



Australian Government

Department of Climate Change, Energy,  
the Environment and Water

[Draft Dated: December 2023]

# Capacity Investment Scheme Agreement

[Insert Facility name]

—

The Commonwealth of Australia represented by the  
Department of Climate Change, Energy, the Environment  
and Water (**Commonwealth**)

[Insert name] (ACN/ABN [insert number]) (**Operator**)

—

## [Important Notice]

This is a copy of the draft Capacity Investment Scheme Agreement (**CISA**) provided in connection with the Capacity Investment Scheme tender process being conducted by the Australian Government pursuant to the Capacity Investment Scheme South Australia and Victoria Tender Guidelines issued by the Australian Government on 15 December 2023 (**Tender Guidelines**). Capitalised terms in this Important Notice have the meaning in the Tender Guidelines.

The draft Project Documents are not an offer by the Australian Government or AEMO to enter into those documents with any entity which receives a copy of those documents and does not impose any legal commitment on the Australian Government or AEMO.

The provision of the draft Project Documents to Proponents is not intended to create legal rights for any party or to form a legally binding relationship, obligation or commitment by or involving the Australian Government or AEMO. Recipients of the draft Project Documents should not rely on them or their contents as the sole basis for making any financial, investment or business decisions. The Australian Government reserves the right to withdraw or amend the draft Project Documents at any time.]



# Capacity Investment Scheme Agreement

<b>Details</b>	<b>8</b>
Parties	8
Background	8
<b>Agreed terms</b>	<b>9</b>
<b>1. Defined terms &amp; interpretation</b>	<b>9</b>
1.1 Defined terms	9
1.2 Interpretation	22
1.3 Order of precedence	23
1.4 Indexation	24
1.5 Commonwealth's rights, duties and functions	25
1.6 Reasonable endeavours of the Commonwealth	26
1.7 No Commonwealth Liability for Review and Approval	26
1.8 Prior approval or consent	26
1.9 Action without delay	26
1.10 Provisions limiting or excluding Liability, rights or obligations	26
1.11 Relationship of the parties	27
<b>2. Term</b>	<b>27</b>
<b>3. Conditions Precedent</b>	<b>27</b>
3.1 Commencement	27
3.2 Satisfaction of Conditions Precedent	27
3.3 Draft CP Cure Plans and CP Cure Plans	28
3.4 Failure to meet CP Sunset Date	29
3.5 Extension of CP Dates	29
3.6 Waiver of Conditions Precedent	29
<b>4. Contract Manager for each Party</b>	<b>29</b>
<b>5. Milestone Events</b>	<b>30</b>
5.1 Achievement of Milestone Events	30
5.2 Draft ME Cure Plans and ME Cure Plans	31
5.3 Failure to meet COD (Sunset)	32
5.4 Extension of dates related to Milestone Events	32
5.5 Sole remedy	32
<b>6. Construction obligations</b>	<b>33</b>
6.1 General construction obligations	33
6.2 Testing and commissioning plan	33
<b>7. Commercial Operation</b>	<b>33</b>
<b>8. Delay and extensions</b>	<b>34</b>
8.1 Extension of required dates	34
8.2 Cap on extensions	35
8.3 Unilateral Extensions	35
<b>9. Operation and maintenance requirements</b>	<b>35</b>
9.1 General operation obligations	35
9.2 Trading Protocol	36



9.3	Maintenance plan	36
9.4	Operation and scheduling	36
9.5	Offtake and related party arrangements	37
9.6	Emergency maintenance	37
<b>10.</b>	<b>Performance and Other Requirements</b>	<b>37</b>
10.1	Performance Requirement obligations	37
10.2	Measurement and validation	37
10.3	Performance Requirement failures	38
10.4	The Operator is a special purpose vehicle	39
<b>11.</b>	<b>Performance Event</b>	<b>39</b>
<b>12.</b>	<b>Authorisations</b>	<b>39</b>
12.1	Authorisations	39
12.2	Notice to Commonwealth	39
<b>13.</b>	<b>Insurance</b>	<b>40</b>
13.1	Insurances required	40
13.2	Insurer	40
13.3	Maintenance of Insurance Policies	40
13.4	Evidence of insurance	40
13.5	Non-vitiation	41
<b>14.</b>	<b>Alterations to the Facility</b>	<b>41</b>
<b>15.</b>	<b>Social Licence</b>	<b>41</b>
15.1	Obligation to comply	41
15.2	Reports and auditing	41
15.3	Audit	43
15.4	Non-compliance	43
15.5	SLC Cure Plan	43
15.6	Termination regarding SLCs	44
<b>16.</b>	<b>Knowledge Sharing</b>	<b>45</b>
<b>17.</b>	<b>[Not used]</b>	<b>45</b>
<b>18.</b>	<b>Invoicing and Payment</b>	<b>45</b>
18.1	Invoicing	45
18.2	Payment	46
18.3	Disputed Invoice	46
18.4	Adjustments	47
18.5	Interest on late payments	47
18.6	Set off	47
<b>19.</b>	<b>Taxes</b>	<b>48</b>
<b>20.</b>	<b>GST</b>	<b>48</b>
20.1	Definitions and interpretation	48
20.2	GST Exclusive Consideration	48
20.3	Barter supply	48
20.4	GST gross-up	48
20.5	Payments and reimbursements	49
20.6	Adjustments	49
20.7	No Partnership	49
<b>21.</b>	<b>Force Majeure</b>	<b>49</b>
21.1	Project Force Majeure Event	49



21.2	Connection Force Majeure Event	50
21.3	Notification	51
21.4	Suspension of obligations	51
21.5	Accrued rights and obligations	51
21.6	Extension	51
21.7	Mitigation	52
21.8	Impact on payments	52
21.9	Termination for extended Force Majeure Event	52
21.10	Cessation	52
21.11	Pre-existing Force Majeure Event	52
<b>22.</b>	<b>Not used</b>	<b>52</b>
<b>23.</b>	<b>Reinstatement</b>	<b>53</b>
23.1	Reinstatement Event	53
23.2	Reinstatement plan	53
23.3	Consequences of failing to reinstate	53
23.4	Obligation to reinstate	54
<b>24.</b>	<b>Change in Law</b>	<b>54</b>
24.1	Change in Law	54
24.2	Exclusions	54
24.3	Mitigation	55
24.4	Notice	55
24.5	Payment	55
<b>25.</b>	<b>[Not used]</b>	<b>56</b>
<b>26.</b>	<b>[Not used]</b>	<b>56</b>
<b>27.</b>	<b>Termination</b>	<b>56</b>
27.1	Termination for Convenience by the Commonwealth	56
27.2	Termination by the Commonwealth for Operator Default	56
27.3	Preservation of rights	58
27.4	Sole basis of termination	58
<b>28.</b>	<b>Payments on Termination</b>	<b>58</b>
28.1	Fixed Termination Payment and Early Termination Payment	58
28.2	Sole remedy	59
28.3	Unenforceability	59
28.4	Invoice	59
<b>29.</b>	<b>Assignment and Change in Control</b>	<b>60</b>
29.1	Assignment or Novation By Operator	60
29.2	Security Interest	60
29.3	Assignment or Novation By Commonwealth	60
29.4	Non-compliance	61
29.5	Change in Control	61
<b>30.</b>	<b>Risk and Liability</b>	<b>61</b>
30.1	Indemnity	61
30.2	Limitation of liability	62
30.3	Benefits held on trust	63
<b>31.</b>	<b>Representations and Warranties by the Operator</b>	<b>63</b>
31.1	General warranties	63
31.2	Operator warranties	64
31.3	Tender matters	64



31.4	Repetition	65
31.5	Trustee representations and warranties	65
31.6	Trustee undertakings	65
31.7	Restrictions on the Trustee	65
31.8	Trustee limitation of liability	66
31.9	No reliance	66
<b>32.</b>	<b>[Not used]</b>	<b>66</b>
<b>33.</b>	<b>Performance Security</b>	<b>66</b>
<b>34.</b>	<b>Intellectual Property</b>	<b>68</b>
34.1	Project Intellectual Property	68
34.2	Licence of Specified Material	68
34.3	Moral rights	68
34.4	Warranties	68
34.5	Intellectual Property Indemnity	69
34.6	Remedy for breach of warranty	69
<b>35.</b>	<b>Subcontracting</b>	<b>69</b>
35.1	Operator remains responsible	69
35.2	Key Subcontractors	69
<b>36.</b>	<b>Confidentiality</b>	<b>70</b>
36.1	Confidential Information not to be Disclosed	70
36.2	Exception to obligations of Confidentiality	70
36.3	Freedom of information	71
<b>37.</b>	<b>Access, records and reporting</b>	<b>71</b>
37.1	Operator to retain records	72
37.2	Access to records	72
37.3	Other information	73
37.4	Right to access and audit	73
37.5	Site Inspection	74
<b>38.</b>	<b>Reporting</b>	<b>74</b>
38.1	CP Period Reporting	74
38.2	Construction Period Reporting	75
38.3	Operating reports	75
38.4	Revenue reports	77
38.5	Capacity Products and Green Product reporting	77
38.6	Foreign Acquisitions and Takeovers Act reporting	77
38.7	Assurances	78
38.8	Provision of further information	78
<b>39.</b>	<b>Publicity</b>	<b>78</b>
<b>40.</b>	<b>Relevant Commonwealth Policies and Other Requirements</b>	<b>79</b>
<b>41.</b>	<b>Dispute Resolution</b>	<b>79</b>
41.1	Dispute mechanism	79
41.2	No proceedings	79
41.3	Disputes	79
41.4	Procedure to resolve Disputes	79
41.5	Negotiation	79
41.6	Independent Expert	80
41.7	Other relief	80
41.8	Continued performance following a Dispute	80



41.9 Interim relief	81
<b>42. Pooled Disputes</b>	<b>81</b>
42.1 Referral of Pooled Disputes	81
42.2 Resolution by Pooled Dispute Panel	81
42.3 Bilateral resolution	82
<b>43. Governing Law</b>	<b>82</b>
<b>44. Notices</b>	<b>82</b>
44.1 Form	82
44.2 Delivery	82
44.3 When effective	82
44.4 When taken to be received	82
44.5 Receipt outside business hours	83
<b>45. General</b>	<b>83</b>
45.1 Variation and waiver	83
45.2 Consents, approvals or waivers	83
45.3 Discretion in exercising rights	83
45.4 Partial exercising of rights	83
45.5 Remedies cumulative	83
45.6 Indemnities and reimbursement obligations	83
45.7 Supervening law	84
45.8 Counterparts	84
45.9 Entire agreement	84
45.10 Expenses and no liability for loss	84
45.11 Rules of construction	84
45.12 Severability	84
45.13 Survival	85
45.14 Proportionate liability	85
45.15 Further steps	85
<b>Schedule 1 – Reference Details</b>	<b>86</b>
<b>Schedule 2 - Conditions Precedent</b>	<b>89</b>
<b>Schedule 3 - Milestone Events and Milestone Dates (Scheduled)</b>	<b>91</b>
<b>Schedule 4 – Payment Mechanism</b>	<b>92</b>
<b>Schedule 5 – Termination Payments</b>	<b>100</b>
<b>Schedule 6 – Knowledge Sharing Plan</b>	<b>101</b>
<b>Schedule 7 – Key Subcontractors</b>	<b>103</b>
<b>Schedule 8 – Social Licence Commitments</b>	<b>104</b>
<b>Schedule 9 – Form of Tripartite Deed</b>	<b>105</b>
<b>Schedule 10 – Form of Performance Security</b>	<b>106</b>
<b>Schedule 11 - Commonwealth Policy and Other Requirements</b>	<b>107</b>
<b>1. Taxation and Shadow Economy Policy</b>	<b>107</b>
1.1 Definitions	107
1.2 Taxation	107
1.3 Valid Statement of Tax Record	107
<b>2. Workplace Gender Equality</b>	<b>108</b>
2.1 Workplace Gender Equality	108
<b>3. Modern Slavery</b>	<b>108</b>



<b>4. Workplace Laws</b>	<b>109</b>
<b>5. Significant Events</b>	<b>109</b>
5.1 Definition	109
5.2 No existing Significant Event	109
5.3 Notice of Significant Event	109
5.4 Commonwealth response to a Significant Event	110
5.5 Remediation plan	110
5.6 General	111
<b>6. Archives Act</b>	<b>111</b>
<b>7. National Anti-Corruption Commission</b>	<b>112</b>
<b>8. Public Interest Disclosure</b>	<b>112</b>
<b>9. Criminal Code</b>	<b>112</b>
<b>10. Prohibited dealings</b>	<b>113</b>
<b>11. Environment</b>	<b>113</b>
<b>12. Privacy</b>	<b>114</b>
<b>13. Fraud</b>	<b>114</b>
<b>Signing page</b>	<b>115</b>



# Details

Date

---

## Parties

Name	<b>The Commonwealth of Australia</b> represented by the <b>Department of Climate Change, Energy, the Environment and Water</b>
Short form name	<b>Commonwealth</b>
Notice details	[insert address] Email: [insert] Attention: [insert]

---

Name	<b>[insert name]</b> (ACN/ABN [insert])
Short form name	<b>Operator</b>
Notice details	[insert address] Email: [insert] Attention: [insert]

---

## Background

- A Following a competitive tender process, the Operator has been awarded this long term revenue support agreement in respect of the Facility by the Commonwealth.
- B As a condition of the award of this Agreement, the Operator has agreed to design, construct, commission, test, complete, operate, manage and maintain the Facility in each case in accordance with this Agreement
- C Amongst other things, the parties will make the payments set out in Schedule 4 during the Support Period.



# Agreed terms

## 1. Defined terms & interpretation

### 1.1 Defined terms

In this document:

**Accounts and Records** has the meaning given in clause 37.1(a).

**Actual LOR3 Event** means AEMO has declared that 'LOR Load Shedding' is occurring in the region of the NEM that relates to the Relevant Jurisdiction as a result of a shortfall of available capacity reserves (an actual LOR3) in accordance with the Reserve Level Declaration Guidelines and the NER.

**Adjusted Net Operational Revenue** has the meaning given in section 12 of Schedule 4.

**AEMO** means the Australian Energy Market Operator Limited ACN 072 010 327, or any successor entity that is the market operator from time to time under the National Electricity Law.

**Affected Party** means the party affected by the event or circumstance that constitutes a Force Majeure Event.

**Aggregate Annual Rebate** has the meaning given in section 9 of Schedule 4.

**Ancillary Services** has the meaning given in the NER.

**Annual Payment Cap** has the meaning given in Schedule 1.

**Annual Reconciliation Payment** has the meaning given in section 7 of Schedule 4.

**Annual Revenue Ceiling** has the meaning given in Schedule 1.

**Annual Revenue Floor** has the meaning given in Schedule 1.

**Annual Revenue Sharing Amount** has the meaning given in section 11 of Schedule 4.

**Annual Storage Capacity Report** has the meaning given in clause 38.3(b).

**Annual Support Amount** has the meaning given in section 10 of Schedule 4.

**Approved Reinstatement Plan** has the meaning given in clause 23.2.

**Associate**, in respect of a party, means that party's officers, employees, servants, agents, advisers, consultants, contractors and direct or indirect subcontractors.

**Audit** means an audit and inspection conducted in accordance with clause 37.4.

**Auditor** has the meaning given in clause 37.4(a).

**Authorisation** means any applicable consent, licence, approval, permit, registration, accreditation, determination, certificate, registration, permission, filing or other authorisation that is required to be issued by or obtained from any Government Agency or in accordance with any Law.

**Authorised Bank** means a bank or financial institution that is the holder of a current licence and is regulated by the Australian Prudential Regulation Authority, or an equivalent regulatory authority in its place of incorporation and which has the Required Rating.

**Availability Rebate** has the meaning given in section 4.1 of Schedule 4.

**Availability Rebate Percentage** has the meaning given in section 4.2 of Schedule 4.

**Background Intellectual Property** means any Intellectual Property developed independently of the Project and used by or on behalf of the Operator for the purpose of undertaking the Project.

**Bid** means a 'dispatch bid' (as defined in the NER) made in accordance with this Agreement and the NER in respect of the Project.

**Breach Notice** has the meaning given in clause 27.2(e)(i).



**Business Day** means:

- (a) for receiving a Notice under clause 44, a day that is not a Saturday, Sunday, public holiday or bank holiday in the place where the notice is received; and
- (b) for all other purposes, a day that is not a Saturday, Sunday, bank holiday or public holiday in the capital city of the Relevant Jurisdiction or the Australian Capital Territory.

**Capacity Product** means any right, entitlement, credit, offset, allowance, compensation, payment, benefit or certificate of any kind, recognised or arising under any scheme, Law, policy or arrangement which becomes available to the owner or operator of a generating facility that is attributable to the capacity or availability of the Project, but not including any Green Products or any Ancillary Services.

**Change in Control** occurs in relation to the Operator (whether alone or together with any Associate or Associates) where:

- (a) a person who does not Control the Operator acquires such Control;
- (b) a person that Controls the Operator ceases to have such Control;
- (c) a change in the manager, trustee or Responsible Entity of any Entity that is a trust, but in each case does not include a change in Control of the Operator which occurs as a result of:
- (d) the Operator or any of its Related Bodies Corporate becoming listed on the Australian Stock Exchange or other recognised securities exchange;
- (e) a transfer of or other dealing in shares in the Operator or any of its Related Bodies Corporate that are listed on the Australian Stock Exchange or other recognised securities exchange; or
- (f) an internal restructure or reorganisation, provided that the restructuring or reorganisation does not result in a change to the Ultimate Holding Company (as defined in the Corporations Act) of the Operator.

For the purposes of this definition of Change in Control, "Associate" or "Associates" has the meaning given in the Corporations Act and includes a person deemed to be an associate of a designated body (within the meaning of section 12 of the Corporations Act).

**Change in Law** means the imposition of, change in, change in the application or official interpretation of or repeal of a Law:

- (a) related to a derogation from the NEL or NER at a State level; or
- (b) which expressly or exclusively applies to the Project, the Facility, its assets or the Project area or to the Operator but only in its capacity as the person contracting with the Commonwealth to implement the Project,

but which expressly excludes the changes described in clause 24.2, change in planning or Environmental requirements associated with the design development, construction, testing, commission, completion, operation or decommissioning of the Project (including any native title or cultural heritage costs) and any change in the NEL or NER which as at the Signing Date is the subject of a final determination of the Australian Energy Market Commission or the Energy Security Board.

**Claim** means any claim, action, demand, suit or proceeding (including for breach of contract, tort (including negligence) or any other common law, equitable or statutory cause of action or by way of contribution or indemnity) made under any Project Document or otherwise at Law in connection with the Project, including for specific performance, restitution, payment of money (including damages), an extension of time or any other form of relief or remedy.

**COD or Commercial Operation Date** means the date on which Commercial Operation is achieved.

**COD Condition** has the meaning given in clause 0.

**COD (Sunset)** has the meaning given in Schedule 1.

**COD (Target)** has the meaning given in Schedule 1.



**Commencement Date** has the meaning given in clause 3.2(d).

**Commercial Close** means the time at which:

- (a) the Operator has secured the equity and/or internal shareholder debt financing that is required to fund the construction and commissioning of the Project; and
- (b) the Operator issues an unconditional notice to proceed for the full scope of work under the engineering, procurement and construction contract (or equivalent) for the Project.

**Commercial Operation** means that:

- (a) all COD Conditions have either been satisfied by the Operator in accordance with clause 7(a) or waived by the Commonwealth; and
- (b) the Operator has provided to the Commonwealth all notices and accompanying documents referred to in clause 5.1.

**Communications** has the meaning given in clause 44.1.

**Condition Precedent** means each condition specified in Schedule 2.

**Condition Precedent Date** means, for each Condition Precedent, the relevant date identified as the Condition Precedent Date in Schedule 2 (as such date may be adjusted pursuant to this Agreement).

**Confidential Information** means information (regardless of its form) that is by its nature confidential and:

- (a) is designated by a party as confidential; or
- (b) a party knows or ought to know is confidential,

but does not include information which:

- (c) is in the public domain or becomes publicly available other than through a breach of any Project Document including clause 36 or any other confidentiality obligation of the disclosing party;
- (d) has been independently developed or acquired by the disclosing party; and
- (e) is disclosed with the prior written consent of the party which provided the information (such consent not to be unreasonably withheld or delayed) to the other party.

**Connection Force Majeure Event** has the meaning given in clause 21.2.

**Connection Point** means the "connection point" (as defined in the NER) for the Facility.

**Consolidated Group** means a Consolidated Group or MEC (Multiple Entry Consolidated) group as those terms are defined in section 995-1 of the *Income Tax Assessment Act 1997* (Cth).

**Construction Contracts** means any one or more contracts between the Operator and its subcontractors which when performed in the aggregate will result in the completion of the design, construction, commissioning and testing of the Facility to enable it to comply with the Performance Requirements.

**Construction Period** means the period commencing on the Commencement Date and ending on the earlier of:

- (a) COD; and
- (b) the date this Agreement is terminated or otherwise ends.

**Contract Manager** has the meaning given in clause 4(a).

**Contracted Capacity** has the meaning given in Schedule 1.

**Contracted Percentage** has the meaning given in Schedule 1.

**Control** has the meaning given in section 50AA of the Corporations Act, except that:

- (a) the application of section 50AA(4) will be disregarded;



- (b) in the case of a body corporate, it includes the direct or indirect right to exercise more than 50% of the votes exercisable at a general meeting of that body corporate and the direct or indirect right to appoint more than 50% of its directors;
- (c) in the case of a trust, it includes the direct or indirect right to exercise more than 50% of the votes exercisable by the beneficiaries of that trust in their capacity as beneficiaries and the ability to appoint or remove the trustee of the trust;
- (d) in the case of any other person, it includes the direct or indirect right to exercise more than 50% of the voting rights in the person; and
- (e) in the case of any person (including those listed in paragraphs (b) to (d) above), it includes the direct or indirect capacity to determine the outcome of decisions about the person's financial and operating policies,

and **Controlled** has a corresponding meaning.

**Controller** means, in relation to a Change in Control of the Operator, the person or body corporate to whom Control will pass.

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

**Corrected GST Amount** has the meaning given in clause 20.6(a).

**Cost Change Principles** means:

- (a) any increase in the Operator's costs will be discounted for any related economic benefit to the Operator associated with the relevant Change in Law (including any tax benefits); and
- (b) where the most efficient response to the Change in Law involves the incurring of capital expenditure by the Operator, the cost of that capital expenditure will be annualised and allocated on a proportional basis between the remaining Term and the expected useful economic life of the relevant capital item.

**Cost Change Threshold** means \$500,000 (Indexed).

**CP Cure Plan** has the meaning given in clause 3.3(f).

**CPI** means the Consumer Price Index (All Groups) weighted average of the eight capital cities of Australia as published for a Quarter by the Australian Bureau of Statistics or if clause 1.4(c) applies, the index determined in accordance with clause 1.4(c).

**CP Period** means the period commencing on the Signing Date and ending on the earlier of the Commencement Date and CP Sunset Date.

**CP Sunset Date** has the meaning given in Schedule 1 as such date may be adjusted pursuant to the terms of this Agreement.

**CP Target Date** has the meaning given in Schedule 1 as such date may be adjusted pursuant to the terms of this Agreement.

**Deemed Availability Period** has the meaning given in section 4.3(b) of Schedule 4.

**Default Interest Rate** means the rate which is the Australian Tax Office General Interest Charge rate current at the due date of payment expressed as a percentage.

**Dispute** has the meaning given in clause 41.1.

**Disputed Amount** has the meaning given in clause 18.3(a).

**Dispute Notice** has the meaning given in clause 41.3.

**Draft CP Cure Plan** has the meaning given in clause 3.3(a).

**Draft ME Cure Plan** has the meaning given in clause 5.2(a).

**Draft PR Cure Plan** has the meaning given in clause 10.3(c)(iv).

**Draft SLC Cure Plan** has the meaning given in clause 15.5(a).

**Early Termination Payment** has the meaning given in Schedule 5.

**Election to Reinstate** has the meaning given in clause 23.1(a).



**Energy** means electricity exported to the Network by the Facility as measured at the Metering Point.

**Entity** has the meaning given in section 64A of the Corporations Act, but is also deemed to include a joint venture within the meaning of Australian Accounting Standard 131 (AASB 131).

**Environment** means the physical factors of the surroundings of humans and other life forms, including the land, soil, plants, habitat, waters, atmosphere, climate, sounds, odours, tastes, biodiversity and the social and aesthetic characteristics.

**Equivalent Availability Factor** means the amount determined in accordance with section 4.3 of Schedule 4.

**Equivalent Availability Threshold** means 90%.

**Expiry Date** means the Final Expiry Date, unless this Agreement is terminated or ends prior to that date in which case the Expiry Date will be the date of that termination or end.

**Facility** has the meaning given in Schedule 1.

**Final Expiry Date** has the meaning given in Schedule 1.

**Final Support Commencement Date** has the meaning given in Schedule 1.

**Financial Close** means the time at which:

- (a) the Operator has secured the equity and external debt financing that is required to fund the construction and commissioning of the Project, and all conditions precedent to first draw down under that financing have been satisfied or waived and that first draw down is made available to the Operator; and
- (b) the Operator issues an unconditional notice to proceed for the full scope of work under the engineering, procurement and construction contract (or equivalent) for the Project.

**Financial Year** means:

- (a) for the first Financial Year, the period commencing on the Signing Date until the next 30 June;
- (b) subject to paragraph (c) of this definition, each subsequent 12 Month period commencing on 1 July and ending on 30 June; and
- (c) for the final Financial Year, the period from the end of the last full Financial Year (as identified in paragraph (b) of this definition) to the Expiry Date,

unless this Agreement is terminated or ends earlier, in which case the last Financial Year will be the period from the end of the last full Financial Year (as identified in paragraph (b) of this definition) immediately preceding the termination or end date to the Expiry Date.

**Financier** means any person or organisation which provides funding to the Operator, or a Related Body Corporate of the Operator, for the Project under a Funding Agreement.

**Fixed Termination Payment** has the meaning given in Schedule 5.

**Force Majeure Event** means a Project Force Majeure Event or a Connection Force Majeure Event.

**Funding Agreement** means any agreement under which funding is provided for the Project, security is granted by the Operator in respect of that funding and/or derivatives are entered into by the Operator for the Project.

**Good Faith** means acting honestly, reasonably, with fair dealing and in a manner consistent with and which does not undermine this Agreement

**Good Industry Practice** means Good Construction Industry Practice and Good Electricity Industry Practice or either one of them (as the case may be).

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



**Good Electricity Industry Practice** has the meaning given in the National Electricity Rules.

**Government Agency** means a government, government department or other body, or a governmental, semi-governmental, judicial, municipal, statutory or public entity or authority (including a statutory authority, a State owned enterprise or a corporate Commonwealth entity), a self-regulatory authority established under statute, or a stock exchange (wherever created or located) or a person (whether or autonomous or not) who is charged with the administration of the Law.

**Green Product** means any right, entitlement, credit, offset, allowance, compensation, payment, benefit or certificate of any kind, recognised or arising under any scheme, Law, policy or arrangement which may be created in respect of, or relate to, the regulation or reduction of greenhouse gas emissions.

**GST Amount** has the meaning given in clause 20.4(a).

**GST Exclusive Consideration** has the meaning given in clause 20.4(a).

**GST Group** means a GST group formed in accordance with Division 48 of the GST Law and any related act imposing such tax or legislation that is enacted to validate, recapture or recoup such tax.

**GST Law** has the meaning given to that term in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**Import Capacity** has the meaning given in Schedule 1.

**Independent Expert** has the meaning given in clause 41.6.

**Indexed** means the relevant amount is to be indexed in accordance with the CPI Factor set out in clause 1.4.

**Input Resource** means the energy available at the Connection Point.

**Insolvency Event** means, in respect of the Operator:

- (a) it is (or states that it is) an insolvent under administration or insolvent (each as defined in the Corporations Act);
- (b) it is in liquidation, in provisional liquidation, under administration or wound up or has had a "controller" (as defined in the Corporations Act) appointed to all or substantially all of its property;
- (c) it is subject to any arrangement (including a deed of company arrangement or scheme of arrangement), assignment, moratorium or compromise or composition, protected from creditors under any statute or dissolved (in each case, other than to carry out a reconstruction or amalgamation while solvent on terms approved by the other parties to this Agreement);
- (d) an application or order has been made (and in the case of an application which is disputed by the person, it is not stayed, withdrawn or dismissed within 10 Business Days), resolution passed, proposal put forward or any other action taken, in each case in connection with that person, which is preparatory to or could result in any of the things described in paragraphs (a), (b) or (c) or any other action taken, in each case in connection with that person, in respect of any of the things described in paragraphs (a), (b) or (c);
- (e) it is taken (under section 459F(1) of the Corporations Act) to have failed to comply with a statutory demand;
- (f) it is the subject of an event described in section 459C(2)(b) or section 585 of the Corporations Act (or it makes a statement from which the Commonwealth reasonably deduces it is so subject);
- (g) it is otherwise unable to pay its debts when they fall due; or
- (h) something having a substantially similar effect to any of the things described in paragraphs (a) to (g) happens in connection with the Operator under the law of any jurisdiction.



**Insurance Policies** means the policies specified in clause 13.1.

**Intellectual Property** means all intellectual property rights, including the following rights:

- (a) patents, copyright (including future copyright), rights in circuit layouts, designs, trade and service marks (including goodwill in those marks), know how, domain names and trade names and any right to have information kept confidential;
- (b) any application or right to apply for registration of any of the rights referred to in paragraph (a); and
- (c) all rights of a similar nature to any of the rights in paragraphs (a) and (b) that may subsist anywhere in the world (including Australia),

whether or not such rights are registered or capable of being registered.

**Key Subcontract** means a contract between the Operator and any Key Subcontractor and any direct or indirect Key Subcontractor which performs any part of the Operator's obligations under any Transaction Document.

**Key Subcontractor** means a Subcontractor: **[Drafting note: this value will be set as a percentage of total capital expenditure being 20% of Capex during the Construction Period and 50% of annual Opex during the Operations Period. The shortlisted Proponent is required to provide that information as part of its Financial Value Bid in Stage B of the Tender Process.]**

- (a) specified as such in Schedule 7;
- (b) under a Subcontract which has a contract value of more than \$[insert amount] (Indexed) in the Construction Phase;
- (c) whose various Subcontracts have an aggregate value of more than \$[insert amount] (Indexed) in the Construction Phase;
- (d) under a Subcontract which has a contract value of more than \$[insert amount] (Indexed) in the Operations Period; and
- (e) whose various Subcontracts have an aggregate value of more than \$[insert amount] (Indexed) in the Operations Period,

and any replacement of that Subcontractor in accordance with this Agreement.

**Knowledge Sharing Deliverables** means the deliverables set out in the Knowledge Sharing Plan.

**Knowledge Sharing Plan** means the knowledge sharing plan set out in Schedule 6.

**Law** means:

- (a) those principles of common law and equity established by decisions of courts;
- (b) any legislation or regulation; or
- (c) any Authorisation (including any conditions or requirements under them) which is issued under an instrument referred to in paragraph (b) of this definition.

**Liability** means any debt, obligation, claim, action, cost (including legal costs, deductibles or increased premiums), expense, loss (whether direct or indirect), damage, compensation, charge or liability of any kind (including fines or penalties), whether it is:

- (a) actual, prospective or contingent; or
- (b) currently ascertainable or not,

and whether under or in any way in connection with any of the Project Documents or arising at Law.

**Location** means the region of the NEM in relation to which the Project is to be registered, and **Located** has a corresponding meaning

**LOR Period** means, in respect of a Performance Event, the period commencing on the declaration of a Actual LOR3 Event and ending on the earlier of:



- (a) the point after that declaration at which the Facility has been dispatched for an aggregate amount of energy equal to 50% of the Contracted Capacity multiplied by the Minimum Hours (and that aggregate is expressed in MWh); and
- (b) the completion or cancellation of that Actual LOR3 Event.

**Loss** means any loss, damage, liability, cost or expense (including legal expenses on a full indemnity basis) of any kind suffered or incurred or agreed to be paid by way of settlement or compromise.

**Maximum Capacity** has the meaning given in Schedule 1.

**ME Cure Plan** has the meaning given in clause 5.2(f).

**Metering Point** has the meaning given in Schedule 1.

**Milestone Event** means each milestone described in Schedule 3.

**Milestone Date (Scheduled)** means, in respect of a Milestone Event, the Milestone Dates (Scheduled) identified as such in Schedule 3 in respect of that Milestone Event (as such date may be adjusted pursuant to this Agreement).

**Minimum Hours** has the meaning given in Schedule 1.

**Minimum State of Charge** has the meaning given in Schedule 1.

**Month** means a calendar month.

**National Electricity Law** means the National Electricity Law set out in the schedule to the *National Electricity (South Australia) Act 1996* (SA) as it applies in the Relevant Jurisdiction.

**National Electricity Market** and **NEM** means the national electricity market managed by AEMO pursuant to the National Electricity Law and the National Electricity Rules.

**National Electricity Rules** and **NER** means the National Electricity Rules made under the National Electricity Law, as it is applied in the Relevant Jurisdiction.

**Net Annual Payment** has the meaning given in section 8 of Schedule 4.

**Net Operational Revenue** means, for a period, the Operational Revenue for that period less the Permitted Costs for that period.

**Network** means the transmission or distribution network (as applicable) to which the Facility is connected at its Connection Point.

**Network Support Services** means any service provided by the Facility to support a transmission network or a distribution network, including any service that is an alternative to network augmentation.

