

Agreement



Funding Agreement for a Project under the Hydrogen Hub Initiative

The Crown in Right of the State of New South Wales, acting through the
Department of Planning, Industry and Environment (**Department**)

[insert Recipient's name] (**Recipient**)

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Funding Agreement

Date ►

Between the parties

Department The Crown in Right of the State of New South Wales, acting through the Department of Planning, Industry and Environment
ABN 20 770 707 468
4 Parramatta Square, Parramatta NSW 2150
(Department)

Recipient *[insert Recipient's full legal name]*
ABN [●]
[insert Recipient's address]
including, where the context permits, its Personnel and Subcontractors
(Recipient)

Recitals 1 The Department administers the Hydrogen Hub Initiative, under which it may award funding to support approved projects.
2 The Recipient will carry out the Project, as described in this Funding Agreement, including without limitation, in item 4 of the Project Details, Schedule 1 and the Operating Parameters.
3 The Department agrees to provide the Funds, and the Recipient agrees to complete the Project and achieve the Outcomes, subject to and in accordance with the terms of this Funding Agreement.

The parties agree as follows:

1 Project Details

Project overview		
1	Project title	[●].
2	Reference number	[●].
3	Recipient	[●].
4	Guidelines	NSW Hydrogen Hub Initiative: Guidelines, dated [Drafting Note: Insert date of Guidelines].
Key project details		
5	Project	[Drafting note: Insert description of Project as stated in item 1.1 of Schedule 1].
6	Outcomes	[Drafting note: Insert outcomes of Project as stated in item 1.2 of Schedule 1].
7	Total Funds	[Drafting note: Insert total amount stated in item 2.1 of Schedule 1].
8	Total Estimated Costs	[Drafting note: Insert total amount stated in item 2.1 of Schedule 1].
9	Grant Funding Percentage	[Drafting note: Insert the calculation of the ratio, as a percentage, of Total Funds stated in item 2.1 of Schedule 1 against the Total Estimated Costs stated in item 2.1 of Schedule 1].
10	Recipient Contributions	[Drafting note: Insert total amount stated in item 2.3 of Schedule 1].
11	Other Contributions	[Drafting note: Insert total amount stated in items 2.4 of Schedule 1 and summary of 2.5 of Schedule 1 if applicable].
12	Project Completion Date	[Drafting note: Intended to be analogous to the commercial operations date for the Project.]
13	Project Participants	[●].
14	Specified Personnel	[●].
15	Subcontractor	[●].
Other information		
16	Public acknowledgement of support	<p>[Drafting note: Any specific acknowledgements of support to be set out here (relevant to clause 19)]</p> <p>The NSW Government's Waratah logo must be used in conjunction with all acknowledgements of NSW Government support in accordance with the:</p>

		(a) NSW Government Brand Guidelines (as may be updated from time to time; and (b) Funding Acknowledgement Guidelines (as may be updated from time to time).
17	Public disclaimer	The Recipient must include the following statement on any published material in relation to the Project (as may be updated from time to time): <i>The views expressed herein are not necessarily the views of the NSW Government. The NSW Government does not accept responsibility for any information or advice contained herein.</i>
18	Address for invoices	hydrogen@planning.nsw.gov.au or [Drafting note: insert]
19	Address for Notices	Department hydrogen@planning.nsw.gov.au or [Drafting note: insert street address here – this cannot be a PO Box for the purposes of receiving a notice] Recipient [•]

2 Definitions

2.1 Definitions

The meanings of the terms used in this Funding Agreement are set out below.

Term	Meaning
Abandoned	means circumstances in which no Activities have been carried out in respect of the Project for 60 consecutive days, other than to the extent the Recipient's obligations to carry out such Activities have been excused in accordance with clause 21 ('Force Majeure').
Activities	means substantive work or activities (whether on the Project site or otherwise) to further the development of the Project.
AEMO	means the Australian Energy Market Operator Limited (ABN 94 072 010 327).

Term	Meaning
Agreement Material	means any Material created by, for, or on behalf of the Recipient on or following the Commencement Date, for the purpose of, or as a result of, performing its obligations under this Funding Agreement, including modifications required under clause 15.1(h)(3).
Application	means the application submitted by, for, or on behalf of the Recipient for funding under the Hydrogen Hub Initiative in relation to the Project and all related supporting documentation provided to the Department in connection with the application.
Applicable Cure Period	has the meaning given to that term in clause 23.2(d)(2).
Approved Cure Plan	has the meaning given to that term in clause 23.2(d).
ARENA	means the Australian Renewable Energy Agency (ABN 35 931 927 899).
Assets	means any items of tangible or intangible property which are purchased, leased, created or otherwise brought into existence by, for or on behalf of the Recipient either wholly or in part with use of the Funds, not including Agreement Material.
Authorisation	means any authorisation, approval, licence, permit, consent, determination, certificate, notice, requirement or permission from any Authority which must be obtained or satisfied (as the case may be) to undertake the Project.
Authority	means any Commonwealth, State, Territory, local or foreign government or semi-governmental authority, court, administrative or other judicial body or tribunal, department, commission, public authority, agency, minister, statutory corporation or instrumentality or any other person having jurisdiction in connection with the Project.
Bank Account	has the meaning given to that term in clause 8.1(a).
Budget	means the budget for the Project set out in Attachment 1, as may be amended from time to time in accordance with clause 10.3.
Business Day	means a day that is not a Saturday, Sunday, public holiday or bank holiday in Sydney, New South Wales.

Term	Meaning
CEFC	means the Clean Energy Finance Corporation (ABN 43 669 904 352).
Change in Control	<p>in relation to the Recipient or its permitted successors (in this definition referred to as the First Party), means a person or persons who do not Control the First Party (in this definition referred to as the Acquiring Party) as at:</p> <ol style="list-style-type: none"> 1 the Commencement Date; or 2 where the First Party is a party to this Funding Agreement because of a transfer approved under clause 16.2(a), the date of completion of that transfer, <p>(in this definition referred to as the Relevant Date),</p> <p>acquiring Control of the First Party, unless the Acquiring Party is itself Controlled directly or indirectly by a person who Controlled the First Party immediately before the Relevant Date.</p> <p>A Change in Control will not occur as a result of the transfer, issue, redemption, buyback, cancellation, repurchase or reorganisation of marketable securities in an entity that is listed or, in connection with the relevant transaction becomes listed, on a recognised public stock exchange (provided that such Change of Control does not result in the First Party ceasing to be listed as a result of such transaction).</p>
Change in Policy	means a change in NSW Government policy with respect to the Department or funding provided by the Department that relates to the Department's obligations under this Funding Agreement.
Claim	means a distress, attachment or other execution levied or enforced upon or against the assets of a person, and in the case of legal proceedings or other order or process requiring payment (other than a statutory demand or a bankruptcy notice) which is not withdrawn or dismissed within 10 Business Days'.
Commencement Date	means the date of this Funding Agreement.
Commonwealth	means the Commonwealth of Australia.
Confidential Information	<p>of a party means all know-how, prototypes, data, trade secrets, compiled databases, financial information and other commercially or scientifically valuable information of whatever description and in whatever form (whether written or oral, visible or invisible) which:</p> <ol style="list-style-type: none"> (a) is by its nature confidential; (b) a party has designated as confidential;

Term	Meaning
	<p>(c) is capable of protection at common law or equity as confidential information; or</p> <p>(d) is derived or produced partly from the information described in paragraph (a), (b) or (c) above,</p> <p>but does not include information that:</p> <p>(e) is in the public domain; or</p> <p>(f) is independently known or developed by the party receiving the information other than as a result of a breach of this Deed or any other obligation of confidentiality owed by or to any other person.</p>
Contract Management Agent	any person (including ARENA) appointed by the Department in accordance with clause 29.2.
Control	<p>means 'control' as defined in section 50AA of the Corporations Act, provided that:</p> <ol style="list-style-type: none"> 1 in the case of a corporation, includes the power (whether it is legally enforceable or not) to control, whether directly or indirectly, the composition of a majority of the board of directors of that corporation, the voting rights of the majority of the voting shares of the corporation or the management of the affairs of the corporation; 2 in the case of a trustee of a trust, includes the power (whether it is legally enforceable or not) to control, whether directly or indirectly, the appointment or removal of the trustee of the trust, the composition of the board of directors of the trustee, the voting rights of the majority of units of the trust or the management of the affairs of the trust or the business operated by that trust; 3 in the case of a partnership, includes the power (whether it is legally enforceable or not) to control, whether directly or indirectly, the management of the affairs of the partnership; and 4 in the case of the Recipient, includes the power (whether it is legally enforceable or not) to control, whether directly or indirectly the manner in which the Project is developed, constructed, implemented or operated. <p>In each case, whether or not the power has statutory, legal or equitable force or is based on statutory, legal or equitable rights and whether or not it arises by means of trusts, agreements, arrangements, understandings, practices, the ownership of any interest in shares or stock of the entity or otherwise</p>
Controller	has the meaning given to it in section 9 of the Corporations Act.
Coronavirus Epidemic	the 2019 novel coronavirus, coronavirus disease, COVID-19, severe acute respiratory syndrome coronavirus 2, or SARS-CoV-2.

Term	Meaning
Coronavirus Event	<p>means:</p> <ol style="list-style-type: none"> 1 the occurrence or transmission of the Coronavirus Epidemic; or 2 any travel disruption or quarantine directly caused by the Coronavirus Epidemic, <p>subsisting on or after the date of this Funding Agreement, provided that if such Coronavirus Event commenced prior to the date of this Funding Agreement, it will be deemed to have commenced on and from the date of this Funding Agreement.</p>
Corporations Act	<i>Corporations Act 2001</i> (Cth).
Curable Termination Event	has the meaning given to that term in clause 24.2(a).
Data Request	<p>means a request made by the Department for the Recipient to produce certain data relating to the Project. Such data may include, but is not limited to:</p> <ol style="list-style-type: none"> 1 data relating to hydrogen production; 2 energy usage; 3 hydrogen usage or production; 4 vehicle usage; or 5 any other data that the Department may require in relation to the Project.
Data Sharing Deed	means a deed between the Department and the Recipient outlining the rights and obligations relating to the sharing of data under the Knowledge Sharing Plan or Project.
Dealing	has the meaning given in clause 16.2(a).
Debt Financier	<p>means:</p> <ol style="list-style-type: none"> 1 a financial institution providing debt finance on a limited recourse basis to the Recipient for the purpose of funding construction of the Project; and 2 any security trustee or agent of any such financial institution.
Department Confidential Information	means Confidential Information provided by the Department to the Recipient under or in connection with this Funding Agreement.

Term	Meaning
Department Observer	the meaning given to that term in clause 12(b).
Determination Notice	has the meaning given to that term in clause 6.2(b).
DISER	means the Department of Industry, Science, Energy and Resources (ABN 74 599 608 295).
Dispute	has the meaning given to that term in clause 26(a).
Distributed Funds	has the meaning given in item 1.2 of Schedule 5.
Draft Adjustment Amount	has the meaning given in item 1.2 of Schedule 5.
Draft Calculations	has the meaning given in item 1.2 of Schedule 5.
Draft Cure Plan	has the meaning given to that term in clause 23.1(a).
Eligible Expenditure	<p>means expenditure (inclusive of GST but less related input tax credits the Recipient or its representative member is entitled to claim in relation to that expenditure) incurred by, or whether the context requires, expected to be incurred by, the Recipient on the Project after Commencement Date that:</p> <ol style="list-style-type: none"> 1 qualifies as eligible expenditure under item 2 of Schedule 3; or 2 the Department otherwise approves (in its absolute discretion) as eligible expenditure for the purposes of this Funding Agreement.
End Date	<p>means the earlier of:</p> <ol style="list-style-type: none"> 1 the date on which the Recipient has performed all of its obligations under this Funding Agreement (including the provision of all reports to the Department's satisfaction); and 2 termination of this Funding Agreement in accordance with its terms.
Total Estimated Costs	the total amount of Eligible Expenditure as set out in the Initial Budget.
Expert	has the meaning given to that term in clause 26(f).

