed Independent Auditor's employer are Related Parties
  - (vi) any Related Party, Related Entity or Entity Connected with Jasmin Solar Energy Retailer / Jasmin Solar is a Related Party, Related Entity or Entity Connected with the Proposed Independent Auditor.
  - (vii) Jasmin Solar Energy Retailer / Jasmin Solar and the Proposed Independent Auditor or the Proposed Independent Auditor's employer have a contractual relationship or had one within the past three years, other than those attached to this form.
  - (viii) the Proposed Independent Auditor's employer is a supplier of Jasmin Solar Energy Retailer / Jasmin Solar or has been in the past three years.
  - (ix) Jasmin Solar Energy Retailer / Jasmin Solar is a supplier of the Proposed Independent Auditor's employer or has been in the past three years.
  - (x) any other relationship between Jasmin Solar Energy Retailer / Jasmin Solar and the Proposed Independent Auditor or the Proposed Independent Auditor's employer that allows one to affect the business decisions of the other.
- 3) A document outlining the terms of appointment for the Proposed Independent Auditor.



FRED E. SELLER  
EXT. 225  
fseller@brazeauseller.com

August 28, 2013

BY COURIER

PERSONAL AND CONFIDENTIAL

Australian Competition and Consumer Commission  
Adjudication Branch  
23 Marcus Clarke Street  
Canberra ACT 2601

Attention: Luke Griffin, Assistant Director

Dear Mr. Griffin,

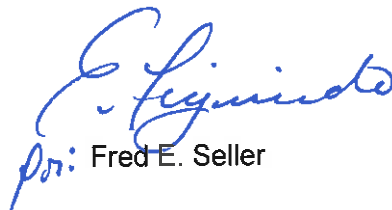
Re: **Jasmin Solar Pty Ltd. & Diamond Energy Pty Ltd. –  
Undertaking**  
Our File No.: 32-19646

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Further to our email of August 27, 2013, please find enclosed herewith the original Undertaking to the Australian Competition and Consumer Commission executed by the undersigned.


If you need anything further, please let me know.

Yours very truly,

  
for: Fred E. Seller

/ef  
Encl.

**BrazeauSeller**.LLP  
*Business People. Business Law.*

 MERITAS LAW FIRMS WORLDWIDE

[www.brazeauseller.com](http://www.brazeauseller.com)

t. 613.237.4000  
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# Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and  
Consumer Act 2010* (Cth) by Jasmin Solar Pty  
Ltd ACN 158 644 225 and Diamond Energy Pty  
Ltd ACN 107 516 334

## 1. Persons giving the Undertaking

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- 1.1. This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by:
- (a) Jasmin Solar Pty Ltd ACN 158 644 225 (**Jasmin Solar**); and
  - (b) Diamond Energy Pty Ltd ACN 107 516 334 (**Diamond Energy**),
- (together, **the Parties**).

## 2. Background

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### The Parties

- 2.1. Jasmin Solar is a retailer of Solar Systems to residential customers located in Queensland. Jasmin Solar supplies and installs the various components that constitute a Solar System or arranges for installation to be undertaken by a third party.
- 2.2. Diamond Energy supplies electricity on a retail basis and has an integrated renewable energy generation business in Australia primarily in order to support its retail operations. Diamond Energy offers retail services in Victoria, South Australia, New South Wales and South East Queensland.

### The Notified Conduct

- 2.3. Jasmin Solar lodged two notifications with the ACCC:
- (a) Notification N96232 was lodged on 31 October 2012. Under this notification, Jasmin Solar proposes to supply domestic Solar Systems to customers in South East Queensland for \$1 on condition that Jasmin Solar Customers use Diamond Energy as their energy retailer. Statutory protection for this conduct commenced on 14 November 2012; and
  - (b) Notification N96653 was lodged on 12 March 2013. Under this notification, Jasmin Solar proposes to supply domestic Solar Systems to customers in South East Queensland for \$999 on condition that the Jasmin Solar Customers uses Diamond Energy as their energy retailer and that the Jasmin Solar Customer has been approved for the Queensland Government's 44c/kWh rebate scheme. Statutory protection for this conduct commenced on 26 March 2013,
- (together, the **Notified Conduct**).
- 2.4. The Jasmin Solar Customer Agreements have a term of up to 16 years (**16 Year Term**) which means that the customer may be required to acquire energy from Diamond Energy or another energy retailer of Jasmin Solar's nomination for that entire period.
- 2.5. During productive daylight hours, Jasmin Solar Customers are able to consume energy free of charge, up to the amount generated by their Solar System. However, Jasmin Solar Customers are required to use Diamond Energy as their energy retailer for:

- (a) all energy consumption above / beyond the energy generated by their Solar System during the day (if any); and
  - (b) all energy consumption outside of productive daylight hours such as during the evening and night.
- 2.6. The Queensland Government provides a feed-in tariff as an incentive for residential consumers to purchase and install solar systems. Customers eligible for the feed-in tariff receive an amount per kWh of energy exported to the electricity grid. Under the Jasmin Solar Customer Agreement, Jasmin Solar Customers agree to assign their rights to the feed-in tariff to Jasmin Solar for the term of their Jasmin Solar Customer Agreement. Jasmin Solar entered into an agreement with Diamond Energy to enable the Jasmin Solar Customer's feed-in tariff payments to be paid directly to Jasmin Solar.

#### **Queensland electricity retail market**

- 2.7. The Queensland electricity retail market operates within the parameters of the regulated retail pricing determinations issued by the Queensland Competition Authority (**QCA**). At the time this Undertaking was accepted there were two types of electricity residential contracts in Queensland: Standard Retail Contracts and Market Contracts.
- 2.8. If a customer has not actively negotiated a contract for energy supply with a retailer they are likely to be on a Standard Retail Contract. Customers who are on a Standard Retail Contract are charged for their electricity usage based on the regulated rate set by the QCA (**Regulated Rate**). As at the date of this Undertaking the terms and conditions of Standard Retail Contracts are also regulated.
- 2.9. Market Contracts involve negotiation between the energy retailer and customer. Some of the terms and conditions that may be negotiated include price, service standards, fees and charges, billing and payment arrangements and penalties for early termination. Market Contracts generally offer a discount below the Regulated Rate and are often offered where the customer pays their energy bill on time or pays through a direct debit transaction.