**Notice to Proceed Date** has the meaning given in Schedule 1.

**Offtake Contract** means any contract, arrangement or understanding entered into by the Operator in relation to:

- (a) electricity imported and/or exported by the Project;
- (b) Ancillary Services provided by the Project;
- (c) the Rated Capacity, Registered Capacity or Maximum Capacity of the Project; and/or
- (d) the energy Storage Capacity of the Project.

To avoid doubt, without limitation an Offtake Contract may take the form of:

- (e) a purchase contract;
- (f) subject to clause 9.5, a tolling contract, a lease or such other arrangement as gives a third party the economic benefit of the Project for a period of time;
- (g) an underwriting arrangement in respect of the profit or revenue of the Project or the Operator; and/or
- (h) a derivative, forward, option or any such combination where the consideration under it is derived by reference to electricity, Capacity Products or Green Products.



**Operational Revenue** means, in respect of a period, the revenue to which the Operator is entitled on a cashflow basis in that period (without double counting), including amounts to which the Operator is entitled in that period:

- (a) from the sale of electricity, hedges, Capacity Products or Green Products;
- (b) from the supply of Ancillary Services, Network Support Services or System Support Services;
- (c) to the extent not referred to above, under an Offtake Contract;
- (d) to the extent not referred to above, from AEMO (in its capacity as a market body) in respect of the Facility in accordance with the NEL and NER,

but excluding:

- (e) amounts which the Commonwealth is obliged to pay to the Operator under this Agreement;
- (f) liquidated damages to which the Operator is entitled under a Construction Contract or a contract for the operation and/or maintenance of the Facility (except to the extent those liquidated damages compensate for loss of revenue and/or profit); and
- (g) amounts to which the Operator is entitled under or in connection with an insurance policy (other than an insurance policy which compensates for loss of revenue and/or profit).

**Operations Period** means the period commencing on the day after COD and ending on the Expiry Date.

**Operations Year** means

- (a) for the first Operations Year, the period commencing on the first day after COD until the next 30 June;
- (b) subject to paragraph (c) of this definition, each subsequent 12 Month period during the Operations Period commencing on 1 July and ending on 30 June; and
- (c) for the final Operations Year, the period from the end of the last full Operations Year (as identified in paragraph (b) of this definition) to the Expiry Date,

unless this Agreement is terminated or ends earlier, in which case the last Operations Year will be the period from the end of the last full Operations Year (as identified in paragraph (b) of this definition) immediately preceding the termination or end date to the Expiry Date.

**Operator Parties** has the meaning given in clause 30.1(a)(i).

**Other Agreement** means another agreement materially similar to this Agreement in relation to the Capacity Investment Scheme and titled "Capacity Investment Scheme Agreement" to which the Commonwealth is a party, other than this Agreement.

**Other Counterparty** means, in respect of an Other Agreement, the Commonwealth's counterparty under that Other Agreement.

**Other Dispute** means a dispute between the Commonwealth and an Other Counterparty under an Other Agreement.

**Payment Notice** means any notice issued by the Operator pursuant to clause 18.1(a)(i) or 18.1(b) or by the Commonwealth pursuant to clause 18.1(c).

**Peak Period** means the period from 1 December of each year to 31 March of the following year in each case during the Operations Period, as may be adjusted by the Commonwealth by notice to the Operator where the Commonwealth considers that an adjustment to that period is appropriate to reflect changes in electricity demand and peak Spot Prices applicable in the Relevant Jurisdiction provided that:

- (a) the Commonwealth must give the Operator at least 2 years' notice of any change to the Peak Period; and
- (b) the Peak Period must not exceed four months out of any period of 12 months.

**Performance Coverage Capacity Ratio** and **PCCR** have the meaning given in section 6.4 of Schedule 4.



**Performance Coverage Time Ratio** and **PCTR** have the meaning given in section 6.3 of Schedule 4.

**Performance Event** has the meaning given in clause 11(a).

**Performance Event Rebate** has the meaning given in section 46.1 of Schedule 4.

**Performance Requirement** has the meaning given in clause 10.1.

**Performance Requirements (Minimum)** has the meaning given in clause 10.3(c).

**Performance Security** has the meaning given in clause 33(a).

**Permitted Costs** means, in respect of a period, the following costs and expenses incurred by the Operator on a cash flow basis in respect of the Project in that period (without double counting):

- (a) the costs in relation to the import of electricity from the Network, including any costs incurred on arm's length terms on account of Green Products required by Law (or required to avoid a shortfall charge imposed by Law) to be acquired or surrendered in respect of such electricity;
- (b) the costs incurred by the Project in respect of any Ancillary Services, Network Support Services or System Support Services;
- (c) any other amounts incurred by the Operator under the National Electricity Rules;
- (d) any payments under any Offtake Contract, provided that an Offtake Contract will not qualify under this paragraph (d) if the counterparty to the Offtake Contract is a Related Body Corporate of the Operator and the Operator has not demonstrated to the Commonwealth's reasonable satisfaction that the arrangement is on arm's length terms; and
- (e) any other costs and expenses the Operator and the Commonwealth agree are Permitted Costs,

but excluding:

- (f) operating costs (other than those listed in paragraph (a) and (b) above), maintenance costs and other capital costs;
- (g) any Taxes (and GST, in accordance with clause 20.5(a));
- (h) any fines or penalties (including fines or penalties under the National Electricity Rules);
- (i) any liquidated damages, warranty payments, or payments related to non-performance under an Offtake Contract; and
- (j) any interest, margin, guarantee or letter of credit fees, line fees, commitment fees, establishment fees, underwriting fees, discount, rent under finance leases or hire purchase or other one-off or recurrent payments in the nature of the foregoing (including gross-ups and recurrent increased cost or reduced yield indemnity payments) payable by the Operator in relation to any debt financing for the Project.

**Permitted Security Interest** means any Security Interest granted in support of the external debt financing whose sole purpose is to fund the design, construction, commissioning, testing, operation and maintenance of the Facility.

**Pooled Dispute** has the meaning in clause 42.1

**Pooled Dispute Panel** means a panel constituted in accordance with clause 42.2.

**Pooled Dispute Participant** means, in respect of a Pooled Dispute:

- (a) Commonwealth;
- (b) Operator; and
- (c) each other Operator Counterparty that receives a Pooled Dispute Referral in respect of that Pooled Dispute from the Commonwealth,

but notwithstanding the foregoing, does not include any person that ceases to be a Pooled Dispute Participant pursuant to clause 42.3.



**Pooled Dispute Referral** has the meaning in clause 42.1(b).

**PR Cure Period** has the meaning given in clause 10.3(c)(iv).

**PR Cure Plan** has the meaning given in clause 10.3(g).

**Project** means the design, construction, commissioning, testing, completion, operation and maintenance of the Facility and all necessarily related or ancillary activities.

**Project Documents** means:

- (a) this Agreement;
- (b) the Tripartite Deed; and
- (c) any other document the parties agree is a Project Document.

**Project Force Majeure Event** has the meaning given in clause 21.1.

**Project Intellectual Property** means all Intellectual Property developed by or on behalf of the Operator in the course of undertaking the Project, including all Intellectual Property in all reports, plans, documents, information, data and other material written, created or prepared by or on behalf of the Operator in relation to the Project.

**Proposed Reinstatement Plan** has the meaning given in clause 23.1(a).

**Quarter** means each consecutive three month period commencing on each Quarterly Date during the Operations Period save that:

- (a) the first Quarter of the CP Period will be the period from the day after the Signing Date to the date which is a day before the first Quarterly Date during the CP Period;
- (b) the last Quarter during the CP Period will be the period from the last Quarterly Date to the Commencement Date;
- (c) the first Quarter of the Construction Period will be the period from the day after the Commencement Date to the date which is a day before the first Quarterly Date during the Construction Period;
- (d) the last Quarter during the Construction Period will be the period from the last Quarterly Date to the COD;
- (e) the first Quarter of the Operations Period will be the period from the day after COD to the date which is a day before the first Quarterly Date during the Operations Period;
- (f) the last Quarter during the Operations Period will be the period from the last Quarterly Date to the Expiry Date;
- (g) the first Quarter of the Support Period will be the period from the day after Support Period Start Date to the date which is a day before the first Quarterly Date during the Support Period; and
- (h) the last Quarter during the Support Period will be the period from the last Quarterly Date to the Expiry Date.

**Quarterly Date** means every 1 January, 1 April, 1 July and 1 October.

**Quarterly Payment** means the amount determined in accordance with section 3 of Schedule 4.

**Rated Capacity** means the actual instantaneous export capability of the Project from time to time.

**Recipient** has the meaning given in clause 20.4(a).

**Registered Capacity** has the meaning given in Chapter 4A of the National Electricity Rules.

**Registration Date** has the meaning given in Schedule 1.

**Reinstatement Event** means an event or circumstance (whether alone or together with other events or circumstances) that results in the loss or destruction of, or material damage to, at least:

- (a) 50% of the Maximum Capacity of the Facility (in MW); and/or
- (b) 50% of the Storage Capacity of the Facility (in MWh).



**Related Body Corporate** in relation to a corporation means a body corporate that is related to the corporation within the meaning of the Corporations Act.

**Relevant Cost Change** means a net increase or decrease in the Operator's reasonable and direct costs which are reasonably and properly incurred (or to be incurred) of:

- (a) designing, constructing, commissioning, testing and completion of the Facility;
- (b) operating and maintain the Facility; or
- (c) storing and exporting energy,

that arises as a direct result of a Change in Law after COD and as a result of applying the Cost Change Principles, but in each case excluding any Permitted Costs.

**Relevant Jurisdiction** means the State or Territory in Australia in which the Facility is or is to be Located.

**Reports** has the meaning given in clause 27.2(h).

**Required Rating** means, in respect of an entity, the rating assigned by a ratings agency to the unsecured, senior long term debt or deposit obligations of the entity (unsupported by third party credit enhancement) of at least:

- (a) A– by Standard and Poor's (Australia) Pty Limited; or
- (b) A3 by Moody's Investors Service, Inc,

and if both of those agencies cease to operate or provide ratings of the kind referred to above, an equivalent rating from another reputable ratings agency acceptable to the Commonwealth (acting reasonably).

**Reserve Level Declaration Guidelines** means the reserve level declaration guidelines made under clause 4.8.4 of the NER.

**Responsible Entity** has the meaning given in the Corporations Act.

**Revenue Ceiling Sharing Percentage** has the meaning given in section 1 of Schedule 4.

**Revenue Floor Support Percentage** has the meaning given in section 1 of Schedule 4.

**Revised Statement** means a "routine revised statement" or a "special revised statement" (each as defined in the NER).

**Security Amount** has the meaning given in Schedule 1.

**Security Interest** means:

- (a) any security for the payment of money or performance of obligations, including a mortgage, charge, lien, pledge, encumbrance, trust arrangement, contractual right of set-off, preferential right, power or title retention or flawed deposit arrangement or any other security agreement or arrangement in favour of any person including any "security interest" as defined in sections 12(1) or (2) of the *Personal Property Securities Act 2009* (Cth); or
- (b) any agreement to create any of the above or allow them to exist.

**Signing Date** means the date on which the last party signs this Agreement.

**SLC Cure Plan** has the meaning given in clause 15.5(g).

**Social Licence Commitments** means the commitments set out in in Schedule 8. **[Drafting note: an example proforma version of Schedule 8 will be provided by the Commonwealth to the Proponents as part of Stage B of the Tender Process]**

**Specified Material** means any reports, plans, documents, information, data or other material (whether developed by or on behalf of the Operator or its Associates) which:

- (a) the Operator provides, or is required to provide, to the Commonwealth under or in connection with this Agreement or the Tender; or
- (b) is copied or derived at any time from the material referred to in paragraph (a).

**Spot Price** has the meaning in the NER.



**Storage Capacity** has the meaning given in Schedule 1.

**Storage Capacity Rebate** means the rebate determined or calculate in accordance with sections 5.1 and 5.2 of Schedule 4.

**Storage Capacity Rebate Percentage** means the percentage calculated in accordance with section 5.3 of Schedule 4.

**Subcontract** means any subcontract relating to the performance of the Operator's obligations under any Transaction Document (other than a contract with the Commonwealth) including with subcontractors whether hired directly by the Operator or by a person hired by the Operator and including each tier of subcontract, sub-subcontract and so forth.

**Subcontractor** means a subcontractor of the Operator (other than the Commonwealth) and includes any subcontractor of such a subcontractor, whether hired directly by the Operator or by a person hired by the Operator and including each tier of subcontract, sub-subcontract and so forth and any replacement of that subcontractor in accordance with this Agreement.

**Supplier** has the meaning given in clause 20.4.

**Support Period** means the period commencing on the day after Support Period Start Date and ending on the Expiry Date.

**Support Period Start Date** has the meaning given in Schedule 1.

**Support Year** means

- (a) for the first Support Year, the period commencing on the first day of the Support Period until the next 30 June;
- (b) subject to paragraph (c) of this definition, each subsequent 12 Month period during the Support Period commencing on 1 July and ending on 30 June; and
- (c) for the final Support Year, the period from the end of the last full Support Year (as identified in paragraph (b) of this definition) to the Expiry Date,

unless this Agreement is terminated or ends earlier, in which case the last Support Year will be the period from the end of the last full Support Year (as identified in paragraph (b) of this definition) immediately preceding the termination or end date to the Expiry Date.

**System Support Services** means any service provided by the Facility to support the power system (as defined in the NER) including the provision of inertia or the provision of a system strength service, as each is defined in the NER, but excluding any Network Support Service.

**Tax** means any present or future tax, levy, impost, duty, rate, charge, excise, royalty (whether based on value, profit or otherwise), fee, deduction or withholding of any nature, which is imposed, levied or administered by an Authority, the Commonwealth or any State or Territory of the Commonwealth, together with any interest, penalty, charge, fee or other amount imposed or made on, or in connection with, any of the foregoing.

**Tender** means the tender process conducted by the Commonwealth (assisted by AEMO and its Related Bodies Corporate) which resulted in the parties entering into this Agreement.

**Tender Date** means the date on which the Operator submitted its "Financial Value Bid" in connection with the Tender.

**Tender Submission** means all documents submitted by the Operator or its Related Bodies Corporate to the Commonwealth (assisted by AEMO and its Related Bodies Corporate) in connection with the Tender.

**Tenure** means

- (a) a freehold interest; and/or
- (b) an interest under a lease, sale and purchase agreement, transfer granting an easement agreement, easement or similar right including any valid option to enter into such an agreement or right, which provides for access to and/or use of land for the purpose of developing, constructing, commissioning, operating, maintaining and decommissioning the Project (including any connection assets).



**Term** means the period commencing on the Commencement Date and ending on and including the Expiry Date.

**Termination Payment** means an Early Termination Payment or a Fixed Termination Payment.

**Tested Storage Capacity** has the meaning given under section 5.4(c)(iv) of Schedule 4.

**Trading Interval** has the meaning given in the NER.

**Trading Protocol** means a protocol setting out in reasonable detail the processes and strategy which the Operator uses to generate revenue directly or indirectly from the Facility and/or the Project, which as a minimum must be prepared in accordance with Good Electricity Industry Practice.

**Transaction Documents** means:

- (a) **[Drafting note: list of the equity, debt and project documents related to the project to be inserted here. The shortlisted Proponent is required to provide that information as part of its Financial Value Bid in Stage B of the Tender Process.]**

**Tripartite Deed** means the document entitled "Tripartite Deed" between the Commonwealth, the Operator, the Facility Agent and/or the Security Trustee on behalf of the Financiers in the form attached as Schedule 9.

**[Trust** means **[insert].**

**Trust Deed** means **[insert].]**

**Trust Property** means all of the assets of the Trust] **[Drafting note: to be included if the Operator enters into this Agreement in its capacity as trustee of a trust]**

**Warranted Materials** has the meaning given in clause 34.4.

## 1.2 Interpretation

Headings and subheadings are for convenience only and do not affect interpretation. Unless the contrary intention appears, in this Agreement:

- (a) the singular includes the plural and vice versa and a word indicating gender includes every other gender;
- (b) another grammatical form of a defined word or expression has a corresponding meaning;
- (c) the meaning of general words is not limited by specific examples introduced by "including", "for example", "such as" or similar expressions;
- (d) a reference to a document also includes any variation, replacement, novation or supplement of it;
- (e) a reference to a "**person**" includes an individual, a corporation, a body corporate, a partnership, a joint venture (whether incorporated or unincorporated), an unincorporated association, an Entity, a trust and any Government Agency or any other entity or organisation;
- (f) a reference to a particular person includes the person's executors, administrators, successors, permitted substitutes (including persons taking by novation) and assigns and in the case of a trustee, includes any substituted or additional trustee;
- (g) unless otherwise indicated:
  - (i) a reference to a party, clause, Schedule, Annexure or Attachment is a reference to a party, clause, Schedule, Annexure or Attachment of or to this Agreement; and
  - (ii) a reference to a section, table, item or part is a reference to the relevant numbered section, table, item or part within the Schedule, Annexure or Attachment (as applicable) in which it is located;
- (h) a reference to a time of day is to the time in the capital city of the Relevant Jurisdiction;
- (i) a reference to dollars, \$ or \$A is a reference to the currency of Australia;



- (j) a reference to any legislation includes regulations under it and any consolidations, amendments, re-enactments or replacements of any of them;
- (k) a reference to "**regulations**" includes instruments of a legislative character under legislation (such as regulations, rules, by-laws, subordinate legislation, ordinances, statutory instruments (however described) and proclamations);
- (l) a reference to a group of persons is a reference to any two or more of them jointly and to each of them individually and a reference to an obligation or a Liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally;
- (m) a reference to any thing (including an amount) is a reference to the whole and each part of it;
- (n) a period of time dating from a given day or the day of an act or an event is to be calculated exclusive of that day;
- (o) if the day on which a party must do something under this Agreement not a Business Day, the party must do it on the next Business Day; and
- (p) this Agreement is comprised of the Details, the Background, clauses 1 to 45, Schedule 1 to Schedule 11 and any Annexures and Attachments to this Agreement;
- (q) a reference to a right includes any benefit, remedy, function, discretion, authority or power;
- (r) where there is a reference to a Government Agency, institute, association or other body referred to in a Project Document which:
  - (i) is reconstituted, renamed or replaced or if its powers or functions are transferred to, or assumed by, another entity, that Project Document is deemed to refer to that other entity; or
  - (ii) ceases to exist, that Project Document is deemed to refer to the new entity (if any) which serves substantially the same purpose or object as the former entity;
- (s) if:
  - (i) a term used in this Agreement (including as a result of a prior application of this clause 1.2) has the meaning given to it in the NER; and
  - (ii) the term in the NER is subsequently renamed or replaced with another term of similar effect,
 the new term will be used in place of the term which was renamed or replaced; and
- (t) if there is a change to the NER or the Reserve Level Declaration Guidelines affecting the description, categorisation or thresholds of low reserve or LORs, the Commonwealth may, acting reasonably, notify the Operator which low reserve descriptions, categorisations or thresholds apply for the purposes of the definition of Actual LOR3 Event.

### 1.3 Order of precedence

- (a) If there is an ambiguity, inconsistency or discrepancy between any of the documents forming part of this Agreement, those documents will be interpreted in the following order of priority:
  - (i) [clauses 1 to 45 inclusive;
  - (ii) Schedules 1 to 5, 10 and 11; and
  - (iii) Schedules 6, 7, 8 and 9],
 so that the terms of the higher ranked document prevails to the extent of the ambiguity, inconsistency or discrepancy.
- (b) If there is an ambiguity, inconsistency or discrepancy within a document forming part of this Agreement or two or more documents of the same level of order of precedence, the Commonwealth will notify the Operator how the ambiguity, inconsistency or discrepancy is to be resolved and the Operator must comply with that direction.



- (c) If there is an ambiguity, inconsistency or discrepancy between this Agreement and any other Project Document, then the following order of precedence applies to the extent of any ambiguity, inconsistency or discrepancy:
  - (i) the Tripartite Deed;
  - (ii) this Agreement; and
  - (iii) the remaining Project Documents (if any).
- (d) If the Operator discovers any ambiguity, inconsistency or discrepancy within or between any one or more of the documents forming part of this Agreement or between the Project Documents, that party must give the other party notice of such ambiguity, inconsistency or discrepancy within a reasonable time after discovering it.
- (e) The resolution of any ambiguity, inconsistency or discrepancy pursuant to this clause 1.3 does not entitle the Operator to make any Claim against the Commonwealth and the Operator waives any such right nor does it modify any of the Operator's rights and obligations.

#### 1.4 Indexation

- (a) Unless otherwise provided in this Agreement, only amounts identified in this Agreement which are followed by the term "(Indexed)" are subject to indexation. Where an amount identified in this Agreement is followed by the term "(Indexed)", that amount is to be indexed by multiplying the relevant amount by the CPI Factor.
- (b) The CPI Factor (**CPIF**) is calculated as:
 
$$\text{CPIF} = \text{RCPI} / \text{ICPI}$$
 where:
  - CPIF** means the CPI Factor;
  - RCPI** means the CPI value most recently published by the Australian Bureau of Statistics at the end of the relevant Quarter; and
  - ICPI** means the CPI value most recently published by the Australian Bureau of Statistics for the Quarter most recently ended prior to the Signing Date.
- (c) The following rules only apply to the amounts identified in this Agreement as being "(Indexed)":
  - (i) if there is a change in the coverage of the relevant price index from that applying at the Signing Date and the new index is linked to another index, the defined term is to be referable to the new index;
  - (ii) if the index is published and:
    - (A) there is a change in its coverage and it is not linked to another index; or
    - (B) there is a change in its periodicity,
 the parties must request the President of the Institute of Actuaries of Australia (or the President's nominee) to determine:
    - (C) whether the index remains appropriate as a general indicator of the rate of price change for the relevant goods and services; and
    - (D) if it is not, what other index should be used as a substitute index for the purpose of the defined term's use in this Agreement,
 and that determination is final and binds the parties;
  - (iii) if there is a change in the reference base of the index from that applying at the Signing Date and the person that publishes that index provides a conversion factor, that conversion factor must be applied to calculate revised figures for the purpose of the defined term's use in this Agreement, in terms of the new reference base;



- (iv) if there is a change in the reference base of the index from that applying at the Signing Date and the person that publishes that relevant index does not provide a conversion factor, the parties must request the President of the Institute of Actuaries of Australia (or the President's nominee) to calculate a revised index for the purposes of the defined term's use in this Agreement, and that calculation is final and binds the parties;
- (v) if the index ceases to be published by the person that publishes that relevant index and that person publishes another index which is:
  - (A) a replacement of that index; and
  - (B) linked to the index,
 the defined term must be re-calculated to the same reference base as the replacement index;
- (vi) if the index ceases to be published by person that publishes that relevant index and that person does not publish another index which is linked to the index, the parties must request the President of the Institute of Actuaries of Australia (or the President's nominee) to calculate a revised index for the purposes of the defined term's use in this Agreement, and that calculation is final and binds the parties;
- (vii) if the index ceases to be published by the person that publishes that relevant index and that person does not publish another index in place of the index, the parties must request the President of the Institute of Actuaries of Australia (or the President's nominee) to determine an appropriate index which is a general indicator of the rate of price change for the relevant goods and services, and that determination is final and binds the parties; and
- (viii) if a Change in Law causes a material aberration in the index, the index must be adjusted to remove the impact of that material aberration in accordance with any such methodology published by a responsible Government Agency for adoption by business or, in the absence of such publication, within 6 months of the occurrence of the material aberration as agreed by the parties or, in the absence of agreement, as determined in accordance with clause 41.

## 1.5 Commonwealth's rights, duties and functions

- (a) Unless otherwise expressly provided in a Project Document, nothing in any Project Document gives rise to any duty on the part of the Commonwealth to consider interests other than its own interests when exercising any of its rights or carrying out any of its obligations under any Project Document.
- (b) Notwithstanding anything expressly provided or implied in any Project Document to the contrary:
  - (i) the Commonwealth is not obliged:
    - (A) to exercise any executive or statutory right, duty or function, or to influence, over-ride, interfere with or direct any part of the Commonwealth or any other Government Agency in the proper exercise and performance of any of its executive or statutory rights, duties or functions;
    - (B) to develop or implement any new Commonwealth policy or change any Commonwealth policy;
    - (C) to enact any new legislation or implement a change in Law or make or revoke any regulation including any statutory instrument or delegation;
    - (D) to provide an interpretation of any legislation, regulation or Commonwealth policy; and
  - (ii) nothing expressly provided or implied in any Project Document has the effect of constraining the Commonwealth or placing any fetter on the Commonwealth's discretion to exercise or not to exercise any of its executive or statutory rights, duties or functions.



## **1.6 Reasonable endeavours of the Commonwealth**

In any Project Document, a requirement for the Commonwealth to use 'best endeavours', 'reasonable endeavours', 'act reasonably', to not act unreasonably, to act in 'Good Faith' or to take 'reasonable' or 'all reasonable' steps or action, does not require the:

- (a) exercise or non-exercise of any executive or statutory discretion, right or power;
- (b) development or implementation of any new Commonwealth policy or change in Commonwealth policy;
- (c) enactment of any new legislation or making of a change in Law or the making or revocation of any regulation including any statutory instrument or delegation; or
- (d) Commonwealth to act in a way it regards as not in the public interest.

## **1.7 No Commonwealth Liability for Review and Approval**

No:

- (a) review of, comment upon, acceptance, approval or certification of any document or approval of or consent to a proposed Subcontractor, permission, comment or recommendation, in each case by the Commonwealth or its Associates (or a failure to do so);
- (b) failure by (or on behalf of) the Commonwealth or Commonwealth's Associates, to detect any non-compliance by the Operator with its obligations in accordance with the Project Documents or any Laws;

will:

- (c) relieve the Operator from, or alter, affect or modify, its Liabilities, obligations or responsibilities whether in accordance with the Project Documents or otherwise according to Law or give rise to the right of the Operator to make a Claim against the Commonwealth;
- (d) constitute a waiver or prejudice the Commonwealth's rights against the Operator whether under the Project Documents or otherwise according to Law;
- (e) constitute an approval or acceptance by the Commonwealth of the Operator's performance of its obligations in accordance with the Project Documents or acceptance of any item or material delivered; or
- (f) entitle the Operator to an adjustment of any Milestone Event, Milestone Date (Scheduled), payment or amount or any other obligation arising from or in connection with any Project Document or to Claim from the Commonwealth any Liability incurred by the Operator.

## **1.8 Prior approval or consent**

If the Operator is required by a Project Document to obtain the Commonwealth's consent or approval to an action, document or thing, unless otherwise expressly provided, that consent or approval must be obtained as a condition precedent to the action, document or thing occurring or coming into effect.

## **1.9 Action without delay**

Unless there is a provision in a Project Document which specifies a period of time in which something must be done by the Operator, all things must be done by the Operator without undue delay.

## **1.10 Provisions limiting or excluding Liability, rights or obligations**

- (a) A right or obligation of the Commonwealth or the Operator under this Agreement will not limit or exclude any other right or obligation of the Commonwealth or the Operator under this Agreement unless otherwise expressly provided.



- (b) Any provision of this Agreement which seeks, either expressly or by implication, to limit or exclude any Liability of a party is to be construed as doing so only to the extent permitted by Law.

### **1.11 Relationship of the parties**

- (a) Nothing in any Project Document:
  - (i) creates a partnership, joint venture, fiduciary, employment or agency relationship with the Commonwealth; or
  - (ii) imposes any duty of Good Faith on the Commonwealth, unless otherwise expressly provided.
- (b) The Operator acknowledges that the Commonwealth may enter into arrangements which are the same or similar to those set out in the Project Documents with other persons.

## **2. Term**

Subject to clause 3, this Agreement commences on the Signing Date and ends on the last day of the Term.

## **3. Conditions Precedent**

### **3.1 Commencement**

- (a) Subject to clause 3.1(b), this Agreement and the rights and obligations of the parties under this Agreement will not come into force and effect until the Operator has received a notice from the Commonwealth in accordance with clause 3.2(d) and each of the Conditions Precedent has been satisfied by the Operator (or waived by the Commonwealth in accordance with clause 3.6).
- (b) Clauses 1, 2, 3, 4, 8, 10.4, 14, 18, 19, 20, 21, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38.7, 39, 41, 42, 43, 44, 45 and Schedules 1, 2, 5, 7, 9, 10 and 11 come into full force and effect immediately on the Signing Date.

### **3.2 Satisfaction of Conditions Precedent**

- (a) Schedule 2 sets out the Conditions Precedent which the Operator must satisfy.
- (b) Unless otherwise waived in accordance with clause 3.6, the Operator must:
  - (i) use reasonable endeavours to satisfy each Condition Precedent by the relevant Condition Precedent Date;
  - (ii) use reasonable endeavours to satisfy all of the Conditions Precedent by the CP Target Date; and
  - (iii) satisfy all of the Conditions Precedent by the CP Sunset Date,and in each case the Operator must notify the Commonwealth within 5 Business Days after doing so.
- (c) The Operator must provide with that notice objective evidence which demonstrates that the relevant Condition Precedent has been satisfied, and must promptly provide any further information reasonably requested by the Commonwealth regarding the satisfaction of a Condition Precedent within 5 Business Days after being requested to do so.
- (d) Within 5 Business Days after it becomes aware that the last of the Conditions Precedent has been satisfied or waived, the Commonwealth must provide a notice to the Operator confirming that all of the Conditions Precedent have been satisfied or waived and the date upon which the last Condition Precedent was satisfied or waived (**Commencement Date**).



### 3.3 Draft CP Cure Plans and CP Cure Plans

- (a) If at any time the Operator is, or the Commonwealth reasonably believes that the Operator is, likely to fail to satisfy:
- (i) any Condition Precedent on or before the relevant Condition Precedent Date;
  - (ii) all of the Conditions Precedent on or before the CP Target Date; or
  - (iii) all of the Conditions Precedent on or before the CP Sunset Date,
- the Operator must submit a draft cure plan to the Commonwealth within 20 Business Days after receipt of a written request to do so from the Commonwealth (**Draft CP Cure Plan**).
- (b) A Draft CP Cure Plan must identify the proposed revised date by which the Operator will satisfy the relevant Condition Precedent or all of the Conditions Precedent (as applicable) and demonstrate, to the Commonwealth's reasonable satisfaction, that the Operator will be able to satisfy:
- (i) the relevant Condition Precedent or Conditions Precedent on or before the proposed revised date; and
  - (ii) all of the remaining Conditions Precedent which have not been satisfied by no later than the CP Sunset Date.
- (c) The Commonwealth must act reasonably in determining whether to approve or reject a Draft CP Cure Plan submitted under clause 3.3(a) and must use reasonable endeavours to either approve or reject the Draft CP Cure Plan within 30 Business Days (or such other period agreed by the parties) after that Draft CP Cure Plan (which complies with this Agreement) is submitted to the Commonwealth.
- (d) If the Commonwealth rejects a Draft CP Cure Plan pursuant to clause 3.3(c):
- (i) the Commonwealth must provide the Operator with reasonable details of its reasons for the rejection at the time the Draft CP Cure Plan is rejected; and
  - (ii) within 20 Business Days after the Draft CP Cure Plan is rejected, the Operator must amend and resubmit a revised Draft CP Cure Plan for approval by the Commonwealth in accordance with clause 3.3(c).
- (e) Clauses 3.3(c) and 3.3(d)(i), but not clause 3.3(d)(ii), will apply to an amended Draft CP Cure Plan submitted by the Operator pursuant to clause 3.3(d)(ii).
- (f) If the Commonwealth approves a Draft CP Cure Plan, it must notify the Operator of that approval and that Draft CP Cure Plan becomes the approved cure plan on the date of that approval (**CP Cure Plan**). On and from the date on which the Commonwealth notifies the Operator of that approval, the Operator must:
- (i) subject to clause 8, comply with the CP Cure Plan;
  - (ii) provide a report to the Commonwealth regarding its progress against the CP Cure Plan within 5 Business Days after the end of each Month until the relevant Conditions Precedent the subject of the CP Cure Plan have been satisfied by the Operator or waived by the Commonwealth; and
  - (iii) if applicable, any reference to the relevant Condition Precedent Date, CP Target Date and CP Sunset Date in this Agreement will be deemed to refer to the relevant Condition Precedent Dates, the CP Target Date and/or CP Sunset Date as adjusted under the CP Cure Plan.
- (g) If the Operator:
- (i) is unable to comply with the conditions specified in clause 3.3(b);
  - (ii) fails to submit or resubmit a Draft CP Cure Plan to the Commonwealth when required to do so pursuant to this clause 3.3;
  - (iii) has submitted a draft CP Cure Plan which has been rejected by the Commonwealth and has resubmitted the draft CP Cure Plan which has also been rejected, each case in accordance with this Agreement;



- (iv) subject to clause 3.3(f), fails to commence the implementation of the CP Cure Plan as required pursuant to this clause 3.3 or otherwise fails to comply with the CP Cure Plan in any material respect, and does not remedy any such failure within 10 Business Days after receipt of a notice from the Commonwealth requiring it to do so; or
- (v) is complying with a CP Cure Plan but the Commonwealth becomes aware (acting reasonably) that the conditions specified in clause 3.3(b) will not be satisfied by the relevant dates referred to in clause 3.3(b),

the Commonwealth may terminate this Agreement by notice to the Operator, this Agreement will terminate on the date set out in that notice and that termination will be deemed to be a termination pursuant to clause 27.2.

- (h) The Commonwealth must not terminate this Agreement pursuant to clause 3.3(g) if the Operator is entitled to and has submitted a Draft CP Cure Plan to the Commonwealth under clause 3.3(a) and the Commonwealth has not yet approved or rejected the Draft CP Cure Plan under clause 3.3(c).

