



[Draft Dated: December 2023]

# Tripartite Deed

Capacity Investment Scheme

[Insert Facility name]

Dated [insert]

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

[insert] (**Operator**)

[insert] (**Security Trustee**)

## [Important Notice]

This is a copy of the draft Tripartite Deed 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 or about 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 its 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.]

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# Tripartite Deed

## Details

### Date

### Parties

Name	<b>The Commonwealth of Australia represented by the 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]
Name	<b>[insert name]</b> (ACN/ABN [insert])
Short form name	<b>Security Trustee</b>
Notice details	[insert address] Email: [insert]
Attention	[insert]

### Background

- A The Commonwealth and the Operator have entered into the CISA in connection with the Facility and the Project.
- B The Operator has requested that the Beneficiaries provide financial accommodation to the Operator or its Related Bodies Corporate to enable it to carry out the Project.
- C The provision of financial accommodation is conditional on, among other things:
  - (a) the Operator granting Security to Security Trustee over its rights under the Agreement; and
  - (b) the Operator and the Commonwealth entering into this Deed with Security Trustee.

# Tripartite Deed

## Agreed terms

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### 1 Definitions and interpretation

#### 1.1 Definitions

Unless the contrary intention appears, these meanings apply:

**Beneficiary** has the meaning it has in the Security Trust Deed.

**CISA** means the long-term revenue support agreement dated [insert] between the Commonwealth and the Operator and the with respect to the Project.

**Controller** has the meaning it has in the Corporations Act.

**Cure Period Start Date** means, for a Termination Event which the Commonwealth is relying on for the purposes of clause 4.4 (Termination), the date on which all of the following are satisfied:

- (a) the Termination Event which the Commonwealth is relying on has occurred; and
- (b) the Commonwealth has given Security Trustee:
  - (i) a copy of the Termination Event Notice (if any) it has given to the Operator which states that the Termination Event which the Commonwealth is relying on has occurred; or
  - (ii) if the Commonwealth has not given Security Trustee a Termination Event Notice which complies with paragraph (b)(i) above, including for example because it was not required to give such a notice to the Operator under the CISA, it has notified the Operator and Security Trustee of the Termination Event it is relying on (and the notice includes reasonable details of that event); and
- (c) all cure periods (if any) specified in, or agreed under, the CISA for that Termination Event have expired or ended.

**Details** means the section of this Deed headed "Details".

**Enforcing Party** means Security Trustee or any Controller or attorney appointed under any Security.

**[Event of Default** has the meaning given to the term "Event of Default" (howsoever named) in the Security Trust Deed.]

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

**Security** means: [Drafting note: the Security will be limited to security granted over the Project, the assets of the Operator and any Related Body Corporate established for the Project and the ownership interests in the Operator and those Related Bodies Corporate and will only be to secure debt related to the Project]

- (a) [insert]; and
- (b) any other Security Interest granted by or entered into by the Operator or any of its Related Bodies Corporate (whether alone or with other grantors) in favour of Security Trustee (in its capacity as trustee of the Security Trust).

**Security Trust** has the meaning it has in the Security Trust Deed.

**Security Trust Deed** means the security trust deed executed by Security Trustee before this Deed was signed and which relates to the Security.

**Security Trustee** has the meaning it has in the Details.

**Terminate** includes terminate, end, close out, determine, rescind, cancel, revoke, repudiate, avoid, release, surrender, forfeit, discharge (other than by performance) or accept the termination, rescission or repudiation of the CISA and includes claiming that an obligation under the CISA is void, voidable or unenforceable.

**Termination Event** means each of the events set out in clause 27.2 (Termination by the Commonwealth for Operator Default) of the CISA.

**Termination Event Notice** means any notice given by the Commonwealth to the Operator notifying the Operator of the occurrence of a Termination Event.

**Transferee** has the meaning given in clause 5.1 (Transfer).

## **1.2 Terms defined in the CISA**

Unless the contrary intention appears, a term which has a defined meaning in the CISA has the same meaning when used in this Deed.