#### **The public benefit test applied by the ACCC**

- 2.10. The ACCC made an initial assessment of the notifications and considered whether to issue a draft notice revoking the notifications pursuant to s 93(3A) of the Act. Under s 93(3A), if the ACCC is satisfied that the likely benefit to the public from the proposed conduct will not outweigh the likely detriment to the public from the proposed conduct, the ACCC may give the corporation a written notice stating that it is so satisfied. The notice has the effect of removing the statutory protection conferred by the notifications.
- 2.11. As at the date on which this Undertaking is given, the ACCC has decided that it has a number of concerns in relation to the Notified Conduct. These concerns are outlined below.

#### **The ACCC's concerns regarding pricing**

- 2.12. Whilst the ACCC recognises the potential for the Notified Conduct to result in reduced consumption of externally generated electricity, the ACCC is not satisfied that such reductions will outweigh the cost increases for such electricity that

customers might incur in the future as a result of the Notified Conduct. The ACCC considers that, in the absence of this Undertaking, the likely detriment to the public from the Notified Conduct would exceed the likely benefit to the public.

- 2.13. Residential electricity customers in South East Queensland are generally able to choose from a number of energy retailers. These customers may pay a default tariff set by the QCA or may pay a price established by a Market Contract. Prices established in Market Contracts may be below or in excess of the default tariff. Other things being equal, where a customer is able to choose its retailer, the customer would be expected to pay a market price that is less than the default tariff.
- 2.14. In these circumstances, customers would only be likely to agree to prices higher than the default tariff in return for some other additional benefit or inducement. The ACCC accepts that Jasmin Solar's customers agree to become customers of Diamond Energy, in return for obtaining Solar Systems from Jasmin Solar at a discount. However, the ACCC understands that the prices initially offered by Diamond Energy to Jasmin Solar Customers only apply for the initial one or two year term of the customer's contract with Diamond Energy.
- 2.15. While a default tariff was set by the QCA at the time this Undertaking was accepted, it is not necessarily the case that such a tariff will be set in the future. That is, the level of regulation of retail energy prices in Queensland may change during the 16 Year Term.
- 2.16. The ACCC considers that there is potential for prices to exceed the default tariff through the Market Contract mechanism. Further, the level of regulation of retail energy prices in Queensland may change during the 16 Year Term. Accordingly, the ACCC does not consider there is sufficient assurance that Jasmin Solar Customers will not be exposed to prices significantly in excess of the prices that they would be free to obtain in the absence of the Notified Conduct.
- 2.17. The ACCC therefore considers that, in the absence of this Undertaking, Jasmin Solar Customers may be required by Diamond Energy to pay energy prices that are significantly in excess of the prices that would be available to those customers, in the future, were they free to make their own choice of energy retailer.

#### **Other ACCC concerns**

- 2.18. The ACCC is concerned that Jasmin Solar Customers may be exposed to a number of contingencies during the course of the 16 Year Term. In particular, the ACCC is concerned that Jasmin Solar Customers may be exposed to onerous costs or the application of the Termination Amount (up to \$7000) where the Solar System fails or is damaged beyond the control of the Jasmin Solar Customer. The ACCC also wishes to ensure that Jasmin Solar Customers are adequately informed about their rights and responsibilities arising from the Notified Conduct.

#### **The Undertaking remedy**

- 2.19. The objective of this Undertaking is to:
  - (a) address the ACCC's concerns that Jasmin Solar Customers may be exposed to prices significantly in excess of the prices that they would be free to obtain in the absence of the Notified Conduct;





- (b) address the ACCC's concerns that Jasmin Solar Customers may be exposed to other risks as a result of the Notified Conduct during the 16 Year Term; and
- (c) ensure, to the greatest extent possible, that the potential benefits of the Notified Conduct continue to outweigh the potential detriments associated with the Notified Conduct for the duration of the 16 Year Term.

2.20. This Undertaking addresses the ACCC's concerns by:

- (a) requiring the Jasmin Solar Energy Retailer to supply electricity to Jasmin Solar Customers at prices that are reflective of those that would be available to those customers in the absence of the Notified Conduct;
- (b) requiring Jasmin Solar to obtain ACCC approval in the event that Jasmin Solar wants another entity or person to become an energy retailer supplying electricity to Jasmin Solar Customers, which may include that entity or person giving a section 87B undertaking to the ACCC, including in the event that Diamond Energy is replaced as the Jasmin Solar Energy Retailer;
- (c) requiring Jasmin Solar to comply with the retailer pricing commitments if Jasmin Solar replaces the Jasmin Solar Energy Retailer as an energy retailer supplying electricity to some or all Jasmin Solar Customers;
- (d) requiring Jasmin Solar to obtain ACCC approval in the event that a Change of Control of Jasmin Solar's business to another person or entity is expected to occur before the withdrawal of this Undertaking in accordance with clause 4.1, which may include that entity or person giving a section 87B undertaking to the ACCC;
- (e) requiring Jasmin Solar to provide Jasmin Solar Customers with a minimum three year retail warranty on the Solar System and in some circumstances, assisting Jasmin Solar Customers in making warranty claims outside of this period where the Jasmin Solar Customer has consumer guarantee rights under the Australian Consumer Law or rights under a manufacturer's warranty;
- (f) preventing Jasmin Solar from requiring Jasmin Solar Customers to pay the Termination Amount if the Solar System fails during the period under which the Jasmin Solar Customer has consumer guarantee rights under the Australian Consumer Law or rights under a manufacturer's warranty for any reason other than wilful action, neglect or negligence by the Jasmin Solar Customer;
- (g) providing an effective dispute resolution mechanism in the event of a dispute between Jasmin Solar and a Jasmin Solar Customer relating to the payment of the Termination Amount;
- (h) requiring Jasmin Solar and the Jasmin Solar Energy Retailer to inform customers of their rights arising from the obligations contained in this Undertaking; and
- (i) providing effective oversight of Jasmin Solar's and the Jasmin Solar Energy Retailer's compliance with this Undertaking.

2.21. This Undertaking is given in respect of the Notified Conduct only.



### **3. Commencement of this Undertaking**

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#### **Commencement**

- 3.1. This Undertaking comes into effect when:
- (a) this Undertaking is executed by the Parties; and
  - (b) this Undertaking so executed is accepted by the ACCC,  
(the **Commencement Date**).

### **4. Cessation of Ongoing Obligations**

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#### **Withdrawal**

- 4.1. This Undertaking is taken to be withdrawn on the date the ACCC consents in writing to the withdrawal of this Undertaking in accordance with section 87B of the Act.

#### **Revocation**

- 4.2. The ACCC may, at any time, revoke its acceptance of this Undertaking if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.

#### **Waiver**

- 4.3. The ACCC may, at any time, expressly waive in writing any of the obligations contained in this Undertaking or amend the date by which any such obligation is to be satisfied.