### 3.4 Failure to meet CP Sunset Date

If the Operator fails to satisfy all of the Conditions Precedent on or before the CP Sunset Date, this Agreement will automatically terminate on the day after the CP Sunset Date without the Commonwealth having to take any further action and that termination will be deemed to be a termination pursuant to clause 27.2.

### 3.5 Extension of CP Dates

Each of the Condition Precedent Dates, CP Target Date and CP Sunset Date:

- (a) may be adjusted:
  - (i) in accordance with clause 8; or
  - (ii) by written agreement between the parties; and
- (b) are not subject to adjustment for any other reason.

### 3.6 Waiver of Conditions Precedent

- (a) Schedule 2 identifies that the Commonwealth is the only party which benefits from the satisfaction of each Condition Precedent. Only the Commonwealth may waive a Condition Precedent.
- (b) A Condition Precedent is only waived where the Commonwealth gives written notice of that waiver of the Condition Precedent to the Operator.

## 4. Contract Manager for each Party

- (a) Each party must ensure that at all times during the Term, there is a natural person appointed by it to be its contract manager for this Agreement (**Contract Manager**). The initial Contract Manager for each of the Commonwealth and the Operator is the person to whom notices are to be sent as set out in Notice details at the start of this Agreement.
- (b) Each party shall notify the other in writing of any change in the identity, position and contact details of its Contract Manager within 10 Business Days after the change, as the case may be.
- (c) Each party's Contract Manager must administer this Agreement on behalf of the party appointing him or her and may exercise all rights, powers, authority and functions of the party appointing him or her under this Agreement and does so as agent of the party appointing him or her.
- (d) Each party may at any time delegate the exercise of any power or authority of that party to a person other than its then appointed Contract Manager. That party must promptly notify the other party of the identity of each delegate and the powers and authority delegated



(including any conditions applying to the delegated power). A party may vary or terminate any power or authority it has delegated, whether to the Contract Manager or otherwise, and must promptly notify the other party of any such variation or termination.

## 5. Milestone Events

### 5.1 Achievement of Milestone Events

- (a) The Operator must:
  - (i) use reasonable endeavours to achieve each Milestone Event on or before the relevant Milestone Date (Scheduled) including achieving Commercial Operation on or before the COD (Target); and
  - (ii) achieve Commercial Operation on or before the COD (Sunset).
- (b) If a Milestone Event is not achieved by the relevant Milestone Date (Scheduled), the Operator must continue to use reasonable endeavours to achieve the Milestone Event as soon as reasonably practicable after the relevant Milestone Date (Scheduled).
- (c) The Operator must notify the Commonwealth that it has achieved a Milestone Event within 5 Business Days after achieving that Milestone Event. The Operator must provide to the Commonwealth with that notice objective evidence which demonstrates that the relevant Milestone Event has been achieved, and must promptly provide any further information reasonably requested by the Commonwealth regarding the achievement of that Milestone Event within 5 Business Days after being requested to do so.
- (d) Notwithstanding anything to the contrary in this Agreement, a Milestone Event will not have been achieved unless and until the Operator has provided to the Commonwealth:
  - (i) in relation to the Milestone Event related to Commercial Operations only, evidence from an appropriately qualified independent professional firm nominated by the Operator and approved by the Commonwealth (acting reasonably) and which has no actual or perceived conflict of interest which demonstrates that the relevant Milestone Event has been achieved. The Operator must ensure that the professional firm providing that independent evidence has agreed to permit the Commonwealth to rely on that evidence and is liable to the Commonwealth for the contents of that evidence;
  - (ii) a certificate from a director of the Operator that the information contained in the notice referred to in clause 5.1(c) is true, complete and accurate; and
  - (iii) such other information or documentation as may be reasonably necessary to demonstrate that the Milestone Event has been satisfied in accordance with this Agreement including evidence from an appropriately qualified independent person (provided on a reliance or non-reliance basis) and which has no actual or perceived conflict of interest which demonstrates that the relevant Milestone Event has been achieved.
- (e) Where all of the COD Conditions have been achieved, if the Operator fails to provide to the Commonwealth with each of the following (within 20 Business Days after the date on which last of the COD Conditions has been achieved by the Operator or waived by the Commonwealth each in accordance with this Agreement):
  - (i) the notice, evidence and/or further information requested each as identified in clause 5.2(c) and/or
  - (ii) the evidence from the independent professional firm, certificate from the director of the Operator and the other information and document each as identified in clause 5.2(d),

the Commonwealth may, at its absolute discretion take any one or more of the following steps:

- (iii) procure the evidence referred to in clause 5.2(d)(i) itself, in which case the Operator must pay the Commonwealth within 20 Business Days after receipt of a



request to do so, the costs incurred by the Commonwealth in obtaining that evidence;

- (iv) direct the Operator to provide the certification referred to in clause 5.2(d)(ii) within a further period of 5 Business Days;
- (v) terminate this Agreement by notice to the Operator and this Agreement will terminate on the date set out in that notice and that termination will be deemed to be a termination pursuant to clause 27.2; and
- (vi) determine that Commercial Operation has been achieved and notify the Operator of the date on which Commercial Operation was achieved, in which case Commercial Operation will be deemed to have occurred on the date notified by the Commonwealth.

## 5.2 Draft ME Cure Plans and ME Cure Plans

- (a) If at any time the Operator fails to achieve Commercial Operation on or before the COD (Target), the Operator must submit a draft cure plan to the Commonwealth within 20 Business Days after receipt of a written request to do so from the Commonwealth (**Draft ME Cure Plan**).
- (b) A Draft ME Cure Plan must identify the proposed revised date by which the Operator will achieve Commercial Operation and demonstrate, to the Commonwealth's reasonable satisfaction, that the Operator will be able to achieve Commercial Operation on or before the proposed revised date and that proposed revised date must be no later than the COD (Sunset).
- (c) The Commonwealth must act reasonably in determining whether to approve or reject a Draft ME Cure Plan submitted pursuant to clause 5.2(a) and must use reasonable endeavours to either approve or reject the Draft ME Cure Plan within 20 Business Days (or such other period agreed by the parties) after that Draft ME Cure Plan (which complies with this Agreement) is submitted to the Commonwealth.
- (d) If the Commonwealth rejects a Draft ME Cure Plan pursuant to clause 5.2(c):
  - (i) the Commonwealth must provide the Operator with reasonable details of its reasons for the rejection at the time the Draft ME Cure Plan is rejected; and
  - (ii) within 20 Business Days after the Draft ME Cure Plan is rejected, the Operator must amend and resubmit a revised Draft ME Cure Plan for approval by the Commonwealth in accordance with clause 5.2(c).
- (e) Clauses 5.2(c) and 5.2(d)(i), but not clause 5.2(d)(ii), will apply to an amended Draft ME Cure Plan submitted by the Operator pursuant to clause 5.2(d)(ii).
- (f) If the Commonwealth approves a Draft ME Cure Plan, it must notify the Operator of that approval and that Draft Cure Plan becomes the approved cure plan on the date of that approval (**ME Cure Plan**). On and from the date on which the Commonwealth notifies the Operator of that approval:
  - (i) subject to clause 8, the Operator must comply with the ME Cure Plan;
  - (ii) the Operator must provide a report to the Commonwealth regarding its progress against the ME Cure Plan within 5 Business Days after the end of each Month until Commercial Operations has been achieved; and
  - (iii) if applicable, any reference to the COD (Target) in this Agreement will be deemed to refer to the COD (Target) as adjusted under the ME Cure Plan.
- (g) If the Operator:
  - (i) fails to submit or resubmit a Draft ME Cure Plan to the Commonwealth when required to do so pursuant to this clause 5.2;
  - (ii) has submitted a draft ME Cure Plan which has been rejected by the Commonwealth and has resubmitted the draft ME Cure Plan which has also been rejected, each case in accordance with this Agreement;



- (iii) subject to clause 5.2(f), fails to commence the implementation of the ME Cure Plan as required pursuant to this clause 5.2 or otherwise fails to comply with the ME Cure Plan in any material respect, and does not remedy that failure within 20 Business Days after receipt of a notice from the Commonwealth requiring it to do so; or
- (iv) is complying with a ME Cure Plan but the Commonwealth becomes aware (acting reasonably) that the conditions specified in clause 5.2(b) will not be satisfied by the relevant date referred to in clause 5.2(b),

the Commonwealth may terminate this Agreement by notice to the Operator, this Agreement will terminate on the date set out in that notice and that termination will be deemed to be a termination pursuant to clause 27.2.

- (h) The Commonwealth must not terminate this Agreement pursuant to clause 5.2(g) if the Operator has submitted a Draft ME Cure Plan to the Commonwealth under clause 5.2(a) and the Commonwealth has not yet approved or rejected the Draft ME Cure Plan under clause 5.2(c).

### **5.3 Failure to meet COD (Sunset)**

If the Operator fails to achieve Commercial Operation on or before the COD (Sunset), this Agreement will automatically terminate on the day after the COD (Sunset) without the Commonwealth having to take any further action and that termination will be deemed to be a termination pursuant to clause 27.2.

### **5.4 Extension of dates related to Milestone Events**

Each of the Milestone Event (Scheduled), COD (Target) and COD (Sunset):

- (a) may be adjusted:
  - (i) in accordance with clause 8; or
  - (ii) by written agreement between the parties including under a ME Cure Plan; and
- (b) are not subject to adjustment for any other reason.

### **5.5 Sole remedy**

- (a) Except in circumstances where the Commonwealth elects to terminate this Agreement and subject to clauses 5.5(b) and 5.5(e), the Commonwealth's sole financial remedy and the Operator's sole financial Liability for failure to achieve Commercial Operation by the Final Support Commencement Date is limited to any resulting reduction in the length of the Operations Period (including Support Period) in accordance with the definition of that term and the amount of any Quarterly Payment and Annual Reconciliation Payments not required to be paid by the Commonwealth in those circumstances.
- (b) The Operator acknowledges and agrees that clause 5.5(a) does not limit the Commonwealth's rights and Operator's Liability in respect of an event giving rise to the delay or the consequences of such event, other than the delay itself.
- (c) Subject to clauses 5.5(d) and 5.5(e), where this Agreement terminates for a failure to achieve Commercial Operation by the COD (Sunset), the Commonwealth's sole remedy for the Operator's failure to achieve Commercial Operation by the COD (Sunset) is termination of this Agreement in accordance with clause 5.3 and clause 27.2 and the Commonwealth's rights pursuant to clauses 27.3 and 28.
- (d) The Operator acknowledges and agrees that clause 5.5(c) does not limit the Commonwealth's rights and Operator's Liability in respect of an event giving rise to the delay or the consequences of such event, other than the delay itself.
- (e) This clause 5.5 is without prejudice to:
  - (i) any rights or remedies the Commonwealth may have in relation to matters arising under or in connection with this Agreement (other than those specifically referred to in this clause 5.5); and



- (ii) clause 5.2 to clause 5.4.

## 6. Construction obligations

### 6.1 General construction obligations

On and from the Commencement Date, the Operator must, at its own cost and risk, promptly commence and carry out the design, construction, commissioning, testing and completion of the Facility:

- (a) regularly, diligently and expeditiously and in accordance with Good Construction Industry Practice;
- (b) in compliance with all Authorisations and Laws, including health and safety Laws;
- (c) in accordance with this Agreement and the Operator's Transaction Documents;
- (d) so that the Facility (when designed, constructed, commissioned, tested and completed):
  - (i) is fit for its intended purpose as determined by reference to the COD Conditions;
  - (ii) satisfies each of the COD Conditions;
  - (iii) is capable of meeting the Operator's obligations under this Agreement; and
  - (iv) is compliant with, and capable of being operated and maintained in accordance with all applicable Laws and Authorisations;
- (e) in accordance with the Social Licence Commitments; and
- (f) to the extent not inconsistent with the preceding clauses, in accordance with the recommendations and guidelines specified by the suppliers of any plant, equipment and materials forming part of the Facility or to be used in the operation and maintenance of the Facility.

### 6.2 Testing and commissioning plan

The Operator must prepare and provide a copy of its testing and commissioning plan for the Facility to the Commonwealth which includes the testing and commissioning activities which the Operator will carry out to achieve Commercial Operations. That plan must as a minimum be prepared in accordance with Good Electricity Industry Practice. That testing and commissioning plan must be provided by the Operator to the Commonwealth at least 60 Business Days prior to the date when the testing and/or commissioning of the Facility which is designed to demonstrate Commercial Operations is scheduled to commence.

## 7. Commercial Operation

- (a) Without limiting any other obligation which the Operator has under this Agreement, to achieve Commercial Operation, the following must have occurred:
  - (i) the Operator has completed the design, construction, commissioning and testing of the works on the Project site (which includes all ancillary plant, control systems and connection infrastructure on the Operator's side of the Connection Point required for the operation of the Facility) and the Operator has obtained all applicable Authorisations including registrations under the NEL, in each case which will enable the Facility to be operated and maintained in accordance with Good Industry Practice and all applicable Laws;
  - (ii) the Facility must:
    - (A) be capable of exporting electrical energy through the Connection Point at a level of output that is equal to or exceeds the Maximum Capacity;
    - (B) be capable of importing electrical energy through the Connection Point at a level that is equal to or exceeds the Import Capacity; and



- (C) have an energy storage capacity that is equal to or exceeds the Storage Capacity,
- in each case when tested, operated and maintained in accordance with Good Industry Practices and all applicable Laws;
- (iii) the relevant network service provider has confirmed that the Facility is unconditionally released from all hold points so that the Facility is permitted to:
    - (A) export electrical energy through the Connection Point at a level of output that is equal to or exceeds the Maximum Capacity; and
    - (B) import electrical energy through the Connection Point at a level that is equal to or exceeds the Import Capacity.
  - (iv) the Operator has submitted and received approval (or deemed approval) from the Commonwealth for its first annual maintenance plan under clause 9.3 and has provided the Commonwealth with a copy of its Trading Protocol in a form which complies with the applicable requirements of this Agreement;
  - (v) the Operator is:
    - (A) registered with AEMO as an integrated resource provider and the Facility is classified as a scheduled bidirectional unit in accordance with the NEL and NER; and
    - (B) licensed to generate, or undertake any other relevant activity, under any applicable jurisdictional energy legislation; and
  - (vi) all Social Licence Commitments have been met, to the extent they apply to the Construction Period,
- (each a **COD Condition**).
- (b) The COD Conditions are for the benefit of the Commonwealth and may only be waived by the Commonwealth (in its absolute discretion) in writing.

## 8. Delay and extensions

### 8.1 Extension of required dates

- (a) Subject to clauses 8.1(b) and 8.2, if the Operator has been or will be directly delayed in:
  - (i) satisfying a Condition Precedent by the relevant Condition Precedent Date;
  - (ii) satisfying the Conditions Precedent by the CP Target Date;
  - (iii) satisfying the Conditions Precedent by the CP Sunset Date;
  - (iv) achieving Commercial Operation by the COD (Target); or
  - (v) achieving Commercial Operation by the COD (Sunset),

due to a Force Majeure Event, provided the Operator has complied with all relevant requirements of clause 21, the relevant Condition Precedent Date, CP Target Date, CP Sunset Date, COD (Target) or COD (Sunset) (as applicable) will be extended by a period equal to the delay caused by the Force Majeure Event to the Operator satisfying the relevant Condition Precedent by the Condition Precedent Date, CP Target Date and CP Sunset Date (as applicable) or achieving Commercial Operation by the COD (Target) and COD (Sunset) (as applicable).
- (b) Where:
  - (i) an extension of any of the dates referred to in clause 8.1(a) is granted under that clause; and
  - (ii) the relevant Force Majeure Event also directly delays the Operator in achieving any Milestone Event (other than Commercial Operation) by its Milestone Date (Scheduled),



the Milestone Date (Scheduled) relating to that Milestone Event will also be extended by a period equal to the extension granted under clause 8.1(a) (to the extent applicable).

- (c) For the avoidance of doubt, the Final Support Commencement Date is not subject to adjustment other than pursuant to the rights of the Commonwealth under clause 8.3.

## 8.2 Cap on extensions

Subject to clause 8.3, the COD (Sunset) may not be extended:

- (a) for any Project Force Majeure Event, beyond the date that is 6 months after the COD (Sunset) identified in Item 12 of Schedule 1 as at the Signing Date and disregarding any adjustments to that of that date other than pursuant to clause 8.3); and
- (b) for any Connection Force Majeure Event, by more than the length of the relevant delay caused by that Connection Force Majeure Event.

## 8.3 Unilateral Extensions

- (a) The Commonwealth may, at any time, in its absolute and unfettered discretion and whether or not for any reason stated in this Agreement, grant an extension of any Condition Precedent Date, the CP Target Date, the CP Sunset Date, the COD (Target), the COD (Sunset) or any Milestone Date (Scheduled), or any other date by which any obligation is required to be performed under this Agreement.
- (b) An extension granted by the Commonwealth under this clause 8.3 must be granted in writing to be effective

**[Drafting note: this right of the Commonwealth to unilaterally extend is in addition to the extension mechanism under clause 8.1 and therefore is in the Commonwealth's absolute discretion as it may relate to scenarios where the Operator is not entitled to an extension of time]**

# 9. Operation and maintenance requirements

## 9.1 General operation obligations

Throughout the Operations Period, the Operator must:

- (a) operate and maintain the Facility in accordance with:
  - (i) this Agreement and the Operator's Transaction Documents;
  - (ii) the standards and skills of a reasonable and prudent operator and in a manner that will preserve the asset life of the Facility to the end of the Term;
  - (iii) Good Industry Practice and all applicable Laws and Authorisations including health and safety Laws;
  - (iv) the Social Licence Commitments; and
  - (v) to the extent not inconsistent with the preceding clauses, the recommendations and guidelines specified by the suppliers of any plant, equipment and materials forming part of the Facility or used in the operation and/or maintenance of the Facility;
- (b) register and maintain its registration with AEMO as an integrated resource provider and ensure that the Facility is and remains classified as a scheduled bidirectional unit in accordance with the NEL and NER; and
- (c) ensure that it is and remains licensed to generate, or undertake any other relevant activity, under any applicable jurisdictional energy legislation.



## **9.2 Trading Protocol**

- (a) The Operator must provide the Commonwealth with a copy of its Trading Protocol for the information of the Commonwealth on or before Commercial Operation in accordance with clause 0.
- (b) Immediately after the end of each Operations Year, the Operator must provide to the Commonwealth:
  - (i) an annual report for that Operations Year outlining whether it operated the Facility in accordance with the Trading Protocol and if not how the operations of the Facility differed from the Trading Protocol; and
  - (ii) a revised Trading Protocol for the next Operations Year (to the extent that there is to be any change to the Trading Protocol).

## **9.3 Maintenance plan**

- (a) The Operator must submit a proposed annual maintenance plan, setting out a two year forecast of planned maintenance activities for the Facility, to the Commonwealth for review and approval:
  - (i) prior to COD; and
  - (ii) on the first day of each Operating Year.
- (b) The Operator must prepare each proposed annual maintenance plan in accordance with Good Industry Practice.
- (c) The Commonwealth may, following review of an annual maintenance plan:
  - (i) approve the plan by notice in writing to the Operator; or
  - (ii) notify the Operator that the plan is rejected, providing reasons and the Commonwealth may only reject that plan acting reasonably where that plan does not comply with Good Industry Practice.
- (d) If the Commonwealth:
  - (i) gives notice under clause 9.3(c)(ii), the Operator must revise the annual maintenance plan accordingly and resubmit it for the approval of the Commonwealth pursuant to clause 9.3(c); or
  - (ii) does not give notice under clause 9.3(c) within 10 Business Days after receipt of that annual maintenance plan, the Operator must issue a notice to the Commonwealth warning it that if it fails to respond to the annual maintenance plan within a further 5 Business Days, that annual maintenance plan will be deemed to be approved. If the Commonwealth fails to approve that revised annual maintenance plan or notify the Operator that the revised annual maintenance plan is rejected within that further 5 Business Day period, the revised annual maintenance plan will be deemed to be approved.
- (e) The Operator must use reasonable endeavours to perform planned maintenance arising from or in connection with the Facility in a way that complies with the most recently approved annual maintenance plan and which mitigates the impact of planned maintenance on the Facility's operations.

## **9.4 Operation and scheduling**

During the Support Period, the Operator must:

- (a) minimise any disruption to the operation of the Facility;
- (b) use reasonable endeavours not to schedule or conduct any planned maintenance or outage for the Facility during the Peak Period;
- (c) use reasonable endeavours to operate and maintain the Facility so as to optimise the amount of energy and timing of energy exported at the Connection Point to correspond with Peak Periods;



- (d) use reasonable endeavours to minimise the amount of any payments payable by the Commonwealth pursuant to Schedule 4; and
- (e) operate, contract, Bid and dispatch the Facility in Good Faith and:
  - (i) in accordance with market signals for a storage project of its nature as if it were a stand-alone project and not operated as part of a portfolio of assets; and
  - (ii) having regard to any Offtake Contracts or any arrangements entered into pursuant to clause 9.5.

## 9.5 Offtake and related party arrangements

The Operator must not enter into:

- (a) any Offtake Contract or any arrangement regarding Permitted Costs, in each case which applies during the Support Period unless that contract or the arrangement is on arm's length terms; and **[Drafting note: the purpose of applying an arm's length test to these concepts is to ensure that the Operator enters into arrangements on terms which reflect market terms and is intended to prevent gaming of (for example) Operational Revenues and Permitted Costs.]**
- (b) any arrangement or Offtake Contract with a Related Entity unless it has demonstrated to the Commonwealth's reasonable satisfaction that the arrangement is on arm's length terms.

## 9.6 Emergency maintenance

Nothing in this Agreement prevents the Operator from undertaking emergency or unplanned maintenance or repairs in accordance with Good Electricity Industry Practice that are:

- (a) necessary to prevent injury, death or damage to the Environment or the Facility; or
  - (b) required to maintain manufacturer's warranties,
- and which is not able to be reasonably rescheduled or deferred.

# 10. Performance and Other Requirements

## 10.1 Performance Requirement obligations

Subject to clause 10.3, the Operator must ensure that:

- (a) Equivalent Availability Factor for the Facility for each Operating Year is equal to or exceeds 90%; and
- (b) the energy storage capacity for the Facility for each Operating Year is equal to or exceeds the Storage Capacity,

each a performance requirement (**Performance Requirement**).

## 10.2 Measurement and validation

- (a) The Operator must measure, test and calculate the performance of the Facility in respect of each of the Performance Requirements at the end of each Operations Year for that Operations Year.
- (b) The Operator must conduct the Storage Capacity test in accordance with section 5 of Schedule 4 and that test must be conducted at the times when the independent professional firm identified in clause 10.2(c)(i) is able to attend the relevant measurements, tests and calculations undertaken by the Operator.
- (c) In addition to the Operator providing the relevant Reports pursuant to clause 38.3 in relation to a Performance Requirement for any Operations Year, a Performance Requirement will not be taken to have been achieved for the relevant Operations Year unless and until the Operator delivers to the Commonwealth:



- (i) a report from an appropriate independent professional firm nominated by the Operator and approved by the Commonwealth (in its absolute discretion) and which has no actual or perceived conflict of interest which confirms whether or not the relevant Performance Requirements has been satisfied. The Operator must ensure that the entity providing that report has agreed to permit the Commonwealth to rely on that report and is liable to the Commonwealth for the contents of that report; and
- (ii) such other information or documentation as may be reasonably necessary to demonstrate that the Performance Requirements has been achieved in accordance with this Agreement.

### 10.3 Performance Requirement failures

- (a) Subject to this clause 10.3, where the Equivalent Availability Factor for the Facility in any Support Year is less than 90%, the Availability Rebate will apply in accordance with Schedule 4.
- (b) Subject to this clause 10.3, where the energy storage capacity for the Facility for each Support Year is less than 100%, the Storage Rebate will apply in accordance with Schedule 4.
- (c) If:
  - (i) the Equivalent Availability Factor for the Facility is less than 50%; and/or
  - (ii) the energy storage capacity of the Facility is less than 50% of the Storage Capacity,

**(Performance Requirements (Minimum))** in each case in any Operations Year the Operator must:

  - (iii) investigate the cause of the non-compliance; and
  - (iv) within 20 Business Days after becoming aware of the relevant failure (**PR Cure Period**), provide a draft cure plan to the Commonwealth which demonstrates how the Operator will ensure that the relevant Performance Requirements (Minimum) will be achieved in the following Operations Year (**Draft PR Cure Plan**).
- (d) The Commonwealth must act reasonably in determining whether to approve or reject the Draft PR Cure Plan and must either approve or reject a Draft PR Cure Plan within 30 Business Days after that Draft PR Cure Plan (which complies with this Agreement) is submitted to the Commonwealth.
- (e) If the Commonwealth rejects a Draft PR Cure Plan:
  - (i) the Commonwealth must provide the Operator with written reasons for the rejection at the time the Draft PR Cure Plan is rejected; and
  - (ii) the Operator may submit a revised Draft PR Cure Plan for approval by the Commonwealth in accordance with clause 10.3(d).
- (f) Clauses 10.3(d) and 10.3(e)(i), but not clause 10.3(e)(ii), will apply to an amended Draft PR Cure Plan submitted by the Operator pursuant to clause 10.3(e)(ii).
- (g) If the Commonwealth approves a Draft PR Cure Plan it must notify the Operator of that approval and that Draft PR Cure Plan becomes the approved cure plan on the date of that approval (**PR Cure Plan**). On and from the date on which the Commonwealth notifies the Operator of that approval, the Operator must:
  - (i) subject to clause 21, comply with the PR Cure Plan; and
  - (ii) provide a report to the Commonwealth regarding its progress against the approved PR Cure Plan within 5 Business Days after the end of each Month until the Operator next satisfies the relevant Performance Requirements.
- (h) If the Operator:
  - (i) fails to submit a Draft PR Cure Plan to the Commonwealth within the relevant PR Cure Period;



- (ii) has submitted a draft PR Cure Plan which has been rejected by the Commonwealth and has resubmitted the draft PR Cure Plan which has also been rejected, each case in accordance with this Agreement;
- (iii) subject to clause 10.3(g), fails to commence the implementation of the PR Cure Plan as required pursuant to clause 10.3 or otherwise fails to comply with the PR Cure Plan in any material respect, and does not remedy any such failure within 20 Business Days after receipt of a notice from the Commonwealth requiring it to do so; or
- (iv) fails to meet either Performance Requirement (Minimum) in respect of any two consecutive Operations Years, the Commonwealth may terminate this Agreement by notice to the Operator, this Agreement will terminate on the date set out in that notice and that termination will be deemed to be a termination pursuant to clause 27.2.

#### 10.4 The Operator is a special purpose vehicle

The Operator must: **[Drafting note: this special purpose vehicle requirement applies to the Project as a whole, including where the Contracted Percentage is less than 100%.]**

- (a) be a special purpose vehicle established for the sole purpose of carrying on the Project and the business and activities contemplated by this Agreement; and
- (b) not carry on, (or have previously carried on prior to the Signing Date), any other business or activity other than the Project or the business and activities contemplated by this Agreement.

### 11. Performance Event

- (a) If an Actual LOR3 Event occurs during the Support Period (a **Performance Event**), the Operator must Bid at least 50% of the Contracted Capacity for each Trading Interval during the LOR Period for that Actual LOR3 Event.
- (b) If the LOR Period referred to in clause 11(a) is less than the Minimum Hours as a result of the event identified in paragraph (b) of the definition of the LOR Period, the Operator will be taken to have complied with this clause 11 if it has Bid at least 50% of the Contracted Capacity for each Trading Interval in that LOR Period.
- (c) If AEMO declares an Actual LOR3 Event, which occurs during the Operations Period (but outside of the Support Period), the Operator must use reasonable endeavours to Bid the Contracted Capacity for each Trading Interval during that Actual LOR3 Event.

### 12. Authorisations

#### 12.1 Authorisations

The Operator must obtain, maintain and comply with and ensure that the Facility complies with all Authorisations which are necessary for the performance of its obligations and/or exercise of any rights arising from or in connection with this Agreement including all conditions of such Authorisations, including those required to:

- (a) design, construct, commission, test, complete, maintain, manage and operate the Facility; and
- (b) perform its other obligations under this Agreement,

in each case in accordance with this Agreement and all applicable Laws.

#### 12.2 Notice to Commonwealth

The Operator must promptly notify the Commonwealth if it becomes aware of any pending or threatened litigation, Claim, dispute, action or circumstance of any kind concerning the Facility or the Project which is likely to have an adverse effect on the Operator's ability to:



- (a) perform its obligations under this Agreement;
- (b) own, design, construct, commission, test, complete, operate, manage or maintain the Facility; or
- (c) grant, renew, obtain, maintain or extend any Authorisation referred to in clause 12.1.

## 13. Insurance

### 13.1 Insurances required

The Operator must, at its own cost, procure and maintain insurance policies in relation to the Project consistent with Good Industry Practice, including the following insurances:

- (a) during the Construction Period only, contract works insurance for the full replacement or reinstatement value of the Facility plus amounts sufficient to cover costs of demolition and removal of debris, including coverage for material and equipment in transit;
- (b) during the Operations Period only, industrial special risks insurance for each Operations Year reflecting a combined limit of no less than the full replacement or reinstatement value of the Facility, plus amounts sufficient to cover costs of demolition and removal of debris, professional fees and an amount to cover additional costs and expenses to expedite the commencement and completion of the repair, replacement or reinstatement of the Facility;
- (c) throughout the Term:
  - (i) public and product liability insurance for an amount of at least \$20 million (Indexed) per claim;
  - (ii) workers' compensation scheme insurance and motor vehicle liability insurance as required by Law; and
  - (iii) any other insurance required by Law.

### 13.2 Insurer

The insurances required to be procured and maintained under each of clauses 13.1(a), 13.1(b) and 13.1(c)(i) must be maintained with an insurance company that has a Required Rating.

### 13.3 Maintenance of Insurance Policies

The Operator must maintain the Insurance Policies:

- (a) in the case of insurance issued on a claims made basis, for seven years after the end of the relevant period specified in clause 13.1; **[Drafting note: as the limitation of actions in certain jurisdictions is at least six years, the Commonwealth has included this requirement to maintain the relevant insurances past that period.]**
- (b) otherwise, until the end of the relevant period specified in clause 13.1.

### 13.4 Evidence of insurance

- (a) Within 10 Business Days after being requested to do, the Operator must provide the Commonwealth, with a current certificate of currency and any other evidence the Commonwealth may reasonably require as evidence that the Operator has complied with its obligations under this clause 13.
- (b) If the Operator fails to provide evidence reasonably satisfactory to the Commonwealth of any insurance when required to do so under clause 13.4(a), the Commonwealth may procure the relevant insurance and the Operator must pay the costs of procuring that insurance to the Commonwealth within 20 Business Days after a receipt of a request to do so.



### **13.5 Non-vitiation**

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

## **14. Alterations to the Facility**

- (a) The Operator must not (and must procure its Related Bodies Corporate not to) make or permit (or agree to make or permit) any alteration, expansion or change to the Facility (excluding maintenance and repairs arising out of fair wear and tear to the Project) without the Commonwealth's written consent.
- (b) The Commonwealth's consent under clause 14(a) must not be unreasonably withheld or delayed where the proposed alteration, expansion or change will not:
  - (i) materially or adversely impact:
    - (A) the Commonwealth's rights and obligations under:
      - (I) this Agreement, including its financial rights and obligations; or
      - (II) any arrangement it has entered into with a third party; or
    - (B) the Operator's performance of (or ability to perform) its obligations under the Project Documents including the Social Licence Commitments; or
  - (ii) result in the Facility no longer:
    - (A) being capable of dispatching at or above its Maximum Capacity through the Connection Point or importing electrical energy capacity at or above its Import Capacity through the Connection Point; or
    - (B) having an energy storage capacity that exceeds the Storage Capacity, in each case for any Operations Year (or Quarter in any Operations Year);
  - (iii) result in installation of a new generating system, energy storage system or load behind the Connection Point; or
  - (iv) result in any reduction to any one or more of the Registered Capacity, Maximum Capacity, Contracted Capacity, Storage Capacity or Import Capacity of the Facility.
- (c) The Operator must provide the Commonwealth with sufficient information to assess the proposed alteration, expansion or change and its impact, including in respect of the matters referred to in clause 14(b). The Commonwealth may withhold its consent under clause 14(a) if the Operator fails to provide such information or any additional information or clarification reasonably requested by the Commonwealth within 20 Business Days after receipt of a request to do so.

## **15. Social Licence**

### **15.1 Obligation to comply**

- (a) The Operator must comply with the Social Licence Commitments.
- (b) The Operator must promptly notify the Commonwealth if it fails or becomes likely to fail to comply with any of the Social Licence Commitments.