Term	Meaning
External Controller	means an administrator, Controller, trustee, provisional liquidator, liquidator or any other person holding or appointed to an analogous office or acting or purporting to act in an analogous capacity.
Financial Close	has the meaning given to that term in Schedule 5.
Force Majeure Event	has the meaning given to that term in clause 21.1.
Funding Agreement	means this agreement and includes any schedules, annexures, or amendments to it.
Funds	the funds paid or payable by the Department to the Recipient under this Funding Agreement (as the context requires).
Funds Payment Request	a funds payment request in the form set out in Schedule 4.
Funds Payment Request Date	any date that the Recipient gives the Department a Funds Payment Request.
Good Electricity Industry Practice	has the meaning given to that term in the NER.
Good Industry Practice	<p>practices followed when works and services are undertaken in accordance with all of the following:</p> <ol style="list-style-type: none"> 1 in a sound and workmanlike manner; 2 with due care and skill; 3 using materials of merchantable quality which are fit for the Project and enable it to achieve the Outcomes; 4 to the standard expected of an experienced, suitably qualified and competent contractor experienced in: <ol style="list-style-type: none"> (a) the design, engineering, procurement, supply, construction, testing, commissioning, maintenance and operation of projects and infrastructure comparable to the Project; (b) performing works; and (c) providing services,

Term	Meaning
	<p>of the skill and quality to be expected of an experienced, suitably qualified continually compliant and competent contract, with particular experience in Australia,</p> <p>5 in accordance with all applicable Laws; and</p> <p>6 consistently with best practice for the performance of design, engineering, procurement, supply, construction, testing, commissioning, maintaining and operating of a facility that has the same or similar performance requirements of the Project and the performance of:</p> <p>(a) design, engineering, procurement, supply, construction and testing of works that are similar to the works to be undertaken with respect to the Project; and</p> <p>(b) commissioning, maintaining and operating equipment that is similar to the equipment to be commissioned, maintained and operated with respect to the Project.</p>
Grant Funding Percentage	<p>means the Total Funds as a percentage of the Total Estimated Costs as established in the Initial Budget and listed in clause 2.1 of Schedule 1.</p>
Green Hydrogen	<p>means hydrogen that is produced from:</p> <p>1 electrolysis powered with 100% renewable electricity derived from:</p> <p>(a) on-site renewable electricity generation; or</p> <p>(b) retirement of Renewable Energy Certificate (RECs) through GreenPower; or</p> <p>(c) any combination of (a) or (b) above; or</p> <p>2 steam methane reforming that is using 100% responsibly sourced biomethane from:</p> <p>(a) direct supply of biomethane to the production site; or</p> <p>(b) retirement of renewable gas certificates, with written confirmation from the Department of the acceptance of the certificates as evidence of biomethane use; or</p> <p>(c) any combination of (a) or (b) above.</p> <p>Further details and requirements regarding the process for certifying renewable electricity can be found in Section 7.3 of the Guidelines, including requirements for renewable generators not creating renewable energy certificates and for the use of small-scale technology certificates.</p> <p>All feedstocks used to produce biomethane must be responsibly sourced.</p> <p>Note: hydrogen produced using any input (including electricity or feedstock) derived using biomass from native forests is not considered Green Hydrogen.</p>

Term	Meaning
GreenPower	means the national GreenPower Accreditation Program administered by the Department.
GST Law	has the same meaning as in the <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth).
Guidelines	means Hydrogen Hub Initiative: Guidelines dated [<i>Drafting note: insert date</i>], as annexed to this Funding Agreement at Schedule 7.
Hydrogen Hub Initiative	means the hydrogen hub initiative as described in the Guidelines.
Initial Budget	the Budget for the Project approved by the Department as at the Commencement Date.
Insolvency Event	<p>means the occurrence of any of the following events:</p> <ol style="list-style-type: none"> 1 in relation to a corporation (including in its capacity as trustee of a trust): <ol style="list-style-type: none"> (a) its Liquidation; (b) the appointment of an External Controller to the corporation or any of its property; (c) it entering into or resolving to enter into a Scheme; (d) it ceasing or threatening to cease carrying on its business; (e) it becoming insolvent within the meaning of section 95A of the Corporations Act, presumed to be insolvent under sub-section 459C(2) of the Corporations Act or otherwise stopping or suspending, or threatening to stop or suspend, payment of all or a class of its debts as and when they become due and payable; (f) it taken to have failed to comply with a statutory demand as a result of sub-section 459F(1) of the Corporations Act; (g) any distress, attachment or writ of execution in an amount greater than \$[<i>Drafting note: insert contract value</i>] being issued, levied or enforced against it or its property; (h) any judgment in an amount of greater than \$[<i>Drafting note: insert contract value</i>] being issued, levied or enforced against it or its property that is not set aside, satisfied or stayed (through appeal or otherwise) within 10 Business Days; or (i) any security interest being enforced against its property in respect of a liability in excess of \$[<i>Drafting note: insert contract value</i>] at any time; or 2 in relation to any person, the person is served with a Claim or anything analogous to or having a similar effect to anything

Term	Meaning
	described above in this definition under the law of the relevant jurisdiction.
Intellectual Property Rights	<p>means all intellectual property rights, including:</p> <ol style="list-style-type: none"> 1 copyright, patents, trademarks (including goodwill in those marks), designs, trade secrets, know how, rights in circuit layouts, domain names and any right to have confidential information kept confidential; 2 any application or right to apply for registration of any of the rights referred to in paragraph 1; and 3 all rights of a similar nature to any of the rights in paragraphs 1 and 2 which may subsist in Australia or elsewhere, <p>whether or not such rights are registered or capable of being registered.</p>
Interest Rate	means the daily 11am cash rate quoted on Reuters page RBA30.
Knowledge Sharing Agent	means any person or entity (including ARENA) appointed by the Department in accordance with clause 29.3.
Knowledge Sharing Plan	means the knowledge sharing plan attached as Schedule 6 (including the Knowledge Sharing Deliverables set out in the Knowledge Sharing Plan), as varied by agreement in writing between the parties from time to time.
Law	<p>means:</p> <ol style="list-style-type: none"> 1 any act, regulation or other statutory instrument or proclamation of any applicable jurisdiction in which any act or obligation in connection with this Funding Agreement is or is to be carried out or regulated, including the NER and the rules of any recognised stock exchange; 2 any applicable law, whether of a legislative, equitable or common law nature; and 3 any judgment, decree or similar order with mandatory effect or any binding requirement or mandatory approval of an Authority.
Legally Committed	<p>means at any time, a present or accrued obligation on the Recipient under contract or at Law to pay money to a third party.</p> <p>It does not include any future obligation to make payment to a third party:</p>

Term	Meaning
	<ol style="list-style-type: none"> 1 which is subject to any outstanding condition to payment (other than the expiration of time) or other contingency that has not been satisfied at that time; or 2 which the Recipient has a right to cancel, suspend or terminate under the contract or under Law.
Licensed Materials	<p>means:</p> <ol style="list-style-type: none"> 1 Pre-existing Material included, embodied in or attached to the Agreement Material; 2 Third Party Material; and 3 Agreement Material.
Liquidation	<p>means a winding up or liquidation (whether voluntary or involuntary), provisional liquidation, dissolution, deregistration, or steps are taken (including the calling of meetings or the filing of applications), orders are made, or resolutions are passed to give effect to any of the above.</p>
Material	<p>includes property, information, software, firmware, documented methodology or process, documentation or other material in whatever form, including any reports, specifications, business rules or requirements, user manuals, user guides, operations manuals, training materials and instructions, and the subject matter of any category of Intellectual Property Rights.</p>
Material Breach	<p>means any breach by the Recipient of clauses 4 ('Recipient to undertake the Project'), 6.5 ('Use of Funds'), 8 ('Bank Account'), 9(b) ('Contributions'), 14 ('Liability and indemnity'), 15.1(e) ('Compliance with Law'), 16 ('Change in Control and Transfer'), 17 ('Assets') and 25 ('Repayment of the Funds') of this Funding Agreement.</p>
Merit Criteria	<p>means the merit criteria for an Application referred to in the Guidelines (including the portfolio analysis referred to in the Guidelines).</p>
Milestone Long Stop Date	<p>means, in respect of a Milestone, the date specified in item 1.3 in Schedule 1 for that Milestone.</p>
Milestone Report	<p>has the meaning given in item 3.1 of Schedule 1.</p>
Milestone Reviewer	<p>means the applicable milestone reviewer set out in item 1.3 of Schedule 1.</p>

Term	Meaning
Milestones	means the milestones set out in item 1.3 of Schedule 1.
Minor Variation	means a variation: <ol style="list-style-type: none"> 1 by way of extension to the dates specified in the Project Details or Schedule 1 (other than a variation to the Milestone Long Stop Dates); 2 to elements of the Project as described in item 1.1 of Schedule 1; or 3 to the Knowledge Sharing Plan, that does not and is not likely to materially affect the Project or the achievement of the Outcomes.
Modern Slavery	has the meaning given in section 4 of the <i>Modern Slavery Act 2018</i> (Cth) and includes any form of slavery, servitude, debt bondage, deceptive recruitment practices, or forced labour to exploit children or other persons.
Moral Rights	has the meaning given to that term in the <i>Copyright Act 1968</i> (Cth) and includes a right of a similar nature that is conferrable by statute and that exists or comes to exist anywhere in the world.
National Electricity Law	means the national electricity law introduced by the <i>National Electricity (New South Wales) Act 1997 (NSW)</i> and amended from time to time.
NER	the National Electricity Rules made under the National Electricity Law.
Non-Compliance Event	has the meaning given to that term in clause 22.2(a).
Notice of Dispute	has the meaning given to that term in clause 26(b).
Notice of Non-Compliance	has the meaning given to that term in clause 22.2(a).
NSW Government	means the government of the State of New South Wales, including any governmental agency, department or authority of New South Wales.
Operating Parameters	means those operating parameters for the Project as set out in Schedule 2 (as may be amended from time to time with the written consent of the Department).

Term	Meaning
Other Contributions	means the financial and in-kind contributions specified in items 2.4 and 2.5 of Schedule 1.
Outcomes	means the outcomes for the Project as set out in item 1.2 of Schedule 1.
Overseas and Interjurisdictional Expenditure	any expenditure of Funds by the Recipient (other than Permitted Overseas Expenditure) that is: <ol style="list-style-type: none"> 1 outside of New South Wales; and/or 2 to a 'foreign company' as defined under section 9 of the Corporations Act.
Payment Criteria	means the payment criteria specified in clause 6.3.
Permitted Overseas and Interjurisdictional Expenditure	means any expenditure of Funds by the Recipient incurred outside of Australia or payment of Funds by the Recipient to a non-Australian entity that is: <ol style="list-style-type: none"> 1 used for the purchase of equipment or materials permanently located outside of NSW for the Project; and 2 approved by the Department in writing prior to incurring the relevant expenditure of Funds; or 3 otherwise exempted from the definition of Overseas and Interjurisdictional Expenditure by agreement of the Department in writing.
Personal Information	means: <ol style="list-style-type: none"> 1 information or an opinion about an identified individual (that is, a natural person) or an individual who is reasonably identifiable whether the information or opinion is: <ol style="list-style-type: none"> (a) true or not; and (b) recorded in a material form or not; and 2 information defined as such under applicable Privacy Laws.
Personnel	means in relation to a person, any employee, officer, agent or professional adviser or subcontractor of that agent or adviser.
Plan	means a plan required to be provided by the Recipient under item 3.2 of Schedule 1.

Term	Meaning
Pre-existing Material	means Material owned by a party before execution of this Funding Agreement.
Privacy Law	<p>means:</p> <ol style="list-style-type: none"> 1 the <i>Privacy Act 1988</i> (Cth); 2 the <i>Privacy and Personal Information Protection Act 1998</i> (NSW); 3 the <i>Health Records and Information Privacy Act 2002</i> (NSW); 4 any legislation (to the extent that such legislation applies to the Customer or the Supplier or any other recipient of Personal Information) from time to time in force in: <ol style="list-style-type: none"> (a) any Australian jurisdiction (which includes the Commonwealth of Australia and any State or Territory of Australia); and (b) any other jurisdiction (to the extent that the Customer or any Personal Information or the Supplier is subject to the laws of that jurisdiction), <p>affecting privacy or Personal Information, provided that the Supplier ensures that it complies at all times with the Privacy Laws applicable in New South Wales; and</p> 5 any ancillary rules, guidelines, orders, directions, directives, codes of conduct or other instruments made or issued under any of the legislation referred to in paragraphs (a), (b), (c) and (d), as amended from time to time.
Project	means the Project described in item 1.1 of Schedule 1.
Project Completion Date	means the date specified in item 12 of the Project Details.
Project Details	means the Project Details set out in clause 1.
Project Information	means has the meaning given to that term in clause 19(b).
Project Participants	means the entities specified in item 12 of the Project Details.
Project Steering Committee	has the meaning given to it in clause 12.
Recipient Confidential Information	means the Confidential Information of the Recipient.