### **5. Pricing**

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#### **Residential electricity pricing by the Jasmin Solar Energy Retailer**

- 5.1. Jasmin Solar and the Jasmin Solar Energy Retailer must ensure that pricing by the Jasmin Solar Energy Retailer for electricity, rates, fees and charges (applied only to electricity supplied from the grid to the customer) is structured in accordance with the procedure set out in clauses 5.2 to 5.7 of this Undertaking.

#### **Electricity consumption rate**

- 5.2. In the period between 1 July and 15 August each year, or upon any Significant Change in the Sample Market Rates (as defined in clause 5.2 (b) below), the Jasmin Solar Energy Retailer must:

#### *Identify*

- (a) identify either the 6 largest electricity retailers by customer numbers or retailers that account for at least 75% of the residential customers in



Queensland based upon the most current data released by the Australian Energy Regulator (**Sample Retailers**);

*Adjust*

(b) calculate an electricity consumption rate for each of the Sample Retailers. For each Sample Retailer, that rate is to be a Market Contract rate available, in the then current Financial Year, to residential retail energy customers with a Solar PV system of 5 kilowatts or less, for the applicable distributor supply tariff, including any discount available to those customers that:

(i) is expressed as a discount off the Regulated Rate (other than a discount referred to in subclauses (iii) or (iv) below); or

(ii) is given for on time payment or for paying by direct debit;

but excluding any:

(iii) cross product or product bundling discounts; or

(iv) contract sign-on discounts or similar sign-on inducements

**(Sample Market Rate)**; and

*Average*

(c) calculate the simple arithmetic average of those Sample Market Rates (**Average Market Rate**).

5.3. To Jasmin Solar Customers:

(a) on a Market Contract, from 1 July each year (or upon any Significant Change in the Sample Market Rate) the Jasmin Solar Energy Retailer must charge the lower of the:

(i) Average Market Rate for that Financial Year (as determined in accordance with clause 5.2); and

(ii) the Regulated Rate for that Financial Year, and

(b) on a Standard Retail Contract, from 1 July each year (or upon any change in the Regulated Rate) the Jasmin Solar Energy Retailer must charge the Regulated Rate.

**(Contract Rate)**.

#### Other allowable fees

- 5.4. The Jasmin Solar Energy Retailer must not charge any fees to Jasmin Solar customers other than those:
- (a) specified in the Standard Retail Contract (Annexure B to the Electricity Industry Code);
  - (b) charged by the Sample Retailers; and/or
  - (c) required by State Government or Commonwealth Government legislation,
- (Other Allowable Fees).**
- 5.5. Jasmin Solar and the Jasmin Solar Energy Retailer must not charge the Jasmin Solar Customer an amount for any individual Other Allowable Fee that is above the simple arithmetic average of the amounts that the Sample Retailers charge for that particular fee or comparable fee.
- 5.6. The Jasmin Solar Energy Retailer may also charge Jasmin Solar Customers Distribution Non-Network Charges:
- (a) which the relevant Distribution Entity is entitled to charge under the applicable connection contract; and
  - (b) which have been charged by the relevant Distribution Entity to the Jasmin Solar Energy Retailer on the Jasmin Solar Customer's account.
- 5.7. The Jasmin Solar Energy Retailer may also charge Jasmin Solar Customers Network Charges charged to the Jasmin Solar Energy Retailer by the Distribution Entity.

#### Rebate offer by Jasmin Solar

- 5.8. In the event that the Jasmin Solar Energy Retailer charges a Jasmin Solar Customer electricity rates during the term of the Jasmin Solar Customer's Agreement with Jasmin Solar that exceeds the Contract Rate(s), Jasmin Solar will pay to the Jasmin Solar Customer a rebate calculated and paid in accordance with clauses 5.8(a) to 5.8(c):
- (a) Jasmin Solar will on 1 January, 1 May and 1 September in each year of a Jasmin Solar Customer's contract with Jasmin Solar (**Review Date**), review the energy price charged to Jasmin Solar Customers by the Jasmin Solar Energy Retailer against the Contract Rate(s) that applied for the previous quarter (**Comparison**).
  - (b) If the Comparison indicates that the Jasmin Solar Customer has been charged by the Jasmin Solar Energy Retailer an electricity price greater than the Contract Rate(s) that applied for the previous quarter, Jasmin Solar will pay to the Jasmin Solar Customer a rebate to fully reimburse the Jasmin Solar Customer for the difference (**Rebate**). For the avoidance of doubt, Jasmin Solar will pay to the Jasmin Solar Customer any amount charged by the Jasmin Solar Energy Retailer greater than the Contract Rate(s) for the previous quarter.



- (c) The Rebate will be paid to the Jasmin Solar Customer by Jasmin Solar by direct transfer into the Jasmin Solar Customer's bank account, or by another method as agreed between Jasmin Solar and the Jasmin Solar Customer, within 30 days of the Review Date.

## **6. Jasmin Solar**

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- 6.1. Jasmin Solar must procure that the Jasmin Solar Energy Retailer complies with this Undertaking.

### **Additional energy retailers**

- 6.2. In the event that Jasmin Solar intends to:
- (a) enter into an Agreement with another entity or person for that other entity or person to become an energy retailer supplying electricity to Jasmin Solar Customers, and
  - (b) require some or all Jasmin Solar Customers who are customers of the Jasmin Solar Energy Retailer to become customers of that other person or entity,

then Jasmin Solar must comply with clause 6.3 of this Undertaking.

- 6.3. Prior to Jasmin Solar entering into an Agreement with another entity or person as described in clause 6.2 above, Jasmin Solar must:
- (a) notify the ACCC of this intention;
  - (b) seek the ACCC's written approval; and
  - (c) only enter into such an Agreement with another entity or person if that entity or person has given a section 87B undertaking to the ACCC that requires it to comply with the same obligations as are imposed on the Jasmin Solar Energy Retailer pursuant to this Undertaking, or on terms that are otherwise acceptable to the ACCC, unless the ACCC has notified Jasmin Solar in writing that a section 87B undertaking under this clause is not required.
- 6.4. If Jasmin Solar replaces the Jasmin Solar Energy Retailer as the energy retailer supplying electricity to some or all Jasmin Solar Customers, then Jasmin Solar must comply with this Undertaking, including the obligations on the Jasmin Solar Energy Retailer in relation to pricing, as if references to the Jasmin Solar Energy Retailer were references to Jasmin Solar. This includes continuing to charge those Jasmin Solar Customers the Contract Rate previously determined by the Jasmin Solar Energy Retailer, under clause 5.3 of this Undertaking, until the end of the Financial Year in which the replacement occurs.