### **15.2 Reports and auditing**

- (a) The Operator must provide a report to the Commonwealth within:



- (i) 10 Business Days after the Operator first satisfies all Social Licence Commitments which are required to be satisfied prior to the Commercial Operation Date, demonstrating the Operator's satisfaction of those commitments;
  - (ii) 20 Business Days after the end of each Quarter thereafter until the date which is at the end of the second Operating Year, detailing the Operator's progress in satisfying the Social Licence Commitments during that Quarter;
  - (iii) within 20 Business Days after the end of each Operating Year thereafter, detailing the Operator's progress in satisfying the Social Licence Commitments during that Operating Year provided however that where the Operator breaches any obligation to comply with any Social Licence Commitment, the obligation to report will immediately revert to a Quarterly basis in accordance with clause 15.2(a)(ii) from the date of the breach until to the end of the Term (unless otherwise determined by the Commonwealth acting reasonably).
- (b) Each such report must:
  - (i) be in the reporting format specified by the Commonwealth from time to time (if any);
  - (ii) be certified by a director of the Operator to be true and correct;
  - (iii) include:
    - (A) sufficient information for the Commonwealth to assess the Operator's performance in satisfying the Social Licence Commitments; and
    - (B) any specific or additional information reasonably requested by the Commonwealth.
- (c) Subject to clause 15.2(d), within 40 Business Days after receiving the Operator's report under clause 15.2(a), the Commonwealth must:
  - (i) in the case of a report identified in clause 15.2(a)(i), confirm whether or not the Operator has satisfied all Social Licence Commitments that are required to be satisfied prior to the Commercial Operation Date;
  - (ii) request any further information from the Operator that the Commonwealth reasonably requires in order to assess whether the Operator has satisfied those Social Licence Commitments; or
  - (iii) reject that report where it does not comply with the requirements of this Agreement or the Social Licence Commitments set out that report have not been satisfied.
- (d) If the Commonwealth requests any further information from the Operator under clause 15.2(c)(ii), within:
  - (i) 20 Business Days after the Operator receives the Commonwealth's request, the Operator must provide the requested information to the Commonwealth; and
  - (ii) 40 Business Days after receiving the requested information from the Operator, the Commonwealth must use reasonable endeavours to either confirm or reject the Operator's report under clause 15.2(c).
- (e) If the Operator does not provide the requested information under clause 15.2(c)(ii) within the period identified in clause 15.2(d)(i), the Commonwealth is deemed to have rejected the Operator's report.
- (f) If the Commonwealth rejects, or is deemed to reject, the Operator's report:
  - (i) other than where the Operator's report is deemed to have been rejected by the Commonwealth pursuant to clause 15.2(e), the Commonwealth must provide reasonable details of its reasons; and
  - (ii) within 20 Business Days after the Operator's report is rejected, the Operator must amend and resubmit an updated report to the Commonwealth.



- (g) Clauses 15.2(c) to 15.2(f) will apply to the updated report submitted by the Operator pursuant to clause 15.2(f).

### 15.3 Audit

- (a) The Commonwealth may audit or cause a third party to audit the Operator's performance of the Social Licence Commitments at any time.
- (b) The Operator must comply fully with any such audit, including by providing the Commonwealth or its auditor with full access to all relevant information, documents and locations required by the Commonwealth or its auditor.
- (c) The Operator must bear the costs associated with an audit undertaken under clause 15.3(a) in each Operations Year, except where the Commonwealth has required an audit more than once in any such Operations Year.
- (d) Subject to clause 15.3(e), if the Commonwealth has required an audit more than once in any Operations Year (excluding any audits or investigations undertaken pursuant to Law including by the Auditor-General), the Commonwealth will bear the costs associated with the second and any subsequent audit undertaken in that Operations Year under clause 15.3(a) (excluding any costs incurred by or on behalf of the Operator).
- (e) If any audit demonstrates that the certified statements and reports provided by the Operator under clause 15.2 are materially inaccurate, the Operator will bear all the costs of that audit.

### 15.4 Non-compliance

If following:

- (a) the receipt of the Operator's report and any additional information requested by the Commonwealth under clause 15.2(c)(ii);
- (b) the expiry of the 20 Business Day period in which the Operator must provide any additional information requested by the Commonwealth under clause 15.2(c)(ii); or
- (c) the completion of an audit of the Operator's performance of its Social Licence Commitments in accordance with clause 15.3,

the Commonwealth determines (acting reasonably) that the Operator is not complying with its obligation to perform the Social Licence Commitments, then the Commonwealth may give a notice to the Operator which:

- (d) specifies each Social Licence Commitment with which the Operator has failed to comply; and
- (e) may specify whether the Commonwealth considers the Operator's non-compliance to be not remediable, in which case the Commonwealth will provide reasonable details of its reasons.

### 15.5 SLC Cure Plan

- (a) If:
  - (i) the Operator gives notice under clause 15.1(b); or
  - (ii) the Commonwealth issues a notice under clause 15.4,the Operator must submit a cure plan to the Commonwealth within 20 Business Days (**Draft SLC Cure Plan**).
- (b) A Draft SLC Cure Plan must identify:
  - (i) the steps which the Operator is taking or will take to remedy its failure to comply with its Social Licence Commitments;
  - (ii) the progress made by the Operator in satisfying the relevant Social Licence Commitments;



- (iii) the Operator's estimate of when the non-compliance will be remedied (acting reasonably); and
- (iv) if the Operator or the Commonwealth considers that a non-compliance cannot be remedied, an alternative proposal to the relevant Social Licence Commitment or part of a Social Licence Commitment. The alternative proposal may include:
  - (A) the payment of an amount to the Commonwealth in lieu of complying with the relevant Social Licence Commitment; or
  - (B) an alternative to the relevant Social Licence Commitment which is of equivalent or greater merit than that Social Licence Commitment.
- (c) The Commonwealth will determine (acting reasonably) whether any proposed alternative to the Social Licence Commitment is acceptable to the Commonwealth, having regard to the original Social Licence Commitment.
- (d) The Commonwealth must act reasonably in determining whether to approve or reject a Draft SLC Cure Plan submitted under clause 15.5(a) and must use reasonable endeavours to either approve or reject a Draft SLC Cure Plan by notice in writing to the Operator within 60 Business Days after that Draft SLC Cure Plan (which complies with this Agreement) is submitted to the Commonwealth.
- (e) If the Commonwealth rejects a Draft SLC Cure Plan:
  - (i) the Commonwealth must provide the Operator with reasonable details of its reasons at the time the Draft SLC Cure Plan is rejected and may suggest amendments to the Draft SLC Cure Plan, which may include an assessment of the merit of any alternative proposal made by the Operator; and
  - (ii) within 20 Business Days after the draft SLC Cure Plan is rejected, the Operator must amend and resubmit the revised Draft SLC Cure Plan to the Commonwealth for approval in accordance with clause 15.5(d).
- (f) Clauses 15.5(c), 15.5(d) and 15.5(e)(i), but not clause 15.5(e)(ii), will apply to an amended Draft SLC Cure Plan submitted by the Operator pursuant to clause 15.5(e)(ii).
- (g) If the Commonwealth approves a Draft SLC Cure Plan it must notify the Operator of that approval and that Draft SLC Cure Plan becomes the approved cure plan on the date of that approval (**SLC Cure Plan**). On and from the date on which the Commonwealth notifies the Operator of that approval:
  - (i) subject to clauses 8 and 21, the Operator must comply with the SLC Cure Plan; and
  - (ii) the Operator must provide a report to the Commonwealth regarding its progress against the SLC Cure Plan within 5 Business Days after the end of each calendar month until the relevant non-compliances the subject of the SLC Cure Plan have been satisfied by the Operator or waived by the Commonwealth.

## 15.6 Termination regarding SLCs

- (a) Subject to clause 15.6(b), if the Operator:
  - (i) fails to submit or resubmit a draft SLC Cure Plan when required under clause 15.5;
  - (ii) has submitted a draft SLC Cure Plan which has been rejected by the Commonwealth and has resubmitted the draft SLC Cure Plan which has also been rejected, each case in accordance with this Agreement;
  - (iii) subject to clause 15.5(g), fails to commence the implementation of the SLC Cure Plan or otherwise fails to comply with the SLC Cure Plan in any material respect, and does not remedy that failure within 10 Business Days after receipt of notice from the Commonwealth requiring it to do so; or
  - (iv) fails to make any cash payment contemplated in an approved SLC Cure Plan,



the Commonwealth may terminate this Agreement by notice to the Operator, this Agreement will terminate on the date set in that notice and that termination will be deemed to be a termination pursuant to clause 27.2.

- (b) The Commonwealth must not terminate this Agreement pursuant to clause 15.6(a) if the Operator has submitted or resubmitted a Draft SLC Cure Plan to the Commonwealth under clause 15.6(a) and the Commonwealth has not yet approved or rejected the Draft SLC Cure Plan under clause 15.5(d).

## 16. Knowledge Sharing

- (a) The Operator must provide the Knowledge Sharing Deliverables to the Commonwealth in accordance with, and otherwise comply with, the Knowledge Sharing Plan.
- (b) The Operator must, acting reasonably and in Good Faith, categorise each Knowledge Sharing Deliverable it provides to the Commonwealth pursuant to this clause 16 as follows:
  - (i) **public information:** information that may be shared freely within the Commonwealth, with industry participants and with the general public; or
  - (ii) **confidential information:** information that may only be shared in accordance with clause 16(c) or clause 36.
- (c) The Commonwealth may disclose information received pursuant to this clause 16 that is marked by the Operator or identified in the Knowledge Sharing Plan as 'confidential information' to the public on an aggregated and anonymised basis.

## 17. [Not used]

## 18. Invoicing and Payment

### 18.1 Invoicing

- (a) For each Quarter during the Support Period (other than the last Quarter in each Support Year), on or before the date which is 20 Business Days after the end of that Quarter the Operator must deliver to the Commonwealth:
  - (i) a notice setting out for that Quarter:
    - (A) the amount of the Quarterly Payment, determined in accordance with Schedule 4;
    - (B) the amount of GST (if any) payable in relation to each taxable supply related to those amounts; and
    - (C) any other requirement notified by the Commonwealth to the Operator; and
  - (ii) on the same day that it issues that notice, an invoice for the total amount payable by the Commonwealth in respect of that Quarter (including any GST).
- (b) For each Support Year, on or before the date which is 20 Business Days after the end of that Support Year the Operator must deliver to the Commonwealth a notice setting out for that Support Year:
  - (i) each amount to which the Commonwealth or the Operator is entitled;
  - (ii) any adjustments to any previous Payment Notice or amount payable under this Agreement pursuant to clause 18.4;
  - (iii) the amount of GST (if any) payable in relation to each taxable supply related to those amounts;
  - (iv) the net amount of the above amounts which are payable either by the Commonwealth or the Operator (as applicable);



- (v) any other requirement notified by the Commonwealth to the Operator.
- (c) If the Operator fails to issue a Payment Notice for a Quarter or Support Year or fails to include an amount to which the Commonwealth is entitled under this Agreement in a Payment Notice for a Support Year, the Commonwealth may issue a notice which sets out the relevant information.
- (d) On request by the Commonwealth, the Operator must provide information or other evidence reasonably requested by the Commonwealth to verify the information set out in any Payment Notice issued pursuant to clause 18.1(a)(i) and 18.1(b) within 10 Business Days after receipt of that request.
- (e) If the amount referred to a Payment Notice is an amount payable by:
  - (i) the Commonwealth to the Operator, the Commonwealth must issue an invoice for that amount to the Operator on the same day that it issues that Payment Notice; or
  - (ii) the Operator to the Commonwealth, the Operator issue an invoice for that amount to the Commonwealth on the same day that it issues the relevant Payment Notice.
- (f) Any party making a taxable supply under this Agreement in relation to an invoice identified under clause 18.1(e) must also provide a tax invoice for that supply to the recipient of that supply, in accordance with clause 20.4.

## 18.2 Payment

Subject to clause 18.6, if an amount is stated to be payable in a Payment Notice, the party which is obliged to pay that amount must pay that amount to the other party on the date which is:

- (a) where the Operator has an obligation to pay that amount, the date which is 20 Business Days after the date on which the Operator is obliged to provide the relevant Payment Notice related to that amount to the Commonwealth; and
- (b) where the Commonwealth has an obligation to pay that amount, the date which is 20 Business Days after it either receives or issues that Payment Notice (as applicable).

## 18.3 Disputed Invoice

- (a) If a party that is required to pay an amount referred to in a Payment Notice or an invoice reasonably believes the Payment Notice or invoice or any component of the Payment Notice or invoice is incorrect:
  - (i) it must notify the other party of the amount in dispute (**Disputed Amount**) and provide a statement of its reasons for disputing the Payment Notice or invoice (as applicable); and
  - (ii) if a party is required to pay an amount identified in that Payment Notice or invoice, that party must pay that part of the Payment Notice or invoice which is not in dispute.
- (b) If a party notifies the other party of a Disputed Amount pursuant to clause 18.3(a)(i), the parties must meet as soon as practicable after the other party receives that notice, and in any event within 10 Business Days after the other party receives that notice, to discuss the Disputed Amount.
- (c) If following the end of that 10 Business Day period the parties have not agreed a resolution in respect of the Disputed Amount, and a party wishes to progress the Dispute, that Dispute must be referred by that party for determination by an Independent Expert pursuant to clauses 41.4(b)(ii) and 41.6 and for the avoidance of doubt, clauses 41.4(b)(i) and 41.5 will not apply to that Dispute.
- (d) A party must pay any Disputed Amounts within 10 Business Days after the date of resolution of the Dispute (whether by agreement or determination by an Independent Expert) in respect of the Disputed Amount.



## **18.4 Adjustments**

- (a) Subject to clause 18.4(c), the Operator must adjust a Payment Notice (and its associated invoice) to the extent required to reflect any changes to the inputs that were used to determine or prepare that Payment Notice, including any change under a Revised Statement.
- (b) The Operator must include any adjustments in the next prepared Payment Notice (and invoice).
- (c) Other than adjustments for Revised Statements, no adjustment will be made to a Payment Notice (or invoice) more than 3 years after the end of the Quarter that is the subject of the Payment Notice (or invoice).
- (d) If a party pays the other party an amount arising from or in connection with this Agreement and it is subsequently agreed or determined for any reason that the recipient was not entitled to that payment, in whole or in part, the recipient must refund that payment (or such part as constitutes an overpayment) as a debt due and payable to the party that made the payment together with interest calculated in accordance with clause 18.5 on that amount. That refund must be paid by the recipient to the party that made the payment on or before the date which is 40 Business Days after the date on which it is agreed or determined that the recipient was not entitled to that payment.
- (e) The payment of any Payment Notice by the Commonwealth to the Operator and the issuing of any invoice or tax invoice (as the case may be) is not evidence that the obligations the subject of that Payment Notice invoice or tax invoice have been carried out by the Operator in accordance with the Project Documents, or an admission of liability, and is only to be taken as payment on account.
- (f) The Commonwealth may, in any Payment Notice or invoice, correct any error in any previous Payment Notice or invoice issued by the Commonwealth.

## **18.5 Interest on late payments**

If an amount payable by a party under this Agreement (including an amount determined to be payable as the result of a Dispute) is not paid by the due date, interest will accrue on the unpaid amount from day to day at the Default Interest Rate from (and including) the date the original payment was due and payable to:

- (a) in the case of a Disputed Amount, the date of resolution of the Dispute (whether by agreement or determination by an Independent Expert) in respect of the Disputed Amount; or
- (b) otherwise, the date the original payment was due and payable to the date the unpaid amount is paid in full.

## **18.6 Set off**

- (a) The Commonwealth may deduct from any amounts due and payable by the Commonwealth to the Operator under any of the Project Documents or otherwise at Law:
  - (i) any amount due and payable by the Operator to the Commonwealth; and
  - (ii) the amount of any Claim that the Commonwealth may have against the Operator.
- (b) The Operator must make all payments to the Commonwealth free from any set-off or counterclaim and without deduction or withholding for or on account of any present or future Tax, unless the Operator is compelled by Law to make such a deduction or withholding.
- (c) If a party is compelled by Law to make a deduction or withholding for the benefit of a Government Agency, it must:
  - (i) remit the deducted or withheld amount to the relevant Government Agency within the time required by Law; and
  - (ii) provide to the other party all information and documentation relating to that deduction or withholding, including any information or documentation required to



obtain a credit for or repayment of the deducted or withheld amount from a Government Agency.

## 19. Taxes

Subject to clause 20, the Operator is solely liable for payment of all Taxes which may arise from or be payable in connection with any Project Document, any payments under any Project Document and/or the Project.

## 20. GST

### 20.1 Definitions and interpretation

Words and phrases which have a defined meaning in the GST Law have the same meaning when used in this clause 20, unless the contrary intention appears.

### 20.2 GST Exclusive Consideration

Unless this Agreement expressly states otherwise, all consideration to be provided under this Agreement is exclusive of GST.

### 20.3 Barter supply

The parties have entered this Agreement on the assumption that, in accordance with the principles set out in public GST ruling *GSTR 2001/6 – GST and non-monetary consideration and GST Determination GSTD 2005/3 – Goods and services tax: are contracts for difference and financial spread betting contracts financial supplies?*, that:

- (a) upon execution of this Agreement, the following supplies will be made for GST purposes:
  - (i) the Commonwealth is making an input taxed financial supply of entry into the arrangements specified under Schedule 4, in return for the Operator's entry into the arrangements specified under Schedule 4;
  - (ii) the Operator is making an input taxed financial supply of entry into the arrangements specified under Schedule 4, in return for the Commonwealth's entry into the arrangements specified under Schedule 4;
- (b) as a result, any payments by the parties to each other under Schedule 4 represent further consideration for the input taxed supply of entry (by the recipient of those payments) into the arrangements specified under Schedule 4, and therefore are not subject to GST – consistent with paragraph 27 of GSTD 2005/3; and
- (c) neither party makes a taxable supply to the other party under the provisions of, or by agreeing to the obligations set out in, this Agreement.

### 20.4 GST gross-up

Notwithstanding clause 20.3, if a party (**Supplier**) makes a supply under or in connection with this Agreement on which GST is imposed, in whole or in part (not being a supply the consideration for which is specifically described in this Agreement as inclusive of GST) then:

- (a) the consideration payable or to be provided for that supply under this Agreement but for the application of this clause (**GST Exclusive Consideration**) is increased by, and the recipient of the supply (**Recipient**) must also pay to the Supplier, an amount equal to the GST payable on the supply (**GST Amount**); and
- (b) the GST Amount must be paid to the Supplier by the Recipient without set off, deduction or requirement for demand, at the same time as the GST Exclusive Consideration is payable or to be provided, subject to the Supplier giving the Recipient a tax invoice in respect of that taxable supply.



## 20.5 Payments and reimbursements

- (a) If a payment to a party under this Agreement is a reimbursement or indemnification, calculated by reference to a loss, cost or expense incurred by that party, then the payment will be reduced by the amount of any input tax credit to which that party, or the representative member of a GST group of which that party is a member, is entitled for that loss, cost or expense.
- (b) If a payment is calculated by reference to, or as a specified percentage of, another amount or revenue stream, that payment shall be calculated by reference to, or as a specified percentage of, the amount or revenue stream exclusive of GST.

## 20.6 Adjustments

If an adjustment event arises in respect of a supply made under or in connection with this Agreement, then:

- (a) the Supplier must issue an adjustment note to the Recipient within 7 days of the adjustment event occurring or otherwise as soon as it becomes aware of the adjustment event, outlining the revised amount of GST payable in respect of that supply (**Corrected GST Amount**);
- (b) if the Corrected GST Amount is less than the previously attributed GST Amount, the Supplier shall refund the difference to the Recipient within 15 days of the adjustment note being issued by the Supplier; and
- (c) if the Corrected GST Amount is greater than the previously attributed GST Amount, the Recipient shall pay the difference to the Supplier within 15 days of the adjustment note being issued by the Supplier.

## 20.7 No Partnership

In reliance on Public GST Rulings GSTR 2003/13 and 2004/6, the parties acknowledge and agree that they do not intend to form a general law partnership or a tax law partnership in entering into this Agreement.

# 21. Force Majeure

## 21.1 Project Force Majeure Event

- (a) Subject to clause 21.1(b), a Project force majeure event (**Project Force Majeure Event**) means any event or circumstance or combination of events or circumstances occurring after the Signing Date which:
  - (i) is not within the reasonable control of the Affected Party or any of its Associates;
  - (ii) could not have been prevented or overcome by the Affected Party or any of its Associates exercising reasonable care or complying with its obligations under this Agreement (including by implementing Good Industry Practice, by expending any reasonable amount and by rescheduling manpower and resources);
  - (iii) was not reasonably foreseeable or could not have been reasonably foreseen before the Signing Date; and
  - (iv) causes the Affected Party to be unable to comply with any of its obligations (other than an obligation to pay amounts) under this Agreement including causing the Facility to be unable to export, import or store energy.
- (b) For the purposes of clause 21.1(a), each of the following does not constitute a Project Force Majeure Event:
  - (i) a Connection Force Majeure Event;
  - (ii) lack of funds, financial hardship, failure or inability of any person to pay any sum due and payable or the inability of the Affected Party or any of its Associates to



obtain financing or insurance or to make a profit or achieve a satisfactory rate of return;

- (iii) a shortage or delay in delivery of materials, consumables, equipment or utilities required by the Affected Party or any of its Associates or any failure by the Affected Party or any of its Associates to hold sufficient stock of spares except to the extent that shortage or delay is caused by the relevant Project Force Majeure Event;
- (iv) a malfunction, temporary unavailability, breakdown or failure of equipment, property or assets caused by fair wear and tear;
- (v) any event or circumstance arising due to a failure by the Operator, any of its Related Bodies Corporate or any of its or their respective Associates to properly maintain any equipment, property or asset in accordance with Good Industry Practice;
- (vi) strikes, industrial disputes or other industrial actions or disruption that only affect the Facility or the Affected Party or any of its Associates at the Project site;
- (vii) failure of any person (other than the party to this Agreement which is not an Affected Party) to perform an obligation it owes to the Affected Party or any of its Associates, except where such failure is caused by any event or circumstance that, if such event or circumstance had happened to the Affected Party under this Agreement, would have constituted a Project Force Majeure Event under this Agreement;
- (viii) a failure to obtain or delay in obtaining an Authorisation required to be held by a party to perform its obligations under this Agreement or at Law;
- (ix) any absence, failure, lack or excess of any Input Resource, at the site of the Facility;
- (x) wet or inclement weather (other than extreme storms, hurricanes, cyclones, tornados, typhoons, tsunamis, ice and ice storms); and
- (xi) any Change in Law.

## 21.2 Connection Force Majeure Event

- (a) Subject to clause 21.2(b), a connection force majeure event (**Connection Force Majeure Event**) means any event or circumstance or combination of events or circumstances occurring after the Signing Date which:
  - (i) is not within the reasonable control of the Operator or any of its Associates;
  - (ii) could not have been prevented or overcome by the Operator or any of its Associates exercising reasonable care or complying with its obligations under this Agreement (including by implementing Good Industry Practice, by expending any reasonable amount and by rescheduling manpower and resources);
  - (iii) occur when the Facility is otherwise ready to be energised;
  - (iv) solely relate to the connection of the Facility to the Network and/or the commissioning of the Facility in accordance with the NER, and not to the procurement, design, construction, commissioning, testing or completion of the Facility; and
  - (v) cause the Facility to be unable to export a volume of energy equal to or above the Maximum Capacity.
- (b) For the purposes of clause 21.2(a), each of the following does not constitute a Connection Force Majeure Event:
  - (i) a Project Force Majeure Event; and
  - (ii) any Change in Law.
- (c) Connection Force Majeure Event includes the Facility being unable to directly export Energy to the Network because:



- (i) of the Operator's obligations under Law, including a legally binding direction from AEMO or a Network Service Provider; or
- (ii) the Network conditions are not in accordance with the requirements of the connection agreement related to the Facility,

other than where such obligations or Network conditions are due to an act or omission of the Operator or the Operator being in breach of that connection agreement, applicable Law or this Agreement.

### **21.3 Notification**

If a Force Majeure Event occurs the Affected Party must:

- (a) notify the other party of the event as soon as reasonably practicable (and in any event not later than 10 Business Days following the date on which the Affected Party first became aware of the occurrence of that event) and provide reasonable details of the event and related circumstances;
- (b) within 10 Business Days after the Affected Party delivers the notice referred to in clause 21.3(a), provide to the other party reasonable details of:
  - (i) the facts and circumstances constituting the Force Majeure Event (to the extent not already notified under clause 21.3(a));
  - (ii) any obligations affected or likely to be affected by the Force Majeure Event;
  - (iii) the action being taken to mitigate the effects of the Force Majeure Event;
  - (iv) the likely duration of the impact of the Force Majeure Event and any related delay in the performance of the affected obligations; and
- (c) provide the other party with an update of those details every two weeks, or such other frequency as may be agreed between the parties in writing, on the impact of the Force Majeure Event.

### **21.4 Suspension of obligations**

- (a) Subject to the remainder of this clause 21.4 and clause 21.5, if a Force Majeure Event occurs and prevents the Affected Party from performing its obligations under this Agreement, the Affected Party's obligations (other than an obligation to pay amounts) will be suspended to the extent that and for as long as the Affected Party is prevented from performing them by that Force Majeure Event.
- (b) An Affected Party will only be granted relief under clause 8 and this clause 21.4 if it has complied with clauses 21.3 and 21.7 in respect of the relevant Force Majeure Event and to the extent that it has not caused or contributed to that Force Majeure Event or its impacts.

### **21.5 Accrued rights and obligations**

Suspension of any obligations pursuant to clause 21.4 will not affect:

- (a) any rights or obligations which may have accrued prior to the occurrence of the Force Majeure Event; or
- (b) if the Force Majeure Event affects only some obligations, any other rights and obligations of the Affected Party or other rights and obligations of the other party.

### **21.6 Extension**

- (a) Without limiting clause 21.4, if this Agreement requires an obligation to be performed or any act, matter, event, circumstance or thing to be achieved by a specified date (other than the Final Support Commencement Date), then to the extent that a Force Majeure Event directly delays the Operator's ability to perform that obligation or achieve that act, matter, event, circumstance or thing, the relevant date (other than the Final Support Commencement Date) will be extended by a period equal to the delay caused to the Operator performing that obligation or achieving that act, matter, event, circumstance or thing by the specified date.



- (b) This clause 21.6:
  - (i) is without prejudice to clause 8.1; and
  - (ii) does not apply to any obligation to be performed or thing to be achieved under this Agreement prior to the commencement of the Operations Period.

## **21.7 Mitigation**

- (a) If a Force Majeure Event occurs the Affected Party must, as soon as practicable after the occurrence of that Force Majeure Event and for as long as the effects of that Force Majeure Event persist, use reasonable endeavours (including by implementing Good Industry Practice, by expending any reasonable amount and by rescheduling manpower and resources) to mitigate the consequences of that Force Majeure Event and (where applicable) mitigate any resulting impact on the performance of the obligations of the Affected Party.
- (b) Any period of extension or suspension granted by the Commonwealth due to a Force Majeure Event under this Agreement shall exclude any delay in the performance of the affected obligation attributable to a failure by the Affected Party to comply with clause 21.7(a).

## **21.8 Impact on payments**

Neither party is relieved of its obligations under clause 18 during the period of any suspension for a Force Majeure Event.

## **21.9 Termination for extended Force Majeure Event**

- (a) If a Force Majeure Event occurs and impacts at least:
  - (i) 50% of the Maximum Capacity (in MW); and/or
  - (ii) 50% of the Storage Capacity (in MWh),for a period of 18 months commencing from the first date of the Force Majeure Event, the Commonwealth may terminate this Agreement by notice to the Operator, this Agreement will terminate on the date set out in that notice and that termination will be deemed to be a termination pursuant to clause 27.2.
- (b) Termination under this clause 21.9 is without liability to either party, other than in respect of any Liability accrued as at the date of termination.

## **21.10 Cessation**

- (a) Any relief or an extension to which an Affected Party is entitled pursuant to clause 21.4 or 21.6 (as applicable) ends, in respect of an obligation, immediately on the date on which the Affected Party ceases to be prevented from performing that obligation by the relevant Force Majeure Event.
- (b) The Affected Party must promptly notify the other party when a Force Majeure Event ceases or when it ceases to be prevented from performing any obligation in respect of which it has claimed relief or an extension under clause 21.4 or 21.6 (as applicable).

## **21.11 Pre-existing Force Majeure Event**

Each party represents and warrants that as at the date of this Agreement it is not aware of any event, combination of events or circumstance that constitutes or is likely to constitute a Force Majeure Event.

## **22. Not used**



## 23. Reinstatement

### 23.1 Reinstatement Event

If a Reinstatement Event occurs, the Operator must provide the Commonwealth with either:

- (a) a notice that the Operator elects to reinstate the Facility (**Election to Reinstate**), including the Operator's proposed plan to reinstate the Project as soon as reasonably practicable after that Reinstatement Event occurs (**Proposed Reinstatement Plan**); or
- (b) a notice that the Operator elects to not reinstate the Facility,

provided that if the Operator does not provide an Election to Reinstate by the date that is 6 months after the occurrence of the Reinstatement Event (or any such longer period agreed by both parties, acting reasonably), the Operator will be deemed to have elected to not reinstate the Facility.

### 23.2 Reinstatement plan

- (a) If the Commonwealth receives an Election to Reinstate:
  - (i) the Commonwealth must either:
    - (A) request any reasonable changes to the Proposed Reinstatement Plan; or
    - (B) approve the Proposed Reinstatement Plan,provided that:
    - (C) if the Commonwealth does not request any changes to the Proposed Reinstatement Plan within 60 Business Days after receipt of the Election to Reinstate;
    - (D) the Operator provides a notice to the Commonwealth of that fact which includes an express warning that if the Commonwealth does not provide any comments on the Proposed Reinstatement Plan within a further 10 Business Days after receipt of that notice, the Commonwealth will be deemed to have approved the Proposed Reinstatement Plan; and
    - (E) the Commonwealth does not request any changes to the Proposed Reinstatement Plan within that further 10 Business Day period,the Commonwealth will be deemed to have approved the Proposed Reinstatement Plan at the end of that further 10 Business Day period; and
  - (ii) if the Commonwealth requests any changes to the Proposed Reinstatement Plan in accordance with clause 23.2(a)(i), within 20 Business Days after receipt of:
    - (A) the Commonwealth's request, the Operator must provide an amended Proposed Reinstatement Plan to the Commonwealth; and
    - (B) the Operator's amended Proposed Reinstatement Plan, the Commonwealth must (acting reasonably) approve or reject the amended Proposed Reinstatement Plan.
- (b) If the Commonwealth approves a Proposed Reinstatement Plan:
  - (i) that Proposed Reinstatement Plan will become an **Approved Reinstatement Plan** on and from the date it is approved; and
  - (ii) the Operator must, at its sole cost and risk, comply with that Approved Reinstatement Plan in all material respects.

### 23.3 Consequences of failing to reinstate

If, following a Reinstatement Event:

- (a) the Operator elects not to (or is deemed to have elected not to) reinstate the Project;
- (b) the Operator does not provide an amended Proposed Reinstatement Plan in accordance with clause 23.2(a)(ii)(A);



- (c) the Commonwealth rejects a Proposed Reinstatement Plan in accordance with clause 23.2(a)(ii)(B); or
- (d) the Operator:
  - (i) fails to comply with an Approved Reinstatement Plan in any material respect; and
  - (ii) does not cure that failure within 2 months after being notified of that failure by the Commonwealth,

the Commonwealth may terminate this Agreement by notice to the Operator, this Agreement will terminate on the date set in that notice and that termination will be deemed to be a termination pursuant to clause 27.2.

#### **23.4 Obligation to reinstate**

- (a) Where the Operator elects to reinstate the Facility following a Reinstatement Event, the Operator must:
  - (i) ensure that the repair and/or reinstatement results in the Facility being able to achieve or exceed the Performance Requirements; and
  - (ii) apply the proceeds of any insurance payment received in respect of any loss, damage or destruction to the Facility to the repair or reinstatement of the Facility.
- (b) The Operator must comply with its obligations under this clause 23.4:
  - (i) promptly and diligently, without unnecessary or unreasonable delay in the relevant circumstances; and
  - (ii) in accordance with Good Industry Practice.

### **24. Change in Law**

#### **24.1 Change in Law**

- (a) Subject to clause 24.2, at any time after COD, if a Change in Law occurs that prevents or materially interferes with the operation of this Agreement or any of the transactions contemplated by this Agreement, the parties will:
  - (i) use reasonable endeavours to mitigate the effect of the Change in Law; and
  - (ii) consider and negotiate in Good Faith any specific amendment to this Agreement requested by a party so as to preserve the efficacy of the operation of this Agreement in the manner intended as at the Signing Date.
- (b) If the parties are unable to agree any changes to this Agreement as contemplated under clause 24.1(a)(ii), then this Agreement will continue to operate in accordance with its terms.
- (c) This clause 24.1 may operate in conjunction with clause 24.5 but is intended to address amendments to this Agreement other than those relating to Relevant Cost Changes.

#### **24.2 Exclusions**

The following do not constitute a Change in Law at any time after the Signing Date:

- (a) a change to a term (including any renaming or replacement of a term) in the NER of similar meaning or effect to the relevant term. The change to the term will apply in place of the relevant term in the NER; or
- (b) a change to the Reserve Level Declaration Guidelines or the NER in relation to the description, categorisation or thresholds of low reserves or lack of reserves (**LOR**). The Commonwealth may (acting reasonably) notify the Operator which description, categorisation or thresholds of low reserve or LORs will apply for the purpose of the definition of an Actual LOR3 Event.



### 24.3 Mitigation

If the Operator incurs a Relevant Cost Change, then Operator must use its reasonable endeavours to mitigate any such Relevant Cost Change incurred and to maximise the extent of any reduction in costs arising from the Relevant Cost Change.