Term	Meaning
Recipient Contributions	means the financial contributions specified in item 2.3 of Schedule 1.
Refund Amount	means refund amount calculated in accordance with clause 1.4(b) of Schedule 5.
Related Body Corporate	has the meaning given to 'related body corporate' in the Corporations Act, but on the basis that 'subsidiary' has the meaning given to Subsidiary in this Funding Agreement and that 'body corporate' includes any entity or trust.
Related Party	<p>has the meaning given to that term in section 228 of the Corporations Act, provided that for purposes of this definition:</p> <ol style="list-style-type: none"> 1 'public company' refers to any body corporate, trust or partnership; or 2 'director' includes a shareholder (in the case of a company), unitholder or beneficiary (in the case of a trust) and partner (in the case of a partnership); and 3 'control' has the meaning set out in this Funding Agreement.
Report	means any report to be provided by the Recipient to the Department under this Funding Agreement.
Response Notice	has the meaning given to that term in clause 24.2(b).
Scheme	means an arrangement, assignment, composition, merger, amalgamation, reconstruction, or moratorium with or for the benefit of creditors or any class or group of creditors (including an administration or arrangement under part 5.3A of the Corporations Act), other than for the purposes of a solvent reconstruction or amalgamation as approved by the Department.
Segregated Bank Account	has the meaning given to that term in clause 8.2(a).
Show Cause Notice	has the meaning given to that term in clause 24.2(a).
Specified Personnel	means the nominated Personnel of the Recipient who will be carrying out the Project, as identified at item 14 of the Project Details.
Statement of Compliance	a statement, certificate or letter that:

Term	Meaning
	<ol style="list-style-type: none"> 1 is issued by a suitably qualified independent firm approved by the Department (acting reasonably), with demonstrated relevant market experience, suitably qualified personnel and capability in preparing similar statements, certificates or letters; 2 is able to be relied upon by the Department with reliance language acceptable to it; and 3 certifies that the relevant Plan: <ol style="list-style-type: none"> (a) has been developed satisfactorily; (b) complies with all applicable Laws, including but without limitation all work, health and safety laws; (c) is prepared in accordance with Good Industry Practice; (d) where relevant, is prepared in accordance with Good Electricity Industry Practice; and (e) is being appropriately implemented complying with each of the points above.
Subcontractor	any person to which the Recipient has subcontracted work in connection with the Project.
Subsidiary	<p>has the meaning given to 'subsidiary' in the Corporations Act but so that:</p> <ol style="list-style-type: none"> 1 a trust may be a Subsidiary, for the purposes of which a unit or other beneficial interest will be regarded as a share; and 2 a corporation or trust may be a Subsidiary of a trust if it would have been a Subsidiary if that trust were a corporation.
Suspected Breach	has the meaning given to that term in clause 22.1(a).
Termination Event	has the meaning given to that term in clause 24.1.
Third Party Material	<p>Material owned by another person that is:</p> <ol style="list-style-type: none"> 1 included, embodied in or attached to the Agreement Material; or 2 used in undertaking the Project.
Total Funds	the maximum aggregate amount of Funds payable by the Department under this Funding Agreement, as set out in item 2.1 of Schedule 1 (and may be reduced in accordance with this Funding Agreement).

Term	Meaning
Tripartite Agreement	a tripartite agreement in favour of the Recipient's Debt Financier, in a form and substance approved by the Department, acting reasonably.
Trust	has the meaning given to that term in clause 13.2.
Undisbursed Funds	means the Total Funds less any amounts already paid to the Recipient under this Funding Agreement.
Unused Proportion	the proportion that the sum of the unused Recipient Contributions and Other Contributions represents when compared to the total Recipient Contributions and Other Contributions.
Update Period	the period of six months commencing on the Commencement Date and each six month period thereafter occurring partly or wholly during the Term.
Visitors	has the meaning given in clause 15.1(q)(1).
Warranty	a representation and warranty in clause 13.
WHS Laws	all applicable Law relating to work health and safety and electrical safety, and includes (without limitation): <ol style="list-style-type: none"> 1 <i>Work Health and Safety Act 2011</i> (Cth); 2 <i>Work Health and Safety Regulations 2011</i> (Cth); and 3 <i>Work Health and Safety Act 2011</i> (NSW) and associated regulations, as enacted or amended from time to time.

2.2 Interpretation

In this Funding Agreement:

- (a) headings and bold type are for convenience only and do not affect the interpretation of this Funding Agreement;
- (b) the singular includes the plural and the plural includes the singular.
- (c) other parts of speech and grammatical forms of a word or phrase defined in this Funding Agreement have a corresponding meaning;
- (d) an expression importing a person includes any company, partnership, joint venture, association, corporation or other body corporate and any Authority as well as an individual;

- (e) a reference to a clause, party, schedule, attachment or exhibit is a reference to a clause of, and a party, schedule, attachment or exhibit to, this Funding Agreement;
- (f) a reference to any legislation includes all delegated legislation made under it and amendments, consolidations, replacements or re-enactments of any of them;
- (g) a reference to a document includes all amendments or supplements to, or replacements or novations of, that document;
- (h) a reference to a party to a document includes that party's successors and permitted assignees;
- (i) a reference to an agreement other than this Funding Agreement includes a deed and any legally enforceable undertaking, agreement, arrangement or understanding, whether or not in writing;
- (j) no provision of this Funding Agreement will be construed adversely to a party because that party was responsible for the preparation of this Funding Agreement or that provision;
- (k) a reference to a body, other than a party to this Funding Agreement (including an institute, association or authority), whether statutory or not:
 - (1) which ceases to exist; or
 - (2) whose powers or functions are transferred to another body,
 is a reference to the body which replaces it or which substantially succeeds to its powers or functions;
- (l) if a period of time is specified and dates from a given day or the day of an act or event, it is to be calculated exclusive of that day;
- (m) if an act prescribed under this Funding Agreement to be done by a party on or by a given day is done after 5.00pm on that day, it is taken to be done on the next day;
- (n) a reference to time is a reference to Sydney time; and
- (o) a reference to \$ is to Australian currency unless denominated otherwise.

2.3 Business Day

Where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the next Business Day.

2.4 Inclusive expressions

Specifying anything in this Funding Agreement after the words 'include' or 'for example' or similar expressions does not limit what else is included.

2.5 Agreement components and inconsistency

This Funding Agreement includes any schedule or attachment. In the event of an inconsistency between the Project Details and any other part of this Funding Agreement, that other part of this Funding Agreement will prevail to the extent of the inconsistency.

3 Term

This Funding Agreement begins on the Commencement Date and expires on the End Date.

4 Recipient to undertake the Project

- (a) Subject to the terms of this Funding Agreement, the Recipient must use reasonable endeavours to:
- (1) undertake the Project and achieve the Outcomes;
 - (2) once the Project becomes operational, operate the Project in accordance with Operating Parameters and any plan set out in clause 3.2 of Schedule 1;
 - (3) progress the Project in a timely and expeditious manner;
 - (4) meet the completion dates for the Milestones listed in item 1.3 of Schedule 1; and
 - (5) complete the Project by the Project Completion Date.
- (b) The Recipient must:
- (1) notify the Department in writing, as soon as reasonably practicable of any material delay or anticipated material delay to the progress of the Project or achievement of a Milestone or an Outcome, with such notice to include:
 - (A) the reason for the material delay;
 - (B) the anticipated impact on the Project; and
 - (C) the steps the Recipient is taking or will take to overcome the material delay; and
 - (2) keep the Department updated as to the status of any such material delay.
- (c) Without limiting the Recipient's obligations under clause 4(b), within 20 Business Days' of the end of each Update Period the Recipient must provide the Department with a notice identifying any revisions made to the expected achievement date for a Milestone or Outcome during that Update Period.
- (d) The Recipient must promptly notify the Department if, after the Project becomes operational, the Project ceases to operate in accordance with the Operating Parameters for more than:
- (1) 20 consecutive days; or
 - (2) 20 days in aggregate in any 3-month period.
- If so requested by the Department, the Recipient must promptly provide the Department with information about the reasons for the divergence from the Operating Parameters.

5 Knowledge sharing

5.1 Knowledge Sharing Plan

- (a) The Recipient must:
- (1) in consultation with the Department, implement and comply with the Knowledge Sharing Plan;
 - (2) as reasonably required by the Department:
 - (A) participate in relevant meetings, conferences, seminars, workshops, surveys and interviews;
 - (B) deliver presentations and publish reports; and
 - (C) provide briefings to the Department (including its staff) and other relevant industry forums, on Project progress and achievement of the Outcomes.
- (b) The Recipient must categorise the documentation and information it provides to the Department pursuant to the Knowledge Sharing Plan as follows:
- (1) **public unrestricted:** information that may be shared freely within the Department, with industry participants, and with the public in general;
 - (2) **public restricted:** information that may be shared freely within the Department, with industry participants, and with the public in general, subject to any reasonable restrictions specified in the Knowledge Sharing Plan; and
 - (3) **Recipient Confidential Information:** information that may only be shared in accordance with clause 20.
- (c) The Department may require the Recipient, either through lessons learnt reports (where applicable) or ad hoc reports, to cover particular topics related to the Project (or a portfolio of activities related to the Project).
- (d) To avoid doubt, it is the Recipient's responsibility to ensure that any Project documentation or information (including any reports) prepared for public release does not contain any Recipient Confidential Information.
- (e) In addition to the characterisation by the Recipient under clause 5.1(b), the Recipient must also mark any document or information it provides pursuant to the Knowledge Sharing Plan that it considers to be commercially sensitive as 'Commercially Sensitive Information' before it is submitted to the Department or the Department's knowledge sharing agent.

5.2 Data Requirements

- (a) In addition to the information required under the Knowledge Sharing Plan or with respect to the Project, the Department may at any time submit a Data Request to the Recipient. The Recipient must use best endeavours to make available the required data under the Data Request.
- (b) Within 10 Business Days' of the submission of the Data Request, the Recipient must confirm whether the data is available and able to be extracted. If the Recipient confirms that the data:
- (1) is available and able to be extracted, then the parties must promptly and in good faith execute a Data Sharing Deed in a form required by the Department (acting reasonably); or

- (2) is not available and unable to be extracted, then the Recipient must promptly provide written reasons to substantiate its assessment. The Department may request further information or detail and may direct the Recipient, acting reasonably, to undertake further action to provide the information in the Data Request.
- (c) Without liability, the Department may in its absolute discretion, withdraw the Data Request at any time.

6 Funds

6.1 Funds

- (a) Subject to satisfaction of the Payment Criteria, the Department will pay the Funds to the Recipient in accordance with item 2.2 of Schedule 1 and this clause 6.
- (b) Notwithstanding any other provision of this Funding Agreement, the Department's total liability under or in connection with this Funding Agreement, including all the Funds paid or payable, will not exceed the Total Funds, unless otherwise agreed by the parties in writing.
- (c) The Department may set-off any money due for payment by the Department to the Recipient under this Funding Agreement against any money owed by the Recipient:
 - (1) to the Department under this Funding Agreement or any other agreement between the parties under which the Department provides funding to the Recipient; or
 - (2) to the NSW Government under another agreement.
- (d) Following Financial Close, the Total Funds may be adjusted in accordance with the process set out in Schedule 5.

6.2 Funds Payment Request

- (a) Upon achievement of any relevant Milestone in accordance with item 1.3 of Schedule 1, the Recipient may submit a request for payment of the Funds in the form of a Funds Payment Request.
- (b) The Department must, within 20 Business Days' of its receipt from the Recipient of the Funds Payment Request and all other information reasonably required to determine whether or not the Payment Criteria for a Milestone are satisfied, provide the Recipient with a notice setting out:
 - (1) the Department's determination as to whether or not the Payment Criteria have been satisfied; and
 - (2) if the Department has determined that the Payment Criteria have not been satisfied, the reasons for that determination,

(Determination Notice).
- (c) The Department must, within 20 Business Days of delivering a Determination Notice confirming that the Payment Criteria for a Milestone have been satisfied:
 - (1) deposit the Funds payable upon achievement of that Milestone into the Bank Account or Segregated Bank Account; or

- (2) authorise release of the Funds payable upon achievement of that Milestone from the Segregated Bank Account, as applicable.