### **Change of Control of Jasmin Solar's business**

- 6.5. In the event that a Change of Control of Jasmin Solar's business is expected to occur before the withdrawal of this Undertaking in accordance with clause 4.1 Jasmin Solar must:
- (a) notify the ACCC of this expectation; and

- (b) only implement a Change of Control to another person or entity if that person or entity has given a section 87B undertaking to the ACCC that requires it to comply with the same obligations as are imposed on Jasmin Solar pursuant to this Undertaking, or on terms that are otherwise acceptable to the ACCC, unless the ACCC has notified Jasmin Solar in writing that a section 87B undertaking under this clause is not required.

### **Solar System obligations**

- 6.6. Jasmin Solar must provide Jasmin Solar Customers with a minimum retailer warranty period of three years on the operation and performance of the whole Solar System including workmanship and products (**Retailer Warranty Period**) in addition to the Jasmin Solar Customers' rights under the Australian Consumer Law.
- 6.7. After the expiration of the Retailer Warranty Period and during the period under which the Jasmin Solar Customer has consumer guarantee rights under the Australian Consumer Law or rights under a manufacturer's warranty (**ACL/Manufacturer Warranty Period**), Jasmin Solar:
  - (a) must assist the Jasmin Solar Customer in making a warranty claim (if the Jasmin Solar Customer wishes to make a claim), which may include Jasmin Solar:
    - (i) providing the Jasmin Solar Customer with a remedy to resolve the claim; and
    - (ii) making a claim directly with the manufacturer of the Solar System, and
  - (b) must not require Jasmin Solar Customers to pay the Termination Amount if the Solar System fails during the ACL/Manufacturer Warranty Period for any reason other than wilful action, neglect or negligence by the Jasmin Solar Customer.

### **Information to Jasmin Solar Customers**

- 6.8. Jasmin Solar must, within one month of the Commencement Date, provide to the Jasmin Solar Customers who are Jasmin Solar Customers at the time this Undertaking was accepted, a plain English summary of the obligations contained within this Undertaking (which is to be approved by the ACCC prior to distribution).
- 6.9. The Jasmin Solar Energy Retailer must include a statement on or with Jasmin Solar Customer electricity bills that:
  - (a) the Jasmin Solar Energy Retailer's pricing is subject to the terms of a section 87B undertaking to the ACCC; and
  - (b) the Undertaking and a plain English summary is available upon request and via the ACCC's website.
- 6.10. The obligation to provide a copy of the plain English summary extends to the provision of that document to new Jasmin Solar Customers within one month of them becoming Jasmin Solar Customers.

## 7. Independent Audit

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### Obligation to appoint an Approved Independent Auditor

- 7.1. Jasmin Solar must appoint and maintain an Approved Independent Auditor to audit and report up on Jasmin Solar's and the Jasmin Solar Energy Retailer's compliance with this Undertaking.
- 7.2. Without limiting its obligations in this Undertaking, Jasmin Solar must:
- (a) comply with and enforce the Approved Terms of Appointment for the Approved Independent Auditor;
  - (b) maintain and fund the Approved Independent Auditor to carry out his or her functions including:
    - (i) indemnifying the Approved Independent Auditor for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Approved Independent Auditor of his or her functions as the Approved Independent Auditor except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Approved Independent Auditor;
    - (ii) providing and paying for any external expertise, assistance or advice required by the Approved Independent Auditor to perform his or her functions as the Approved Independent Auditor, andwithout limiting its obligations under this clause 7.2(b), Jasmin Solar may, by agreement with the Jasmin Solar Energy Retailer, obtain an apportioned amount of the funding of the Approved Independent Auditor from the Jasmin Solar Energy Retailer; and
  - (c) not appoint the Approved Independent Auditor, or have any Agreements with the Approved Independent Auditor, to utilise the Approved Independent Auditor's services for anything other than compliance with this Undertaking until at least 12 months after the Approved Independent Auditor ceases to act in the role of the Approved Independent Auditor.
- 7.2A. Without limiting their obligations under this Undertaking, Jasmin Solar and the Jasmin Solar Energy Retailer must not interfere with, or otherwise hinder, the Approved Independent Auditor's ability to carry out his or her functions as the Approved Independent Auditor, including:
- (a) directing Jasmin Solar and the Jasmin Solar Energy Retailer's personnel, including directors, contractors, managers, officers, employees and agents, to act in accordance with this clause 7;
  - (b) providing to the Approved Independent Auditor any information or documents requested by the Approved Independent Auditor that he or she considers necessary for carrying out his or her functions as the Approved Independent Auditor or for reporting to or otherwise advising the ACCC; and

- (c) not requesting any information relating to the compliance audit from the Approved Independent Auditor without such a request having been approved by the ACCC.

#### **Approval of proposed independent auditor as the Approved Independent Auditor**

- 7.3. Within 15 Business Days of the Commencement Date, Jasmin Solar must provide the ACCC with a notice for a Proposed Independent Auditor in the form prescribed in Schedule 2 to this Undertaking (**Proposed Independent Auditor Notice**).
- 7.4. After receiving a Proposed Independent Auditor Notice, the ACCC must decide whether to:
  - (a) approve the appointment of the person named in the Proposed Independent Auditor Notice as the Approved Independent Auditor which includes approving the:
    - (i) terms of appointment attached to the Proposed Independent Auditor Notice; and
    - (ii) draft audit plan attached to the Proposed Independent Auditor Notice; or
  - (b) not approve the person named in the notice as the Proposed Independent Auditor.
- 7.5. If clause 7.4(b) applies, the ACCC may, at its absolute discretion:
  - (a) direct Jasmin Solar to submit a Proposed Independent Auditor Notice that:
    - (i) names a person identified by the ACCC as the Proposed Independent Auditor; and/or
    - (ii) includes attachments that:
      - (A) relate to the person identified by the ACCC under clause 7.5(a)(i) (if applicable); and/or
      - (B) address any issues identified by the ACCC in relation to the terms of appointment and/or draft audit plan; or
  - (b) identify and approve a person as the Approved Independent Auditor together with the:
    - (i) terms of appointment; and
    - (ii) draft audit plan.
- 7.6. As soon as practicable, and within two Business Days of any direction by the ACCC under clause 7.5(a), Jasmin Solar must submit a Proposed Independent Auditor Notice in accordance with the direction.