### 24.4 Notice

- (a) If the net impact of a Relevant Cost Change on the Operator is likely to result in a:
  - (i) net increase in the Relevant Cost Change that exceeds the Cost Change Threshold, the Operator may;
  - (ii) a net decrease in the Relevant Cost Change that exceeds the Cost Change Threshold, the Operator must,in each case give the Commonwealth a notice under this clause 24.4 in respect of that Relevant Cost Change. Any such notice provided pursuant to clause 24.4(a) must be provided by the Operator to the Commonwealth on or before the date on which is 20 Business Days after the date on which the Operator became aware of the relevant Change in Law.
- (b) The net impact of a Relevant Cost Change pursuant to this clause 24.4 is to be calculated on the basis that the Operator complies with its obligations under this Agreement including under clause 24.3.
- (c) A notice given by the Operator pursuant to this clause 24.4 must specify:
  - (i) reasonable details of the Relevant Cost Change and the circumstances that gave rise to it;
  - (ii) its best estimate of the amount of the Relevant Cost Change (together with reasonable supporting evidence); and
  - (iii) reasonable evidence demonstrating the Operator's steps taken to use reasonable endeavours to mitigate additional costs and maximise reductions in costs in accordance with clauses 24.1(a) and 24.3.

### 24.5 Payment

- (a) If:
  - (i) a Relevant Cost Change occurs;
  - (ii) that Relevant Cost Change is likely to result in a net increase in such costs which exceeds the Cost Change Threshold; and
  - (iii) the Operator has complied with its obligations under this Agreement including clause 24 in respect of the relevant Change in Law and Relevant Cost Change,the Commonwealth must pay the Operator an amount equal to 50% of the amount by which the net increase in the Relevant Cost Change exceeds the Cost Change Threshold.
- (b) If:
  - (i) a Relevant Cost Change occurs;
  - (ii) that Relevant Cost Change is likely to result in a net decrease in such costs which exceeds the Cost Change Threshold,;the Operator must pay the Commonwealth an amount equal to 50% of the amount by which the net decrease in the Relevant Cost Change exceeds the Cost Change Threshold.
- (c) The Operator:
  - (i) may include an amount which is payable to the Operator;
  - (ii) must include an amount which is payable to the Commonwealth,



in each case, under this clause 24.5, in the next Payment Notice it issues under clause 18.1.

- (d) Any Dispute regarding whether an amount is payable under this clause 24.5 will be determined by an Independent Expert in accordance with clause 41.6.

25. [Not used]

26. [Not used]

## 27. Termination

**[Drafting note: the Operator is not provided with a right to terminate because it has rights to seek damages from the Commonwealth. The Commonwealth does not believe that termination by the Operator would address the policy objectives of the CIS. Further the Commonwealth has a robust credit rating, interest is payable for late payments and the Commonwealth is subject to model litigant guidelines.]**

### 27.1 Termination for Convenience by the Commonwealth

- (a) Subject to clause 27.1(b), the Commonwealth may at its absolute discretion at any time terminate this Agreement by notice in writing to the Operator.
- (b) A termination of this Agreement under this clause 27.1 will take effect at the date specified by the Commonwealth in the notice given pursuant to clause 27.1(a), provided that such date is no less than 6 months after the date the notice is given.
- (c) Termination under this clause 27.1 will be without Liability to either party, other than:
  - (i) in respect of any Liability accrued as at the date of termination; and
  - (ii) the Commonwealth's Liability to the Operator as expressly set out in clause 28.

### 27.2 Termination by the Commonwealth for Operator Default

The Commonwealth may terminate this Agreement with immediate effect by notice in writing to the Operator if:

- (a) the Commonwealth becomes entitled to terminate this Agreement under any of clauses 3.3(g) (Draft CP Cure Plans and CP Cure Plans), 5.1(e)(v) (Achievement of Milestone Events), 5.2(g) (Draft ME Cure Plans and ME Cure Plans), 10.3(h) (Performance Requirement failures), 15.6(a) (Termination regarding SLCs), 29.4 (Non-compliance) or sections 5.4(c), 5.5(c)(iii) or 5.5(d)(iii) of Schedule 11 (Significant Events);
- (b) the Operator assigns, novates, transfers or otherwise deals with the Operator's rights or obligations under, title to or interest in any Project Document or the Project other than in accordance with the requirements of this Agreement without the Commonwealth's written consent;
- (c) where the Operator undergoes or agrees to undergo a Change in Control other than in accordance this Agreement;
- (d) the Operator:
  - (i) fails to pay any amount by the date on which that payment is due and payable to the Commonwealth under this Agreement (other than an amount which is the subject of a Dispute in Good Faith); and
  - (ii) does not pay the relevant amount (other than an amount which is the subject of a Dispute in Good Faith) in full within 20 Business Days after receiving notice of that failure from the Commonwealth;
- (e) the Operator fails to comply in any material respect with an obligation under this Agreement (other than an obligation to pay an amount due and payable) and:



- (i) the Operator does not commence remedying that failure within 20 Business Days after receiving notice of that failure from the Commonwealth (**Breach Notice**);
- (ii) if the Operator has commenced remedying that failure within 20 Business Days after receiving the Breach Notice, the Operator:
  - (A) does not pursue that remedy in a diligent manner; or
  - (B) does not remedy the relevant failure within 40 Business Days after receiving the Breach Notice (or by any later date determined by the Commonwealth acting reasonably); or
- (iii) the failure is not reasonably capable of remedy:
  - (A) if the Commonwealth provides the Operator with reasonable requirements to overcome the consequences of, or compensate the Commonwealth for that failure and a reasonable date by which the Operator must comply with those requirements, the Operator fails to comply with those requirements by that date; or
  - (B) if the Commonwealth forms the view acting reasonably that there are no reasonable requirements that can be met by the Operator to overcome the consequences of, or compensate the Commonwealth for, that failure, stating that to be the case along with its reasons for forming that view;
- (f) an express representation made by the Operator under this Agreement (other than under clause 31.3) is incorrect or misleading in any material respect when made and the Operator does not remedy that incorrect or misleading representation within 60 Business Days after receiving notice from the Commonwealth of that incorrect or misleading representation (including by the Operator paying the Commonwealth compensation reasonably acceptable to the Commonwealth on account of loss suffered by the Commonwealth);
- (g) an express representation made by the Operator under clause 31.3 is incorrect or misleading in any material respect when made and:
  - (i) the Commonwealth forms the view that the Commonwealth would not have awarded the Operator this Agreement but for the materials and information which caused or contributed to that representation being materially incorrect or misleading;
  - (ii) the Commonwealth notifies the Operator of that incorrect or misleading representation in writing no later than 2 years after the Commercial Operation Date; and
  - (iii) the Operator does not remedy that incorrect or misleading representation within 60 Business Days after receiving notice from the Commonwealth of that incorrect or misleading representation (including by the Operator paying the Commonwealth compensation reasonably acceptable to the Commonwealth on account of loss suffered by it);
- (h) the Operator:
  - (i) fraudulently, recklessly or knowingly provides a report or other information required under clauses 15, 38.1, 38.2, 38.3, 38.4, 38.6, 38.7 or 38.8 (**Reports**) that is incorrect or misleading in any material respect; and
  - (ii) does not, within 60 Business Days after receiving notice from the Commonwealth of that incorrect or misleading representation:
    - (A) pay the Commonwealth compensation reasonably acceptable to the Commonwealth on account of loss suffered by it;
    - (B) ensure that the persons involved in preparing and/or providing the reports and/or information which gave rise to the incorrect or misleading representation will have no future involvement in respect of the Project or this Agreement;



- (C) procure that an auditing firm approved by the Commonwealth conducts an audit of all previous Reports and provides the Commonwealth the results of such audit (in each case at the cost of the Operator); and
- (D) undertake to procure that an independent auditing firm nominated by the Operator and approved by the Commonwealth (acting reasonably) and which has no actual or perceived conflict of interest conducts an annual audit of all Reports provided to the Commonwealth in respect of each future Operations Year and provide the Commonwealth the results of such audits within 40 Business Days after the end of that Operations Year;
- (i) the Operator is the subject of an Insolvency Event or the Operator wholly or substantially abandons all or any material (in scope or effect) part of the Facilities and the Operator does not cure that Insolvency Event or abandonment within 5 Business Days after receiving notice from the Commonwealth to do so;
- (j) the Commonwealth becomes entitled to terminate this Agreement in accordance with clause 21.9 (Termination for extended Force Majeure Event); and
- (k) the Commonwealth becomes entitled to terminate this Agreement in accordance with clause 23.3 (Consequences of failure to reinstate).

For the avoidance of doubt, this Agreement is also deemed to be terminated pursuant to this clause 27.2 on the terms set out in clauses 3.4 and 5.3 and section 5.1(d)(ii) of Schedule 4.

### **27.3 Preservation of rights**

Termination or expiry of this Agreement for any reason will not extinguish or otherwise affect any rights of either party against the other party that:

- (a) accrued before the time of such termination or expiry; or
- (b) otherwise relates to or may arise at any future time from any breach or non-observance of obligations under this Agreement that arose prior to the date of such termination or expiry.

### **27.4 Sole basis of termination**

- (a) Clauses 27.1 and 27.2 set out the sole bases at Law or otherwise upon which the Commonwealth is entitled to terminate, rescind or accept a repudiation of this Agreement.
- (b) The Operator acknowledges and agrees that, the Operator has no right to, and will not, terminate any Project Document notwithstanding any other provision of this Agreement or any other Project Document or any rights the Operator would have at Law or otherwise (including for repudiation) but for this clause 27.4(b).

## **28. Payments on Termination**

### **28.1 Fixed Termination Payment and Early Termination Payment**

- (a) If this Agreement is terminated by the Commonwealth in accordance with clause 27.1, the Commonwealth must pay the Fixed Termination Payment to the Operator.
- (b) If this Agreement is terminated by the Commonwealth in accordance with any of clause 27.2 (other than clauses 27.2(k) and 27.2(j)), pursuant to clause 3.4 or 5.3 or pursuant to section 5.1(d)(ii) of Schedule 4, the Operator must pay the Early Termination Payment to the Commonwealth.
- (c) If this Agreement is terminated by the Commonwealth in accordance with clause 27.2(k):
  - (i) subject to clause 28.1(c)(ii), no Termination Payment is payable under this Agreement; or
  - (ii) if:
    - (A) the relevant Reinstatement Event did not arise as a result of a Project Force Majeure Event; or



- (B) the Operator or a Related Body Corporate of the Operator subsequently commences reinstating the Project (or a project which is similar to the Project) within 5 years after the Reinstatement Event occurred,

then the Operator must pay the Early Termination Payment to the Commonwealth.

- (d) If this Agreement is terminated by the Commonwealth in accordance with clause 27.2(j), no Termination Payment is payable under this Agreement.
- (e) Notwithstanding anything to the contrary under this clause 28.1, each party is entitled to recover from the other party amounts related to rights which accrued before the time of such termination or expiry of this Agreement or which otherwise relate to or may arise at any future time from any breach or non-observance of obligations under this Agreement that arose prior to the date of such termination or expiry.

## **28.2 Sole remedy**

Subject to clauses 27.3 and 28.3, the parties acknowledge and agree that:

- (a) the Operator's sole financial remedy arising out of in connection with a termination under clause 27.1 is the Operator's right to be paid the Fixed Termination Payment by the Commonwealth in accordance with clause 28.1(a);
- (b) the Fixed Termination Payment is a genuine pre-estimate of the Operator's anticipated liabilities and Losses arising from the termination of this Agreement under clause 27.1;
- (c) the Commonwealth's sole financial remedy arising out of or in connection with a termination under clause 27.2 (other than clause 27.2(j)), pursuant to clause 3.4 or 5.3 or pursuant to section 5.1(d)(ii) of Schedule 4 is the Commonwealth's right to be paid the Early Termination Payment by the Operator in accordance with clause 28.1; and
- (d) the Early Termination Payment is a genuine pre-estimate of the Commonwealth's anticipated liabilities under clause 27.2 (other than clause 27.2(j)) and Losses arising from the termination of this Agreement.

## **28.3 Unenforceability**

- (a) If:
- (i) the Early Termination Payment becomes payable by the Operator under the terms of this Agreement; and
- (ii) that Early Termination Payment is found to be a penalty or the Operator's obligation to pay the Early Termination Payment pursuant to clause 28.1 is found to be void or unenforceable for any reason (whether in whole or in part),

the Operator indemnifies the Commonwealth against, and agrees to reimburse and compensate it for, any liability or Loss (including in respect of loss of bargain) suffered by the Commonwealth arising from or in connection with the termination of this Agreement, provided that the Operator's aggregate Liability pursuant to this clause 28.3 will not exceed an amount equal to the Early Termination Payment.

## **28.4 Invoice**

- (a) The party entitled to be paid a Termination Payment must provide an invoice to the other party for the Termination Payment within 60 Business Days after termination of this Agreement.
- (b) The party required to pay a Termination Payment must pay the amount of any such Termination Payment within 30 Business Days after receipt of an invoice provided under clause 28.4(a).



## 29. Assignment and Change in Control

### 29.1 Assignment or Novation By Operator

- (a) The Operator must not assign, novate, transfer or otherwise deal with the Operator's rights or obligations under, title to or interest in any Project Document or the Project without the Commonwealth's written consent.
- (b) Prior to the Commencement Date, the Commonwealth may provide or withhold its consent under clause 29.1(a) at its absolute discretion.
- (c) On and from the Commencement Date, the Commonwealth must not unreasonably withhold or delay its consent under clause 29.1(a) where:
  - (i) the proposed assignee, novatee or transferee has the legal, commercial, financial and technical capability to comply with the Operator's obligations under the Project Documents;
  - (ii) the proposed assignee, novatee or transferee is solvent and reputable, does not have an interest which conflicts in a material way with the interests of the Commonwealth and there is no prohibition or restriction imposed by Law which would prevent or impact its ability to assume the rights and/or obligations of the assignor, novator or transferor;
  - (iii) the proposed assignment, novation or transfer is not against the national interests, would not have a material adverse effect on the Project nor would increase the Liability of, or risks accepted by the Commonwealth under any Project Documents or in any other way in connection with the Project; and
  - (iv) the proposed assignee, novatee or transferee agrees to assume all obligations of the Operator arising from or in connection with the Project Documents including those which arise prior to the novation, transfer or dealing on terms reasonably acceptable to the Commonwealth.
- (d) The Operator must not assign, novate, transfer or otherwise deal with its rights or obligations under, title to or interest in this Agreement or the Project unless it also assigns, novates or otherwise transfers:
  - (i) its rights and obligations under, title to or interest in and its obligations under each other Project Document; and
  - (ii) the Project and the Transaction Documents to which it is a party, to the same person.

### 29.2 Security Interest

- (a) Notwithstanding anything else in clause 29.1, the parties agree that the Operator may grant a Security Interest in respect of its rights and obligations under this Agreement or the Project in favour of a secured lender (or a trustee acting on its behalf) who is providing financial accommodation on secured terms to the Operator (or to any of its Related Bodies Corporate) in connection with the Project.
- (b) The parties acknowledge and agree that the provisions of clause 29.1 will apply to any assignment, novation, transfer of or dealing with the Operator's rights and/or obligations under, title to and interest in this Agreement following the enforcement of a Security Interest granted by the Operator in accordance with clause 29.2(a).

### 29.3 Assignment or Novation By Commonwealth

- (a) The Commonwealth may assign, novate, transfer or otherwise deal with the Commonwealth's rights or obligations under, title to or interest in any Project Document and the Operator's consent is hereby given to that assignment, novation, transfer or dealing where the Commonwealth assigns, novates or transfers to or enters into a dealing with another entity which has been guaranteed by or has the financial support of the Commonwealth including the Clean Energy Financial Corporation and the Australian Renewable Energy Agency.



- (b) The Commonwealth must not otherwise assign, novate, transfer or otherwise deal with the Commonwealth's rights or obligations under, title to or interest in any Project Document without the Operator's prior written consent (such consent not to be unreasonably withheld or delayed).

#### 29.4 Non-compliance

- (a) Any purported assignment, novation, transfer or dealing that is not in compliance with clauses 29.1 to 29.3 will not be effective as between the parties to this Agreement.
- (b) Without limiting clause 29.4(a), if the Operator does not comply with any of clauses 29.1 to 29.3, the Commonwealth may terminate this Agreement by giving notice to the Operator, this Agreement will terminate on the date set in that notice and that termination will be deemed to be a termination pursuant to clause 27.2.

#### 29.5 Change in Control

- (a) The Operator must not undergo, or agree to undergo, a Change in Control without the Commonwealth's prior written consent.
- (b) The Commonwealth must not unreasonably withhold or delay its consent under clause 29.5(a) where:
  - (i) the Operator's legal, commercial, technical, managerial and financial capability to enable it to perform its obligations under this Agreement will not be adversely affected by the proposed Change in Control;
  - (ii) in the case of Change in Control that would occur prior to the Commercial Operation Date, the Commonwealth considers (in its absolute discretion) that its assessment of the Operator or the Project during the Tender would not have been adversely affected in any way had the Change in Control occurred prior to the conclusion of the Tender;
  - (iii) the proposed Controller is solvent and reputable and does not have any an interest which conflicts in a material way with the interests of the Commonwealth and there is no prohibition or restriction imposed by Law which would prevent or impact its ability to take Control of the Operator; or
  - (iv) the proposed Change in Control of the Operator is not against the national interest, would not have a material adverse effect on the Project nor would increase the Liability of, or risks accepted by the Commonwealth under any Project Documents or in any other way in connection with the Project.
- (c) The Operator must promptly provide such further information as the Commonwealth reasonably requires in order to determine whether to grant consent to a proposed Change in Control of the Operator pursuant to this clause 29.5.

### 30. Risk and Liability

#### 30.1 Indemnity

- (a) The Operator indemnifies (and must keep indemnified) the Commonwealth and the Commonwealth's Associates (referred to in this clause 30.1 as **'those indemnified'**) from and against all Losses sustained or incurred by those indemnified and arising out of or as a consequence of:
  - (i) any Claim against the Commonwealth or any Commonwealth Associate arising from or in connection with any act or omission of the Operator or its Related Bodies Corporate, or their respective Associates or other persons acting on their behalf or under their direction (together the **Operator Parties**) in connection with this Agreement or the Project;
  - (ii) any:



- (A) loss, damage or destruction to, or loss of use of, property including any real or personal property belonging to the Commonwealth, a Commonwealth Associate or a third party; or
  - (B) injury to, illness or death of, any person,
- which occurs or arises in connection with any act or omission of the Operator or any Operator Party in connection with this Agreement or the Project;
- (iii) a negligent, reckless, wilful or unlawful act or omission of the Operator or an Operator Party in connection with this Agreement or the Project;
  - (iv) the exercise of any Intellectual Property or other rights licensed or granted in accordance with this Agreement, including any Claim that any act in relation to the Specified Material, Background Intellectual Property or Project Intellectual Property infringes the Intellectual Property of any third party;
  - (v) a breach by the Operator of any obligation under this Agreement; or
  - (vi) a breach of any representation or warranty given by the Operator under this Agreement.
- (b) The Operator's liability to indemnify those indemnified under this clause 30.1 will be reduced proportionally to the extent that any negligent, reckless, wilful or unlawful act or omission on the part of those indemnified directly caused the relevant Loss.
  - (c) The right of those indemnified to be indemnified under this clause 30.1 is in addition to, and not exclusive of, any other right, power, or remedy provided by Law, but those indemnified are not entitled to be compensated in excess of the amount of the relevant Loss.

## 30.2 Limitation of liability

- (a) Neither party is liable to the other party under this Agreement, at Law or otherwise for any:
  - (i) indirect or consequential loss or damage of any kind;
  - (ii) loss of profit, loss of revenue, loss of use, loss of production or loss of goodwill or loss of property;
  - (iii) business interruption; or
  - (iv) indirect and consequential financial or economic loss of any kind,

suffered by the other party however arising due to any causes including the default or sole or concurrent negligence of a party, or its Associates, and whether or not foreseeable at the Signing Date.
- (b) Subject to clause 30.2(c) to the extent permitted by Law:
  - (i) the Commonwealth's Liability arising from or in connection with this Agreement is limited to:
    - (A) \$1 million (Indexed) in respect of any single event; and
    - (B) \$2 million (Indexed) in aggregate in respect of all events occurring within any Financial Year; and
  - (ii) the Operator's Liability arising from or in connection with this Agreement is limited to:
    - (A) \$5 million (Indexed) in respect of any single event; and
    - (B) \$10 million (Indexed) in aggregate in respect of all events occurring within any Financial Year.
- (c) Nothing in clauses 30.2(a) or 30.2(b) limits or otherwise affects any of the following:
  - (i) any party's obligation to make payments which are expressly required arising from or in connection with this Agreement including any Termination Payment;



- (ii) the right of the Commonwealth to make deductions from any payment to be made to the Operator as expressly permitted under this Agreement including the Availability Rebate, the Storage Capacity Rebate and the Performance Event Rebate;
- (iii) the Operator's Liability under any indemnity identified in this Agreement including in clauses 30.1(a)(i) and 30.1(a)(vi) and under clause 34.5;
- (iv) any party's liability arising from criminal acts or omissions, fraud, wilful breach of this Agreement, wilful misconduct or unlawful act or omission;
- (v) either party's liability for property damage, personal injury or illness or death; and
- (vi) either the Operator's liability to the extent that insurance proceeds:
  - (A) are payable to the Operator in respect of the event or circumstance giving rise to the liability; or
  - (B) would have been payable to the Operator in respect of the event or circumstance giving rise to the liability had the Operator complied with its obligations under this Agreement in relation to insurance and the relevant insurance policy itself.
- (d) The Commonwealth and its Associates are not responsible at any time for any Liabilities incurred or suffered by the Operator as a result of, or arising out of the Operator's responsibilities under this Agreement or the conduct of the Project.
- (e) Except as expressly provided in this Agreement to the contrary, it is the responsibility of the Operator to perform its obligations under this Agreement and to carry out the Project at its own cost and risk.

### **30.3 Benefits held on trust**

- (a) The Commonwealth holds on trust for each Commonwealth Associate the benefit of:
  - (i) each indemnity, release, limitation of Liability and exclusion of Liability given by the Operator pursuant to this Agreement in favour of the relevant Commonwealth Associate; and
  - (ii) each right in this Agreement to the extent that such right is expressly stated to be for the benefit of the Commonwealth or any Commonwealth Associate.
- (b) The Operator acknowledges the existence of such trusts and consents to the Commonwealth exercising rights in relation to, or otherwise enforcing such indemnities, releases, limitations, exclusions and rights on behalf of the Commonwealth Associates.
- (c) The parties agree that the Commonwealth does not require the consent of any Commonwealth Associate to amend or waive any provision of any Project Document.

## **31. Representations and Warranties by the Operator**

### **31.1 General warranties**

Each party warrants and represents to the other party for the benefit of the other party that:

- (a) in the case of the Operator only, it is duly registered and validly existing under the laws of its place of incorporation and has power and authority to own its assets and carry on its business as it is now being conducted;
- (b) it has the full power and authority to enter into, deliver and perform its obligations under the Project Documents and carry out the transactions contemplated by the Project Documents;
- (c) it has taken all necessary action to authorise the entry into, delivery of and performance of its obligations under the Project Documents; and
- (d) this Agreement constitutes a legal, valid and binding obligation on it enforceable in accordance with its terms.



### 31.2 Operator warranties

The Operator warrants and represents to the Commonwealth for the benefit of the Commonwealth that:

- (a) it, its directors and/or its Related Body Corporates are not engaged in any Claim or are aware of any pending or threatened Claim of which written or verbal communication has been given or received and there are no facts, matters, circumstances or events which are reasonably likely to give rise to any such Claims by any third party against it, its directors and/or its Related Body Corporates in each case which would have a material effect on the subject matter of any Project Document;
- (b) the execution, delivery and performance of its obligations under each Project Document to which it is a party does not and will not violate:
  - (i) any Law, or any document or agreement to which it is a party or which is binding on it or any of its assets;
  - (ii) any authorisation, ruling, judgment, order or decree of any Government Agency; or
  - (iii) its constitutional documents;
- (c) it holds and will continue to hold all Authorisations that it is required by Law to hold in order to lawfully execute, deliver and perform its obligations under the Project Documents;
- (d) unless otherwise expressly provided or permitted in this Agreement, it is not the trustee or Responsible Entity of any trust nor does it hold any property subject to or impressed by any trust;
- (e) all information that has been provided to the Commonwealth by the Operator is true and correct at the time it was provided to the Commonwealth;
- (f) it is not aware of any material facts or circumstances that have not been disclosed to the Commonwealth as at the Signing Date:
  - (i) that may have an adverse effect on the Operator's ability to meet its obligations under any Project Document; or
  - (ii) which, had they been disclosed, may have made a prudent person in the Commonwealth's position, considering whether or not to enter into any Project Document, determine not to do so;
- (g) it is not subject to an Insolvency Event;
- (h) neither it nor any of its Related Bodies Corporate, or any of their respective Associates, have engaged in any activity or conduct in connection with the Project which would violate any applicable anti-bribery, anticorruption or anti-money laundering and counter-terrorism finance laws, regulations or rules in any applicable jurisdiction;
- (i) it has not entered into any Offtake Contract or other arrangement which would have been a breach of clause 9.5 if it had entered into that arrangement during the Term;
- (j) it has no subsidiaries; and
- (k) none of its assets are subject to any Security Interest other than a Permitted Security Interest.

### 31.3 Tender matters

The Operator represents and warrants that:

- (a) all statements, representations, declarations, materials and information provided by the Operator to the Commonwealth as part of or in connection with the Tender Submission (other than forecasts or projections) was true, correct and not misleading in any material respect (whether by omission or otherwise) as at the Tender Date; and
- (b) all forecasts and projections which were provided to by the Operator to the Commonwealth as part of or in connection with the Tender Submission were prepared using due care and skill based on assumptions which the Operator or its Related Bodies



Corporate believed, in Good Faith, were fair and reasonable assumptions as at the Tender Date.

### 31.4 Repetition

Unless expressly stated otherwise, each representation and warranty given by the Operator is deemed to be given on the Signing Date Agreement and repeated on each day thereafter.

### 31.5 Trustee representations and warranties

**[Drafting note: clause to be included in this Agreement where the Operator enters into the Agreement in its capacity as trustee for a trust]**

[The Operator represents and warrants to the Commonwealth that:

- (a) the Trust has been duly established and constituted;
- (b) it is the sole trustee of the Trust;
- (c) it has been validly appointed as trustee of the Trust and no action has been taken or proposed to remove it as trustee of the Trust;
- (d) it has power under the terms of the Trust to enter into the Project Documents and comply with its obligations under it and them;
- (e) it has in full force and effect the authorisations necessary for it to enter into each Project Document, perform obligations under it or them and allow it or them to be enforced (including any authorisation required under the Trust Deed and its constitution (if any));
- (f) it has a right to be fully indemnified out of the Trust Property in respect of obligations incurred by it under this Agreement and there are no facts, matters or circumstances that would disentitle the Operator from being so indemnified;
- (g) it is not, and never has been, in default under the Trust Deed;
- (h) no action has been taken or proposed to terminate the Trust;
- (i) it and its directors and other officers have complied with their obligations in connection with the Trust;
- (j) it has not exercised its powers under the Trust Deed to release, abandon or restrict any power conferred on it by the Trust Deed; and
- (k) no action has been taken, proposed or contemplated to remove the Operator as trustee of the Trust or to appoint a new trustee of the Trust in place of, or in addition to, the Operator; and
- (l) entry into the documents to which it is a party is a valid exercise of its powers under the Trust Deed for the benefit of the Trust's beneficiaries.

### 31.6 Trustee undertakings

The Operator, in its personal capacity and as trustee of the Trust, undertakes to the Commonwealth during the term that the Operator will:

- (a) do everything necessary to comply with its obligations under the Trust Deed and in performing its obligations under each Project Document;
- (b) not do anything which might limit its right as trustee to be indemnified out of the assets of the Trust for any Liabilities it may incur arising from or in connection with each Project Document; and
- (c) not otherwise do anything to compromise its ability to comply with its obligations in connection with each Project Document.]

### 31.7 Restrictions on the Trustee

Without the consent of the Commonwealth, the Operator may not, and may not agree, attempt or take any step to, do anything which:



- (a) effects or facilitates the retirement, removal or replacement of the Operator as trustee of the Trust;
- (b) may restrict the Operator's right of indemnity from the Trust Property in respect of obligations incurred by the Operator under any Project Document;
- (c) may restrict or impair the ability of the Operator to comply with its obligations under any Project Document;
- (d) effects or facilitates the termination of the Trust;
- (e) effects or facilitates the variation of the Trust Deed; or
- (f) effects or facilitates the resettlement of the Trust Property.

### **31.8 Trustee limitation of liability**

- (a) This clause 31.8 applies to the Operator as trustee of the Trust to the extent that the Operator is acting in that capacity.
- (b) Subject to clause 31.8(c) to 31.8(e), the Operator's Liability to any person in connection with this Agreement (or any transaction in connection with it) is limited to the extent to which the Liability is or can be satisfied out of the Trust Property by the Operator exercising its right of indemnity out of the Trust Property.
- (c) Subject to clauses 31.8(c)(i) and 31.8(c)(ii), the Commonwealth may not seek to recover any amounts owing to it under this Agreement by bringing proceedings against the Operator in its personal capacity. However, the Commonwealth may:
  - (i) do anything necessary to enforce its rights in connection with the Trust Property; and
  - (ii) take proceedings to obtain either or both:
    - (A) an injunction or other order to restrain any breach of this Agreement by the Operator; and
    - (B) declaratory relief or other similar judgment or order as to the obligations of the Operator under this Agreement.
- (d) The limitations and restrictions under clauses 31.8(b) and 31.8(c) do not apply to a Liability to the extent that it is not satisfied because there is a reduction in the extent of the Operator's indemnification out of the Trust Property either as a result of the Operator's fraud, negligence or wilful default, or by operation of Law.
- (e) The limitation of the Operator's Liability under clause 31.8(b) is to be disregarded for the purposes of determining whether the Operator has failed to comply with or perform any obligation under this Agreement because of a failure by the Operator to pay an amount payable by it under this Agreement.]

### **31.9 No reliance**

Each party acknowledges that it has not relied on any representation or warranty (whether express or implied) about the subject matter of this Agreement other than those expressly set out in this Agreement.

## **32. [Not used]**

## **33. Performance Security**

- (a) The Operator must procure and provide to the Commonwealth a performance bond or bank guarantee which has a face value at least equal to the Security Amount and which:
  - (i) is unconditional, irrevocable and payable on demand;



- (ii) is issued by a Authorised Bank;
- (iii) specifies a location in Melbourne or Sydney, Australia (or such other place as the Commonwealth may approve) where demand can be given and payment made, without further confirmation from the issuer on any Business Day;
- (iv) names the Commonwealth as the beneficiary; and
- (v) is in the relevant form set out in Schedule 10 or such other form approved by the Commonwealth (such approval not to be unreasonably withheld where the amendments proposed by the Operator have no material effect on the Commonwealth),

which for the purpose of this Agreement is known as the performance security  
**(Performance Security)**.

(b) The Performance Security must:

- (i) be provided to the Commonwealth within 20 Business Days after the Signing Date or by such later date as otherwise agreed between the parties; and
- (ii) remain valid from and including the date on which it is provided to the Commonwealth until and including the date which is the earlier of:
  - (A) 20 Business Days after the COD; and
  - (B) if this Agreement is terminated prior to COD, 40 Business Days after the date on which all amounts payable under clause 28 in connection with that termination have been paid,

**(Validity Period)**. To the extent it has not already done so, the Commonwealth must return the Performance Security to the Operator within 10 Business Days after the end of the Validity Period if so requested by the Operator.

- (c) If the Performance Security provided by the Operator to the Commonwealth is due to expire in accordance with its terms prior to the last day of the period identified in clause 33(b)(ii), the Operator must procure and provide to the Commonwealth a replacement Performance Security. That replacement Performance Security must be of equal face value and must otherwise comply with all the requirements of this Agreement in respect of the Performance Security and must be provided to the Commonwealth on or before the date which is 20 Business Days prior to the date on which the Performance Security is due to expire.
- (d) If the issuer of a Performance Security ceases to have a Required Rating, the Operator must procure and provide to the Commonwealth a replacement Performance Security of equal face value and otherwise complying with all the requirements of this Agreement in respect of the Performance Security on or before the date which is 10 Business Days after that issuer ceases to have a Required Rating. The Commonwealth will return the Performance Security issued by a bank or financial institution which no longer holds the Required Rating promptly after the Operator provides that replacement Performance Security to the Commonwealth.
- (e) Without prejudice to the unconditional, irrevocable and on demand nature of the Performance Security, if:
  - (i) the Commonwealth believes that an amount is due and payable by the Operator to the Commonwealth arising from or in connection with this Agreement and that amount has not been paid; or
  - (ii) the Operator fails to provide an replacement Performance Security pursuant to clause 33(c) or 33(d) (as applicable) within the relevant period identified in clause 33(c) or 33(d) (as applicable),

the Commonwealth may call upon, draw on or have recourse to the Performance Security. The Commonwealth must apply the proceeds of the drawing to pay any amount that it believes is due and payable by the Operator to the Commonwealth arising from or in connection with this Agreement or hold such proceeds and apply them to pay any amount



which the Commonwealth believes subsequently becomes due and payable to the Commonwealth arising from or in connection with this Agreement.