6.3 Payment Criteria

The Recipient must satisfy the following **Payment Criteria**, each in a form and substance that is acceptable to the Department, as a condition precedent to payment or release of the Funds in connection with a Milestone:

- (a) the Recipient must have submitted an invoice which complies with the requirements set out in clause 7;
- (b) the Recipient must have submitted a Funds Payment Request;
- (c) the Recipient must have achieved the relevant Milestone and provided the relevant Milestone Report to the Department, together with a report for the benefit of the Department from a Milestone Reviewer confirming that, in the Milestone Reviewer's opinion, the relevant Milestone has been achieved in accordance with clause 11.2;
- (d) the Recipient must have provided all plans, Reports and Knowledge Sharing Deliverables in accordance with clause 11, item 3 of Schedule 1 and Schedule 6 due to be provided before the date for payment;
- (e) the total Funds requested, when taken with all other Funds previously provided to the Recipient under this Funding Agreement, must not exceed the Total Funds; and
- (f) the Department, acting reasonably, must be satisfied that the Recipient is not in breach of this Funding Agreement at the relevant time (including clause 9).

6.4 Referral to Expert

If the Department determines under clause 6.2(b) that the Payment Criteria has not been satisfied, then either party may refer the Dispute to an Expert under clause 26(f).

6.5 Use of the Funds

- (a) Subject to clause 6.5(b), the Recipient must apply or Legally Commit the Funds only:
 - (1) for Eligible Expenditure;
 - (2) in accordance with, and as contemplated in, the then-current Budget as may be amended from time to time under clause 10;
 - (3) so that at all times no more than the Grant Funding Percentage for total Eligible Expenditure incurred or expected to be incurred is sourced from the Funds; and
 - (4) in accordance with the terms and conditions set out in this Funding Agreement.
- (b) The Recipient must not spend more than 10% of the Funds on Overseas and Interjurisdictional Expenditure unless otherwise agreed in writing by the Department.

6.6 Early payment of Undisbursed Funds

The Department may, in its sole discretion, pay to the Recipient or deposit into the Bank Account or Segregated Bank Account some or all of the Undisbursed Funds before the time otherwise specified for payment in this clause 6.

7 Invoices

- (a) An invoice submitted by the Recipient must:
- (1) meet the requirements of a tax invoice as set out in the GST Law;
 - (2) be in a form approved by the Department; and
 - (3) set out:
 - (A) any reference number provided by the Department and Project title; and
 - (B) the amount of funding to be paid by the Department together with the supporting documentation and any other evidence specified in Schedule 1 or by the Department.
- (b) The Recipient must:
- (1) submit invoices to the address listed in item 18 of the Project Details; and
 - (2) cooperate with any request by the Department with respect to invoicing and payment where the Department advises that it is moving to a different payment system.

8 Bank Account

8.1 Bank Account requirements

Unless the Department otherwise agrees in writing, the Recipient must:

- (a) ensure that the Funds are held in an account in the Recipient's name:
- (1) which is not controlled by any person other than the account bank, the Recipient, a Related Body Corporate of the Recipient or a Debt Financier; and
 - (2) with a deposit-taking institution in Australia authorised under the *Banking Act 1959* (Cth) to carry on banking business in Australia
- (Bank Account);**
- (b) notify the Department of details sufficient to identify the Bank Account prior to receipt of any the Funds; and
- (c) identify the receipt and expenditure of the Funds separately within the Recipient's accounting records so that at all times the Funds are identifiable and ascertainable.

8.2 Segregated Bank Account

- (a) If the Department notifies the Recipient of its intention to deposit Undisbursed Funds into the Recipient's Bank Account under clause 6.6, the Recipient must, if so requested by the Department, establish a new Bank Account (**Segregated Bank Account**) that is:
- (1) established solely for the purposes of accounting for and administering any Funds paid to the Recipient by the Department;
 - (2) an account that bears a rate of interest;
 - (3) separate from the Recipient's or any other person's operational accounts; and
 - (4) if requested by the Department, governed by an account control deed between the Department, the Recipient and the relevant bank, which limits the Recipient's ability to withdraw Funds from the Segregated Bank Account without the Department's consent.
- (b) At any time, if there are Funds in the Segregated Bank Account, the Recipient must:
- (1) if requested by the Department, provide the Department (and the authorised deposit-taking institution) with:
 - (A) an authority for the Department to obtain any details relating to the use of the Segregated Bank Account; and
 - (B) a copy of any statement relating to the Segregated Bank Account, and any other reasonable details relating to use of the Segregated Bank Account; and
 - (2) notify the Department of any change of the Segregated Bank Account, provide the Department with details of the new account, and comply with this clause 8 in respect of the new account.

8.3 Withdrawal of funds from the Bank Account or Segregated Bank Account

The Recipient must not withdraw or transfer funds from a Bank Account or Segregated Bank Account other than in accordance with this Funding Agreement.

9 Contributions

- (a) Other than with respect to payment of the Funds in accordance with this Funding Agreement, the Recipient is responsible for providing or securing all funds and resources, and bearing all costs necessary, to complete the Project (including on account of cost overruns).
- (b) Unless otherwise agreed by the Department and the Recipient in writing:
- (1) the Recipient must ensure that the Recipient Contributions are provided and used for the Project in accordance with item 2.3 of Schedule 1; and
 - (2) the Recipient must ensure that any Other Contributions are provided and used for the Project in accordance with items 2.4 and 2.5 of Schedule 1.

10 Variations

10.1 Variations

Any variation of this Funding Agreement (including any Schedule) must be in writing and signed by the parties. Unless otherwise required by the Department, a variation will be effected by completing and executing the form set out in Attachment 2.

10.2 Variation requests

- (a) The Recipient may request a variation of this Funding Agreement by providing the Department with written details of the proposed variation.
- (b) Subject to clause 10.2(c)(1), where the requested variation is a Minor Variation or a variation reasonably required to address a Force Majeure Event, the Department will act reasonably in providing or withholding its consent.
- (c) The Department may provide or withhold its consent in its absolute discretion to the extent the requested variation:
 - (1) is a change to a Milestone Long Stop Date (including a change to a Milestone Long Stop Date required to address a Force Majeure Event); or
 - (2) is otherwise not contemplated under clause 10.2(b).

10.3 Variations to Budget

- (a) Subject to clauses 10.3(b), the Recipient may, with prior written notice to the Department, amend the Budget without the consent of the Department.
- (b) The Recipient must not amend the Budget or otherwise apply or Legally Commit the Funds (without the prior written consent of the Department), if this will result in:
 - (1) more than the Grant Funding Percentage of the amounts needed for total Eligible Expenditures incurred or expected to be incurred being sourced from the Funds; or
 - (2) the total Overseas and Interjurisdictional Expenditure exceeding 10% of the Funds.
- (c) Within 20 Business Days' of the end of each Update Period, the Recipient must provide the Department with a notice identifying any amendments made to the Budget during that Update Period and attaching a copy of the amended Budget.

11 Reporting and plans

11.1 Reporting obligations

The Recipient must provide the Department with:

- (a) the Reports and plans in accordance with the requirements set out in items 3.1 and 3.2 of Schedule 1 and in the form and substance satisfactory to the Department (including details of any Knowledge Sharing Deliverables required in accordance with the Knowledge Sharing Plan);

- (b) from time to time, at the time and in the manner reasonably required by the Department, reports or any other information requested by the Department (including in relation to any significant developments concerning the Project or any significant delays or difficulties encountered in undertaking the Project); and
- (c) if this Funding Agreement is terminated by the Department as a result of the Recipient:
 - (1) Abandoning the Project; or
 - (2) failing to achieve a Milestone by the relevant Milestone Long Stop Date, within 30 Business Days' after the termination, a report for public release explaining the reasons for such termination and the information, knowledge and lessons learnt (both positive and negative) by the Recipient, its Personnel or Subcontractors from the Project.

11.2 Review of Milestone Reports

Where the Recipient is required to provide a Milestone Report under item 3.1 of Schedule 1, unless otherwise specified by the Department, the Recipient must provide to the Department a report for the benefit of the Department from a Milestone Reviewer, confirming that, in the Milestone Reviewer's opinion, the relevant Milestone has been achieved.

11.3 Certification of Plans

- (a) Where the Recipient is required to provide a risk management plan or work, health and safety plan, the Recipient must provide a Statement of Compliance on or prior to achievement of the first Milestone.
- (b) The Department may reasonably require the Recipient to provide a Statement of Compliance for any other Plan or Milestone provided under this Funding Agreement.

11.4 Acceptance or rejection of Reports or Plans

- (a) Within 30 Business Days' of receiving a Report or Plan the Department must use reasonable endeavours to:
 - (1) accept the Report or Plan, if it considers acting reasonably, that the Report or Plan satisfies all the requirements set out under items 3.1 or 3.2 of Schedule 1 (as applicable); or
 - (2) reject the Report or Plan, if it considers, acting reasonably, that the Report or Plan does not satisfy all the requirements set out under items 3.1 or 3.2 of Schedule 1 (as applicable).
- (b) If the Department rejects the Report or Plan, it must provide the Recipient with written reasons for the rejection and a date (acting reasonably) for the Recipient to reissue that Report or Plan. The Recipient must reissue that Report or Plan by that date in a form and substance that addresses the issues raised by the Department for the Department's approval or rejection under clause 11.4(a).

12 Project governance

Where a steering committee, group or body is established for the purpose of overseeing and/or coordinating the delivery of the Project (including in relation to the development and construction of the Project) (**Project Steering Committee**), the parties acknowledge and agree that:

- (a) the Recipient must promptly notify the Department of the establishment of the Project Steering Committee;
- (b) the Department may, in its absolute discretion, send a representative to observe any meeting of the Project Steering Committee (**Department Observer**);
- (c) all decisions or recommendations made, and actions taken, by the Project Steering Committee are based on the Project Steering Committee's own information, enquiries, independent advice, and/or considerations;
- (d) the Department Observer will have no vote or other decision-making powers on behalf of the Project in connection with his or her attendance at any Project Steering Committee meeting;
- (e) neither the Department Observer nor the Department will have any liability to the Recipient in connection with the Department Observer's attendance at any Project Steering Committee meeting; and
- (f) the Project Steering Committee's decisions, recommendations and actions will not bind the Department.

13 Warranties

13.1 Warranties

The Recipient represents and warrants that:

- (a) (**corporate power**): it has the corporate power to own its assets and to carry on its business as it is now being conducted;
- (b) (**authority**): it has the right, power and authority to enter into, perform and observe its obligations under this Funding Agreement;
- (c) (**authorisations**): the execution, delivery and performance of this Funding Agreement has been duly and validly authorised by it;
- (d) (**binding obligations**): this Funding Agreement constitutes legal, valid and binding obligations and is enforceable in accordance with its terms, subject to laws generally affecting creditors' rights and to principles of equity;
- (e) (**transaction permitted**): it will not be breaching any Law, Authorisation or agreement by signing and performing this Funding Agreement;
- (f) (**no misleading information**): all information provided to the Department (including in the Application):
 - (1) is true, correct and complete in all material respects; and
 - (2) is not misleading,
 at the time:
 - (3) given to the Department; and

- (4) throughout the term of this Funding Agreement, including at the Commencement Date and the date each Funds Payment Request is submitted (other than to the extent that the Recipient has given the Department prior notice in writing otherwise);
- (g) **(not a trustee)**: it does not enter into this Funding Agreement as trustee of any trust (unless otherwise stated in this Funding Agreement);
- (h) **(conflicts of interest)**: to the best of its knowledge after making diligent inquiry, and except as otherwise disclosed to the Department, no conflict of interest exists or is likely to arise in the performance of its obligations under this Funding Agreement;
- (i) **(employee entitlements)** it is not subject to any judicial decision against it relating to employee entitlements (not including decisions under appeal) where it has not paid the claim;
- (j) **(Licensed Materials)**: the Licensed Materials, and to the best of the Recipient's knowledge the Department's use of the Licensed Materials in accordance with this Funding Agreement, will not infringe the Intellectual Property Rights or Moral Rights of any person or entity;
- (k) **(legal capacity)**: it has full legal capacity to:
 - (1) own its own property;
 - (2) undertake the Project;
 - (3) in the case of the Recipient enter into this Funding Agreement; and
 - (4) to carry out the transactions that each of these contemplate (as applicable);
- (l) **(financial capacity)**: it has, or will have, sufficient funds to complete the Project;
- (m) **(insolvency)**: no Insolvency Event has occurred, and there are no reasonable grounds to suspect that an Insolvency Event will occur, in respect of the Recipient; and
- (n) **(qualifications)**: the Recipient, its Personnel and Subcontractors are fit and proper people that have (without limitation) the necessary experience, skill, knowledge, expertise and competence to undertake the Project:
 - (1) consistent with Good Industry Practice;
 - (2) consistent with Good Electricity Industry Practice; and
 - (3) holding (or will hold when required) such licences, permits or registrations as are required under any State, Territory or Commonwealth legislation to undertake the Project.