## **1.3 General interpretation**

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

- (a) labels used for definitions are for convenience only and do not affect interpretation;
- (b) the singular includes the plural and vice versa and a word indicating gender includes every other gender;
- (c) another grammatical form of a defined word or expression has a corresponding meaning;
- (d) the meaning of general words is not limited by specific examples introduced by "including", "for example", "such as" or similar expressions;
- (e) a reference to a Deed also includes any variation, replacement, novation or supplement of it;
- (f) 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;
- (g) 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;
- (h) 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 Deed; 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 they are located);
- (i) a reference to a time of day is to the time in the capital city of the Relevant Jurisdiction;

- (j) a reference to dollars, \$ or A\$ is a reference to the currency of Australia;
- (k) a reference to any legislation includes regulations under it and any consolidations, amendments, re-enactments or replacements of any of them;
- (l) 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);
- (m) a reference to a group of persons is a reference to any two 3 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
- (n) a reference to any thing (including an amount) is a reference to the whole and each part of it;
- (o) a period of time dating from a given day or the day of an act or event is to be calculated exclusive of that day;
- (p) if the day on which a party must do something under this Deed is not a Business Day, then the party must do it on the next Business Day;
- (q) this Deed is comprised of the Details, the Background, clauses 1 to 11 and any Schedules, Annexures and Attachments to this Deed;
- (r) a reference to a right includes any benefit, remedy, function, discretion, authority or power;
- (s) 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; and
- (t) a reference to “**property**” or “**asset**” includes any present or future, real or personal, tangible or intangible property, asset or undertaking and any right, interest or benefit under or arising from it;
- (u) a reference to cure includes any deemed cure contemplated or effected by clause 4.6 (Deemed cure);
- (v) a reference to remedy, rectify, cure or overcoming the effects of, or similar, includes a reference to any of them; and
- (w) a reference to “**cure period**” includes a reference to any cure, grace, notice or other period or requirement, or similar.

#### 1.4 Order of precedence

- (a) If there is an ambiguity, inconsistency or discrepancy between this Deed and any other Project Document, then the following order of precedence applies to the extent of any ambiguity, inconsistency or discrepancy:
  - (i) this Deed;
  - (ii) the CISA; and
  - (iii) the remaining Project Documents (if any).

- (b) If any party (other than the Commonwealth) discovers any ambiguity, inconsistency or discrepancy within or between any one or more of the Project Documents, that party must give the other parties notice of such ambiguity, inconsistency or discrepancy within a reasonable time after discovering it.
- (c) The resolution of any ambiguity, inconsistency or discrepancy pursuant to this clause 1.4 does not entitle the Operator of the Security Trustee to make any Claim against the Commonwealth and each of the Operator and Security Trustee waives any such right.

## **1.5 Project Documents**

The Security Trustee acknowledges that as at the date it signed this Deed, it has received a final signed version of the CISA and it has reviewed the CISA (or is deemed to have received and reviewed the final signed version of the CISA).

## **1.6 Commonwealth's rights, duties and functions**

- (a) Unless otherwise expressly stated in this Deed, nothing in this Deed 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 this Deed.
- (b) Notwithstanding anything expressly stated or implied in this Deed 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 stated or implied in this Deed 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.

## **1.7 Reasonable endeavours of the Commonwealth**

In this Deed, 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 statutory instrument or delegation; or
- (d) Commonwealth to act in a way it regards as not in the public interest.



## **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 stated, 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, the Operator or the Security Trustee under this Deed will not limit or exclude any other right or obligation of the Commonwealth, the Operator or the Security Trustee under this Deed unless otherwise expressly stated.
- (b) Any provision of this Deed 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**

Nothing in this Deed:

- (a) creates a partnership, joint venture, fiduciary, employment or agency relationship with the Commonwealth; or
  - (b) imposes any duty of Good Faith on the Commonwealth,
- unless otherwise expressly provided.