- (f) Notwithstanding anything to the contrary in this Agreement, if the Operator fails to comply with its obligations under this Agreement to provide any Performance Security in connection with this Agreement, the Operator must not issue any further Payment Notices, issue any further invoices (including tax invoices) nor make any further Claims under this Agreement and the Operator is not entitled to any payment under this Agreement until the Operator has provided that Performance Security to the Commonwealth.
- (g) The Commonwealth may direct the Operator to provide the Performance Security to be held by a nominee selected by the Commonwealth rather than to the Commonwealth. If the Commonwealth does so:
  - (i) the Operator must comply with that direction;
  - (ii) provision of the Performance Security by the Operator to the nominee will be deemed for the purposes of this clause 33 to constitute provision of the Performance Security to the Commonwealth;
  - (iii) return of the Performance Security by the nominee to the Operator will be deemed for the purposes of this clause 33 to constitute return of the Performance Security by the Commonwealth; and
  - (iv) for the avoidance of doubt, the Performance Security must name the "Commonwealth of Australia" as the beneficiary of the Performance Security (not the Commonwealth's nominee).

## 34. Intellectual Property

### 34.1 Project Intellectual Property

As between the Operator and the Commonwealth, all Project Intellectual Property vests in the Operator upon creation.

### 34.2 Licence of Specified Material

The Operator grants to the Commonwealth a permanent, irrevocable, royalty-free, world-wide, non-exclusive, transferrable licence (including a right to sub-license) to use and otherwise do any acts in relation to Specified Material for non-commercial purposes.

### 34.3 Moral rights

If any Specified Material that is a copyright work contains information over which a third party (including the Operator's Associates) has 'Moral Rights' (as defined in the *Copyright Act 1968* (Cth)), the Operator must ensure that it has in place all necessary consents sufficient to allow the Commonwealth to deal with the Specified Material in accordance with any Project Document.

### 34.4 Warranties

The Operator warrants that:

- (a) it is entitled to use for the Project and for the purposes of meeting its obligations under any Project Document:
  - (i) all Background Intellectual Property and Project Intellectual Property and
  - (ii) all Specified Material,(together, **Warranted Materials**); and
- (b) it has the right to grant the licence in clause 34.2.



### 34.5 Intellectual Property Indemnity

- (a) The Operator indemnifies (and must keep indemnified) the Commonwealth, the Commonwealth's Associates (and its licensees or sub-licensees of any Intellectual Property Rights) (**Indemnified Party**) against any Liability, licence fee or royalty sustained or incurred by an Indemnified Party regarding:
  - (i) any Intellectual Property Rights which arises out of any Claim brought by any third party in respect of any infringement or alleged infringement of that third party's Intellectual Property Rights, Moral Rights (as defined in the *Copyright Act 1968* (Cth)) or any other rights when the infringement or alleged infringement arises out of any activity permitted under any licence or sublicense referred to in this clause 34 or otherwise under this Agreement; or
  - (ii) any breach of clause 34.4.
- (b) For the purposes of this clause 34.5, "infringement" includes unauthorised acts which would, but for the operation of section 163 of the *Patents Act 1990*, section 100 of the *Designs Act 2003*, section 183 of the *Copyright Act 1968*, and section 25 of the *Circuit Layouts Act 1989*, constitute an infringement.

### 34.6 Remedy for breach of warranty

If the Operator breaches this clause 34, and as a result of that breach, a third party claims the Commonwealth's use of all or part of the Warranted Materials infringes its Intellectual Property rights, the Operator must, in addition to its obligations under clause 30.1(a)(vi) and to any other rights that the Commonwealth may have against it, promptly, at the Operator's expense:

- (a) use its best efforts to secure the rights for the Commonwealth to continue to use the affected Warranted Materials as permitted under clause 34.2 free of any Claim or Liability for infringement; or
- (b) replace or modify the affected Warranted Materials so that the Commonwealth's use of them as permitted under this clause 34 does not infringe the Intellectual Property rights of any other person without any degradation of the performance or quality of the affected Warranted Materials.

## 35. Subcontracting

### 35.1 Operator remains responsible

The Operator:

- (a) is responsible to the Commonwealth for the management, coordination and supervision of all Subcontractors and for the acts, omissions, negligence and recklessness of its Associates (whether employed directly or indirectly by the Operator) as if they were the acts, omissions, negligence and recklessness of the Operator;
- (b) remains fully responsible for the performance of all of its obligations under this Agreement which it has subcontracted to a Subcontractor and for all costs incurred with respect to its Subcontractors;
- (c) must ensure that its Subcontractors comply with the Operator's obligations under this Agreement when carrying out any work or activities under a Subcontract; and
- (d) agrees that a Subcontractor's failure to perform does not constitute a Force Majeure Event, except to the extent that the Subcontractor's failure to perform is caused or contributed to by a Force Majeure Event.

### 35.2 Key Subcontractors

- (a) Subject to clauses 35.2(b) and 35.2(c), the Operator must not (and must procure that its direct and indirect Subcontractors do not) enter into a Key Subcontract to perform any of its obligations under any Transaction Document without the prior written consent of the Commonwealth. **[Drafting note: the requirements regarding Key Subcontractors are**



intended to reflect the fact that prospective Operators will be evaluated during the tender phase in part on their technical solution and proposed Key Subcontractors to the extent they are known. The Commonwealth therefore wishes to ensure that an Operator utilises the relevant Key Subcontractors and technologies referred to their Bid (to the extent that Key Subcontractors are known and form part of the evaluation of the relevant Bid of a Proponent). If changes to the proposed Key Subcontractors are warranted, the Operator may follow the process set out in this clause 35.2. If the identities of any Key Subcontractors are not known as at the Signing Date, the Commonwealth is open to preapproving a limited number of potential Key Subcontractors from which the Operator may seek proposals to perform the relevant Key Subcontract.]

- (b) The Operator is not required to seek prior written approval from the Commonwealth for any Key Subcontractor identified in Schedule 7 provided that the applicable Key Subcontractor is to be engaged to provide or perform or deliver the goods, services and parts of the work comprising or in relation to the Facility which they are approved to provide and perform as set out in Schedule 7.
- (c) The Commonwealth may only refuse approval for a Key Subcontractor not identified in Schedule 7 where that proposed Key Subcontractor:
  - (i) does not have the legal, commercial, technical, managerial and financial capability to enable it to perform or deliver the relevant goods, services or parts of the works which it is being engaged to provide; or
  - (ii) is insolvent or not reputable or has an interest which conflicts in a material way with the interests of the Commonwealth and there is no prohibition or restriction imposed by Law which would prevent or impact its ability to perform or deliver the relevant goods, services or parts of the works which it is being engaged to provide.
- (d) The Operator is not discharged from any obligation or Liability under this Agreement by entering into any Subcontract.

## 36. Confidentiality

### 36.1 Confidential Information not to be Disclosed

- (a) Subject to clause 36.2, a party must not (and must procure its Associates not to) directly or indirectly disclose or make available any Confidential Information of the other party to a third party which would compromise the confidentiality of such Confidential Information, without the prior consent of the other party.
- (b) In giving written consent to the disclosure of its Confidential Information, a party may impose such conditions as it thinks fit, and the other party agrees to comply with these conditions.

### 36.2 Exception to obligations of Confidentiality

A party may disclose Confidential Information of the other party to the extent that the Confidential Information is:

- (a) disclosed to any person in connection with an exercise of rights or a dealing, or proposed dealing, with rights or obligations in connection with any Project Document or other Transaction Document but only to the extent that such a person has a need to know;
- (b) disclosed to its Associates solely in order to comply with the obligations or to exercise rights in relation to the Project Documents or other Transaction Documents or to a Related Body Corporate for internal management purposes, in each but only to the extent that such a person has a need to know;
- (c) to the extent required by Law, in connection with any legal or recognised dispute resolution process to which the relevant party is a party or authorised or required by the rules of any recognised stock exchange on which that party's shares are listed;



- (d) disclosed by the Commonwealth:
  - (i) to a Minister or Parliament in accordance with statutory or portfolio duties or functions or for public accountability reasons including following a request by a Minister, Parliament or a House or a Committee of the Parliament of the Commonwealth;
  - (ii) to any Government Agency where this services the Commonwealth's legitimate interests including to the Australian National Audit Office;
  - (iii) AEMO or its Related Bodies Corporate and its or their Associates;
  - (iv) to any person entitled to a licence or sublicense Specified Materials rights pursuant to this Agreement and its Associates;
- (e) authorised or required by Law to be to be disclosed provided that:
  - (i) the party notifies the other party of the requirement to make that disclosure; and
  - (ii) takes all reasonable steps to minimise the extent of the disclosure and to ensure the information is disclosed on a basis that the recipient agrees to maintain the confidentiality of the information;
- (f) to:
  - (i) a bank or other financial institution (and its professional advisers) in connection with any existing or proposed loan or other financial accommodation or, or sought to be arranged by, the recipient of that information;
  - (ii) any person who is proposing to acquire a direct or indirect interest in the party; or
  - (iii) any Related Body Corporate of a party to this Agreement,
 provided the recipient agrees to act consistently with this clause;
- (g) in the case of disclosure by the Commonwealth, Knowledge Sharing Deliverables that have been categorised by the Operator as "public information" pursuant to clause 16;
- (h) to a rating agency;
- (i) to the extent expressly permitted under this Agreement; and
- (j) as otherwise agreed by the other party.

### **36.3 Freedom of information**

- (a) Where the Commonwealth has received a request for access to a document created by, or in the possession of, the Operator or any Subcontractor that relates to the performance of this Agreement (and not to the entry into this Agreement), the Commonwealth may at any time by written notice require the Operator to provide the document to the Commonwealth and the Operator shall, at no additional cost to the Commonwealth, promptly comply with the notice.
- (b) The Commonwealth shall include in any first tier Subcontract (namely those which the Operator enters into directly with a Subcontractor) relating to the performance of any Transaction Document provisions that will enable the Operator to comply with its obligations under this clause 36.3.
- (c) In this clause 36.3, 'document' has the same meaning as in the *Freedom of Information Act 1982* (Cth).
- (d) Nothing in this clause 36 derogates from or restricts the Commonwealth's ability to comply with its obligations under the *Freedom of Information Act 1982* (Cth).

## **37. Access, records and reporting**



### 37.1 Operator to retain records

- (a) The Operator must, throughout the Term and for a period of seven years after the expiry of the Term, keep true and accurate books of account, records and other documents (however stored) in relation to the Project including:
  - (i) operational data relating to the Project and the Facility including technical, metering, revenue, costs and financial data; and
  - (ii) those related to other matters relating to the Facility and the Project in accordance with Good Industry Practice,(together the **Accounts and Records**).
- (b) The Operator must:
  - (i) ensure that its Accounts and Records are prepared in accordance with the Corporations Act and generally accepted Australian Accounting Standards and practices consistently applied, and fairly represent its operations and financial condition or consolidated financial position (as the case may be); and
  - (ii) procure that each Key Subcontractor's Accounts and Records truly reflect the status and scheduled achievement of the Project and are prepared in accordance with generally accepted Australian Accounting Standards (or equivalent) and fairly represent its operations and financial condition or consolidated financial position (as the case may be).
- (c) The Operator must ensure that its Accounts and Records are available to the Commonwealth and its nominee at any time during business hours (subject to receiving 5 Business Days' prior notice from the Commonwealth) during the Term and for a period of seven years after the termination or expiry of this Agreement for examination, audit, inspection, transcription and copying and must ensure that each Key Subcontractor does likewise.
- (d) If this Agreement is terminated or expires, the Operator must give the Commonwealth and its nominee access to all of its Accounts and Records which are necessary for the carrying out of the Operator's obligations under this Agreement and must ensure that each Key Subcontractor does likewise in relation to each of its or their Accounts and Records.
- (e) The Operator must retain and must procure that each Key Subcontractor retains all Accounts and Records relating to this Agreement for a period of seven years after termination or expiration of this Agreement or such longer period as may be required by Law.
- (f) This clause 37.1 applies for the Term and for a period of seven years from the termination or expiry of this Agreement.

### 37.2 Access to records

- (a) During the performance of this Agreement, the Operator shall give the Commonwealth and its nominee access to:
  - (i) its premises; and
  - (ii) any of its Accounts and Records,relevant to or impacting on the performance of this Agreement, including the right to copy any Accounts and Records for the purposes of this Agreement.
- (b) The Operator shall ensure that each Key Subcontractor gives the Commonwealth and its nominee, access to its or their:
  - (i) premises; and
  - (ii) Accounts and Records,relevant to or impacting on the performance of the Operator's obligations under this Agreement including the right to copy any Accounts or Records for the purposes of this Agreement.



### 37.3 Other information

The Operator must give to the Commonwealth the following information:

- (a) details of any changes to the constitutions or trust deed of the Operator within 20 Business Days after the change; and
- (b) such other financial and associated information relating to the Project as the Commonwealth may reasonably require from time to time and such information will be provided to the Commonwealth within 20 Business Days after it is requested.

### 37.4 Right to access and audit

- (a) The Commonwealth may elect to commission an “**Auditor**” to audit and inspect the Accounts and Records of the Operator and, to the extent reasonably required by the Commonwealth, the Operator’s Related Bodies Corporate and/or Key Subcontractors, for the purpose of verifying:
  - (i) the accuracy of any report or information provided by the Operator arising from or in connection with this Agreement; and
  - (ii) the Operator’s compliance with this Agreement.
- (b) The Commonwealth may appoint either the Australian National Audit Office or a suitably qualified independent professional firm as the Auditor.
- (c) The Commonwealth may commission an Audit no more than once in each calendar year during the Term, unless an Audit occurring in the preceding calendar year identified a material non-compliance with this Agreement.
- (d) The Commonwealth must give the Operator at least 20 Business Days’ prior notice of any Audit.
- (e) The Operator must:
  - (i) subject to clause 37.4(f), allow the Auditor to access during business hours the Accounts and Records kept by the Operator and its Related Bodies Corporate and/or Key Subcontractors (as applicable) and any premises, systems, equipment, personnel and information of the Operator, its Related Bodies Corporate and/or Key Subcontractors relating to the Project or this Agreement;
  - (ii) provide (and procure its Related Body Corporates and/or Key Subcontractors (as applicable) to provide) reasonable co-operation, information and assistance to the Auditor including answering reasonable questions relating to the audit and inspection in writing; and
  - (iii) if an Audit reveals any breach of this Agreement by the Operator, the Operator must take remedial action including complying with any reasonable directions or instructions from the Commonwealth,in each case in connection with Audit.
- (f) The Auditor’s access to any premises, systems, equipment and personnel will be subject to the Operator’s reasonable instructions relating to site access and to physical and information security.
- (g) In absence of fraud or manifest error, a finding of the Auditor in respect of any matter referred to in clause 37.4(a) will be binding on the parties.
- (h) The Operator will bear the costs of any Audit.
- (i) If an Audit is in respect of any amount to which the Operator is entitled and such Audit reveals that the Operator has overcharged the Commonwealth, the Operator must promptly reimburse the Commonwealth for those costs overcharged following any request by the Commonwealth to do so.
- (j) If any Audit reveals that Operator’s Payment Notice or invoices (including tax invoices) for the audited period are not correct for such period:



- (i) the Operator must promptly reimburse the Commonwealth for the amount of any overcharges; or
  - (ii) the Commonwealth must promptly pay to the Operator the amount of any undercharges,
- in each case, as the case may be.
- (k) The requirement for, and participation in, Audits does not in any way reduce the Operator's responsibility to perform its obligations in accordance with this Agreement.
  - (l) Any Audit, acceptance, certificate, approval, attendance, permission, comment or recommendation by, or on behalf of, the Commonwealth (or failure to do so) will not:
    - (i) constitute waiver of any default or acceptance of any act or omission on the part of the Operator; or
    - (ii) affect or modify any of the Operator's obligation to perform this Agreement in accordance with its terms and conditions.
  - (m) Nothing in this Agreement modifies, limits or restricts the Auditor-General exercising any of its rights, functions or powers at Law including to undertake an audit of the Operator, any Project Document, the Project or the Capacity Investment Scheme program in part or as a whole.

### **37.5 Site Inspection**

- (a) The Commonwealth may request access to the Project site from time to time for the purposes of undertaking a visual site inspection. The Commonwealth must give the Operator reasonable notice of the Commonwealth's requested Project site inspection under this clause 37.5, including details of preferred dates and times of it, and relevant Associates or nominees who will be present for it.
- (b) The parties will agree (acting reasonably) a date and time for the Project site inspection.
- (c) During the Project site inspection, the Commonwealth agrees to comply with the Operator's reasonable requirements, including in respect of site safety, occupational health and safety and other applicable site rules.

## **38. Reporting**

### **38.1 CP Period Reporting**

- (a) The Operator must:
  - (i) at least five Business Days before the end of each Quarter during the CP Period, provide a report to the Commonwealth detailing the Operator's progress towards satisfying each Condition Precedent; and
  - (ii) promptly notify the Commonwealth if the Operator reasonably expects that it may not satisfy:
    - (A) a Condition Precedent on or before the relevant Condition Precedent Date;
    - (B) all of the Conditions Precedent on or before the CP Target Date; or
    - (C) all of the Conditions Precedent on or before the CP Sunset Date.
- (b) A report or notification under clause 38.1(a) must include reasonable details and supporting evidence relating to and supporting its subject matter and, the Operator must promptly provide to the Commonwealth any further information reasonably requested by the Commonwealth regarding the subject matter of that report or notification within 5 Business Days after being requested to do so.



## 38.2 Construction Period Reporting

- (a) Within 20 Business Days after the end of each Quarter during the Construction Period, the Operator must provide the Commonwealth, in the form prescribed by the Commonwealth, a report setting out:
  - (i) the progress of achieving the Milestone Events as against the relevant Milestone Date (Scheduled), including information regarding any act, fact, matter, thing, event or circumstance which could cause the Operator not to achieve a Milestone by the relevant Milestone Date (Scheduled);
  - (ii) the progress of design, construction, commissioning, testing and completion of the Facility and information regarding any act, fact, matter, thing, event or circumstance which may prevent the satisfaction of the COD Conditions by either one or more of the COD (Target), the Final Support Commencement Date and the COD (Sunset);
  - (iii) if it is likely that any Milestone Event will not be achieved by its relevant Milestone Date (Scheduled), details of the steps being taken to remedy that delay and the date on which that Milestone Event is reasonably expected to be achieved including supporting evidence and construction programs which show the actual progress of the design, construction, commissioning, testing and completion of the Facility and the new proposed date for achieving the relevant Milestone Events against the Milestone Dates (Scheduled);
  - (iv) the progress in obtaining Authorisations required for the design, construction, commissioning, testing, completion, operation and/or maintenance of the Project;
  - (v) any proposed changes to the scope of the Project;
  - (vi) any material occupational health and safety incidents (including near misses);
  - (vii) complaints received or legal proceedings issued in relation to the Project (other than those issued by the Commonwealth);
  - (viii) any matter which constitutes a material breach, or could constitute a material breach, of the Operator's obligations under any Project Document;
  - (ix) a list of the Key Subcontractors which have been engaged to the date of the report, a high level description of the works and/or services for which they have been engaged and the period over which those works and/or services will be performed; and
  - (x) any other matter reasonably requested in writing by the Commonwealth, which may include information that is reasonably necessary for the Commonwealth to discharge its rights and obligations under this Agreement or at Law in respect of the Project.
- (b) The Operator must notify the Commonwealth during the Construction Period:
  - (i) within 2 Business Days, after the occurrence of a death or serious injury related to the Project;
  - (ii) within 5 Business Days, after the Operator becomes aware of any matter which constitutes any breach of the Operator's material obligations under this Agreement; and
  - (iii) within 10 Business Days, after the occurrence of a dangerous incident or a complaint made in relation to contamination, Environmental harm or breach of any Law relating to the Environment.

## 38.3 Operating reports

- (a) The Operator must provide the Commonwealth a report, in the form prescribed by the Commonwealth, setting out the following for the relevant periods:
  - (i) within 20 Business Days after the end of each Operating Year:



- (A) a summary of all Deemed Availability Periods that occurred during that Operating Year;
  - (B) the Equivalent Availability Factor for the Project for that Operating Year;
  - (C) a summary of the timing and duration of any planned or unplanned maintenance or outages and any instances of reduced export, import or storage capacity of the Facility (including because of Input Resource availability and maintenance of the Facility) during that Operating Year together with reasonable supporting details of those matters; and
  - (D) for each unplanned maintenance event and/or outage and instance of reduced export, import or storage capacity of the Facility during that Operating Year, a summary of the cause and actions or proposed actions to be undertaken by or on behalf of the Operator to remedy and to prevent such unplanned maintenance events and/or outages together with reasonable supporting details of the cause, actions and proposed actions;
  - (E) a list of the Key Subcontractors which have been engaged to the date of the report related to the Operations Period, a high level description of the works and/or services for which they have been engaged and the period over which those works and/or services will be performed; and
- (ii) within 20 Business Days after the end of each Support Year:
  - (A) the Availability Rebate Percentage for that Support Year; and
  - (B) the Availability Rebate (if any) payable in respect of that Support Year.
- (b) The Operator must provide to the Commonwealth a report, in the form prescribed by the Commonwealth, setting out the following for the relevant periods:
  - (i) within 20 Business Days after the end of each Operations Year, the results of the Storage Capacity test identified in section 5.4 of Schedule 4 for that Operations Year;
  - (ii) within 20 Business Days after the end of each Support Year:
    - (A) the Storage Capacity Rebate Percentage for that Support Year; and
    - (B) the Storage Capacity Rebate (if any) payable in respect of for that Support Year,

(each an **Annual Storage Capacity Report**).
- (c) Within 20 Business Days after the end of the relevant year identified below, the Operator must provide the Commonwealth a report, in the form prescribed by the Commonwealth, setting out:
  - (i) the Project's response to each Actual LOR3 Event in each Operations Year including its Bids for those events and the extent to which it was dispatched by AEMO during that Actual LOR3 Event and whether or not that that Actual LOR3 Event was also a Performance Event;
  - (ii) any periods the Project did not meet requirement to Bid at least 50% of the Contracted Capacity for a Trading Interval during the relevant LOR Period which occurs during the relevant Support Year and reasons for the non-performance;
  - (iii) any periods the Project did not meet requirement to use reasonable endeavours to Bid at least the Contracted Capacity for each Trading Interval during the Actual LOR3 Event which occurs during an Operations Year which is not also a Support Year and reasons for the non-performance;
  - (iv) the Performance Event Rebate Percentage for each Support Year; and
  - (v) the Performance Event Rebate (if any) payable for each Support Year.
- (d) Within 20 Business Days after the end of each Quarter during the Operations Period, the Operator must provide the Commonwealth a report, in the form prescribed by the Commonwealth, setting out:



- (i) the progress in obtaining Authorisations required for the operation and/or maintenance of the Project;
  - (ii) any proposed changes to the scope of the Project;
  - (iii) any material occupational health and safety incidents;
  - (iv) complaints received or legal proceedings in relation to the Project;
  - (v) any matter which constitutes a material breach, or could constitute a material breach, of the Operator's obligations under any Project Document; and
  - (vi) any other matter reasonably requested in writing by the Commonwealth, which may include information that is reasonably necessary for the Commonwealth to discharge its rights and obligations under this Agreement or at Law in respect of the Project.
- (e) The Operator must notify the Commonwealth during the Operations Period:
- (i) within 2 Business Days, after the occurrence of a death or serious injury related to the Project;
  - (ii) within 5 Business Days, after the Operator becoming aware of any breach of the Operator's material obligations under this Agreement; and
  - (iii) within 10 Business Days, after the occurrence of a dangerous incident or a complaint made in relation to contamination, Environmental harm or breach of any Law related to the Environmental.

#### **38.4 Revenue reports**

Within 20 Business Days after the end of each Support Year, the Operator must provide the Commonwealth, in the form prescribed by the Commonwealth, a report setting out:

- (a) the Net Operational Revenue (including each of its components) for; and
- (b) the Annual Reconciliation Payment (if any) payable in respect of that Support Year, that Support Year.

#### **38.5 Capacity Products and Green Product reporting**

- (a) If the Operator holds Capacity Products or Green Products which were created, or referable to electricity exported, capacity available or operation of from the Facility, during a Support Year, the Net Operational Revenue for that Support Year will be deemed to include an amount equal to the relevant market price for such products multiplied by number of each of those Capacity Products and Green Products the Operator holds.
- (b) Unless otherwise agreed by the parties, the market price for such products will determined as the average of the quotations (stated on a GST exclusive basis) for the Support Year, obtained from two independent and suitably qualified brokerage firms, one nominated by each of the parties.
- (c) If a market price cannot be determined in accordance with clause 38.5(b), the matter will be referred to an Independent Expert for determination under clause 41.6.

#### **38.6 Foreign Acquisitions and Takeovers Act reporting**

- (a) If:
  - (i) the Operator receives a notice from or on behalf of the Treasurer of the Commonwealth of Australia under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) which provides that the relevant Government Agency has approved an application made by Operator in respect of the Project and that approval is subject to certain conditions that may apply to either the Operator or the Project; or
  - (ii) there is a change to, or satisfaction of such conditions referred to under clause 38.6(a)(i),



the Operator must notify the Commonwealth within 5 Business Days after receiving such notice under clause 38.6(a)(i) or of such occurrence under clause 38.6(a)(ii).

- (b) The Operator must notify the Commonwealth within 5 Business Days after becoming aware of any breach of such conditions notified under 38.6(a). **[Drafting Note: the shortlisted Proponent must notify the Commonwealth as part of its Financial Value Bid in Stage B of the Tender Process whether or not it or the Project is subject to the Foreign Acquisitions and Takeovers Act 1975 (Cth).]**

### 38.7 Assurances

- (a) Each report issued under clauses 38.1, 38.2, 38.3 and 38.4 and, if requested by the Commonwealth, any notice provided pursuant to clause 38.1, 38.2, 38.3 and 38.6 and any further information provided by Operator pursuant to clause 38.8, must be certified by a director of the Operator to be:
  - (i) true and fair statements; and
  - (ii) compliant with this Agreement and any relevant accounting standards (as applicable).
- (b) The Operator warrants and represents that each report issued under clauses 38.1, 38.2, 38.3 and 38.4 and any notice provided pursuant to clause 38.1, 38.2, 38.3 or 38.6 and any further information provided by Operator pursuant to clause 38.8 is true and fair.
- (c) The Operator acknowledges that the provision of any false or misleading information by it under this clause 38 is a material breach of Operator's obligations under this Agreement.

### 38.8 Provision of further information

- (a) Each report issued under clauses 38.1, 38.2, 38.3 and 38.4 and each notice provided pursuant to clause 38.1, 38.2, 38.3 and 38.6 must include reasonable supporting details and evidence in respect of matters required to be included in a report issued under clause 38.1, 38.2, 38.3 or 38.4 and each notice provided pursuant to clause 38.1, 38.2, 38.3 or 38.6.
- (b) If reasonably requested by the Commonwealth following receipt of a report issued under clauses 38.1, 38.2, 38.3 or 38.4 or any notice provided pursuant to clause 38.1, 38.2, 38.3 or 38.6, the Operator must promptly provide further supporting details and evidence in relation to any report or the operation, bidding and dispatch of the Facility in the relevant Quarter or Support Year (as applicable).

## 39. Publicity

- (a) Unless required by Law or by a recognised stock exchange on which the Operator's shares or units are listed, the Operator must not make any public announcements relating to the subject matter of any Project Document without the Commonwealth's prior written consent.
- (b) The Commonwealth may make public announcements relating to the subject matter of any Project Document (including in respect of the Facility's expected Maximum Capacity, Import Capacity and Storage Capacity and the Operator's Social Licence Commitments) without the Operator's prior written consent, provided that the Commonwealth must:
  - (i) consult with the Operator before making any such public announcement that contains commercially sensitive information; and
  - (ii) reasonably consider any request from the Operator to not include that commercially sensitive information, or to only include that commercially sensitive information on an aggregated basis, in the relevant public announcement.



## 40. Relevant Commonwealth Policies and Other Requirements

The Operator must comply with the requirements imposed on it in Schedule 11.

## 41. Dispute Resolution

### 41.1 Dispute mechanism

Any dispute or difference of any kind arising between the parties arising from or in connection with this Agreement, whether during or after the Term (**Dispute**) must be resolved pursuant to this clause 41.

### 41.2 No proceedings

Subject to clause 41.9, a party must not commence or maintain a court action or proceedings in relation to a Dispute until the party has complied with this clause 41, and, if applicable, clause 42.

### 41.3 Disputes

If a party wishes to raise a Dispute, that party must deliver to the other party a notice of dispute (**Dispute Notice**) setting out the:

- (a) nature of the Dispute;
- (b) facts, matters and circumstances relied upon by the party serving the Dispute Notice; and
- (c) anticipated quantum of the Dispute (in money and, if applicable, in time).

### 41.4 Procedure to resolve Disputes

- (a) If there is a Dispute, the parties must use reasonable endeavours to resolve that Dispute as soon as reasonably practicable.
- (b) Subject to clause 42, the procedure that is to be followed to resolve a Dispute is as follows:
  - (i) first, negotiation of the Dispute under clause 41.5;
  - (ii) second, if the Dispute is not resolved pursuant to clause 41.4(b)(i) and only if permitted under clause 41.5(b)(i), referral of the Dispute for determination by an Independent Expert under clause 41.6; and
  - (iii) third, if the Dispute is not resolved pursuant to clause 41.4(b)(i) and if a referral of that Dispute for determination by an Independent Expert under clause 41.6 is permitted under this Agreement, that Dispute has not been resolved pursuant to clause 41.4(b)(ii), determination of the Dispute in a court of competent jurisdiction.

### 41.5 Negotiation

- (a) Within 10 Business Days after the receipt of a Dispute Notice by the other party pursuant to clause 41.3, a senior representative of each party must meet, negotiate and seek to resolve the Dispute in Good Faith.
- (b) If the Dispute is not resolved within 30 Business Days after the receipt of the Dispute Notice by the other party pursuant to clause 41.3:
  - (i) where this Agreement provides that it is a matter which is to be referred for determination by an Independent Expert, and a party wishes to progress that Dispute, that party must by written notice refer the Dispute for determination by an Independent Expert under clause 41.6; and
  - (ii) where this Agreement does not expressly provide that it is a matter which is to be referred for determination by an Independent Expert and a party wishes to progress that Dispute, that party must commence proceedings in a court of competent jurisdiction.



#### **41.6 Independent Expert**

- (a) If this Agreement expressly provides that a Dispute is to be referred for determination by an independent expert and a party wishes to progress the Dispute, that party must refer that Dispute to be determined by an appropriately qualified independent expert (**Independent Expert**). The parties must use reasonable endeavours to agree the identity of that Independent Expert within 10 Business Days after a notice referring that Dispute to an Independent Expert being given (or such longer period the parties agree).
- (b) Failing agreement within the period specified in clause 41.6(a), if a party wishes to progress the Dispute, that party must request the CEO of the Resolution Institute (or their independent nominee) to identify and appoint an Independent Expert.
- (c) If an Independent Expert is not appointed within 20 Business Days after the date of the request being made to the CEO of the Resolution Institute (or their independent nominee) under clause 41.6(b), and a party wishes to progress the Dispute, that party must commence proceedings in a court of competent jurisdiction in relation to the Dispute.
- (d) The Independent Expert appointed must have reasonable qualifications, and commercial and practical experience (including in the context of the National Energy Market) and no interest or duty which conflicts or may conflict with their function as an Independent Expert.
- (e) The Independent Expert will act as an expert and not as an arbitrator.
- (f) The parties must comply with all reasonable requests by an Independent Expert for information relating to the Dispute.
- (g) The parties must ensure that the Independent Expert's terms of appointment include the following requirements:
  - (i) the Independent Expert must consult with the parties concerning the matters under Dispute;
  - (ii) the Independent Expert must make a draft report available to the parties within 30 Business Days after the appointment of the Independent Expert;
  - (iii) the Independent Expert must meet with representatives of the parties to discuss any queries they may have in relation to the draft report;
  - (iv) the Independent Expert must keep information provided by or on behalf of the parties to the Independent Expert confidential;
  - (v) the Independent Expert may investigate the matters under Dispute and make inquiries in relation to them, and take the advice of any other person the Independent Expert deems appropriate; and
  - (vi) the Independent Expert will use best endeavours to notify the parties of the Independent Expert's determination within 60 Business Days after the reference of the Dispute by a party to the Independent Expert.
- (h) In the absence of fraud or manifest error, the parties agree that any decision or award made by an Independent Expert will be final and binding.
- (i) Each party will bear its own costs in respect of or in connection with any determination by an Independent Expert.
- (j) The costs of the Independent Expert will be borne equally between the parties.

#### **41.7 Other relief**

The dispute resolution procedures in this clause 41 and/or clause 42 do not apply to impair, delay or otherwise prejudice the exercise by a party of its rights provided in any Project Document (including any right of termination).

#### **41.8 Continued performance following a Dispute**

Despite the existence of any Dispute, each party must continue to perform its obligations under each Project Document.



#### 41.9 Interim relief

Nothing in this clause 41 or clause 42 prevents either party from seeking urgent injunctive or declaratory relief.

### 42. Pooled Disputes

#### 42.1 Referral of Pooled Disputes

- (a) If in the Commonwealth's opinion (acting reasonably):
  - (i) a Dispute in relation to clause 41 is identical or similar to an Other Dispute; or
  - (ii) the outcome of a Dispute or an Other Dispute could affect the entitlements and/or obligations of a party under this Agreement or an Other Agreement (as relevant),and the Agreement and Other Agreement pursuant to which the Dispute and Other Dispute (as applicable) arise have the same governing law, the Dispute and/or Other Dispute is a **Pooled Dispute**.
- (b) If the Commonwealth gives a Dispute Notice to or receives a Dispute Notice from:
  - (i) the Operator; or
  - (ii) any Other Counterparty, relating to a Pooled Dispute,the Commonwealth may refer the Pooled Dispute to a Pooled Dispute Panel for resolution in accordance with clause 42.2 (**Pooled Dispute Referral**).