13.2 Trustee warranties

If the Recipient enters into this Funding Agreement as a trustee of a trust (**Trust**), the Recipient represents and warrants that:

- (a) the Trust has been duly established;
- (b) the Department has been provided with a true and correct copy of the trust deed of the Trust;
- (c) the Recipient has been validly appointed as the sole trustee of the Trust and no action has been taken, or to its knowledge has been proposed, to remove it as trustee;

- (d) the Recipient has full and valid power and authority to enter into this Funding Agreement and perform the obligations under it on behalf of the Trust;
- (e) the Recipient has entered into this Funding Agreement for the proper administration of the Trust;
- (f) the Recipient has obtained or duly satisfied all necessary resolutions, consents, approvals and procedures to enter into this Funding Agreement and perform the obligations under it;
- (g) the Recipient has the right to be indemnified out of the assets of the Trust for all liabilities incurred by it under this Funding Agreement;
- (h) the Recipient will not, without the consent of the Department, do anything which:
 - (1) amends the trust deed of the Trust in any manner which is likely to be adverse to the interests of the Department;
 - (2) reduces its right of indemnity from the assets of the Trust;
 - (3) effects or facilitates the termination of the Trust; or
 - (4) effects or facilitates the resettlement of the assets of the Trust; and
- (i) the Recipient will exercise its right of indemnity under the trust deed in respect of liabilities it incurs under this Funding Agreement.

13.3 Reliance on Warranties

- (a) Each Warranty will, unless otherwise specified, be made on the signing of this Funding Agreement by the Recipient and be repeated each day of the term of this Funding Agreement.
- (b) As soon as practicable after becoming aware of any matter which is likely to impact upon the accuracy of a Warranty, or the Recipient's ability to comply with a warranty, the Recipient must give written notice to the Department detailing that matter and its likely impact on the Recipient's ability to comply with that Warranty.
- (c) The Recipient acknowledges and agrees that the Department has entered into this Funding Agreement and performs this Funding Agreement in reliance on the Warranties.

14 Liability and indemnity

- (a) The Recipient will at all times indemnify the Department and its Personnel (referred to in this clause 14 as **those indemnified**) from and against any loss, damage, cost, expense or liability (including legal costs on a solicitor and own client basis) arising out of or as a consequence of:
 - (1) the carrying out of works or services, or the supply of goods, in connection with the Project;
 - (2) the Licensed Materials (including the use of the Licensed Materials by the Department or its Personnel, but excluding any Pre-existing Materials owned by the Department) infringing or allegedly infringing the Intellectual Property Rights or Moral Rights of any person;
 - (3) without limiting the previous paragraphs any:
 - (A) breach of this Funding Agreement; or

- (B) negligent or wrongful or unlawful act or omission,
by or on the part of the any of the:
 - (C) Recipient;
 - (D) Related Parties; or
 - (E) Subcontractors,
including the respective Personnel for the entities noted from (C) to (E) above.
- (4) any negligent or wrongful or unlawful act or omission on the part of the Recipient, or their respective Personnel or Subcontractors.
- (b) The Recipient's liability to indemnify those indemnified will be reduced proportionally to the extent that any breach of this Funding Agreement by those indemnified, or any wrongful, unlawful or negligent act or omission of those indemnified, contributed to the loss.

15 Undertakings and acknowledgements

15.1 Undertakings

The Recipient must:

- (a) **(cooperation)**: cooperate with the Department and other parties, and attend any meetings requested by the Department, acting reasonably;
- (b) **(standards)**: undertake the Project diligently, efficiently, safely and to a high professional standard and in accordance with this Funding Agreement;
- (c) **(Green Hydrogen)**: throughout, under, or as a result of this Project, only produce, use or otherwise derive Green Hydrogen;
- (d) **(reporting)**: comply with the reporting requirements set out in item 3 of Schedule 1 and keep the Department regularly and fully informed regarding progress of the Project;
- (e) **(Laws)**: comply with:
 - (1) all applicable Laws, including any WHS Laws; and
 - (2) all relevant Australian industry standards, codes, best practice and guidelines or, where none apply, relevant international industry standards, best practice and guidelines;
- (f) **(privacy)**: comply with all reasonable directions by the Department to the Recipient relating to the Department's compliance with Privacy Law or resolution of any complaint alleging a breach of Privacy Law relating to the Project;
- (g) **(GIPA)**: to the extent that the Recipient or any Subcontractor is required to provide goods or services to the public on behalf of the Department, within 3 days of receiving a written request by the Department, the Recipient, or any relevant Subcontractor, must provide the Department with immediate access to information referred to in Section 121(1) of the *Government Information (Public Access) Act 2009* (NSW) contained in records held, and in such a medium, as the Department may reasonably require. The Department acknowledges that it will consult with the Recipient or relevant Subcontractor before releasing any

information obtained where required under section 54 of the *Government Information (Public Access) Act 2009* (NSW);

- (h) **(Intellectual Property):**
- (1) on request from the Department, provide the Department with a copy of any Agreement Material in the format reasonably requested by the Department;
 - (2) grant to, or, where the Recipient does not own the relevant Licensed Materials, use reasonable endeavours to obtain for, the Department a perpetual, irrevocable, world-wide, royalty-free, fee-free, non-exclusive licence to use, reproduce, adapt, modify, communicate, broadcast, distribute, publish, disseminate and sublicense the Licensed Materials (but excluding any Pre-existing Materials owned by the Department) for the purposes of the Department:
 - (A) exercising any right under this Funding Agreement;
 - (B) giving effect to the Knowledge Sharing Plan;
 - (C) exercising any purpose set out in the Guidelines; or
 - (D) carrying out any objective under Part 6A the *Energy and Utilities Administration Act 1987* (NSW);
 - (3) if someone claims, or the Department reasonably believes that someone is likely to claim, that all or part of the Licensed Materials or their use in accordance with this Funding Agreement infringe their Intellectual Property Rights or Moral Rights, in addition to the indemnity under clause 14 and to any other rights that the Department may have, promptly, at the Recipient's expense:
 - (A) use its best efforts to secure the rights for the Department to continue to use the affected Licensed Materials free of any claim or liability for infringement; or
 - (B) replace or modify the affected Licensed Materials so that the Licensed Materials or the use of them does not infringe the Intellectual Property Rights or Moral Rights of any other person without any degradation of the performance or quality of the affected Licensed Materials; and
 - (4) [where required for the Project, and as agreed between the parties, the Recipient must comply with an Intellectual Property Management Plan as set out in item 3.2 of Schedule 1 when undertaking the Project.]
[Drafting Note: Delete if no Intellectual Property Management Plan is included in Schedule 1.]
- (i) **(Moral Rights):** obtain all consents (including any Moral Rights consents or waivers) necessary to perform its obligations under this Funding Agreement;
- (j) **(adverse effect notification):**
- (1) advise the Department as soon as possible of any circumstances which have, or which are reasonably likely to have, a materially adverse effect on the:
 - (A) Recipient's ability to comply with this Funding Agreement,
 - (B) Recipient's ability to complete the Project; or
 - (C) Department's or the NSW Government's reputation; and

- (2) notify the Department as soon as practicable of any significant concerns of local community groups of which the Recipient becomes aware;
- (k) **(insurance)**: in connection with the Project:
- (1) maintain and use reasonable endeavours to require that their respective Subcontractors maintain, the insurances that would be maintained by a prudent business undertaking the Project, including as may be reasonably required by the Department; and
 - (2) if requested by the Department, provide certificates or other sufficient evidence to satisfy the Department that such insurances have been procured and maintained and diligently pursue any claim under those insurances;
- (l) **(transactions with a Related Party)**: ensure that any transaction between the Recipient and any Related Party of either of them is on terms no less favourable to the Recipient than the terms of a comparable transaction negotiated at arms' length with an unrelated third party;
- (m) **(books and records)**: at its own cost, during the period of this Funding Agreement and for a period of seven years after the End Date, keep and ensure that any Subcontractors keep, adequate books and records in sufficient detail to enable:
- (1) all receipts and payments related to the Project to be identified and reported to the Department; and
 - (2) the amounts payable by the Department under this Funding Agreement to be determined or verified;
- (n) **(monitoring)**: meet with the Department at the times and in the manner reasonably required by the Department to discuss any issues in relation to this Funding Agreement or the Project;
- (o) **(information)**: provide any information reasonably requested by the Department in connection with this Funding Agreement, the Project or the Recipient's compliance with the Outcomes;
- (p) **(conflicts)**: if, during the Project, a conflict of interest arises, or appears likely to arise, notify the Department immediately in writing, make full disclosure of all relevant information relating to the conflict and take such steps as the Department requires to resolve or otherwise deal with the conflict;
- (q) **(visitations)**: during the term of this Funding Agreement and the 2 years after the expiry or termination of this Funding Agreement:
- (1) allow and provide the Department escorted visits by interested persons approved by the Department or the Recipient (**Visitors**) to sites under the Recipient's control where activities relating to the Project are conducted;
 - (2) use best endeavours to obtain permission for escorted visits by Visitors to sites not under the Recipient's control where the activities relating to the Project are conducted;
 - (3) demonstrate the activities relating to or arising from the Project to Visitors and relevant technology and provide detailed explanations where requested;
 - (4) allow the Department representatives to be present at visits; and
 - (5) comply with and ensure that any Visitors complies with WHS Laws;

- (r) **(Bank Account)**: comply with the bank account requirements specified in clause 8;
- (s) **(notification)**: notwithstanding any other provision of this Funding Agreement, notify the Department immediately if it becomes aware that:
 - (1) it has not undertaken the Project as required under this Funding Agreement or has not spent the Funds in accordance with this Funding Agreement;
 - (2) it has, or may have, committed a breach of this Funding Agreement;
 - (3) it has received, or requested to receive, other funds from the NSW Government or the Commonwealth for the Project;
 - (4) an Insolvency Event has occurred or is likely to occur with respect to the Recipient; and/or
 - (5) there is a change to any of the following (after the Commencement Date):
 - (A) Recipient Contributions;
 - (B) Other Contributions; or
 - (C) a legal and/or beneficial right to use, access or have title to any Asset for the Project (including any land rights), where such right was provided by an Authority.

15.2 Acknowledgements

- (a) The parties acknowledge and agree that:
 - (1) this Funding Agreement does not affect ownership of the Intellectual Property Rights in any Pre-existing Material or Third-Party Material; and
 - (2) all Intellectual Property Rights in Agreement Material vest in the Recipient upon creation.
- (b) The Recipient acknowledges that the Department may be required to publish on the NSW eTendering website certain information concerning this Funding Agreement in accordance with sections 27–35 of the *Government Information (Public Access) Act 2009* (NSW).

16 Change in Control and Transfer

16.1 Change in Control

- (a) The Recipient must obtain the prior written consent of the Department in respect of any Change in Control of the Recipient during the term of this Funding Agreement.
- (b) The Department must not unreasonably withhold its consent under clause 16.1(a).
- (c) For purposes of clause 16.1(b) and without limitation, it will be deemed reasonable to withhold consent where the Department has formed the view, acting reasonably, that:
 - (1) the Change in Control would be inconsistent with the basis upon which the Department formed a view that the Recipient:

- (A) was eligible to receive funds; or
- (B) capable to undertake the Project; or
- (C) met the Merit Criteria,
at the time its Application was assessed by the Department;
- (2) the Change in Control would have a material adverse effect on competition in the market for hydrogen supply in NSW;
- (3) the Change in Control would result in the transferee not having the financial, technical or commercial capability to develop, construct, implement or operate the Project or perform the obligations under this Funding Agreement; or
- (4) the Change in Control would materially reduce the likelihood of the Project achieving the Outcomes.
- (d) The Recipient must provide the Department with any information about the Change in Control reasonably requested by the Department to allow the Department to assess whether to provide its consent, including any information relating to the matters set out in clause 16.1(c).
- (e) The Department may require as a condition to its consent that any person acquiring control of the Project or the Recipient (**Acquiring Party**, as defined in the definition of Change in Control) enters into a deed, with the form and substance acceptable to the Department, undertaking that the Acquiring Party will ensure that the Recipient complies and will continue to comply with the Recipient's obligations under this Funding Agreement.