## **1.12 Capacity of Security Trustee**

- (a) Security Trustee enters into and performs this Deed and the transactions it contemplates only as the trustee of the Security Trust, except where expressly stated otherwise. This applies also in respect of any past and future conduct (including omissions) relating to this Deed or those transactions.
  - (b) Under and in connection with this Deed and those transactions and conduct:
    - (i) Security Trustee's liability (including for negligence) is limited to the extent it can be satisfied out of the assets of the Security Trust. Security Trustee need not pay any such liability out of other assets; and
    - (ii) another party may only do the following with respect to Security Trustee (but any resulting liability remains subject to the limitations in this clause):
      - (A) prove and participate in, and otherwise benefit from, any form of insolvency administration of Security Trustee but only with respect to Security Trust assets;
      - (B) exercise rights, powers and remedies with respect to Security Trust assets, including set-off;
      - (C) enforce its security (if any) and exercise contractual rights; and
      - (D) bring any proceedings against Security Trustee seeking relief or orders that are not inconsistent with the limitations in this clause,
- and may not:

- (E) bring other proceedings against Security Trustee;
  - (F) take any steps to have Security Trustee placed in any form of insolvency administration or to have a receiver or receiver and manager appointed; or
  - (G) seek by any means (including set-off) to have a liability of Security Trustee to that party (including for negligence) satisfied out of any assets of Security Trustee other than Security Trust assets.
- (c) Clauses 1.12(a) and 1.6(b) apply despite any other provision in this Deed but do not apply with respect to any liability of Security Trustee to another party (including for negligence):
- (i) to the extent that Security Trustee has no right or power to have Security Trust assets applied towards satisfaction of that liability, or its right or power to do so is subject to a deduction, reduction, limit or requirement to make good, in either case because Security Trustee's behaviour was beyond power or improper in relation to the Security Trust; or
  - (ii) under any provision which expressly binds Security Trustee other than as trustee of the Security Trust (whether or not it also binds it as trustee of the Security Trust).
- (d) The limitation in clause 1.12(b)(i) is to be disregarded for the purposes (but only for the purposes) of the rights and remedies described in clause 1.6(b)(b)(ii), and interpreting this Deed and any security for it, including determining the following:
- (i) whether amounts are to be regarded as payable (and for this purpose damages or other amounts will be regarded as a payable if they would have been owed had a suit or action barred under clause 1.12(b)(ii) been brought);
  - (ii) the calculation of amounts owing; or
  - (iii) whether a breach or default has occurred,
- but any resulting Liability will be subject to the limitations in this clause.

### **1.13 Replacement of Security Trustee**

- (a) If Security Trustee is replaced as trustee under the Security Trust Deed, then:
- (i) Security Trustee may assign, transfer or novate (or do any combination of these things in respect of) its rights and obligations under this Deed to the replacement trustee if it has all the required qualifications, consents, authorisations and approvals necessary to carry on a business similar to the Security Trustee;
  - (ii) Security Trustee may be released from its obligations under this Deed when the replacement security trustee provides, in a form and substance reasonably acceptable to the Operator and the Commonwealth:
    - (A) copies of a deed poll under which the replacement security trustee undertakes to be bound by this Deed as if it were the Security Trustee with effect from the date of that deed poll; and
    - (B) evidence that it has undertaken to be bound by each other document to which the Security Trustee is bound in its capacity as security trustee; and
  - (iii) the other parties agree to co-operate and to execute such documents as are reasonably necessary to give effect to any such assignment, transfer or novation (or any combination of them).
- (b) The Operator must pay the Commonwealth's legal and other costs and expenses incurred in complying with this clause 1.13.

### 1.14 Consideration

Each party acknowledges entering into this Deed and incurring obligations and giving rights under this Deed for valuable consideration received from each other party.

### 1.15 Condition precedent

- (a) The provisions of this Deed (other than this clause 1 and clauses 6, 7, 9, 11 and 9) are of no force or effect unless and until the Commencement Date occurs.
- (b) The condition precedent in clause 1.15(a) is for the benefit of each party to this Deed and may only be waived by notice in writing given by each party.