- 7.7. Without limiting the ACCC's discretion, in making the decisions described in clause 7.4 or 7.5, the factors to which the ACCC may have regard include whether the:
- (a) person named in the Proposed Independent Auditor Notice or identified by the ACCC has the qualifications and experience necessary to carry out the functions of the Approved Independent Auditor;
  - (b) person named in the Proposed Independent Auditor Notice or identified by the ACCC is sufficiently independent of the Jasmin Solar Energy Retailer and Jasmin Solar;
  - (c) terms of appointment and the draft audit plan are consistent with this Undertaking; and
  - (d) terms of appointment and the draft audit plan are otherwise acceptable to the ACCC.
- 7.8. Within 10 Business Days after receiving a Proposed Independent Auditor Notice, the ACCC must notify Jasmin Solar in writing of its decisions and any direction made pursuant to clause 7.4 and/or 7.5.
- 7.9. The ACCC may extend the period within which it will provide notice of the decision or direction (if applicable) described in clause 7.8 by notifying Jasmin Solar in writing of the extension within 10 Business Days after receiving the Proposed Independent Auditor Notice.
- 7.10. If the Approved Independent Auditor has not been appointed:
- (a) within 17 Business Days of the Commencement Date,
  - (b) within 17 Business Days after the Approved Independent Auditor resigns or otherwise ceases to act as the Approved Independent Manager pursuant to clause 7.19, 7.20 or 7.21; or
  - (c) if the ACCC has not received a Proposed Independent Auditor Notice pursuant to clause 7.22;
- then the provisions of clause 7.11 apply.
- 7.11. If clause 7.10 applies, the ACCC at its absolute discretion may:
- (a) identify and approve a person as the Approved Independent Auditor;
  - (b) approve the terms of appointment of the Approved Independent Auditor; and
  - (c) approve the draft audit plan.

#### **Appointment of the Approved Independent Auditor**

- 7.12. After receiving notice from the ACCC of its decisions pursuant to clause 7.4, 7.5(b) or 7.11, Jasmin Solar must, within two Business Days:
- (a) appoint the person approved by the ACCC as the Approved Independent Auditor on the Approved Terms of Appointment; and



- (b) forward to the ACCC a copy of the executed Approved Terms of Appointment within one Business Day of execution.

### **Obligations and powers of the Approved Independent Auditor**

7.13. Jasmin Solar must procure that any proposed terms of appointment for the Approved Independent Auditor include obligations on the Approved Independent Auditor to:

- (a) maintain his or her independence from the Jasmin Solar Energy Retailer and Jasmin Solar, apart from appointment to the role of Approved Independent Auditor, including not to form any relationship of the types described in paragraph 2(c) of Schedule 2 to this Undertaking with the Jasmin Solar Energy Retailer or Jasmin Solar for the period of his or her appointment;
- (b) conduct compliance auditing according to the Approved Audit Plan;
- (c) provide the following reports directly to the ACCC:
  - (i) a scheduled written Audit Report as described in clause 7.15; and
  - (ii) an immediate report of any issues that arise in relation to the performance of his or her functions as Approved Independent Auditor or in relation to compliance with this Undertaking by any person named in this Undertaking; and
- (d) follow any direction given to him or her by the ACCC in relation to the performance of his or her functions as Approved Independent Auditor under this Undertaking.

7.14. Jasmin Solar must procure that any proposed terms of appointment for the Approved Independent Auditor provide the Approved Independent Auditor with the authority to:

- (a) access the facilities, sites or operations of Jasmin Solar's and the Jasmin Solar Energy Retailer's business as required by the Approved Independent Auditor;
- (b) access any information or documents that the Approved Independent Auditor considers necessary for carrying out his or her functions as the Approved Independent Auditor or for reporting to or otherwise advising the ACCC; and
- (c) engage any external expertise, assistance or advice required by the Approved Independent Auditor to perform his or her functions as the Approved Independent Auditor.

### **Compliance Audit**

7.15. The Approved Independent Auditor must conduct an audit and prepare a detailed report (**Audit Report**) on:

- (a) Jasmin Solar Energy Retailer's compliance with this Undertaking or if there is more than one retailer, all Jasmin Solar Energy Retailers;

- (b) Jasmin Solar's compliance with this Undertaking;
  - (c) all of the reasons for the conclusions reached in the Audit Report;
  - (d) any qualifications made by the Approved Independent Auditor in forming his or her views;
  - (e) any recommendations by the Approved Independent Auditor to improve:
    - (i) the Approved Audit Plan;
    - (ii) the integrity of the auditing process;
    - (iii) the Jasmin Solar Energy Retailer's processes or reporting systems in relation to compliance with this Undertaking;
    - (iv) the Jasmin Solar Energy Retailer's compliance with this Undertaking;
    - (v) Jasmin Solar's processes or reporting systems in relation to compliance with this Undertaking; and
    - (vi) Jasmin Solar's compliance with this Undertaking, and
  - (f) the implementation and outcome of any prior recommendations by the Approved Independent Auditor.
- 7.16. Each year, the Approved Independent Auditor is to provide an Audit Report to the ACCC, Jasmin Solar and the Jasmin Solar Energy Retailer for the year ending 30 June (or an alternate annual reporting period as approved in writing with the ACCC). The Approved Independent Auditor is to provide the Audit Report to the ACCC, Jasmin Solar and the Jasmin Solar Energy Retailer no later than 3 months after the end of each annual reporting period.
- 7.17. Jasmin Solar and the Jasmin Solar Energy Retailer must implement any recommendations of the Approved Independent Auditor made in the Audit Report, and notify the ACCC of the implementation of the recommendations, within 10 Business Days after receiving the Audit Report or such other period as agreed in writing with the ACCC.
- 7.18. Jasmin Solar and the Jasmin Solar Energy Retailer must comply with any direction of the ACCC in relation to matters arising from the Audit Report within 10 Business Days after being so directed (or such other period as agreed in writing with the ACCC).

#### **Resignation, revocation or termination of the Approved Independent Auditor**

- 7.19. Jasmin Solar must immediately notify the ACCC in the event that the Approved Independent Auditor resigns or otherwise stops acting as the Approved Independent Auditor before the ACCC has provided the written confirmation pursuant to clause 4.1, 4.2 or clause 4.3.
- 7.20. The ACCC may revoke an Approved Independent Auditor's status as the Approved Independent Auditor if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.

- 7.21. The ACCC may approve any proposal by, or alternatively may direct, Jasmin Solar to terminate the appointment of the Approved Independent Auditor if in the ACCC's view the Approved Independent Auditor acts inconsistently with the provisions of this Undertaking or the Approved Terms of Appointment.
- 7.22. If clause 7.19, 7.20 or 7.21 applies, Jasmin Solar must provide the ACCC with a Proposed Independent Auditor Notice within five Business Days after the relevant event occurs, otherwise clause 7.11 applies.