16.2 Assignment, Novation and Transfer by Recipient

- (a) Subject to clause 16.3, the Recipient must not transfer, assign, novate, create any security interest or other interest in or deal in any other way with any of its right, title to or interest in this Funding Agreement (**Dealing**) without obtaining the prior written consent of the Department (in its absolute discretion). For the purposes of the Department's consent to a Dealing under this clause 16.2(a), the parties acknowledge and agree that clauses 16.1(c) to 16.1(e) (inclusive) apply in respect of a Dealing as if such Dealing were a Change in Control.
- (b) The Department may assign its rights or novate any or all of its rights and obligations under this Funding Agreement if it is to an Authority or an entity where the ultimate legal or beneficial interest is held by an Authority. The Recipient agrees to execute any documents required by the Department in order to give effect to an assignment or novation contemplated by this clause 16.2(b).

16.3 Debt Financier Security and Tripartite Agreement

- (a) The Recipient may grant a security interest over its right, title to or interest in this Funding Agreement to a Debt Financier by providing prior written notice to the Department.
- (b) The Department must (at the request and cost of the Recipient) execute and deliver a Tripartite Agreement to the Recipient.

17 Assets

17.1 Assets generally

- (a) During the term of this Funding Agreement, the Recipient must (unless otherwise agreed with the Department in writing):
- (1) use any Asset only for the purposes of the Project or other purposes consistent with the Outcomes;
 - (2) obtain and maintain good title to all Assets (other than Assets which the Recipient leases);
 - (3) subject to clause 17.1(b), not encumber or dispose of any Asset without the Department's prior written approval;
 - (4) hold all Assets securely and safeguard them against theft, loss, damage, or unauthorised use;
 - (5) use all reasonable endeavours to maintain all Assets in good working order;
 - (6) maintain all appropriate insurances in respect of any Assets;
 - (7) if required by Law, maintain registration and licensing of all Assets;
 - (8) be fully responsible for, and bear all risks relating to, the use or disposal of all Assets; and
 - (9) if requested by the Department, maintain an Assets register as specified by the Department, and provide a copy of the register to the Department on request.
- (b) Notwithstanding clause 17.1(a), the Recipient may, at any time, dispose of any Asset without the Department's prior approval but with prior written notice to the Department, where it relates to:
- (1) the disposal of obsolete or redundant vehicles, plant and equipment;
 - (2) a disposal of an Asset for the purposes of replacing that Asset; or
 - (3) where that disposal is necessary for the maintenance of other Assets.
- (c) If the Recipient sells or otherwise disposes of an Asset during the term of this Funding Agreement, the Department may, at its discretion, recover from the Recipient:
- (1) the proportion of the value of the Asset following depreciation calculated as at the date of sale or disposal which is equivalent to the proportion of the purchase price of the Asset that was funded from the Funds; or
 - (2) the proportion of the market value of the Asset which is equivalent to the proportion of the purchase price of the Asset that was funded from the Funds.
- (d) On termination of this Funding Agreement (other than, to avoid doubt, the expiry of this Funding Agreement in accordance with clause 3), the Department may:
- (1) recover from the Recipient the proportion of the value of the Asset following depreciation calculated as at the date of termination which is equivalent to the proportion of the purchase price of the Asset that was funded from the Funds;

- (2) recover from the Recipient the proportion of the market value of any Asset which is equivalent to the proportion of the purchase price of the Asset that was funded from the Funds; or
 - (3) require the Recipient to use, deal with or transfer any Asset as the Department directs in writing.
- (e) If any Asset is lost, damaged or destroyed, the Recipient must reinstate or replace the Asset (including by using the proceeds of insurance) without using any of the Funds and this clause 17.1 continues to apply to the reinstated or replaced Asset.

18 Evaluation, audits and access

18.1 Evaluation

- (a) The Department may undertake an evaluation of the Project at any time, either directly or through a third-party adviser.
- (b) The Recipient must, at its own cost, provide all reasonable assistance to the Department (and any adviser) for such review or evaluation.
- (c) Subject to clause 20, during the term of this Funding Agreement, the Recipient must provide, upon request by the Department, any information reasonably required by the Department on the implementation and progress of the Project in the format requested by the Department.

18.2 Audits and access

- (a) During the term of this Funding Agreement, and for 7 years after the expiry or termination of this Funding Agreement, the Department or its nominee may:
 - (1) conduct audits relevant to the performance of the Recipient's obligations under this Funding Agreement and in respect of the Project; and
 - (2) upon giving the Recipient reasonable notice, access the Recipient's premises, require the provision of records and information, and inspect and copy any documentation or records reasonably necessary for that purpose.
- (b) The Recipient must retain all relevant records relating to the Project for at least 7 years after the expiry or termination of this Funding Agreement.
- (c) The Recipient must provide all reasonable assistance to the Department and its nominee (if any) for such audit or access.
- (d) In carrying out an audit or accessing the Recipient's premises, the Department will, and will procure that any nominee, use reasonable endeavours to minimise any disruption to the activities contemplated in this Funding Agreement caused by any audit or access, and will comply with the Recipient's reasonable workplace and site access policies.
- (e) Where an audit under this clause 18.2 identifies, in the Department's opinion, that the Recipient is in breach of this Funding Agreement, then the Department may recover from the Recipient the costs incurred in conducting that audit. The Recipient acknowledges and accepts that it is not permitted to use Funds to meet any such costs.

19 Acknowledgement, disclaimer and publicity

- (a) The Recipient must (and must ensure that any Project Participants) acknowledge the financial and other support received from the Department in all publications, promotional and advertising materials, public announcements, events and activities in relation to the Project, or any products, processes or inventions developed as a result of it, and, if required by the Department, at the place where the Project is undertaken. The form of acknowledgement must be as specified in item 16 of the Project Details or as otherwise approved by the Department (after having received at least 10 Business Days' notice) prior to their use.
- (b) The Department reserves the right to publicise and report on the awarding of the Funds, and may include the name of the Recipient, Recipient's shareholders and Project Participants, the amount of the Funds and a brief description of the Project (**Project Information**).
- (c) Unless otherwise agreed by the Department, the Recipient must procure, and provide to the Department as soon as practicable, artists' impressions or renders which demonstrate the anticipated appearance of any works constructed or goods developed in connection with the Project upon completion.
- (d) The Recipient must (and must ensure that any Project Participants):
 - (1) include a disclaimer as specified in item 17 of the Project Details or otherwise approved or requested by the Department in all published material relating to the Project; and
 - (2) before making a public announcement in connection with this Funding Agreement or any transaction contemplated by it, obtain the Department's written consent to the announcement, except if required by Law or a regulatory body (including a relevant stock exchange), in which case the Department should be notified of any such requirement as soon as practicable.

20 Confidentiality

- (a) The Department must not, without the prior written consent of the Recipient, disclose any Recipient Confidential Information to another person.
- (b) Notwithstanding any other provision of this Funding Agreement, the Department may disclose Recipient Confidential Information and information of the type specified in clause 5.1(b)(2):
 - (1) as specified or as contemplated in the Knowledge Sharing Plan;
 - (2) to the Department's Personnel or advisers, including its Knowledge Sharing Agent;
 - (3) to ARENA, CEFC and/or DISER (where the Recipient indicates in its Application that it will be applying for ARENA, CEFC and/or DISER funding);
 - (4) where applicable, to other lenders or financial institutions involved in the Project;
 - (5) to a house or a committee of the Parliament of New South Wales and/or the Parliament of Australia, or any of the Commonwealth or State or Territory Ombudsmen;

- (6) to the Department's responsible Minister or to any NSW Government or Australian Government agency;
 - (7) to AEMO;
 - (8) to the relevant network service provider (as that term is defined in the NER); and
 - (9) where required by Law.
- (c) The Recipient must not, without the prior written consent of the Department, disclose any Department Confidential Information to another person.
 - (d) Without limiting any other provision of this Funding Agreement, where the Recipient discloses the Department Confidential Information and information of the type specified in clause 5.1(b)(2) to a third pursuant to clause 20(c), the Recipient must:
 - (1) give notice to the receiving party in writing that the information is Confidential Information; and
 - (2) only provide the Confidential Information if the receiving party agrees to keep the information confidential as if it were bound by the obligations of confidentiality imposed under this Funding Agreement.
 - (e) The Recipient acknowledges that Recipient Confidential Information provided to the Department may be provided to a contractor for data handling and analysis services or incorporated into databases or other IT systems, and aggregated into documents or other media for public release, provided that arrangements are in place to maintain confidentiality of Recipient Confidential Information and meet any conditions in the Knowledge Sharing Plan.
 - (f) Notwithstanding any other provision of this Funding Agreement (and without limiting any other right the Department has under this Funding Agreement), the Department may release public information that contains a description of the Project and the Outcomes, and the Total Funds available and/or paid under this Funding Agreement.

21 Force Majeure

21.1 Force Majeure Event defined

In this Funding Agreement, **Force Majeure Event** means any event or circumstance or combination of events or circumstances occurring after the Commencement Date:

- (a) that is not within the reasonable control or foresight of the Recipient;
- (b) the occurrence or effect of which the Recipient could not have avoided through compliance with its obligations under this Funding Agreement and the exercise of reasonable care and conducting its activities in accordance with Good Electricity Industry Practice or Good Industry Practice; and
- (c) that causes or results in the prevention or delay of the Recipient from performing its obligations under this Funding Agreement,

including arising out of, to the extent they satisfy clauses 21.1(a) to 21.1(c):

- (d) an act of God, including floods and fire but excluding inclement weather such as prolonged periods of precipitation;
- (e) a Coronavirus Event;

- (f) war, hostilities, invasion, kidnapping, act of foreign enemies, military mobilisation or embargo;
- (g) acts or threats of terrorism;
- (h) rebellion, revolution or insurrection; or
- (i) riot, vandalism or sabotage.

21.2 Exclusions

Notwithstanding clause 21.1, the following will not constitute a Force Majeure Event:

- (a) lack of funds, financial hardship or the inability of the Recipient or any of its Related Bodies Corporate to make a profit or achieve a satisfactory rate of return resulting from performance or failure to perform its obligations under this Funding Agreement;
- (b) the inability of the Recipient or any of its Related Bodies Corporate to obtain financing or insurance, either completely or on commercially acceptable terms;
- (c) a shortage of materials, consumables, equipment or utilities required by the Recipient, except to the extent it is itself caused by a Force Majeure Event;
- (d) a breakdown or failure of the Recipient's equipment, property or an asset (including any Assets) caused by normal wear and tear;
- (e) any event or circumstance arising due to a failure by the Recipient, its Related Bodies Corporate, or their respective employees, agents or contractors to properly maintain any equipment, property or an asset or to hold sufficient stock of spares, except to the extent it is itself caused by a Force Majeure Event;
- (f) strikes, industrial disturbances or other industrial action other than on a national or state-wide basis;
- (g) the failure of any person (other than the Department) to perform an obligation it owes to the Recipient, except to the extent such failure is caused by any event or circumstance that, had it happened to the Recipient, would have been a Force Majeure Event under this Funding Agreement; or
- (h) failure or inability of any person to pay any sum due and payable.

21.3 Non-performance excused

- (a) Subject at all times to clauses 21.3(b) and 21.4, non-performance (wholly or in part) as a result of a Force Majeure Event by a Recipient of any obligation required by this Funding Agreement to be performed will, other than as explicitly set out in this Funding Agreement:
 - (1) be excused during the time and to the extent that the Force Majeure Event prevents such performance, wholly or in part; and
 - (2) not give rise to any liability to the Department or any liability of any kind arising out of, or in any way connected with, that non-performance.
- (b) Nothing in this clause 21.3 will affect any Milestone Long Stop Date or any right the Department may have under clause 24.1(g).

21.4 Notification and diligence

The benefit of clause 21.3 is conditional on the Recipient complying with all of the following at all applicable times:

- (a) notifying the Department as soon as reasonably possible:
 - (1) of full particulars of the Force Majeure Event;
 - (2) the date of commencement and expected duration of the Force Majeure Event; and
 - (3) providing an estimate of the period of time required to enable it to resume full performance of its obligations;
- (b) keeping the Department informed of any material changes or developments to any of the matters referred to in clause 21.4(a);
- (c) using all reasonable diligence and means consistent with Good Electricity Industry Practice and Good Industry Practice to remedy or abate the Force Majeure Event as expeditiously as possible;
- (d) resuming performance as expeditiously as possible after termination of the Force Majeure Event or after the Force Majeure Event has abated to an extent that permits resumption of performance (in whole or in part); and
- (e) notifying the Department when the Force Majeure Event has terminated or abated to an extent that permits resumption of performance (in whole or in part) to occur.