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## 2 Representations and warranties

### 2.1 Operator and Security Trustee representations and warranties

Each party represents and warrants in respect of itself for the benefit of the other parties as follows:

- (a) **(corporate existence)** in the case of the Operator and the Security Trustee 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) **(power and authority)** it has full power and authority to enter into, deliver and perform its obligations under this Deed and carry out the transactions contemplated by this Deed;
- (c) **(execution authorised)** it has taken all necessary action to authorise the execution, delivery and the performance of this Deed;
- (d) **(binding nature)** this Deed constitutes its legal, valid and binding obligations, enforceable in accordance with its terms;
- (e) **(no breach)** the execution, delivery and performance of this Deed does not and will not violate, breach or result in a contravention of:
  - (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;
  - (iii) in the case of the Operator and Security Trustee only, the constitutional documents of that party; or
  - (iv) any Security Interest by which it is bound; and
- (f) **(no insolvency)** in the case of the Operator and the Security Trustee only, it is not subject to an Insolvency Event.

### 2.2 Commonwealth representations and warranties

The Commonwealth represents and warrants for the benefit of the other parties as follows:

- (a) **(power and authority)** it has full power and authority to enter into, deliver and perform its obligations under this Deed and carry out the transactions contemplated by this Deed; and
- (b) **(binding nature)** this Deed constitutes its legal, valid and binding obligations, enforceable in accordance with its terms.

## 2.3 Reliance

The Commonwealth acknowledges that the Beneficiaries may provide financial accommodation to the Operator or any of its Related Bodies Corporate in reliance on the representations and warranties made by the Operator in clause 2.1 (Operator and Security Trustee representations and warranties).

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## 3 Consents and undertakings

### 3.1 Consent by the Operator

The Operator:

- (a) consents to this Deed; and
- (b) agrees to be bound by and co-operate in the implementation of this Deed.

### 3.2 Consent and undertakings by the Commonwealth

The Commonwealth:

- (a) consents to the creation of the Security.
- (b) agrees that none of:
  - (i) the creation or existence of the Security;
  - (ii) the entry into of this Deed by the Operator;
  - (iii) the appointment of any Enforcing Party to the Operator or a person who has Control over the Operator under the Security; or
  - (iv) the exercise by Security Trustee or any Enforcing Party of any rights, powers or remedies in connection with this Deed or the Security (in compliance with the applicable provisions of this Deed (including compliance with clause 5 (Transfer following enforcement) in effecting a sale of an ownership interest in a person who has Control over the Operator)),will, of itself:
  - (v) contravene or constitute a default or breach of the CISA; or
  - (vi) entitle the Commonwealth to exercise any rights, powers or remedies to terminate the CISA.
- (c) **(enforcement)** agrees that an Enforcing Party may, but need not, exercise all or any of the rights, powers and remedies, and perform all or any of the obligations of the Operator, in connection with the CISA, as if it were the Operator to the exclusion of the Operator.
- (d) **(no assumption)** agrees that an Enforcing Party will not be liable nor have any obligations, and will not be taken to have assumed any liability or obligations, in connection with the CISA as a result of the entry into of the Security or this Deed or the exercise of any rights, powers or remedies by an Enforcing Party in connection with the Security or this Deed. However, this does not:
  - (i) apply to any obligation of the Operator under the CISA expressly assumed by Security Trustee by written notice to the Commonwealth (with a copy to the Operator); or
  - (ii) affect any liability or obligation of the Operator for acts and omissions of an Enforcing Party where the Enforcing Party is acting as the agent of the Operator.

### **3.3 Notification by Security Trustee**

The Security Trustee must notify the Commonwealth of:

- (a) any Event of Default as soon as it becomes aware of the same (together with details of that Event of Default; and
- (b) any intention to exercise its rights under the Security to take enforcement action or appoint an Enforcing Party to do so.