## **8. Termination and Dispute resolution**

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- 8.1. Jasmin Solar must act reasonably and in good faith in relation to the termination, or contemplated termination, of the Jasmin Solar Customer Agreement in circumstances where termination will occur prior to the end of the term of the Jasmin Solar Customer Agreement.
- 8.2. If the Jasmin Solar Customer agrees to pay the Termination Amount, Jasmin Solar must have regard to the Jasmin Solar Customer's ability to pay in determining the term over which the Termination Amount is to be paid, including by providing the Jasmin Solar Customer with the option of making payments over a period as agreed between Jasmin Solar and the Jasmin Solar Customer.
- 8.3. If, by operation of any law, a Jasmin Solar Customer is deemed or taken to have entered into an energy supply agreement with an energy retailer other than the Jasmin Solar Energy Retailer, Jasmin Solar must not terminate the Jasmin Solar Customer Agreement with that Jasmin Solar Customer until that law permits that Jasmin Solar Customer to replace that energy supply agreement with another energy supply agreement.
- 8.4. In the event of a failure to reach agreement between Jasmin Solar and a Jasmin Solar Customer in relation to the termination, or contemplated termination, of the Jasmin Solar Customer Agreement including payment of the Termination Amount, Jasmin Solar must notify the ACCC that a dispute has arisen and lodge a claim with the Queensland Civil and Administrative Tribunal (**QCAT**).
- 8.5. Jasmin Solar must comply with any order made by QCAT and must not take any steps (except with the agreement of the Jasmin Solar Customer) to enforce the terms of the Jasmin Solar Customer Agreement in respect of the termination, or contemplated termination, until QCAT has made a final decision in relation to the claim and that decision is not subject to any appeal or appeal period.

## **9. Information**

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- 9.1. The ACCC may direct Jasmin Solar and the Jasmin Solar Energy Retailer in respect of their compliance with this Undertaking to, and they must:
- (a) furnish information to the ACCC in the time and in the form requested by the ACCC;
  - (b) produce documents and materials to the ACCC within Jasmin Solar's or the Jasmin Solar Energy Retailer's custody, power or control in the time and in the form requested by the ACCC; and

- (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 9.2. Any direction made by the ACCC under clause 9.1 will be notified to both Jasmin Solar and the Jasmin Solar Energy Retailer, in accordance with clause 14 of this Undertaking.
- 9.3. In respect of Jasmin Solar's or the Jasmin Solar Energy Retailer's compliance with this Undertaking or an Independent Auditor's compliance with its Approved Terms of Appointment, the ACCC may request any Approved Independent Auditor to:
- (a) furnish information to the ACCC in the time and in the form requested by the ACCC;
  - (b) produce documents and materials to the ACCC within the Approved Independent Auditor's custody, power or control in the time and in the form requested by the ACCC; and/or
  - (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 9.4. Jasmin Solar will use its best endeavours to ensure that the Approved Independent Auditor complies with any request from the ACCC in accordance with this clause 9.
- 9.5. Information furnished, documents and material produced or information given in response to any request or direction from the ACCC under this clause 9 may be used by the ACCC for any purpose consistent with the exercise of its statutory duties.
- 9.6. The ACCC may in its discretion to be exercised in good faith:
- (a) advise the Approved Independent Auditor of any request made by it under this clause 9; and/or
  - (b) provide copies to the Approved Independent Auditor of any information furnished, documents and material produced or information given to it under this clause 9.
- 9.7. Nothing in this clause 9 requires the provision of information or documents in respect of which Jasmin Solar or the Jasmin Solar Energy Retailer has a claim of legal professional or other privilege.

## **10. Disclosure of this Undertaking**

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- 10.1. Jasmin Solar and the Jasmin Solar Energy Retailer acknowledge that the ACCC may provide the Approved Independent Auditor with a copy of this Undertaking.
- 10.2. Jasmin Solar and the Jasmin Solar Energy Retailer acknowledge that the ACCC may:
- (a) make this Undertaking publicly available; and



- (b) publish this Undertaking on its Public Section 87B Undertakings Register; and
- (c) from time to time publicly refer to this Undertaking.

## **11. Obligation to procure**

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- 11.1. Where the performance of an obligation under this Undertaking requires a Related Body Corporate of Jasmin Solar or the Jasmin Solar Energy Retailer to take or refrain from taking some action, the relevant entity (Jasmin Solar or the Jasmin Solar Energy Retailer) will procure that Related Body Corporate to take or refrain from taking that action, as the case may be.

## **12. No Derogation**

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- 12.1. This Undertaking does not prevent the ACCC from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by Jasmin Solar or the Jasmin Solar Energy Retailer of any term of this Undertaking.
- 12.2. Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the Act for penalties or other remedies in the event that Jasmin Solar or the Jasmin Solar Energy Retailer does not fully implement and/or perform its obligations under this Undertaking or in any other event where the ACCC decides to take action under the Act for penalties or other remedies.

## **13. Costs**

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- 13.1. Jasmin Solar and the Jasmin Solar Energy Retailer must pay all of their own costs incurred in relation to this Undertaking.

## **14. Notices**

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### **Giving Notices**

- 14.1. Any notice or communication to the ACCC pursuant to this Undertaking must be sent to:

Email address: [adjudication@accc.gov.au](mailto:adjudication@accc.gov.au)  
Attention: General Manager  
Adjudication Branch  
Mergers and Adjudication Group

**With a copy sent to:** [mergersucu@accc.gov.au](mailto:mergersucu@accc.gov.au)  
Director, Undertaking Compliance Unit  
Coordination and Strategy Branch  
Mergers and Adjudication Group

- 14.2. Any notice or communication to Jasmin Solar pursuant to this Undertaking must be sent to:

Name: Jasmin Solar Pty Ltd ACN 158 644 225

Address: 2/98 Spencer Road, Carrara. QLD. 4211

Email Address: [matthew@jasminsolar.com](mailto:matthew@jasminsolar.com)

Fax number: 07 5578 1177

Attention: Dr. Matthew Starr

- 14.3. Any notice or communication to Diamond Energy pursuant to this Undertaking must be sent to:

Name: Diamond Energy Pty Ltd ACN 107 516 334

Address: Level 1, 695 Burke Road, Camberwell VIC 3124

Email Address: [tjsennitt@diamond-energy.com](mailto:tjsennitt@diamond-energy.com)

Fax number: 03 9006 9031

Attention: Tony Sennitt

- 14.4. If sent by post, notices are taken to be received three Business Days after posting (or seven Business Days after posting if sent to or from a place outside Australia).
- 14.5. If sent by email, notices are taken to be received at the time shown in the email as the time the email was sent.