21.5 Termination for prolonged Force Majeure Event

If non-performance by the Recipient due to the Force Majeure Event under clause 21.1 continues for a period of more than 270 consecutive days, or 270 days in aggregate in any 12-month period, the Department may terminate this Funding Agreement immediately by giving the Recipient written notice.

22 Default and suspension

22.1 Suspension for Suspected Breach

- (a) If the Department, acting reasonably believes that:
 - (1) the Recipient has, or is reasonably likely to have, breached this Funding Agreement;
 - (2) the Recipient is unlikely to be able to perform the Outcomes or manage the Funds in accordance with this Funding Agreement; or
 - (3) there is a serious concern relating to the Recipient's performance of its obligations under this Funding Agreement or its operation of the Project that requires investigation,

(each a **Suspected Breach**),

the Department may, by written notice to the Recipient, immediately suspend the Department's obligations to provide any Funds under this Funding Agreement pending resolution of the Suspected Breach under this clause 22.1.
- (b) The Department will take all reasonable steps to investigate the Suspected Breach as expeditiously as possible. The Recipient must respond to any requests for information or provide any assistance reasonably required to allow the Department to complete its investigation.
- (c) If, on completion of its investigation, the Department reasonably concludes that the Suspected Breach is unsubstantiated, its obligations to provide Funding

under this Funding Agreement will resume and the Department will promptly notify the Recipient.

- (d) If, on completion of its investigation, the Department reasonably concludes that the Suspected Breach is substantiated, the Suspected Breach will be treated as a breach of this Funding Agreement and clause 22.2 will apply.

22.2 Notice of Default

- (a) If the Department becomes aware that:
- (1) the Recipient has breached this Funding Agreement;
 - (2) the Recipient has Abandoned the Project; or
 - (3) the Recipient has become required to accelerate repayment under any loan agreement or similar document related to financing provided by any third party as a result of an event of default or termination event (however defined)
- (each a **Non-Compliance Event**) it may give the Recipient written notice (**Notice of Non-Compliance**).
- (b) A Notice of Non-Compliance must set out the circumstances giving rise to the Non-Compliance Event and indicate whether the Department considers the Non-Compliance Event to be:
- (1) a Material Breach of this Funding Agreement or not; or
 - (2) capable of remedy (**Remediable**) or not capable of remedy.
- (c) Without limiting any other rights, the Department may have under this Funding Agreement, if the Department considers the Non-Compliance Event to be a Material Breach, then the Department may, in its sole discretion:
- (1) require the Recipient to provide a Draft Cure Plan under clause 23.1(a); or
 - (2) issue the Recipient a Show Cause Notice under clause 24.2(a).

22.3 Suspension of payment during Applicable Cure Period

If the Department considers a Non-Compliance Event to be a Material Breach that is Remediable, the Department may, in its sole discretion, suspend its obligation to provide Funds under this Funding Agreement until the Non-Compliance Event has been remedied under clause 23.2.

22.4 Suspension during Force Majeure Event

If a Force Majeure Event has been subsisting for more than 30 consecutive days, or 30 days in aggregate in any 12-month period, the Department may, by written notice to the Recipient, immediately suspend the Department's obligations to provide any Funds under this Funding Agreement pending resolution of the Force Majeure Event.

23 Cure Plan

23.1 Draft Cure Plan

- (a) Where required by the Department under clause 22.2(c)(1) or where the Recipient has elected to provide the Department with a Response Notice under clause 24.2(b), the Recipient must provide the Department with a written plan (**Draft Cure Plan**) outlining:
- (1) in the case of a Curable Termination Event or a Non-Compliance Event that the Department has determined to be Remediable, the steps it will take to remedy or otherwise address the Curable Termination Event or Non-Compliance Event (including the timeframes within which the Recipient will remedy the Curable Termination Event or Non-Compliance Event); and
 - (2) in the case of a Curable Termination Event or Non-Compliance Event that the Department has not determined to be Remediable, the steps it will take to ensure that the Curable Termination Event or Non-Compliance Event does not recur.
- (b) If the Recipient does not submit a Draft Cure Plan within 20 Business Days' after the date the Department issues the relevant request to provide a Draft Cure Plan under clause 22.2(c)(1) or issues a Show Cause Notice under clause 24.2(a) then the Department may terminate this Funding Agreement under clause 24.1(c).

23.2 Department acceptance or rejection of Cure Plan

- (a) Within 20 Business Days after receipt of a Draft Cure Plan, the Department must (acting reasonably) either:
- (1) approve the Draft Cure Plan by notifying the Recipient; or
 - (2) reject the Draft Cure Plan by notifying the Recipient and providing reasons to the Recipient for its rejection.
- (b) If the Department (acting reasonably) rejects a Draft Cure Plan pursuant to clause 23.2(a)(2), then the Recipient may, within 10 Business Days of the date the Recipient receives a notice of rejection from the Department, submit a further Draft Cure Plan to meet the reasonable requirements of the Department, in which case clause 23.2(a) will apply to the amended Draft Cure Plan.
- (c) If the Department (acting reasonably), rejects an amended Draft Cure Plan submitted under clause 23.2(b) or if the Recipient fails to deliver an amended Draft Cure Plan under clause 23.2(b) within 10 Business Days of receipt of a notice under clause 23.2(a)(2), then the Department may terminate this Funding Agreement under clause 24.1(e).
- (d) If the Department approves a Draft Cure Plan pursuant to clause 23.2(a)(1) (**Approved Cure Plan**), the Recipient must:
- (1) comply with, and diligently pursue the actions set out in the Approved Cure Plan; and
 - (2) if the Department has indicated that it considers the Curable Termination Event or Non-Compliance Event to be Remediable, remedy or cure the Curable Termination Event or Non-Compliance Event within the period allowed in that Approved Cure Plan (**Applicable Cure Period**).

- (e) If the Recipient fails to comply with any material aspect of an Approved Cure Plan (including, if applicable, failure to cure or remedy a Non-Compliance Event or Curable Termination Event both of which the Department has indicated that it considers to be Remediabile, within the Applicable Cure Period), the Department (acting reasonably) may:
- (1) provide written notice to the Recipient of the details of the failure to comply; and
 - (2) terminate this Funding Agreement under clause 24.1(g).

24 Termination

24.1 Termination Events

Subject to clauses 24.2 and 24.3, the Department may terminate this Funding Agreement pursuant to this clause 24 if any of the following **Termination Events** occur:

- (a) the Recipient Abandons the Project;
- (b) the Recipient has committed a Material Breach of this Funding Agreement;
- (c) the Recipient has failed to achieve the requirements of the Operating Procedures for *[Drafting Note: insert time frame based on Operating Procedure requirements]* (or part thereof), but for clarity, has otherwise complied with clause 4
- (d) the Recipient fails to submit a Draft Cure Plan as required under clause 23.1(b);
- (e) the Department rejects an amended Draft Cure Plan under clause 23.2(c);
- (f) the Recipient fails to deliver an amended Draft Cure Plan as set out in clause 23.2(b) within 10 Business Days of receipt of a notice under clause 23.2(a)(2);
- (g) the Recipient fails to comply with any material aspect of an Approved Cure Plan as set out in clause 23.2(d);
- (h) the Recipient has not achieved a Milestone by the applicable Milestone Long Stop Date;
- (i) the Recipient has:
 - (1) wilfully, fraudulently or recklessly breached this Funding Agreement; or
 - (2) wilfully, fraudulently or recklessly made any materially false or misleading statements to the Department as part of its Application;
- (j) the Recipient becomes subject to an Insolvency Event.

For the avoidance of doubt, where a Recipient has pursued the Project in good faith and complied with its obligations to progress the Project in a timely and expeditious manner under clause 4(a)(3), it will not be deemed to have wilfully, fraudulently or recklessly breached this Funding Agreement for purposes of clause 24.1(i)(1) or clause 25.1(c) solely because it ceases to develop the Project.

24.2 Curable Termination Events

- (a) The Department may not exercise its right to terminate this Funding Agreement as a result of an event described in clause 24.1(a) or 24.1(b) (**Curable Termination Event**), unless the Department first gives the Recipient a notice (**Show Cause Notice**):

- (1) specifying details of the Curable Termination Event; and
 - (2) stating whether the Department considers the Curable Termination Event to be Remediable.
- (b) The Recipient may, within 20 Business Days' of its receipt of a Show Cause Notice, elect to provide the Department with a response (**Response Notice**):
- (1) describing the Recipient's reasons why the Department should not terminate this Funding Agreement; and
 - (2) attaching a Draft Cure Plan prepared in accordance with clause 23.
- (c) If the Recipient complies with an Approved Cure Plan within the Applicable Cure Period (with any variations or extensions as may be agreed by the Department in its discretion), then the Department must give notice to the Recipient that the Recipient has sufficiently shown cause and the Department will have no further right to terminate this Funding Agreement for that Curable Termination Event.

24.3 Termination

Subject to clause 24.2(c), where a Curable Termination Event occurs, the Department may terminate this Funding Agreement effective immediately by giving notice of termination to the Recipient as follows:

Circumstances	Clause	Earliest time when notice of termination may be given
The Department has given to the Recipient a Show Cause Notice in respect of that Curable Termination Event and the Recipient has failed to provide a Response Notice under clause 24.2(b).	24.1(a) 24.1(b) 24.2(b)	20 Business Days' after the Show Cause Notice.
The Recipient fails to submit a Draft Cure Plan when required under clause 23.1(b).	24.1(c)	20 Business Days' after the relevant request to provide a Draft Cure Plan under clause 23.2(c)(1) or Show Cause Notice.
The Department rejects an amended Draft Cure under clause 23.2(c) or the Recipient fails to deliver an amended Draft Cure Plan as set out in clause 23.2(b).	24.1(e)	10 Business Days' after the notice is provided to the Recipient under clause 23.2(a).
The Recipient fails to comply with an Approved Cure Plan.	24.1(g)	5 Business Days' after the Department provides notice under clause 23.2(e).
A Milestone is not achieved by the Milestone Long Stop Date.	24.1(h)	Immediately on written notice to the Recipient.

The Recipient commits a wilful breach or fraud.	24.1(i)	Immediately on written notice to the Recipient.
The Recipient is subject to an Insolvency Event.	24.1(j)	Immediately on written notice to the Recipient.

24.4 Termination for Change in Policy

Without limiting any other rights or remedies the Department may have arising out of or in connection with this Funding Agreement, if there has been a Change in Policy the Department may, by not less than 30 days' written notice, terminate this Funding Agreement without further obligation or liability, effective from the time specified in the notice, in which case:

- (a) the parties will work cooperatively to facilitate the orderly cessation of the Project; and
- (b) the Recipient will be entitled to payment in accordance with clause 24.5(b) but will not be entitled to any other claim or any other amount from the Department.

24.5 Rights and entitlements upon termination

- (a) If this Funding Agreement is terminated under clause 24:
 - (1) the Department is not obliged to pay to the Recipient any compensation, or any outstanding amount of funding under this Funding Agreement;
 - (2) without limiting any other rights and remedies it may have, the Department is immediately entitled to recover any Undisbursed Funds and other moneys remaining in the Bank Account or Segregated Bank Account at the time of termination; and
 - (3) the Recipient must repay to the Department any amounts demanded by the Department under clause 25.
- (b) If this Funding Agreement is terminated under clause 21 ('Force Majeure') or clause 24.4 ('Termination for Change in Policy'), the Department is liable to the Recipient only for payments due under clause 6.1(a) before the effective date of termination in accordance with this Funding Agreement, but only to the extent that those monies have been spent or Legally Committed on Eligible Expenditure.
- (c) Termination of this Funding Agreement does not affect any accrued rights or remedies of a party.
- (d) The Recipient agrees, on receipt of the notice of termination under this clause 24, to:
 - (1) take all available steps to minimise loss resulting from the termination; and
 - (2) report on and, subject to clauses 24.5(b) and 25, return any part of the Funds to the Department, or otherwise deal with the Funds, as directed by the Department.

24.6 Survival

Clauses 2.2 (Interpretation); 5 (Knowledge Sharing); 6.1(b) and 6.1(c) (Funds); 6.5 (Use of the Funds); 10.3 (Variations to Budget); 11.1(c) (Reporting obligations); 13.1(f) and 13.1(j) (Warranties), 14 (Liability and indemnity); 15.1(c) (Green Hydrogen); 15.1(f) (privacy); 15.1(g) (GIPA); 15.1(h) (Intellectual Property); 15.1(i) (Moral Rights); 15.1(k) (Insurance); 15.1(m) (Books and records); 15.1(q) (visitations); 18.2 (Audits and access); 19 (Acknowledgement, disclaimer and publicity); 20 (Confidentiality); 24.4 (Rights and entitlements upon termination); 24.6 (Survival); 25 (Repayment of the Funds); 26 (Dispute resolution); 27 (GST); 29.4 (Subcontracting); 29.12 (Consequential Loss) and 29.14 (Governing law) survive the expiry or termination of this Funding Agreement, together with any provision of this Funding Agreement which expressly or by implication from its nature is intended to survive the expiry or termination of this Funding Agreement.