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## **4 Termination Events – cure and termination**

### **4.1 Termination Event Notices to Security Trustee**

If a Termination Event occurs, the Commonwealth agrees to:

- (a) give Security Trustee a copy of any Termination Event Notice and all other documents issued by the Commonwealth to the Operator in connection with the Termination Event at or about the same time as the notice is given to the Operator; and
- (b) give the Enforcing Party copies of any information issued by the Commonwealth to the Operator under the CISA in connection with a Termination Event.

### **4.2 Cure rights**

- (a) The parties agree that Security Trustee, or any other Enforcing Party, may but need not, take steps to cure, or procure the cure of, a Termination Event or (where relevant) prevent the occurrence of a Termination Event.
- (b) The Commonwealth agrees that a Termination Event no longer exists under or for the purposes of the CISA after:
  - (i) it is cured or procured to be cured by Security Trustee or any other Enforcing Party; or
  - (ii) it is taken to be cured in accordance with clause 4.6 (Deemed cure).

### **4.3 Restriction on Termination**

- (a) The Commonwealth agrees that despite anything in the CISA and any rights, powers or remedies it may otherwise have (including at Law), it can and will only:
  - (i) Terminate; or
  - (ii) give any notice which would (or with the expiration of time would) Terminate,the CISA only in reliance on a Termination Event and only as expressly permitted by clause 4.4 (Termination).
- (b) Any actual or purported Termination of the CISA in breach of this clause 4.3 is ineffective.
- (c) Clause 4.2 (Cure rights) and the rest of this clause 4.3 do not apply to any Termination or notice in respect of clause 27.1 (Termination for Convenience by the Commonwealth) of the CISA.

### **4.4 Termination**

The Commonwealth may terminate the CISA:

- (a) **(payment default)** in reliance on a Termination Event under the CISA which relates to a failure by the Operator to pay money due under the CISA, if the failure has not been cured within 10 Business Days after the applicable Cure Period Start Date;
- (b) **(insolvency or Change in Control)** in reliance on a Termination Event under the CISA which is or relates to an Insolvency Event or a Change in Control:
  - (i) if an Enforcing Party has not been appointed (or become a Controller) to or over:
    - (A) for only a Change in Control, shares in the Operator; or
    - (B) the Operator's rights under the CISA,
 within 15 Business Days after the applicable Cure Period Start Date; and
  - (ii) if having been so appointed, the Insolvency Event or Change in Control has not been cured within 365 days after the applicable Cure Period Start Date (or by any later date agreed to in writing by the Commonwealth in its absolute discretion);
- (c) **(fraudulent project reports)** in reliance on a Termination Event which is an event set out in clause 27.2(h) (Termination by the Commonwealth for Operator Default) of the CISA, if an Enforcing Party has not satisfied, or procured the satisfaction of, all of the requirements in clause 27.2(h)(ii)(A) to (D) of the CISA within 20 Business Days after the applicable Cure Period Start Date;
- (d) **(other events)** in reliance on a Termination Event under the CISA which is not described above, if:
  - (i) an Enforcing Party has not commenced remedying that Termination Event within 30 Business Days after the applicable Cure Period Start Date (or by any later date agreed to in writing by the Commonwealth in its absolute discretion); or
  - (ii) if the Enforcing Party has commenced remedying that Termination Event within 30 Business Days after the applicable Cure Period Start Date (or by any later date agreed to in writing by the Commonwealth in its absolute discretion):
    - (A) without prejudice to clause 4.4(d)(B), the Enforcing Party does not pursue that remedy in a diligent manner; or
    - (B) in any event, the Enforcing Party has not remedied the relevant Termination Event within 60 Business Days after the applicable Cure Period Start Date (or by any later date agreed to in writing by the Commonwealth, acting reasonably); and
- (e) **(no cure)** in reliance on a Termination Event under the CISA, if Security Trustee notifies the Commonwealth in writing that it does not intend to take any steps or further steps to cure that Termination Event,

by written notice to the Operator and Security Trustee (given after the applicable requirement above is satisfied), if the Commonwealth is still entitled under the CISA to Terminate the CISA in reliance on the relevant event and which event remains uncured.