#### 42.2 Resolution by Pooled Dispute Panel

- (a) If the Commonwealth gives a Pooled Dispute Referral in respect of a Pooled Dispute, then:
  - (i) each Pooled Dispute Participant may appoint a person to represent it on the Pooled Dispute Panel; and
  - (ii) the Pooled Dispute Panel will meet within 1 month (or such other period as reasonably determined by the Commonwealth) from the Pooled Dispute Referral to resolve the Pooled Dispute.
- (b) The Pooled Dispute Panel will determine (on a unanimous basis) its own procedures for meeting, and unless the Pooled Dispute Panel otherwise determines (on a unanimous basis), all meetings of the Pooled Dispute Panel will be held in Melbourne with an option provided for participation via video conference.
- (c) If a party provides information or documents relevant to a Pooled Dispute to the other party, it must promptly provide the information and documents to each representative on the Pooled Dispute Panel.
- (d) Subject to clause 42.3, if the Pooled Dispute Panel unanimously resolves the Pooled Dispute, then that resolution will be binding on the parties to this Agreement regardless of whether they participated in the Pooled Dispute Panel or not.
- (e) If the Pooled Dispute Panel does not unanimously resolve the Pooled Dispute within 3 months after the Pooled Dispute Referral, the Commonwealth may refer the Pooled Dispute for resolution in accordance with clause 41.6, provided that:
  - (i) the Independent Expert will be identified and appointed by the CEO of the Resolution Institute (or their independent nominee);
  - (ii) each Pooled Dispute Participant will be afforded equal treatment and equal opportunity to present its views and to reply to the comments and submissions presented by any other Pooled Dispute Participant;
  - (iii) in the absence of fraud or manifest error, the parties agree that any decision or award made by an Independent Expert will be final and binding on all Pooled Dispute Participants; and



- (iv) the costs of the Independent Expert will be borne equally between the Pooled Dispute Participants.

#### **42.3 Bilateral resolution**

- (a) If the Operator and the Commonwealth bilaterally resolve a Pooled Dispute as it applies to this Agreement, clause 42.2 will cease to apply and Operator will:
  - (i) cease to be a Pooled Dispute Participant in respect of that Pooled Dispute; and
  - (ii) not be required to participate in, and will not be bound by any resolution by, the Pooled Dispute Panel in respect of that Pooled Dispute.
- (b) If the Commonwealth notifies the Operator that an Other Counterparty has bilaterally resolved the Pooled Dispute with the Commonwealth, then that Other Counterparty will cease to be a Pooled Dispute Participant.

### **43. Governing Law**

- (a) The Law in force in the Relevant Jurisdiction governs this Agreement.
- (b) The parties irrevocably submit to the non-exclusive jurisdiction of the courts of the Relevant Jurisdiction and the courts competent to determine appeals from the courts of the Relevant Jurisdiction, with respect to any proceedings which may be brought in connection with this Agreement.

### **44. Notices**

#### **44.1 Form**

- (a) Unless this Agreement expressly states otherwise, all notices, demands, certificates, consents, approvals, waivers and other communications in connection with this Agreement (**Communications**) must be in writing and signed by the sender (if an individual) or a director, secretary or any other person nominated by a party to act as an authorised officer of the sender.
- (b) All Communications (other than email Communications) must also be marked for the attention of the person referred to in the Details (or, if the recipient has notified otherwise, then marked for attention in the way last notified).
- (c) Email Communications must state the first and last name of the sender and are taken to be signed by the named sender.

#### **44.2 Delivery**

- (a) Communications must be:
  - (i) left at the address referred to in the Details;
  - (ii) sent by regular ordinary post (airmail if appropriate) to the address referred to in the Details; or
  - (iii) sent by email to the email address referred to in the Details.
- (b) If the intended recipient has notified changed contact details, Communications must be sent to the changed contact details.

#### **44.3 When effective**

Communications take effect from the time they are received or taken to be received under clause 44.4 (whichever happens first) unless a later time is specified in the Communication.

#### **44.4 When taken to be received**

Communications are taken to be received:



- (a) if sent by prepaid express post, 5 Business Days after posting (or 8 Business Days after the date of posting by airmail to if sent from one country to another);
  - (b) if sent by email:
    - (i) when the sender receives an automated message confirming delivery; or
    - (ii) 4 hours after the time the email is sent (as recorded on the device from which the sender sent the email) unless the sender receives an automated message within that 4 hour period that the delivery failed,
- whichever happens first.

#### **44.5 Receipt outside business hours**

Despite anything else in this clause 44, if Communications are received or taken to be received under clause 44.4 after 5.00pm on a Business Day or on a non-Business Day, they are taken to be received at 9.00am on the next Business Day. For the purposes of this clause 44.5, the place in the definition of Business Day is taken to be the place specified in the Details as the address of the recipient and the time of receipt is the time in that place.

### **45. General**

#### **45.1 Variation and waiver**

A provision of this Agreement, or right, power or remedy created under it, may not be varied or waived except in writing signed by the party to be bound.

#### **45.2 Consents, approvals or waivers**

- (a) A failure to exercise or enforce, a delay in the exercise or enforcement of or the partial exercise or enforcement of a right provided by Law or under this Agreement by a party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right provided by Law or under this Agreement.
- (b) By giving any consent, approval or waiver a party does not give any representation or warranty as to any circumstance in connection with the subject matter of the consent, approval or waiver.
- (c) No waiver of a breach of a term of this Agreement operates as a waiver of another breach of that term or of a breach of any other term of this Agreement.

#### **45.3 Discretion in exercising rights**

Unless a Project Document expressly provides otherwise, a party may exercise a right, power or remedy or give or refuse its consent, approval or a waiver in connection with this Agreement in its absolute discretion (including by imposing conditions).

#### **45.4 Partial exercising of rights**

Unless this Agreement expressly states otherwise, if a party does not exercise a right, power or remedy in connection with this Agreement fully or at a given time, they may still exercise it later.

#### **45.5 Remedies cumulative**

The rights, powers and remedies in connection with this Agreement are in addition to other rights, powers and remedies given in any other agreement or by Law independently of any Project Document.

#### **45.6 Indemnities and reimbursement obligations**

- (a) Any indemnity, reimbursement, payment or similar obligation in this Agreement:



- (i) is a continuing obligation despite the satisfaction of any payment or other obligation in connection with this Agreement, any settlement or any other thing;
  - (ii) is independent of any other obligations under this Agreement or any other agreement; and
  - (iii) continues after this Agreement, or any obligation arising under it, ends.
- (b) It is not necessary for a party to incur expense or make payment before enforcing a right of indemnity in connection with this Agreement.

#### **45.7 Supervening law**

Subject to clause 24, any present or future Law which operates to vary the obligations of a party in connection with this Agreement with the result that another party's rights, powers or remedies are adversely affected (including, by way of delay or postponement) is excluded except to the extent that its exclusion is prohibited or rendered ineffective by Law.

#### **45.8 Counterparts**

- (a) This Agreement may be executed in any number of counterparts or copies, each of which may be executed by physical signature in wet ink or electronically (whether in whole or part). A party who has executed a counterpart of this Deed may exchange it with another party (the **Other Party**) by:
- (i) emailing a copy of the executed counterpart to the Other Party; or
  - (ii) utilising an electronic platform (including DocuSign) to circulate the executed counterpart,
- and will be taken to have adequately identified themselves by so emailing the copy to the Other Party or utilising the electronic platform.
- (b) Each party consents to signatories and parties executing this Agreement by electronic means and to identifying themselves in the manner specified in this clause 45.8.
- (c) Each counterpart constitutes an original (whether kept in electronic or paper form), all of which together constitute one instrument as if the signatures (or other execution markings) on the counterparts or copies were on a single physical copy of this Agreement in paper form. Without limiting the foregoing, if any of the signatures or other markings on behalf of one party are on different counterparts or copies of this Agreement, this shall be taken to be, and have the same effect as, signatures on the same counterpart and on a single copy of this Agreement.

#### **45.9 Entire agreement**

This Agreement constitutes the entire agreement of the parties on the subject matter and supersedes all prior agreements, understandings and negotiations on that subject matter.

#### **45.10 Expenses and no liability for loss**

Unless otherwise expressly provided in this Agreement, each party must pay its own costs and expenses in connection with negotiating, preparing, executing and performing this Agreement.

#### **45.11 Rules of construction**

No rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of, or seeks to rely on, this Agreement or any part of it.

#### **45.12 Severability**

If the whole or any part of a provision of this Agreement is void, unenforceable or illegal in a jurisdiction, then it is severed for that jurisdiction. The remainder of this Agreement has full force and effect and the validity or enforceability of that provision in any other jurisdiction is not affected. This clause 45.12 has no effect if the severance alters the basic nature of this Agreement or is contrary to public policy.



#### **45.13 Survival**

Each of the following will survive the expiry or termination of this Agreement:

- (a) clauses 1, 3, 16, 18, 19, 20, 27, 28, 30, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45;
- (b) any provision that is required to enable a party to exercise rights accrued prior to the expiry, rescission or termination of this Agreement; and
- (c) any provision which (expressly or by implication) by its nature is intended to survive the expiry, rescission or termination of this Agreement.

#### **45.14 Proportionate liability**

The operation of Part IVAA (Proportionate Liability) of the *Wrongs Act 1958* (Vic) and Part 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) are excluded in relation to all and any rights of either party under this Agreement, whether such rights are sought to be enforced in contract, tort or otherwise.

#### **45.15 Further steps**

The Operator and the Commonwealth agree, at the Operator's expense, to do anything the other reasonably requests (such as obtaining consents, signing and producing documents, producing receipts and getting documents completed and signed) as may be necessary or desirable to give full effect to the provisions of this Agreement and the transactions contemplated by it.



# Schedule 1 – Reference Details

Item #	Item	Details
Item 1	Facility	<p><b>[Drafting note: the shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p> <p>The '[insert facility name]', which will be a [insert resource type e.g. battery project] located at [insert location] with:</p> <ul style="list-style-type: none"> <li>(a) a Registered Capacity that is equal to at least the Maximum Capacity;</li> <li>(b) an import capacity that it equal to or greater than the Import Capacity; and</li> <li>(c) an energy storage capacity that is equal to or greater than the Storage Capacity,</li> </ul> <p>and which includes all ancillary plant, control systems and connection infrastructure on the Operator's side of the Connection Point required for the operation of the facility.</p>
Item 2	Maximum Capacity	<p><b>[Drafting note: the shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p> <p>[insert] MW which is the maximum export capacity of the Facility measured in accordance with Good Industry Practice at the Connection Point.</p>
Item 3	Import Capacity	<p><b>[Drafting note: the shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p> <p>[insert] MW which is the maximum import capacity of the Facility measured in accordance with Good Industry Practice at the Connection Point.</p>
Item 4	Storage Capacity	<p><b>[Drafting note: the storage capacity set out here is to reflect degradation to the extent relevant for the technology type. The number of rows in the table below should reflect the number of Support Years which apply to this Agreement noting that if the first Support Year does not commence on 1 July, there will need to be one more Support Year in the table below than there are years of support being sought because the first and last Support Years will be only part of a year. The shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p> <p><b>Storage Capacity</b> means the storage capacity as at COD and for each Support Year as follows:</p> <ul style="list-style-type: none"> <li>(a) as at COD [insert] MWh;</li> <li>(b) for the first Support Year [insert] MWh;</li> <li>(c) for the second Support Year [insert] MWh;</li> <li>(d) for the third Support Year [insert] MWh; and</li> <li>(e) [insert further rows to reflect the Support Period] [insert] MWh.</li> </ul>
Item 5	Contracted Capacity	<p><b>[Drafting note: this will be equal to the Maximum Capacity of the Facility if the whole Facility is to be supported and a lesser MW if the Proponent is only seeking support for part of the capacity of the Facility. The shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p> <p>means [insert] MW.</p>
Item 6	Contracted Percentage	<p><b>[Drafting note: for each Support Year, this will be calculated as the Contracted Capacity divided by the Maximum Capacity (expressed as a percentage). This will be 100% if the whole capacity of the Facility is to be supported and a lesser percentage if the Successful Proponent is only seeking support for part of the capacity. The shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p>



		[insert number]%
Item 7	CP Target Date	<p><b>[Drafting note: the shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p> <p>[insert date] (as such date may be adjusted pursuant to the terms of this Agreement).</p>
Item 8	CP Sunset Date	<p><b>[Drafting note: this date must be no later than the date which is 12 months after the initial CP Target Date (as may be extended pursuant to the terms of this Agreement). The shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p> <p>[insert date] (as such date may be adjusted pursuant to the terms of this Agreement).</p>
Item 9	Notice to Proceed Date	<p><b>[Drafting note: this is the date on which the Notice to Proceed is scheduled to be issued under the relevant Construction Contracts. Construction Contracts do not include an early works contract. The shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p> <p>[insert date]</p>
Item 10	Registration Date	<p><b>[Drafting note: this is the date on which the Facility is scheduled to undergo hold point testing and achieve registration with the network operator. For NEM connected projects, this would be achieving R1 Registration with AEMO. The shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p> <p>[insert date]</p>
Item 11	COD (Target)	<p><b>[Drafting note: The shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p> <p>[insert date] (as such date may be adjusted pursuant to the terms of this Agreement).</p>
Item 12	COD (Sunset)	<p><b>[Drafting note: this date must be 12 months after the COD (Target). The shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p> <p>[insert date] (as such date may be adjusted pursuant to the terms of this Agreement).</p>
Item 13	Final Support Commencement Date	<p><b>[Drafting note: this is the date which is 12 months after the initial COD (Target Date). The shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p> <p>[insert date] and for the avoidance of doubt, this date is not subject to adjustment pursuant to this Agreement other than by the Commonwealth in its absolute discretion pursuant to clause 8.3.</p>
Item 14	Final Expiry Date	<p><b>[Drafting note: Proponent to proposes the relevant number which may be any whole number of years up to and including the fifteenth anniversary. The shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p> <p>means the date which is the [insert number] anniversary after the earlier of the day after COD and the Final Support Commencement Date.</p>
Item 15	Security Amount	<p><b>[Drafting note: the amount to be calculated using the following formula: \$20,000 per MW multiplied by the Maximum Capacity, up to a maximum amount of \$4,000,000. The shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p> <p>[insert amount]</p>
Item 16	Minimum Hours	<p><b>[Drafting note: the Minimum Hours must not be less than 2 hours. The shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p>



		[insert number] hours.															
Item 17	Support Period Start Date	<p><b>[Drafting note: if the shortlisted Proponent is seeking a support for the full term, the Support Period Start Date should be COD. However, a Proponent may consider that it wants support for a shorter period. Proponents are permitted to bid back a date later than COD or a concept which for example could be a number of years after COD provided however that the Support Period Start Date must be no later than the date which is 14 years after COD. The shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p> <p>means [insert date or concept such as a number of whole years after COD].</p>															
Item 18	Annual Revenue Floor	<p><b>[Drafting note: the shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p> <p>The Annual Revenue Floor in respect of a Support Year is:</p> <table> <tr> <td>(a)</td><td>for the first Support Year</td><td>\$(insert);</td></tr> <tr> <td>(b)</td><td>for the second Support Year</td><td>\$(insert);</td></tr> <tr> <td>(c)</td><td>for the third Support Year</td><td>\$(insert);</td></tr> <tr> <td>(d)</td><td>for the fourth Support Year</td><td>\$(insert); and</td></tr> <tr> <td>(e)</td><td>[insert further rows to reflect the Support Period]</td><td>\$(insert).</td></tr> </table>	(a)	for the first Support Year	\$(insert);	(b)	for the second Support Year	\$(insert);	(c)	for the third Support Year	\$(insert);	(d)	for the fourth Support Year	\$(insert); and	(e)	[insert further rows to reflect the Support Period]	\$(insert).
(a)	for the first Support Year	\$(insert);															
(b)	for the second Support Year	\$(insert);															
(c)	for the third Support Year	\$(insert);															
(d)	for the fourth Support Year	\$(insert); and															
(e)	[insert further rows to reflect the Support Period]	\$(insert).															
Item 19	Annual Revenue Ceiling	<p><b>[Drafting note: the shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p> <p>The Annual Revenue Ceiling in respect of a Support Year is:</p> <table> <tr> <td>(a)</td><td>for the first Support Year</td><td>\$(insert);</td></tr> <tr> <td>(b)</td><td>for the second Support Year</td><td>\$(insert);</td></tr> <tr> <td>(c)</td><td>for the third Support Year</td><td>\$(insert);</td></tr> <tr> <td>(d)</td><td>for the fourth Support Year</td><td>\$(insert); and</td></tr> <tr> <td>(e)</td><td>[insert further rows to reflect the Support Period]</td><td>\$(insert).</td></tr> </table>	(a)	for the first Support Year	\$(insert);	(b)	for the second Support Year	\$(insert);	(c)	for the third Support Year	\$(insert);	(d)	for the fourth Support Year	\$(insert); and	(e)	[insert further rows to reflect the Support Period]	\$(insert).
(a)	for the first Support Year	\$(insert);															
(b)	for the second Support Year	\$(insert);															
(c)	for the third Support Year	\$(insert);															
(d)	for the fourth Support Year	\$(insert); and															
(e)	[insert further rows to reflect the Support Period]	\$(insert).															
Item 20	Annual Payment Cap	<p><b>[Drafting note: the shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p> <p>The Annual Payment Cap in respect of a Support Year is:</p> <table> <tr> <td>(a)</td><td>for the first Support Year</td><td>\$(insert);</td></tr> <tr> <td>(b)</td><td>for the second Support Year</td><td>\$(insert);</td></tr> <tr> <td>(c)</td><td>for the third Support Year</td><td>\$(insert);</td></tr> <tr> <td>(d)</td><td>for the fourth Support Year</td><td>\$(insert); and</td></tr> <tr> <td>(e)</td><td>[insert further rows to reflect the Support Period]</td><td>\$(insert).</td></tr> </table>	(a)	for the first Support Year	\$(insert);	(b)	for the second Support Year	\$(insert);	(c)	for the third Support Year	\$(insert);	(d)	for the fourth Support Year	\$(insert); and	(e)	[insert further rows to reflect the Support Period]	\$(insert).
(a)	for the first Support Year	\$(insert);															
(b)	for the second Support Year	\$(insert);															
(c)	for the third Support Year	\$(insert);															
(d)	for the fourth Support Year	\$(insert); and															
(e)	[insert further rows to reflect the Support Period]	\$(insert).															
Item 21	Metering Point	<p><b>[Drafting note: the shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process.]</b></p> <p>means [insert].</p>															
Item 22	Minimum State of Charge	<p><b>[Drafting note: the shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process to the extent relevant to the type of technology being proposed for the Facility.]</b></p> <p>means [insert] MWh</p>															



# Schedule 2 - Conditions Precedent

	Condition Precedent	Condition Precedent Date [Drafting note: the shortlisted Proponent is required to provide this information as part of its Financial Value Bid in Stage B of the Tender Process. ]
1	<b>[Drafting note: the Commonwealth reserves the right to add conditions precedent after reviewing Bids and the relevant Proponent's potential equity funding and debt financing arrangements and transaction structure]</b>	[insert]
2	The Operator has secured all Tenure required for the Project.	[insert]
3	The Operator has obtained all Authorisations related to planning for the Projects which are required to commence works.	[insert]
4	The Operator has obtained notifications from AEMO under clauses 5.3.4A and 5.3.4B of the NER in respect of the Project.	[insert]
5	The Operator has obtained an offer to connect under clause 5.3.6 of the NER from the relevant network service provider in respect of the Project	[insert]
6	The Operator:  (a) has secured the equity and/or external debt financing that is required to fund the construction and commissioning of the Facility, and all conditions precedent to first draw down under that financing have been satisfied or waived and that first draw down is made available to Operator; and  (b) Operator issues an unconditional notice to proceed for the full scope of work under the engineering, procurement and construction contract (or equivalent) for the Facility	[insert]
7	The Commonwealth receiving a certified copy of the approval of the Foreign Investment Review Board of the Commonwealth Department of Treasury in respect of any foreign ownership of any equity investor in the Operator.	[insert]
8	Financial Close/Commercial Close has occurred in respect of the Project <b>[Drafting note: to be drafted to be Financial Close if the Project is funded by external debt and Commercial Close if not]</b>	[insert]
9	The Operator delivering to the Commonwealth an original counterpart of each Project Document (other than this Agreement) and certified copies of the other Transaction Documents) in each case duly executed by each of the parties to those documents other than the Commonwealth in a form and substances satisfactory to the Commonwealth.	[insert]
10	The Commonwealth receiving legal opinions given for the benefit of the Commonwealth in form and substance satisfactory to the Commonwealth from an external law firm appointed by the relevant counterparties to the Transaction Documents (other than the Commonwealth) as to:	[insert]



	<p>(a) the legal capacity and corporate power of those relevant counterparties to enter into and perform its relevant obligations under the Transaction Documents to which it is a party;</p> <p>(b) due execution by the relevant counterparty of the Transaction Documents to which it is a party; and</p> <p>(c) the enforceability against the relevant counterparty of the Transaction Documents to which it is a party.</p>	
--	---	--



# Schedule 3 - Milestone Events and Milestone Dates (Scheduled)

Each Milestone Event and Milestone Date (Scheduled) under this Agreement is set out or identified in the following table:

	Milestone Event	Description	Milestone Date (Scheduled) (CD + x Months) or the relevant date identified
1	Notice to Proceed	Where the Operator has issued the Notice to Proceed.	Notice to Proceed Date
2	[insert others]	<b>[Drafting note: Proponents must identify such other Milestone Events which demonstrate progress of the Project during the Construction Period and the Milestone Date (Scheduled) by which the relevant Milestone Event must be achieved. The expectation is that there will be approximately 6 such Milestone Events in total across the Construction Period and that they will be equivalent to milestones under the construction contracts. Example Milestone Events for consideration may include R0 and R1 Package, commissioning and hold point test completed]</b>	[insert]
[#]	[insert others]	[insert]	[insert]
3	Registration with AEMO	[insert]	Registration Date
4	Commercial Operation	[insert]	COD (Target)

## Notes to the table:

- The description identifies a set of conditions that must be met in order for the relevant Milestone Event to be achieved.
- The Milestone Date (Scheduled) for a particular Milestone Event is the date that is the number of Months after the Commencement Date (**CD**) set out in the 'Milestone Date (Scheduled) CD + x Months' column in the above table or the relevant date specified.
- The letters N/A means "not applicable".
- The Milestone Events must be achieved sequentially. It is a precondition to achieving a Milestone Event that all other Milestone Events which appear above it in the table above have also been achieved.



# Schedule 4– Payment Mechanism

## 1. Definitions

In this Agreement, unless the context otherwise requires:

**Adjusted Net Operational Revenue** has the meaning given in section 12.

**Aggregate Annual Rebate** has the meaning given in section 9.

**Annual Reconciliation Payment** has the meaning given in section 7.

**Annual Revenue Sharing Amount** has the meaning given in section 11.

**Annual Support Amount** has the meaning given in section 10.

**Availability Rebate** has the meaning given in section 4.1.

**Availability Rebate Percentage** has the meaning given in section 4.2.

**Deemed Availability Period** has the meaning given in section 4.3(b).

**Equivalent Availability Factor** means the amount determined in accordance with section 4.3.

**Net Annual Payment** has the meaning given in section 8.

**Performance Coverage Capacity Ratio** and **PCCR** have the meaning given in section 6.4.

**Performance Coverage Time Ratio** and **PCTR** have the meaning given in section 6.3.

**Performance Event Rebate** has the meaning given in section 6.1.

**Performance Event Rebate Percentage** and **PERP** has the meaning given in section 6.2.

**Quarterly Payment** means the amount determined in accordance with section 3.

**Revenue Ceiling Sharing Percentage** means 50%.

**Revenue Floor Support Percentage** means 90%.

**Storage Capacity Rebate** means the rebate determined or calculate in accordance with sections 5.1 and 5.2.

**Storage Capacity Rebate Percentage** means the percentage calculated in accordance with section 5.3.

**Tested Storage Capacity** has the meaning given under section 5.4(c)(iv).

## 2. Support payments

- (a) In respect of each Support Year during the Support Period, the Commonwealth agrees to pay to the Operator in accordance with the terms of this Agreement:
  - (i) each Quarterly Payment; and
  - (ii) any positive Annual Reconciliation Payment.
- (b) In respect of each Support Year during the Support Period, the Operator agrees to pay to the Commonwealth in accordance with the terms of this Agreement the absolute value of any negative Annual Reconciliation Payment.

## 3. Quarterly Payment

### 3.1 Quarterly Payment Calculation

The Quarterly Payment for each Quarter of a Support Year (other than the last Quarter) is calculated as follows:

$$B_q = H_{SY} / 4$$



Where:

$B_q$  = the Quarterly Payment for the relevant Quarter; and

$H_{SY}$  = the Annual Payment Cap for the relevant Support Year.

### 3.2 Pro rata calculation

Where any of paragraph (g) of the definition of Quarter apply, the Quarterly Payment will be adjusted proportionally, having regard to the number of days in the relevant partial quarter as a percentage of the total number of days in the full calendar quarter.

### 3.3 No claim

The Operator will not be entitled to make any Claim in connection with the Quarterly Payment in respect of the last Quarter in any Support Year.

## 4. Availability Rebate

### 4.1 Calculation of Availability Rebate

The **Availability Rebate** for each Support Year during the Support Period is calculated as follows:

$$E_{SY} = P_{SY} \times C_{SY}$$

Where:

$E_{SY}$  = Availability Rebate for the relevant Support Year;

$P_{SY}$  = the Availability Rebate Percentage for the relevant Support Year; and

$C_{SY}$  = the Annual Support Amount for the relevant Support Year.

### 4.2 Calculation of Availability Rebate Percentage

The **Availability Rebate Percentage** for each Support Year during the Support Period is calculated as follows:

$$P_{SY} = EAT - EAF_{SY}$$

Where:

$P_{SY}$  = the Availability Rebate Percentage for the relevant Support Year (expressed as a percentage);

$EAT$  = the Equivalent Availability Threshold being 90%; and

$EAF_{SY}$  = the Equivalent Availability Factor of the Facility for the relevant Support Year (which is a number but that number shall be deemed to be a percentage for the purpose of this clause 4.2), provided that:

- (a) if the Availability Rebate Percentage for the relevant Support Year is less than 0%, the Availability Rebate Percentage for that Support Year will be deemed to be 0%; and
- (b) if the Equivalent Availability Factor (expressed as a percentage) for the relevant Support Year is less than 10%, the Availability Rebate Percentage for that Support Year will be deemed to be 100%.

### 4.3 Calculation of Equivalent Availability Factor

- (a) Subject to section 4.3(b), the Equivalent Availability Factor (expressed as a number and not a percentage) of the Facility for a Support Year is calculated in accordance with the first formula set out in paragraph 8.11 of IEEE 726-2006, provided that:

- (i) a reference to “generation” is taken to be a reference to “export capability”; and
  - (ii) a reference to “generating unit” is taken to be the Facility.

- (b) If the Rated Capacity is impacted during a period as a direct result of:



- (i) any Project Force Majeure Event is subsisting during the relevant Operations year, for which the Operator is entitled to an adjustment or relief pursuant to this Agreement and which the Operator has notified the Commonwealth of in accordance with clause 21; or
- (ii) a direction or instruction given by AEMO (in its capacity as a market body) under the National Electricity Rules that:
  - (A) relates to the condition of the transmission network; and
  - (B) was not issued as a response to or as a result of any act or omission of the Operator or its Associates,

(**Deemed Availability Period**), that period will be disregarded for the purpose of calculating the Equivalent Availability Factor for the Project.

## 5. Storage Capacity Rebate

### 5.1 Determination of Storage Capacity Rebate

- (a) Within 20 Business Days after the date on which the Commonwealth receives the Annual Storage Capacity Report in respect of a Support Year, the Commonwealth must:
  - (i) notify the Operator that the Commonwealth agrees with the Storage Capacity Rebate set out in the Annual Storage Capacity Report; or
  - (ii) notify the Operator that the Commonwealth disputes the Storage Capacity Rebate set out in the Annual Storage Capacity Report.
- (b) If:
  - (i) the Commonwealth notifies the Operator that the Commonwealth agrees with the Storage Capacity Rebate set out in the Annual Storage Capacity Report; or
  - (ii) the Commonwealth does not provide any notice under section 5.1(a) within the timeframe required by that section,

the Storage Capacity Rebate set out in the Annual Storage Capacity Report will be binding on the parties.
- (c) If the Commonwealth notifies the Operator that it disputes the Storage Capacity Rebate, and it wishes to progress the Dispute, it must refer the matter for determination by an Independent Expert under clause 41.6.
- (d) If the Operator fails to provide the Commonwealth with that Annual Storage Capacity Report in accordance with section 38.3(b), the Commonwealth may at its absolute discretion take any one or more of the following steps:
  - (i) procure that Annual Storage Capacity Report the report referred to in section 5.1 itself, in which case the Operator must pay the Commonwealth within 20 Business Days after receipt of a request to do so, the costs incurred by the Commonwealth in obtaining that report; and
  - (ii) after providing the Operator with a notice which allows the Operator a further 20 Business Days from receipt of that notice to provide the Annual Storage Capacity Report to the Commonwealth, if the Operator fails to provide that Annual Storage Capacity Report within that further 20 Business Days, the Commonwealth may suspend all payments which it is obliged to pay to the Operator until that Annual Storage Capacity Report is provided to the Commonwealth or terminate this Agreement by provision of a further notice to the Operator and this Agreement will terminate on the date set out in that notice and that termination will be deemed to be a termination pursuant to clause 27.2.

### 5.2 Calculation of Storage Capacity Rebate

The **Storage Capacity Rebate** for a Support Year is calculated as follows:

$$G_{SY} = C_{SY} \times SCP_{SY}$$



where:

**G<sub>SY</sub>** = the Storage Capacity Rebate for the Support Year (in \$);

**C<sub>SY</sub>** = the Annual Support Amount for the relevant Support Year (in \$); and

**SCP<sub>SY</sub>** = the Storage Capacity Rebate Percentage for the Support Year (expressed as a percentage).

### 5.3 Calculation of Storage Capacity Rebate Percentage

The Storage Capacity Rebate Percentage for a Support Year is calculated as follows:

$$\text{SCP}_{\text{SY}} = (\text{SC}_{\text{SY}} - \text{MSOC} - \text{TSC}_{\text{SY}}) / (\text{SC}_{\text{SY}} - \text{MSOC})$$

where:

**SCP<sub>SY</sub>** = the Storage Capacity Rebate Percentage for the Support Year (expressed as a percentage);

**SC<sub>SY</sub>** = the Storage Capacity for that Support Year;

**MSOC** = the Minimum State of Charge; and

**TSC<sub>SY</sub>** = the Tested Storage Capacity as determined under section 5.4,

provided that if the Storage Capacity Rebate Percentage is less than 0% then it will be deemed to be 0%.

### 5.4 Determination of Tested Storage Capacity

- (a) In the last Quarter of a Support Year, the Operator must conduct a Storage Capacity test in accordance with this section 5.4.
- (b) The Operator must use reasonable endeavours to undertake the Storage Capacity test at a time that is likely to maximise revenue.
- (c) During the Storage Capacity test:
  - (i) the Operator will charge the Facility until it reaches the Storage Capacity for that Support Year or the available charge power (as reported by the Project's SCADA system) is zero;
  - (ii) the Operator will discharge the Facility for the Minimum Hours at the Contracted Capacity for that Support Year;
  - (iii) all auxiliary loads must be operating normally and not restricted; and
  - (iv) the **Tested Storage Capacity** is the quantity of electricity discharged (in MWh) during the Minimum Hours as measured at the AC side of the Connection Point.
- (d) No adjustments will be made for ambient temperature. **[Drafting note: given the Operator has a three month window to run the test it is not proposed to include testing conditions / limitations on the basis that the Operator can choose one or more times to run the test when conditions are appropriate]**
- (e) The Operator must include full details of the Storage Capacity test in the Annual Storage Capacity Report, including:
  - (i) the ambient temperature;
  - (ii) the power at the Connection Point during the Minimum Hours;
  - (iii) auxiliary load use;
  - (iv) the state of charge during the Minimum Hours; and
  - (v) the Tested Storage Capacity.

**[Drafting note: a Storage Capacity Rebate may not be appropriate for all projects and may be deleted depending on the technology type bid by a Proponent]**



## 6. Performance Event Rebate

### 6.1 Calculation of Performance Event Rebate

The **Performance Event Rebate** for each Support Year during the Support Period is calculated as follows:

$$F_{SY} = (\sum PERP_{Event}) \times C_{SY}$$

where:

**F<sub>SY</sub>** = the Performance Event Rebate for each Support Year

**PERP<sub>Event</sub>** = the Performance Event Rebate Percentage (expressed as a percentage) except that if the aggregate of the percentage amounts for all **PERP<sub>Events</sub>** which occur in a Support Year is greater than 100%, the aggregate of the percentage amounts for all **PERP<sub>Events</sub>** will be deemed to be 100%

**C<sub>SY</sub>** = the Annual Support Amount for the relevant Support Year (in \$)

### 6.2 Calculation of Performance Event Rebate Percentage (PERP)

The **Performance Event Rebate Percentage (PERP)** for each Performance Event during the Support Year is calculated as follows:

$$PERP_{Event} = 1 - (PCTR_{Event} \times PCCR_{Event})$$

where:

**PERP<sub>Event</sub>** = the Performance Event Rebate Percentage

**PCTR<sub>Event</sub>** = the Performance Coverage Time Ratio for the Performance Event

**PCCR<sub>Event</sub>** = the Performance Coverage Capacity Ratio for the Performance Event

except that if the **PERP<sub>Event</sub>**:

- (a) is less than 0%, it will be deemed to be 0% for that Performance Event; and
- (b) is greater than 50%, it will be deemed to be 50% for that Performance Event.