#### **Change of contact details**

- 14.6. Jasmin Solar or the ACCC must notify the other party of a change to its contact details within three Business Days.
- 14.7. Any notice or communication will be sent to the most recently advised contact details and subject to clause 14.4 and 14.5, will be taken to be received.

## **15. Defined terms and interpretation**

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### **Definitions in the Dictionary**

- 15.1. A term or expression starting with a capital letter:
- (a) which is defined in the Dictionary in Part 1 of Schedule 1 (**Dictionary**), has the meaning given to it in the Dictionary; or
  - (b) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

### **Interpretation**

- 15.2. Part 2 of Schedule 1 sets out rules of interpretation for this Undertaking.



**Executed as an Undertaking**

Executed by Jasmin Solar Pty Ltd (ACN 158 644 225) pursuant to section 127(1) of the Corporations Act 2001 by:



Signature of director

Signature of a director/company secretary

Fred Seller

Name of director (print)

Name of director/company secretary (print)

August 27, 2013

Date

Date

Executed by Diamond Energy Pty Ltd (ACN 107 516 334) pursuant to section 127(1) of the Corporations Act 2001 by:

Signature of director

Signature of a director/company secretary

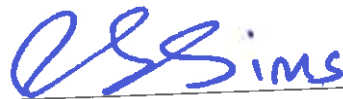
Name of director (print)

Name of director/company secretary (print)

Date

Date

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* on:



Date

4/9/13

And signed on behalf of the Commission:

Chairman

Date



# Schedule 1

## 1. Dictionary

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**16 Year Term** has the meaning given in clause 2.4 of this Undertaking.

**ACCC** means the Australian Competition and Consumer Commission.

**Australian Consumer Law (ACL)** is contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)

**ACL/Manufacturer Warranty Period** has the meaning given in clause 6.7 of this Undertaking.

**Act** means the *Competition and Consumer Act 2010* (Cth).

**Agreements** means any contract, arrangement or understanding, including any contract, arrangement or understanding to renew, amend, vary or extend any contract, arrangement or understanding.

**Approved Audit Plan** means the plan approved by the ACCC in accordance with the terms of this Undertaking, as amended from time to time by ACCC direction given under clause 7.13, by which the Approved Independent Auditor will audit and report upon compliance with this Undertaking.

**Approved Independent Auditor** means the person appointed under clause 7.12 of this Undertaking.

**Approved Terms of Appointment** means the terms of appointment for Approved Independent Auditor as approved by the ACCC in accordance with the terms of this Undertaking.

**Audit Report** has the meaning given to it in clause 7.15 of this Undertaking.

**Average Market Rate** means the electricity consumption rate determined by the procedure set out in clause 5.2 of this Undertaking.

**Business Day** means a day other than a Saturday or Sunday on which banks are open for business generally in the Australian Capital Territory.

**Change of Control** means the assignment or other transfer of:

- (a) one or more Jasmin Solar Customer Agreements;
- (b) the legal or beneficial ownership of some or all of the share capital of Jasmin Solar;

by Jasmin Solar to any other person or entity.

**Commencement Date** means the date described in clause 3.1 of this Undertaking.



**Comparison** has the meaning given in clause 5.8(a)

**Contract Rate** has the meaning given in clause 5.3 of this Undertaking.

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

**Diamond Energy** means Diamond Energy Pty Ltd (ACN 107 516 334).

**Distribution Authority** means an authority issued under the *Electricity Act 1994 (Qld)* that authorises its holder to supply energy using a supply network within a geographic area specified in that authority.

**Distribution Entity** means an entity who holds a Distribution Authority.

**Distribution Non-Network Charges** means the charges of the Distribution Entity set out in the Distribution Entity's price list that:

- (a) are referable to a specific request by the Jasmin Solar Customer or the Jasmin Solar Energy Retailer, or
- (b) are referable to a requirement under relevant electricity legislation, and do not include Network Charges.

Examples of Distribution Non-Network Charges include disconnection fees, reconnection fees and meter test fees.

**Electricity Industry Code** means the rules for electricity retailers and distributors based in Queensland including service obligations to customers, marketing conduct and the provision of information to customers.

**Entity Connected** has the meaning given by section 64B of the Corporations Act.

**Financial Year** means the 12 month period ending on 30 June of any year.

**Jasmin Solar** means Jasmin Solar Pty Ltd (ACN 158 644 225).

**Jasmin Solar Customer** means a person or entity who enters into, or has entered into, an agreement with Jasmin Solar for the supply of a Solar System by Jasmin Solar to that person or entity in Queensland at a discount on condition that the customer obtains electricity from an energy retailer, or from one of a limited number of energy retailers, nominated by Jasmin Solar.

**Jasmin Solar Customer Agreement** means an agreement between Jasmin Solar and a Jasmin Solar Customer for the supply of a Solar System by Jasmin Solar to that person or entity at a discount on condition that the customer obtains electricity from an energy retailer, or from one of a limited number of energy retailers, nominated by Jasmin Solar.

**Jasmin Solar Energy Retailer** means any licensed electricity retailer supplying retail electricity to any Jasmin Solar Customer.

**Market Contract** means an agreement between an energy customer and an energy retailer in Queensland. The price of market contracts is set by energy retailer and is not regulated by the Queensland Competition Authority. The terms and conditions vary between contracts and between retailers.

**Network Charges** means charges of a Distribution Entity for:

- (a) distribution use of system charges for the use of a shared supply network of the Distribution Entity; and
- (b) any transmission use of system charges payable by the Distribution Entity for use of a transmission grid to which the supply network is connected.

**Notified Conduct** has the meaning given in clause 2.3 of this Undertaking.

**Other Allowable Fees** has the meaning given in clause 5.4 of this Undertaking.

**Proposed Independent Auditor** means a person named in Proposed Independent Auditor Notice.

**Proposed Independent Auditor Notice** means a completed notice in the form of Schedule 2 to this Undertaking provided to the ACCC with all required attachments in relation to the Proposed Independent Auditor.