#### 4.5 Rights and obligations not affected

The Commonwealth agrees that if a Termination Event occurs, the Operator's rights, and the Commonwealth's obligations, under the CISA are not, and will not be, affected while Security Trustee or any other Enforcing Party is able to or is exercising any right, power or remedy (including those described in this clause 4 or in connection with any Security) in connection with that Termination Event.

## 4.6 Deemed cure

The Commonwealth agrees that a Termination Event is taken to be cured under and for the purposes of the CISA and this Deed (as applicable):

- (a) if it relates to a failure to pay money due under the CISA, when an Enforcing Party has paid or procured the payment of the amount of that money to the Commonwealth;
- (b) if it relates to a failure to do anything under the CISA, when an Enforcing Party has done, or procured to be done, that thing;
- (c) if it is or relates to a Change in Control or an Insolvency Event, when an Enforcing Party has procured:
  - (i) the assignment, transfer or novation of (or any combination of these things to be done in respect of) the Operator's rights and obligations under the CISA to a Transferee; or
  - (ii) the transfer of the shares in the Operator to a Transferee,in each case, in accordance with clause 5.1 (Transfer); and
- (d) for any other Termination Event or if Security Trustee reasonably considers that the Termination Event is not able to be cured, or will not be or is unlikely to be cured by the end of any applicable cure period provided under the CISA or this Deed, when an Enforcing Party makes arrangements (which may include the taking of steps to prevent a recurrence of the Termination Event or the payment of compensation to the Commonwealth (or both)) which are satisfactory to the Commonwealth.

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## 5 Transfer following enforcement

### 5.1 Transfer

The Commonwealth agrees that after Security Trustee has commenced enforcing the Security in accordance with its terms, an Enforcing Party may:

- (a) transfer the shares in the Operator in accordance with clauses 29.1 (Assignment or Novation by the Operator) and 29.5 (Change in Control) of the CISA; or
- (b) assign, transfer or novate (or do any combination of these things) in respect of the Operator's rights and obligations under the CISA in accordance with clause 29.1 (Assignment or Novation by the Operator) of the CISA,

to any person (including Security Trustee) (**Transferee**), but not otherwise.

### 5.2 Transfer documentation

The Commonwealth and the Operator agree to co-operate with Security Trustee and to execute all documents as are reasonably necessary to give effect to any assignment, transfer or novation (or any combination of these things) under clause 5.1 (Transfer).

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## 6 GST

### 6.1 Definitions and interpretation

Words and phrases which have a defined meaning in the GST Law have the same meaning when used in this clause 6, unless the contrary intention appears.

## 6.2 GST exclusive consideration

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

## 6.3 No taxable supply

The parties have entered this Deed on the assumption that, in accordance with the principles set out in public GST ruling *GSTR 2001/6 – GST and non-monetary consideration*, that no party makes a taxable supply to any other party under the provisions of, or by agreeing to the obligations set out in, this Deed.

## 6.4 GST gross-up

Notwithstanding clause 6.3 and subject to clause 6.5, if a party (**Supplier**) makes a supply under or in connection with this Deed on which GST is imposed, in whole or in part (not being a supply the consideration for which is specifically described in this Deed as inclusive of GST) then:

- (a) the consideration payable or to be provided for that supply under this Deed 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.

## 6.5 Non-monetary consideration

To the extent that consideration for a supply under this Deed includes non-monetary consideration, the parties agree to act in good faith to agree on the GST exclusive market value of the non-monetary consideration provided for the supply. In such circumstances, the parties agree to exchange tax invoices for their respective supplies and to set off any amounts payable on account of GST so that only the net amount of GST is payable to the appropriate party.

## 6.6 Payments and reimbursements

- (a) If a payment to a party under this Deed 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.

## 6.7 Adjustments

If an adjustment event arises in respect of a supply made under or in connection with this Deed, 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.



## **6.8 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 Deed.

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## **7 Confidentiality**

### **7.1 Confidential Information not to be Disclosed**

- (a) Subject to clause 7.2, 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.