### 6.3 Calculation of Performance Coverage Time Ratio (PCTR)

- (a) The **Performance Coverage Time Ratio (PCTR)** for each Performance Event during the Support Year is calculated as follows:

$$PCTR_{Event} = (BTI - NCBTI) / TI$$

Where:

**BTI** = the number of Trading Intervals in which the Operator Bid during the LOR Period.

**NCBTI** = the non-conforming bid Trading Intervals, being the number of Trading Intervals Bid by the Operator during the LOR Period in which the Operator bid less than 50% of the Contracted Capacity.

**TI** = the number of Trading Intervals during the LOR Period.

- (b) Where the Rated Capacity during any LOR Period is impacted as a direct result of:
  - (i) any Project Force Majeure Event subsisting during that LOR Period, for which the Operator is entitled to an adjustment or relief pursuant to this Agreement and which the Operator has notified the Commonwealth of in accordance with clause 21;
  - (ii) scheduled maintenance is undertaken in accordance with the applicable approved annual maintenance plan under clause 9.3 during the LOR Period; or
  - (iii) a direction or instruction given by AEMO (in its capacity as a market body) under the National Electricity Rules that:
    - (A) relates to the condition of the transmission network; and



(B) was not issued as a response to or as a result of any act or omission of the Operator or its Associates,

and that impact results in the Operator being unable to Bid at least 50% of the Contracted Capacity (for the purpose of clause 11(a)) or the Contracted Capacity (for the purpose of clause 11(c)) (as applicable) for each Trading Interval impacted, the Operator will be deemed to have Bid the Facility at 50% of the Contracted Capacity (for the purpose of clause 11(a)) or the Contracted Capacity (for the purpose of clause 11(c)) (as applicable), for those impacted Trading Intervals.

#### 6.4 Calculation of Performance Coverage Capacity Ratio (PCCR)

The **Performance Coverage Capacity Ratio (PCCR)** for each Performance Event during the Support Period is calculated as follows:

$$\text{PCCR}_{\text{Event}} = \text{ACB} / (50\% \times \text{Contracted Capacity})$$

Where:

**ACB** = the average capacity (MW) Bid (or if section 6.3(b) applies, deemed to be Bid) by the Operator during the LOR Period.

#### 6.5 Performance Event at the End of a Support Year

Where a Performance Event commences in one Support Year and ends in the subsequent Support Year, all calculations under this section 6 will be conducted on the basis that:

- (a) for the purposes of the first relevant Support Year, only that part of the Performance Event and its consequences (including the amount of Energy exported during the Performance Event) which occur during that Support Year will be taken into account in respect of that Support Year (as applicable);
- (b) for the purposes of the second and any subsequent relevant Support Year, only that part of the Performance Event and its consequences (including the amount of Energy exported during the Performance Event) which occur during that Support Year will be taken into account in respect of that Support Year; and
- (c) the end of each relevant Support Year will occur at 11:59:59pm on the final day of that Support Year and the start of the subsequent Support Year will occur at midnight on the same day.

### 7. Annual Reconciliation Payment

#### 7.1 Annual Reconciliation Payment Calculation

The **Annual Reconciliation Payment** for each Support Year during the Support Period is calculated as follows:

$$\text{A}_{\text{SY}} = \text{B}_{\text{SY}} - \sum \text{B}_{\text{q}}$$

Where:

**A<sub>SY</sub>** = the Annual Reconciliation Payment for the relevant Support Year;

**B<sub>SY</sub>** = the Net Annual Payment for the relevant Support Year; and

$\sum \text{B}_{\text{q}}$  = the aggregate of the Quarterly Payments to which the Operator is entitled for the first three Quarters of the relevant Support Year.

#### 7.2 Pro rata calculation

Where any of paragraphs (a) and (c) of the definition of Support Year apply, the Annual Revenue Floor and Annual Revenue Ceiling will be adjusted proportionally, having regard to the number of days in the relevant partial year as a percentage of the total number of days in a full calendar year.



## 8. Calculation of Net Annual Payment

The **Net Annual Payment** for each Support Year during the Support Period is calculated as follows:

$$B_{SY} = C_{SY} - D_{SY} - Z_{SY}$$

Where:

**B<sub>SY</sub>** = the Net Annual Payment for the relevant Support Year;

**C<sub>SY</sub>** = the Annual Support Amount for the relevant Support Year;

**D<sub>SY</sub>** = the Annual Revenue Sharing Amount for the relevant Support Year; and

**Z<sub>SY</sub>** = the Aggregate Annual Rebate for the relevant Support Year;

## 9. Calculation of Aggregate Annual Rebate

The **Aggregate Annual Rebate** for a Support Year is calculated as:

$$Z_{SY} = E_{SY} + F_{SY} + G_{SY}$$

where:

**Z<sub>SY</sub>** = the Aggregate Annual Rebate for the relevant Support Year;

**E<sub>SY</sub>** = the Availability Rebate;

**F<sub>SY</sub>** = the Performance Event Rebate; and

**G<sub>SY</sub>** = the Storage Capacity Rebate,

each for the relevant Support Year, provided that if the Aggregate Annual Rebate is greater than **C<sub>SY</sub>** then it will be deemed to be equal to **C<sub>SY</sub>**.

## 10. Calculation of Annual Support Amount

The **Annual Support Amount** for each Year during the Support Period is calculated as follows:

$$C_{SY} = \text{Min}((N_{SY} - I_{SY}) \times J, H_{SY})$$

Where:

**C<sub>SY</sub>** = the Annual Support Amount for the relevant Support Year;

**N<sub>SY</sub>** = the Annual Revenue Floor;

**H<sub>SY</sub>** = the Annual Payment Cap;

**I<sub>SY</sub>** = the Adjusted Net Operational Revenue; and

**J** = the Revenue Floor Support Percentage,

each for the relevant Support Year provided that if the Annual Support Amount is less than zero, then it will be deemed to be zero.

## 11. Calculation of Annual Revenue Sharing Amount

The **Annual Revenue Sharing Amount** for each Support Year during the Support Period is calculated as follows:

$$D_{SY} = \text{Min}((I_{SY} - K_{SY}) \times L, H_{SY})$$

Where:

**D<sub>SY</sub>** = the Annual Revenue Sharing Amount for the relevant Support Year;

**I<sub>SY</sub>** = the Adjusted Net Operational Revenue;

**H<sub>SY</sub>** = the Annual Payment Cap;

**K<sub>SY</sub>** = the Annual Revenue Ceiling; and



**L** = the Revenue Ceiling Sharing Percentage,

each for the relevant Support Year provided that, if the Annual Revenue Sharing Amount is less than zero then it will be deemed to be zero.

## 12. Calculation of Adjusted Net Operational Revenue

The **Adjusted Net Operational Revenue** for each Support Year during the Support Period is calculated as follows:

$$I_{SY} = X_{SY} \times CP$$

Where:

**I<sub>SY</sub>** = the Adjusted Net Operational Revenue;

**X<sub>SY</sub>** = the Net Operational Revenue; and

**CP** = the Contracted Percentage (expressed as a percentage),

each for the relevant Support Year provided that, if the Adjusted Net Operational Revenue is less than zero then it will be deemed to be zero.



# Schedule 5 – Termination Payments

## 1. Early Termination Payment

The Early Termination Payment is calculated as follows in the periods identified:

- 1.1 For the period from and including the Signing Date to the COD, the Early Termination Payment is \$4 million.
- 1.2 For the period from and including the COD to the end of the Term:

**[Drafting note: amount of the Early Termination Payment for this period to be provided by the Commonwealth as part of Stage B of the Tender Process.]**

## 2. Fixed Termination Payment

The Fixed Termination Payment is the amount set out in the second column of the table below for the period within which this Agreement is terminated.

**[Drafting note: the shortlisted Proponent is required to insert additional Operational Years in the table above to match its Bid and to complete the table as part of its Financial Value Bid in Stage B of the Tender Process.]**

Period within which this Agreement is terminated pursuant to clause 27.1	Fixed Termination Payment
Prior to Commercial Operation	[insert amount]
[First Operating Year]	[insert amount]
[Second Operating Year]	[insert amount]



# Schedule 6 – Knowledge Sharing Plan

## 1. Knowledge sharing context

The Commonwealth may use the Knowledge Sharing Deliverables for the following purposes:

- (a) to perform the Commonwealth's obligations under this Agreement;
- (b) to monitor and evaluate the performance of the Commonwealth's Capacity Investment Scheme;
- (c) to accurately inform and engage key stakeholders on the following aspects of electricity storage projects in Australia:
  - (i) actual CAPEX and OPEX costs for such projects, including pathways for cost reductions particularly around risk premiums applied by suppliers as they build experience and confidence in these types of projects;
  - (ii) challenges and lessons learned about the integration of the various systems and technologies at commercial scale;
  - (iii) what commercial, regulatory and social barriers the Project encounters, and how they are effectively addressed;
  - (iv) the capabilities, depth and maturity of the various supply chains required to deliver this Project;
  - (v) how social licence and genuine support for the Project is established and maintained with relevant communities; and
  - (vi) how the actual operation of the completed Project compares to the design forecasts, and how this could be optimised for future projects.



2. Knowledge Sharing Deliverables

All deliverables are to be prepared to a standard acceptable to the Commonwealth and, where relevant, reflect any guidelines provided by the Commonwealth relating to the preparation and delivery of Knowledge Sharing Deliverables. **[Drafting note: examples of the Knowledge Sharing Deliverables will be included by the Commonwealth in the table below as part of Stage B. The shortlisted Proponent is required to complete this table as part of its Financial Value Bid in Stage B of the Tender Process.]**

No.	Knowledge Sharing Deliverable	Purpose	Frequency	When?	Public information or confidential information	Content and delivery
1						
2						
3						
4						
5						
6						
7						
8						
9						
10						



# Schedule 7 – Key Subcontractors

The following Subcontractors are Key Subcontractors for the purpose of this Agreement:

**[Drafting note: the shortlisted Proponent is required to complete the table below as part of its Financial Value Bid in Stage B of the Tender Process.]**

	Key Subcontractor and Address	Relevant goods, services or work	Engaged By	Country of Headquarters and from which the relevant goods, services or work will be provided
[#]	[insert]	[insert]	[insert]	[insert]



# Schedule 8 – Social Licence Commitments

[Drafting note: a proforma of this Schedule will be provided by the Commonwealth as part of Stage B and The shortlisted Proponent is required to complete and provide an updated version of this Schedule 8 as part of its Financial Value Bid in Stage B of the Tender Process.]

DRAFT



# Schedule 9 – Form of Tripartite Deed

**[Drafting note: the form of the Tripartite Deed will be provided as a separate document]**

DRAFT



# Schedule 10 – Form of Performance Security

## Form of Performance Bond

[insert Lender Letterhead]

[Date]

Performance Bond No. [insert]

**Lender** [Lender]

**Beneficiary** The Commonwealth of Australia represented by the Department of Climate Change, Energy, the Environment and Water of [#]

**Operator** [Operator] of [insert address]

**Agreement** Capacity Investment Scheme Agreement (Project) dated on [date]

**Sum** [Amount]

At the request of the Operator, and in consideration of the Beneficiary accepting this undertaking in respect of the Agreement, the Lender irrevocably and unconditionally undertakes to pay to the Beneficiary on demand and without deduction or set off any sum or sums which may from time to time be demanded by the Beneficiary to a maximum aggregate sum of the Sum.

This undertaking is to continue until notification has been received from the Beneficiary that the Sum is no longer required by the Beneficiary or until this undertaking is returned to the Lender or until payment to the Beneficiary by the Lender of the whole of the Sum.

Should the Lender be notified in writing, purporting to be signed by or on behalf of the Beneficiary that the Beneficiary desires payment to be made of the whole or any part or parts of the Sum, it is irrevocably and unconditionally agreed that the Lender must make the payment or payments to the Beneficiary immediately, in Australian dollars and in same day funds without reference to the Operator and notwithstanding any notice given by the Operator not to pay same.

Provided always that the Lender may at any time without being required so to do pay to the Beneficiary the Sum less any amount or amounts it may previously have paid under this undertaking or such lesser sum as may be required and specified by the Beneficiary and thereupon the liability of the Lender hereunder shall immediately cease.

The Beneficiary's rights under this undertaking may not be assigned, novated or transferred, other than to an entity to which the Beneficiary is assigning, novating or transferring the Beneficiary's rights under the Agreement (where such assignment, novation or transfer is in accordance with the terms of the Agreement).

This undertaking is governed by the laws of [Victorian/New South Wales]. Each of the Lender, the Operator and the Beneficiary irrevocably and unconditionally submits to the exclusive jurisdiction of the courts of [Victorian/New South Wales] and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.

Signed for and on behalf of

[Lender]



# Schedule 11 - Commonwealth Policy and Other Requirements

The Operator is required to comply with the Commonwealth policies and other requirements as set out in this Schedule 11. Please note that some of the Commonwealth policies identified below have been modified to suit the subject matter of this Agreement and the Operator is only required to comply with that part of the Commonwealth policy and requirements referred to and set out below.

## 1. Taxation and Shadow Economy Policy

### 1.1 Definitions

In this section 1:

- (a) **Satisfactory**, in respect of a Statement of Tax Record, means the Statement of Tax Record meets the conditions set out in Part 6.b of the Shadow Economy Policy or, if the circumstances in Part 6.c of the Shadow Economy Policy apply, the conditions set out in Part 8 of the Shadow Economy Policy;
- (b) **Statement of Tax Record** means a statement of tax record issued by the Australian Taxation Office following an application made in accordance with the process set out at [https://www.ato.gov.au/Business/Bus/Statement-of-tax-record/?page=1#Requesting\\_an\\_STR](https://www.ato.gov.au/Business/Bus/Statement-of-tax-record/?page=1#Requesting_an_STR);
- (c) **Shadow Economy Policy** means the *Shadow economy – increasing the integrity of government procurement: Procurement connected policy guidelines March 2019* available at <https://treasury.gov.au/publication/p2019-t369466>; and
- (d) **Valid** means valid in accordance with Part 7.e of the Shadow Economy Policy.

### 1.2 Taxation

- (a) The Operator must comply with all applicable Laws relating to taxation.
- (b) The Operator must ensure that any first tier Subcontract (namely those which the Operator enters into directly with a Subcontractor) for the purposes of fulfilling its obligations under this Agreement imposes on the first tier Subcontractor the same obligations that the Operator has under this section 1.2.

### 1.3 Valid Statement of Tax Record

- (a) In this section 1.3, **Required Entity** includes each of the applicable entities listed in the table below. If more than one row of the table below applies to the Operator, Required Entity includes all relevant entities listed in each row that applies to the Operator.

If the Operator is:	Required Entity includes:
a body corporate or natural person	that body corporate or person.
a trustee acting in its capacity as trustee of a trust	a) the Operator; and b) the trust.
a member of a Consolidated Group	a) the Operator; and b) the head company in the Consolidated Group.
a member of a GST Group	a) the Operator; and



	b) the GST Group representative.
--	----------------------------------

- (b) The Operator:
  - (i) warrants that at the date of this Agreement each Required Entity holds a Valid and Satisfactory Statement of Tax Record; and
  - (ii) must ensure that each Required Entity holds a Valid and Satisfactory Statement of Tax Record at all times from the date of this Agreement until the end of the Term.
- (c) The Operator, in relation to each Subcontractor it has engaged to deliver goods or services with an estimated value of over \$4 million (GST inclusive):
  - (i) warrants that such Subcontractor holds a Satisfactory Statement of Tax Record for the Subcontractor that was Valid at the commencement of the term of the relevant Subcontract;
  - (ii) must ensure that such Subcontractor holds a Valid and Satisfactory Statement of Tax Record at all times during the term of the relevant Subcontract; and
  - (iii) must retain a copy of any Statement of Tax Record held by such Subcontractor.
- (d) The Commonwealth may, by notice in writing to the Operator at any time, require the Operator to provide a copy of any Statement of Tax Record held or retained by the Operator or required to be held or retained by the Operator under this section 1.3. The Operator must provide a copy of the relevant Statement of Tax Record held or retained by the Operator to the Commonwealth within 5 Business Days after receiving the notice under this section 1.3(d).
- (e) The Operator must notify the Commonwealth where it is in breach of this section 1 and that notice must be provided by the Operator to the Commonwealth within 10 Business Days after the Operator becomes aware of that breach.

## 2. Workplace Gender Equality

### 2.1 Workplace Gender Equality

- (a) In this section 2.1, **WGE Act** means the *Workplace Gender Equality Act (Cth)* 2012.
- (b) The Operator must:
  - (i) comply with its obligations (if any) under the WGE Act;
  - (ii) immediately notify the Commonwealth of any non-compliance by the Operator with the WGE Act; and
  - (iii) if requested by the Commonwealth at any time, provide a current letter of compliance with the WGE Act issued by the Workplace Gender Equality Agency.
- (c) The Operator must not enter into a Subcontract with a Subcontractor named by the Workplace Gender Equality Agency as an employer currently not complying with the WGE Act.
- (d) The Operator must ensure that any Subcontract entered into by the Operator for the purposes of fulfilling its obligations under this Agreement imposes on the Subcontractor the same obligations that the Operator has under this section 2.1, including this requirement to impose obligations on any further subcontractor.

## 3. Modern Slavery

- (a) The Operator must comply with the *Modern Slavery Act 2018 (Cth)*. The Operator must take reasonable steps to identify, assess and address risks of Modern Slavery (as defined in the *Modern Slavery Act 2018 (Cth)*) practices in its operations and supply chains used by it and its Subcontractors in the procurement or provision of the goods and/or services in relation to the Project.



- (b) If at any time the Operator becomes aware of Modern Slavery (as defined in the *Modern Slavery Act 2018* (Cth)) practices in its operations and supply chains used by it and its Subcontractors in the procurement or provision of the goods and/or services in relation to the Project, the Operator must as soon as reasonably practicable take all reasonable action to address or remove these practices, including where relevant by addressing any practices of other entities in its supply chains.

## 4. Workplace Laws

- (a) The Operator must perform its obligations under this Agreement in such a way that the Operator does not breach, and the Commonwealth is not placed in breach of, any applicable workplace Laws, including work health and safety, workplace relations or workers' compensation Laws.
- (b) The Operator must comply with any request, policy or direction issued by the Commonwealth and otherwise cooperate with the Commonwealth in relation to any action taken by the Commonwealth required or authorised by applicable workplace Laws, including work health and safety, workplace relations or workers' compensation Laws at no cost to the Commonwealth.
- (c) The Operator must ensure that any Subcontract entered into by the Operator for the purposes of fulfilling its obligations under this Agreement after the Signing Date imposes on the Subcontractor the same obligations that the Operator has under this section 4, other than this requirement to impose obligations on any further subcontractor.

## 5. Significant Events

### 5.1 Definition

In this section 5, **Significant Event** means:

- (a) any adverse comments or findings made by a court, commission, tribunal or other statutory or professional body regarding the conduct or performance of the Operator or its Associates that impacts or could be reasonably perceived to impact on their professional capacity, capability, fitness or reputation;
- (b) any other significant matters, including the commencement of legal, regulatory or disciplinary action involving the Operator or its Associates, that may adversely impact on compliance with Commonwealth policy, applicable Laws or the Commonwealth's reputation;
- (c) any unsettled judicial decisions against the Operator (including in or related to overseas jurisdictions relating to employee entitlements where the employee entitlements remain unpaid (but excluding judgments under appeal or instances where the period for appeal or payment/settlement has not expired); or
- (d) any non-compliance by the Operator or its Associates any judgment against that person from any court or tribunal (including overseas jurisdictions but excluding judgments under appeal or instances where the period for appeal or payment/settlement has not expired) relating to a breach of applicable workplace Laws, including workplace relations law, work health and safety law or workers' compensation law.

### 5.2 No existing Significant Event

The Operator warrants and represents that there is no Significant Event in relation to the Operator and its Associates as at the Signing Date.

### 5.3 Notice of Significant Event

- (a) The Operator must immediately upon becoming aware of a Significant Event in relation to the Operator or its Associates, notify the Commonwealth in writing, providing:



- (i) a summary of the Significant Event, including the date or dates on which it occurred and the date on which the Operator became aware of it; and
  - (ii) details of the relevant Operator and/or its Associates involved in the Significant Event.
- (b) If, prior to the Operator providing notice under section 5.3(a), the Commonwealth notifies the Operator in writing that an event or circumstance is to be considered a Significant Event for the purposes of this section 5, the Operator must notify the Commonwealth in writing as if section 5.3(a) applied, within 3 Business Days after receiving the notice issued under this section 5.3(b).
- (c) Where reasonably requested by the Commonwealth, the Operator must, within 3 Business Days after the request, provide the Commonwealth with additional information in writing regarding a Significant Event, to the extent that information is known by or reasonably available to the Operator.

#### **5.4 Commonwealth response to a Significant Event**

If the Commonwealth is notified of a Significant Event pursuant to section 5.3(a) or notifies the Operator of a Significant Event pursuant to section 5.3(b), the Commonwealth may:

- (a) notify the Operator that no further action in relation to the Significant Event is required;
- (b) request the Operator to submit a remediation plan to the Commonwealth; or
- (c) acting reasonably, determine that the Significant Event is of such a serious or significant nature that it is not appropriate in the circumstances for the Operator to continue as a party to this Agreement, in which case the Commonwealth may terminate this Agreement in accordance with clause 27.2.

#### **5.5 Remediation plan**

- (a) If notified by the Commonwealth pursuant to section 5.4(b), the Operator must prepare a draft remediation plan and submit that draft plan to the Commonwealth for approval within 10 Business Days after receipt of that request.
- (b) A draft remediation plan prepared by the Operator under section 5.5(a) must include the following information:
  - (i) how and the timeframe within which the Operator will address the Significant Event in the context of this Agreement and the Project, including confirmation that the implementation of the remediation plan will not in any way impact this Agreement or the Project or compliance by the Operator with its other obligations under this Agreement or otherwise at Law;
  - (ii) how the Operator will ensure events or circumstances similar to the Significant Event do not occur again; and
  - (iii) any other matter reasonably requested by the Commonwealth.
- (c) The Commonwealth must review the draft remediation plan and may:
  - (i) approve the draft remediation plan;
  - (ii) notify the Operator of the details of any changes that the Commonwealth considers are reasonably required to the draft remediation plan; or
  - (iii) reject the draft remediation plan if the Commonwealth, acting reasonably, considers that the draft remediation plan is unsatisfactory having regard to the nature of the Significant Event and the likelihood that the draft remediation plan could address the matters raised by the Significant Event. If this applies, the Commonwealth will notify the Operator in writing of that fact, and that the failure to provide a satisfactory remediation plan will be considered to be a breach of this section 5.5, including for the purposes of clause 27.2 in which case the Commonwealth may terminate this Agreement in accordance with clause 27.2.



- (d) The Operator must make any changes to the draft remediation plan reasonably requested by the Commonwealth and resubmit the draft remediation plan to the Commonwealth for approval within 3 Business Days after the request unless otherwise agreed in writing by the Commonwealth. This section 5.5(d) will also apply to any resubmitted draft remediation plan.
- (e) The Commonwealth must review the draft resubmitted remediation plan and may:
  - (i) approve the draft remediation plan;
  - (ii) notify the Operator of the details of any changes that the Commonwealth considers are reasonably required to the draft remediation plan; or
  - (iii) reject the draft remediation plan if the Commonwealth, acting reasonably, considers that the draft remediation plan is unsatisfactory having regard to the nature of the Significant Event and the likelihood that the draft remediation plan could address the matters raised by the Significant Event. If this applies, the Commonwealth will notify the Operator in writing of that fact, and that the failure to provide a satisfactory remediation plan will be considered to be a breach of this section 5.5, including for the purposes of clause 27.2 in which case the Commonwealth may terminate this Agreement in accordance with clause 27.2.
- (f) Without limiting its other obligations under this Agreement, the Operator must comply with the approved remediation plan.
- (g) The Operator must provide reports and other information about the Operator's progress in implementing the approved remediation plan as reasonably requested by the Commonwealth and within the time reasonably requested by the Commonwealth.
- (h) A failure by the Operator to comply with its obligations under this section 5 will be a failure to comply in a material respect with an obligation under this Agreement for the purposes of clause 27.2.

## 5.6 General

- (a) The Commonwealth's rights under this section 5 are in addition to and do not otherwise limit or affect any other rights the Commonwealth may have under this Agreement or otherwise at Law.
- (b) The performance by the Operator of its obligations under this section 5 will be at no additional cost to the Commonwealth.
- (c) The Commonwealth may, in addition to any of its other rights or remedies under this Agreement or otherwise at Law, take into account the occurrence of a Significant Event at any time, including when:
  - (i) conducting future tenders or procurement processes;
  - (ii) deciding whether to consent to any changes to Key Subcontractors;
  - (iii) exercising any rights of the Commonwealth in relation to access, audit, or the treatment of documentation under or in connection with this Agreement; and
  - (iv) deciding whether to exercise any rights in relation to termination of this Agreement.

## 6. Archives Act

- (a) In this section 6, **Archives Act** means the *Archives Act 1983* (Cth).
- (b) The Operator acknowledges that the Commonwealth is the owner of certain records relating to the Project (including those required to be delivered to the Commonwealth in accordance with this Agreement) that are created or maintained by the Operator and that these records are to be dealt with in accordance with the Archives Act.
- (c) The Operator must not take any action which would cause the Commonwealth to be in breach of its obligations under the Archives Act.



- (d) The Operator must comply with any reasonable request, policy or direction issued by the Commonwealth and otherwise cooperate with the Commonwealth in relation to any action taken by the Commonwealth required or authorised by the Archives Act at no cost to the Commonwealth.
- (e) The Operator must ensure that any Subcontract entered into by the Operator for the purposes of fulfilling its obligations under this Agreement imposes on the Subcontractor the same obligations that the Operator has under this section 6, including this requirement to impose obligations on any further subcontractor.
- (f) The Operator's obligations under this section 6 shall survive termination or expiry of this Agreement.

## 7. National Anti-Corruption Commission

- (a) In this section 7, **NACC Act** means the *National Anti-Corruption Commission Act 2022* (Cth).
- (b) The Operator must comply with any reasonable request, policy or direction issued by the Commonwealth and otherwise cooperate with the Commonwealth in relation to any action taken by the Commonwealth required or authorised by the NACC Act.
- (c) The Operator must ensure that any Subcontract entered into by the Operator for the purposes of fulfilling its obligations under this Agreement imposes on the Subcontractor the same obligations that the Operator has under this section 7, including this requirement to impose obligations on any further subcontractor.
- (d) The Operator's obligations under this section 7 shall survive termination or expiry of this Agreement.

## 8. Public Interest Disclosure

- (a) In this section 8, **PID Act** means the *Public Interest Disclosure Act 2013* (Cth).
- (b) The Operator must comply with any reasonable request, policy or direction issued by the Commonwealth and otherwise cooperate with the Commonwealth in relation to any action taken by the Commonwealth required or authorised by the PID Act.
- (c) The Operator must ensure that any Subcontract entered into by the Operator after the Signing Date for the purposes of fulfilling its obligations under this Agreement imposes on the Subcontractor the same obligations that the Operator has under this section 8, other than this requirement to impose obligations on any further subcontractor.
- (d) The Operator's obligations under this section 8 shall survive termination or expiry of this Agreement.

## 9. Criminal Code

- (a) In this section 9, **Criminal Code** means *Criminal Code Act 1995* (Cth).
- (b) The Operator acknowledges that the giving of false or misleading information to the Commonwealth is a serious offence under section 137.1 of the schedule to the Criminal Code.
- (c) The Operator acknowledges that unauthorised disclosure of security-classified information is an offence and that there are Laws, including the Criminal Code which contain provisions relating to the protection of certain information and sets out the penalties for the unauthorised disclosure of that information.
- (d) The Operator must ensure that any Subcontract entered into by the Operator for the purposes of fulfilling its obligations under this Agreement imposes on the Subcontractor the same obligations that the Operator has under this section 9, including this requirement to impose obligations on any further subcontractor.



- (e) The Operator's obligations under this section 9 shall survive termination or expiry of this Agreement.

## 10. Prohibited dealings

- (a) The Operator must ensure that the Operator and any individuals, persons, entities or organisations involved in the Project, including its Associates, are not:
  - (i) directly or indirectly engaged in preparing, planning, assisting or fostering a terrorist act;
  - (ii) listed terrorist organisations for the purposes of the *Criminal Code Act 1995* (Cth) (details of listed terrorist organisations are available at <https://www.nationalsecurity.gov.au/what-australia-is-doing/terrorist-organisations/listed-terrorist-organisations> );
  - (iii) subject to sanctions or similar measures under the *Charter of the United Nations Act 1945* (Cth) or the *Autonomous Sanctions Act 2011* (Cth) (details of individuals and entities are available at: <https://dfat.gov.au/international-relations/security/sanctions/Pages/consolidated-list.aspx>);
  - (iv) listed on the 'World Bank's Listing of Ineligible Firms and Individuals' posted at: <https://www.worldbank.org/en/projects-operations/procurement/debarred-firms>;
  - (v) owned, controlled by, acting on behalf of, or at the direction of individuals, persons, entities or organisations referred to in section 10(a)(i) to 10(a)(iv); or
  - (vi) providing direct or indirect support, resources or assets (including any grant monies) to individuals, persons, entities or organisations referred to in section 10(a)(i) to 10(a)(iv).
- (b) If the Operator becomes aware that there are reasonable grounds to suspect it or any of its Associates has or may have contravened any part of section 10(a), the Operator must:
  - (i) notify the Commonwealth and confirm that information in writing as soon as possible, which must be no later than within 24 hours;
  - (ii) immediately take all reasonable action to mitigate the risks; and
  - (iii) take any other action required by the Commonwealth.
- (c) The Operator must ensure that any Subcontract entered into by the Operator for the purposes of fulfilling its obligations under this Agreement imposes on the Subcontractor the same obligations that the Operator has under this section 10, including this requirement to impose obligations on any further subcontractor.

## 11. Environment

- (a) The Operator shall perform its obligations under this Agreement in such a way that the Commonwealth is not placed in breach of any applicable environmental Laws, including the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).
- (b) The Operator must comply with any reasonable request, policy or direction issued by the Commonwealth and otherwise cooperate with the Commonwealth in relation to any action taken by the Commonwealth required or authorised by applicable environmental Laws, including the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).
- (c) The Operator must ensure that any Subcontract entered into by the Operator for the purposes of fulfilling its obligations under this Agreement imposes on the Subcontractor the same obligations that the Operator has under this section 11, including this requirement to impose obligations on any further subcontractor.
- (d) The Operator's obligations under this section 11 shall survive termination or expiry of this Agreement.



## 12. Privacy

- (a) In this section 12, **Privacy Act** means the *Privacy Act 1988* (Cth).
- (b) The Operator shall perform its obligations under this Agreement in such a way that the Commonwealth is not placed in breach of any applicable privacy Laws, including the Privacy Act and the "Australian Privacy Principles" as defined in the Privacy Act.
- (c) The Operator must comply with any reasonable request, policy or direction issued by the Commonwealth and otherwise cooperate with the Commonwealth in relation to any action taken by the Commonwealth required or authorised by applicable privacy Laws, including the including the Privacy Act and the "Australian Privacy Principles" as defined in the Privacy Act.
- (d) The Operator must ensure that any Subcontract entered into by the Operator for the purposes of fulfilling its obligations under this Agreement imposes on the Subcontractor the same obligations that the Operator has under this section 12, including this requirement to impose obligations on any further subcontractor.
- (e) The Operator's obligations under this section 12 shall survive termination or expiry of this Agreement.

## 13. Fraud

- (a) In this section 13, **Fraud** mean dishonestly obtaining a benefit from the Commonwealth or causing a loss to the Commonwealth by deception or other means and includes alleged, attempted, suspected or detected fraud.
- (b) The Operator must take all reasonable steps to prevent and detect Fraud in relation to the performance of this Agreement and the Project.
- (c) The Operator acknowledges the occurrence of Fraud will constitute a breach of this Agreement.
- (d) If an investigation finds that the Operator or any of its Associates have committed Fraud, or the Operator has failed to take reasonable steps to prevent Fraud, the Operator must reimburse or compensate the Commonwealth in full.
- (e) The Operator must ensure that any Subcontract entered into by the Operator for the purposes of fulfilling its obligations under this Agreement imposes on the Subcontractor the same obligations that the Operator has under this section 13, including this requirement to impose obligations on any further subcontractor.
- (f) The Operator's obligations under this section 13 shall survive termination or expiry of this Agreement.



# Signing page

**EXECUTED** as an agreement.

Each signatory executing this Agreement (electronically or otherwise) intends by that execution to be bound by this Agreement, and where the signatory has signed as an officer or attorney of a party, for that party to be bound by this Agreement.

**Signed** for and on behalf of **the Commonwealth of Australia** as represented by the Department of Climate Change, Energy, the Environment and Water by its duly authorised delegate in the presence of:

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name of witness (print)

\_\_\_\_\_  
Signature of delegate

\_\_\_\_\_  
Name of delegate (print)

## The Operator

**Executed** by [Name of company] in accordance with Section 127 of the *Corporations Act 2001*

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

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

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

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