**Public Section 87B Undertakings Register** means the ACCC's public register of section 87B undertakings, available at [www.accc.gov.au](http://www.accc.gov.au)

**QCA** means the Queensland Competition Authority.

**QCAT** means the Queensland Civil and Administrative Tribunal.

**Rebate** has the meaning given in clause 5.8(b).

**Regulated Rate** has the meaning given in clause 2.8 of this Undertaking.

**Related Bodies Corporate** has the meaning given to it by section 50 of the Corporations Act.

**Related Entities** has the meaning given to it by section 9 of the Corporations Act.

**Related Parties** has the meaning given to it by section 228 of the Corporations Act.

**Retailer Warranty Period** has the meaning given in clause 6.6 of this Undertaking.

**Sample Market Rate** means, for a Sample Retailer, a rate determined in accordance with clause 5.2(b) of this Undertaking.

**Sample Retailer** has the meaning given in clause 5.2(a) of this Undertaking.

**Significant Change** means a change of 10% or more in the Average Market Rate.

**Solar System** means the photovoltaic solar system that Jasmin Solar has supplied or will supply to a Jasmin Solar Customer under the Notified Conduct.

**Standard Retail Contract** means an agreement that at the time this Undertaking was accepted is regulated by the Queensland Competition Authority, and available to all energy customers located in Queensland. The terms and conditions of these agreements are currently set out in the Electricity Industry Code and cannot be altered by energy retailers.

**Termination Amount** means an amount payable by a Jasmin Solar Customer under a Jasmin Solar Customer Agreement if that Jasmin Solar Customer Agreement is terminated.

**Undertaking** is a reference to all provisions of this document, including its schedules and as varied from time to time under section 87B of the Act.

## 2. Interpretation

- 2.1 In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:
- (a) a reference to this Undertaking includes all of the provisions of this document including its schedules;
  - (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;
  - (c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
  - (d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
  - (e) a reference in this Undertaking to any company includes its Related Bodies Corporate;
  - (f) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
  - (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
  - (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
  - (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
  - (j) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
  - (k) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;
  - (l) a construction that would promote the purpose - or object - underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
  - (m) material not forming part of this Undertaking may be considered to:

Undertaking given to the Australian Competition and Consumer Commission under section 87B of the *Competition and Consumer Act 2010* by Jasmin Solar Pty Ltd ACN 158 644 225 and Diamond Energy Pty Ltd ACN 107 516

- (i) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question; or
  - (ii) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
- (n) in determining whether consideration should be given to any material in accordance with paragraph (m), or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to the:
- (i) effect that reliance on the ordinary meaning conveyed by the text of the clause would, have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and
  - (ii) need to ensure that the result of the Undertaking is to completely address any ACCC competition concerns;
- (o) the ACCC may authorise the Adjudication Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;
- (p) in performing their obligations under this Undertaking, Jasmin Solar and the Jasmin Solar Energy Retailer will do everything reasonably within their power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking;
- (q) a reference to:
- (i) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
  - (ii) a party includes its successors and permitted assigns; and
  - (iii) a monetary amount is in Australian dollars.

## Schedule 2 – Proposed Independent Auditor

This form sets out the information required by the ACCC in relation to proposed appointment of any Proposed Independent Auditor under the Undertaking.  
This form is to be used for the appointment of each Proposed Independent Auditor.

Please note in relation to information given on in relation to this form, giving false or misleading information is a serious offence.

### Method of Delivery to the ACCC

The completed appointment form, along with the additional requested information is to be provided to the ACCC with the subject line (*Proposed Independent Auditor Form – Jasmin Solar Pty Ltd and Diamond Energy Pty Ltd section 87B undertaking*) to the below email addresses:

- 1) [adjudication@accc.gov.au](mailto:adjudication@accc.gov.au)  
Attention: General Manager  
Adjudication Branch  
Mergers and Adjudication Group
- 2) **With a copy sent to:**  
[mergersucu@accc.gov.au](mailto:mergersucu@accc.gov.au)  
Attention: Director  
Undertaking Compliance Unit  
Coordination and Strategy Branch  
Mergers and Adjudication Group

### Information Required

The ACCC requires the following information in order to assess a Proposed Independent Auditor

- 1) Proposed Independent Auditor Details:

- (a) the name of the Proposed Independent Auditor; and
- (b) the name of the Proposed Independent Auditor's employer and contact details including:

- Address;
- Contact name;
- Telephone number;
- Other contact details.

- 2) A submission containing the following information:

- (a) details of Proposed Independent Auditor's qualifications and experience relevant to his or her proposed role pursuant to the Undertaking.

Undertaking given to the Australian Competition and Consumer Commission under section 87B of the *Competition and Consumer Act 2010* by Jasmin Solar Pty Ltd ACN 158 644 225 and Diamond Energy Pty Ltd ACN 107 516

- (b) the names of the [owner/s and the directors (if any) apply) of the Proposed Independent Auditor's employer.
- (c) details of any of the following types of relationships between the Jasmin Solar Energy Retailer or Jasmin Solar and the Proposed Independent Auditor or the Proposed Independent Auditor's employer or confirmation that no such relationship exists whether within Australia or outside of Australia:
- (i) Jasmin Solar Energy Retailer / Jasmin Solar and the Proposed Independent Auditor's employer are Associated Entities.
  - (ii) Jasmin Solar Energy Retailer / Jasmin Solar is an Entity Connected with the Proposed Independent Auditor's employer.
  - (iii) The Proposed Independent Auditor's employer is an Entity Connected with Jasmin Solar Energy Retailer /Jasmin Solar.
  - (iv) Jasmin Solar Energy Retailer / Jasmin Solar and the Proposed Independent Auditor's employer are Related Entities.
  - (v) Jasmin Solar Energy Retailer /Jasmin Solar and the Proposed Independent Auditor's employer are Related Parties
  - (vi) any Related Party, Related Entity or Entity Connected with Jasmin Solar Energy Retailer / Jasmin Solar is a Related Party, Related Entity or Entity Connected with the Proposed Independent Auditor.
  - (vii) Jasmin Solar Energy Retailer / Jasmin Solar and the Proposed Independent Auditor or the Proposed Independent Auditor's employer have a contractual relationship or had one within the past three years, other than those attached to this form.
  - (viii) the Proposed Independent Auditor's employer is a supplier of Jasmin Solar Energy Retailer / Jasmin Solar or has been in the past three years.
  - (ix) Jasmin Solar Energy Retailer / Jasmin Solar is a supplier of the Proposed Independent Auditor's employer or has been in the past three years.
  - (x) any other relationship between Jasmin Solar Energy Retailer / Jasmin Solar and the Proposed Independent Auditor or the Proposed Independent Auditor's employer that allows one to affect the business decisions of the other.
- 3) A document outlining the terms of appointment for the Proposed Independent Auditor.