### **7.2 Exceptions 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 of Specified Materials rights pursuant to the CISA 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 Deed,

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 (Knowledge Sharing) of the CISA;
- (h) to a rating agency;
- (i) to the extent expressly permitted under this Deed; and
- (j) as otherwise agreed by the other parties.

### **7.3 Publicity**

- (a) Clause 39 (Publicity) of the CISA is incorporated into this Deed as if set out in full in this Deed, *mutatis mutandis*.
- (b) Unless required by Law, the Security Trustee must not make any public announcements relating to the subject matter of any Project Document without the Commonwealth's prior written consent.

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## **8 Assignment and Novation**

### **8.1 Assignment or Novation by the Operator**

- (a) The Operator must not assign, novate, transfer of or otherwise deal with the Operator's rights or obligations under, title to or interest in this Deed without the Commonwealth's and Security Trustee's written consent.
- (b) Prior to the Commencement Date, each of the Commonwealth and the Security Trustee may provide or withhold its consent under clause 8.1(a) at its absolute discretion.
- (c) On and from the Commencement Date, each of the Commonwealth and the Security Trustee must not unreasonably withhold or delay its consent under clause 8.1(a) where :
  - (i) the assignee, novatee or transferee has the legal, commercial, financial and technical capability to comply with the Operator's obligations under this Deed; and
  - (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;
  - (iv) the assignee, novatee or transferee agrees to assume all obligations of the Operator arising from or in connection with this Deed including those which arise prior to the novation, transfer or dealing on terms reasonably acceptable to the Commonwealth and the Security Trustee.

- (d) The Operator must not assign, novate, transfer or otherwise deal with its rights or obligations under, title to or interest in this Deed 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.

## **8.2 Assignment or Novation by the 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 each of the Operator's and the Security Trustee'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 prior written consent of each of the Operator and the Security Trustee (such consent not to be unreasonably withheld or delayed).

## **8.3 Non-compliance and release**

- (a) Any purported assignment, novation, transfer or dealing by the Operator, Security Trustee or the Commonwealth that is not in compliance with clauses 1.13, 8.1 or 8.2 will not be effective as between the parties to this Deed.
- (b) Without limiting clauses 1.13 and 8.3(a), if the Commonwealth or the Operator assigns, novates, transfers or otherwise deals with its rights and obligations under, title to or interest in any Project Document in accordance with this clause 8.1 or 8.2 (as applicable), the other parties each agree to release the first party from its obligations under the Project Documents arising on and from the date of the assignment, novation, transfer or dealing to the extent that those obligations are assumed in writing by the assignee, novatee, transferee or person receiving the dealing on terms reasonably acceptable to the other parties.

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# **9 Governing Law**

## **9.1 Governing Law and jurisdiction**

The Law in force in the Relevant Jurisdiction governs this Deed. 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 Deed.

## **9.2 Serving documents**

Without preventing any other method of service, any document in an action in connection with this Deed may be served on a party by being delivered or left at that party's address for service of notices under clause 10.2 (Delivery).

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## 10 Notices and other communications

### 10.1 Form

- (a) Unless this Deed expressly states otherwise, all notices, demands, certificates, consents, approvals, waivers and other communications in connection with this Deed (**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.

### 10.2 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.

### 10.3 When effective

Communications take effect from the time they are received or taken to be received under clause 10.4 (When taken to be received) (whichever happens first) unless a later time is specified in the Communication.

### 10.4 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.

### 10.5 Receipt outside business hours

Despite anything else in this clause 10, if Communications are received or taken to be received under clause 10.4 (When taken to be received) 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, the place in the definition of Business Day in the CISA 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.

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## **11 General**

### **11.1 Duration of this Deed**

Security Trustee must give notice to the Commonwealth (copied to the Operator) if it has fully and finally discharged all of the Security. This Deed terminates (without prejudice to any accrued right or liability) upon the giving of the notice.

### **11.2 Variation and waiver**

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

### **11.3 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 Deed 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 Deed.
- (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 Deed operates as a waiver of another breach of that term or of a breach of any other term of this Deed.

### **11.4 Discretion in exercising rights**

Unless this Deed 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 Deed in its absolute discretion (including by imposing conditions).

### **11.5 Partial exercising of rights**

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

### **11.6 Remedies cumulative**

The rights, powers and remedies of a party in connection with this Deed are in addition to other rights, powers and remedies given in any other document or given by Law independently of this Deed.

### **11.7 Supervening Law**

Any present or future Law which operates to vary the obligations of a party in connection with this Deed 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.

### **11.8 Counterparts**

- (a) This Deed 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 Deed by electronic means and to identifying themselves in the manner specified in this clause.
- (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 Deed 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 Deed, this shall be taken to be, and have the same effect as, signatures on the same counterpart and on a single copy of this Deed.

### **11.9 Entire agreement**

This Deed and the CISA together constitute the entire agreement of the parties about their subject matter and supersede all previous agreements, understandings and negotiations on that subject matter.

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

- (a) Unless otherwise expressly provided in this Deed, each party must pay its own costs and expenses in connection with negotiating, preparing, executing and performing this Deed.
- (b) The Operator agrees to pay the Commonwealth's and the Security Trustee's legal and other costs and expenses (including any stamp duty) in connection with the negotiation, preparation, execution and completion of this Deed.
- (c) Unless this Deed expressly states otherwise, the Security Trustee will not be liable to any party for any Loss in relation to the exercise or attempted exercise of, failure to exercise, or delay in exercising, a right, power or remedy in connection with this Deed.

### **11.11 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 Deed or any part of it.

### **11.12 Severability**

If the whole or any part of a provision of this Deed is void, unenforceable or illegal in a jurisdiction, then it is severed for that jurisdiction. The remainder of this Deed has full force and effect and the validity or enforceability of that provision in any other jurisdiction is not affected. This clause 11.12 has no effect if the severance alters the basic nature of this Deed or is contrary to public policy.

### **11.13 Survival**

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

- (a) clauses 1, 7 and 11;
- (b) any provision that is required to enable a party to exercise rights accrued prior to the expiry, rescission or termination of this Deed; and
- (c) any provision which (expressly or by implication) by its nature is intended to survive the expiry, rescission or termination of this Deed.

### **11.14 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) 2001* (SA) are excluded in

relation to all and any rights of either party under this Deed, whether such rights are sought to be enforced in contract, tort or otherwise.

#### **11.15 Limitation of the Commonwealth liability**

Despite any other provision of this Deed, the parties acknowledge and agree that the Commonwealth's total aggregate liability in connection with this Deed and the CISA at any time, will be no greater than the Commonwealth's total aggregate liability in connection with the CISA at that time (assuming the CISA is enforceable in accordance with its terms) and will be subject to the same limitations of liability set out in the CISA.

#### **11.16 Further steps**

The Operator and the Commonwealth agree, at the Operator's expense, to do anything another party reasonably asks (such as obtaining consents (in relation to the Operator only), signing and producing documents, producing receipts and getting documents completed and signed) as may be necessary or desirable to:

- (a) give full effect to the provisions of this Deed and the transactions contemplated by it; and
- (b) without limiting clause 11.16(a), ensure any assignment, transfer or novation (or any combination of them) contemplated by clause 5 (Transfer following enforcement), and any document the subject or product of any such dealing, is in registerable form, enforceable and registered with the agreed priority.

#### **11.17 Termination of this Deed**

Subject to clause 11.1, this Deed remains in full force and effect until the Security Trustee determines that all of the liabilities to each [Finance Party] under the [Finance Documents] (each as defined in the Security Trust Deed) have been satisfied and it is not reasonably foreseeable that there could be any liabilities to be satisfied in the future, at which time this Deed will terminate.

**EXECUTED** as a deed

# Tripartite deed

Signing page

[Drafting note: Execution blocks to be inserted into execution version.]

DRAFT