25 Repayment of the Funds

25.1 Circumstances giving rise to repayment

Notwithstanding anything else in this Funding Agreement other than clause 25.2(c), the Department may, in its absolute discretion, require the Recipient to repay some or all of the Funds in the circumstances and to the extent specified below:

- (a) **(misspent funds)**: the amount of any Funds which, in the Department's opinion (acting reasonably) and at any time, has been spent or used other than in accordance with this Funding Agreement;
- (b) **(unspent funds)**:
 - (1) the full amount of any the Funds which have been paid to the Recipient but has not been spent or Legally Committed by the Recipient as at the End Date; and
 - (2) any Funds in excess of an amount equal to 10% of the previous Milestone payment (if any), which has been paid to the Recipient and not been spent or Legally Committed by the Recipient as at a due date for payment of further Funds in accordance with this Funding Agreement;
- (c) **(wilful breach)**: an amount equal to all the Funds paid to the Recipient if the Recipient has wilfully, fraudulently or recklessly breached this agreement under clause 24.1(i); or
- (d) **(breach)**: if this agreement is terminated pursuant to clauses 24.1(b) or 24.1(i), an amount equal to all the Funds paid to the Recipient by the Department under this Funding Agreement;
- (e) **(material change to Project costs)**: an amount equal to any Refund Amount calculated in accordance with Schedule 5;
- (f) **(Recipient Contributions and Other Contributions not used)**: if, as at the End Date, Recipient Contributions or Other Contributions have not been used for the Project, an amount that represents the same proportion of the Funds as the Unused Portion;
- (g) **(Insolvency Event)**: an amount equal to all the Funds paid to the Recipient if an Insolvency Event occurs in respect of the Recipient and the Department has terminated this Funding Agreement in accordance with clause 24.1(j);

- (h) **(transfer of Assets)**: at any time, an amount equal to all the Funds provided under this Funding Agreement if the Department terminates this Funding Agreement under clause 24.1(b) for a breach of clause 17;
- (i) **(Operating Parameters)**: if the Department terminates this Funding Agreement pursuant to clause 24.1(c), an amount equal to all the Funds which have been paid to the Recipient by the Department under this Funding Agreement;
- (j) **(Change in Control or transfer)**: an amount equal to all the Funds paid to the Recipient if the Department terminates this Funding Agreement because the Recipient is in breach of clause 24.1(b); and
- (k) **(Abandoned Project)**: an amount equal to all the Funds paid to the Recipient if the Recipient Abandons the Project and does not resume performance within 10 Business Days after the Department gives the Recipient notice requiring it to do so, unless the Recipient provides reasonable evidence (within that timeframe), to the Department's satisfaction (acting reasonably), that there are reasonable technical grounds for abandoning the Project.

25.2 Repayment notice

- (a) The Department may give the Recipient a repayment notice requiring the Recipient to repay to the Department an amount which the Department is entitled to recover under clause 25.1. If the Department gives the Recipient such notice, the Recipient must, within 20 Business Days' of the date of the repayment notice, repay the amount (including interest calculated as set out in clause 25.3) specified in the repayment notice.
- (b) The Department can (in its absolute discretion) elect to require repayment of a lesser amount of the Funds than otherwise required under clause 25.1.
- (c) Where the right to require repayment arises under clause 25.1(e), the Department will act reasonably when exercising its rights, having regard to the impact such repayment would have on the overall viability of the Project.

25.3 Interest on amounts to be repaid

Unless otherwise stated by the Department, the Recipient must pay interest to the Department in connection with any amount notified as owing to the Department under clauses 25.1. The rate of interest will be calculated:

- (a) on the amount to be repaid to the Department as set out in the Department's repayment notice;
- (b) at the Interest Rate plus 3%;
- (c) on a semi-annually compounding basis upon the principal amount specified in the notice as repayable to the Department; and
- (d) from and including the date the amount is payable under clause 25.2(a) up to but excluding the day on which the Recipient repays the total amount specified in the notice as owing to the Department, without any set off, counter-claim, condition, abatement, deduction or withholding.

25.4 Acknowledgement and limitations

- (a) The Recipient acknowledges that the amounts to be paid to the Department under this clause 25 are a genuine pre-estimate of the losses incurred by the Department for the defaults described in this clause 25.

- (b) The Department and the Recipient agree that the amount of any repayments payable to the Department by the Recipient under this clause 25 shall not exceed the amount of the Funds paid to the Recipient.
- (c) This clause 25 does not limit any other right or remedy of the Department.

26 Dispute resolution

- (a) Any party must comply with this clause 26 in relation to any dispute, controversy or claim arising out of, relating to or in connection with this Funding Agreement, including any question regarding its existence, validity or termination (**Dispute**), before starting court proceedings except proceedings for urgent interlocutory relief. After a party has sought or obtained any urgent interlocutory relief, that party must follow this clause 26.
- (b) Any party claiming a Dispute has arisen must give the other parties to the Dispute a notice setting out details of the Dispute (**Notice of Dispute**).
- (c) Within 10 Business Days' after a Notice of Dispute is received (or longer period if the parties to the Dispute agree in writing), each party to the Dispute must use all reasonable endeavours through a meeting of senior officers of each of the Recipient and the Department having the authority to bind their respective parties to resolve the Dispute.
- (d) Any Dispute which remains unresolved 20 Business Days' after the meeting under clause 26(c) (unless such period is extended by agreement of the parties) shall be resolved by arbitration in accordance with the ACICA Arbitration Rules. The seat of arbitration shall be Sydney, Australia. The language of the arbitration shall be English. The number of arbitrators shall be three.
- (e) Each party retains the right to apply to any court of competent jurisdiction (subject to clause 29.14) for provisional, interim and/or conservatory relief, including injunctions, and any such request shall not be deemed incompatible with the obligation to arbitrate under this Funding Agreement or a waiver of the right to arbitrate.
- (f) Notwithstanding clause 26(e), where a Dispute relates solely to:
 - (1) the determination or calculation of a financial amount;
 - (2) whether a Milestone has been achieved for purposes of clause 6.3; or
 - (3) amounts to be determined by an Expert under Schedule 5,
 the Dispute will be referred to an appropriately qualified independent expert (**Expert**) appointed by the Recipient and approved by the Department, in each case acting reasonably. The costs of the expert will be borne by the Recipient.
- (g) If an Expert has not been appointed within 45 days after the meeting under clause 26(c) (unless such period is extended by agreement of the parties), the Dispute may be referred to arbitration under clause 26(d).

27 GST

- (a) In this clause 27:
 - (1) unless otherwise stated, words and expressions which are not defined in this Funding Agreement, but which have a defined meaning in the GST Law have the same meaning as in the GST Law; and
 - (2) a reference to a party or an entity includes the representative member of any GST group of which the relevant party or entity is a member.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided to the Department under this Funding Agreement are exclusive of GST.
- (c) Subject to this clause 27, if a party (**Supplier**) makes a taxable supply to another party (**GST Recipient**) under or in connection with this Funding Agreement in respect of which GST is payable, the GST Recipient must pay the Supplier an additional amount equal to the GST payable on the supply (unless the consideration for the taxable supply was specified to include GST). The additional amount is payable at the same time that any part of the consideration for the supply is first paid or provided, subject to the Supplier providing a tax invoice to the GST Recipient.
- (d) If an adjustment event arises in respect of a taxable supply made by the Supplier under this Funding Agreement, the amount payable by the GST Recipient will be recalculated to reflect the adjustment event and a payment will be made by the GST Recipient to the Supplier or by the Supplier to the GST Recipient as the case requires. The Supplier must provide an adjustment note to the GST Recipient in accordance with the GST Law.
- (e) If the GST payable in relation to a supply is less than the amount the GST Recipient has paid the Supplier under clause 27(c), the Supplier is only obligated to pay a refund of GST to the GST Recipient to the extent the Supplier receives a refund of that GST from the Commissioner.
- (f) If a payment to a party under this Funding 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 is entitled on the acquisition of the supply to which that loss, cost or expense relates.
- (g) This clause 27 will survive the termination of this Funding Agreement by any party.

28 Notices and other communications

- (a) Any notice, approval, consent or other communication must be:
 - (1) in writing, in English and from a person duly authorised by the party; and
 - (2) sent by express post or by email to the recipient's address (as applicable) specified in item 19 of the Project Details (or as updated by notice from time to time).
- (b) Any notice, approval, consent or other communication takes effect when it is taken to be received and is taken to be received:

- (1) if sent by express post, on the Business Day after the date it was mailed if mailed before 5.00pm or otherwise on the second Business Day after it was mailed;
- (2) if sent by email, on the day and at the time it is sent (as recorded on the sender's equipment), unless the sender receives an automated message that the email has not been delivered, or the intended recipient of the notice notifies the sender within 1 Business Day that the email has not been delivered, but if the delivery or transmission is not on a Business Day or is after 5.00pm on a Business Day, the notice is taken to be received at 9.00am on the next Business Day in the receiver's locality.

29 Miscellaneous

29.1 Modern Slavery

- (a) The Recipient acknowledges that it is not aware of any Modern Slavery in its supply chain.
- (b) Should the Recipient become aware of any:
 - (1) Modern Slavery risks in its supply chain or operations, it must notify the Department of those risks and advise the Department of the steps it is taking to eliminate or minimise those risks; or
 - (2) Modern Slavery practices being carried out within its operations or supply chain, it must:
 - (A) in writing, immediately notify the Department of those practices and of the remediation action it proposes to take; and
 - (B) at its cost, take any such additional remediation action required by the Department (acting reasonably and after due consultation with the Department).
- (c) If the Recipient is a 'reporting entity' for the purposes of any State or Commonwealth Modern Slavery legislation, including the *Modern Slavery Act 2018* (Cth), it must comply with such legislation and provide the Department with a copy of any report it is required to prepare under that legislation at the Department's request.

29.2 Contract Management Agent

The Department may appoint from time to time a Contract Management Agent to perform contract management activities on its behalf including (but not limited to):

- (a) providing or withholding any consent required to be obtained from the Department under this Funding Agreement; and
- (b) exercising any decision-making authority or discretion given to the Department under this Funding Agreement,

in which case the Department will notify the Recipient in writing of the appointment. References to a Contract Management Agent in this Funding Agreement will be disregarded unless and until the Department appoints a Contract Management Agent in accordance with this clause 29.2.

29.3 Knowledge Sharing Agent

The Department may appoint from time to time a Knowledge Sharing Agent to perform knowledge sharing activities including (but not limited to):

- (a) collecting, storing, analysing, presenting and reporting on the data generated from the Project;
- (b) providing detailed disaggregated information to the Department; and
- (c) providing identified aggregated analysis suitable for public release,

in which case the Department will notify the Recipient in writing of the appointment. References to a Knowledge Sharing Agent in this Funding Agreement will be disregarded unless and until the Department appoints a Knowledge Sharing Agent in accordance with this clause 29.3.

29.4 Subcontracting

Where the Recipient subcontracts any aspect of the Project, it is fully responsible for:

- (a) undertaking the Project and for the performance of all of its obligations under this Funding Agreement; and
- (b) the Subcontractors' acts and omissions.

29.5 Costs and duty

- (a) Each party must pay its own costs of negotiating, preparing, executing and varying this Funding Agreement.
- (b) The Recipient must pay any taxes and duties payable in respect of this Funding Agreement and the Project.

29.6 Counterparts

This Funding Agreement may be executed in counterparts. All executed counterparts constitute one document.

29.7 Entire agreement

This Funding Agreement constitutes the entire agreement between the parties in connection with its subject matter and supersedes all previous agreements or understandings between the parties in connection with its subject matter.

29.8 Parties must give effect to transaction

Each party must do, at its own cost, everything reasonably necessary (including executing documents) to give full effect to this Funding Agreement and any transaction contemplated by it.

29.9 Severability

A term, or part of a term, of this Funding Agreement that is illegal or unenforceable may be severed from this Funding Agreement and the remaining terms, or parts of the terms, of this Funding Agreement continue in force.

29.10 Exercise of rights and waiver

- (a) Except where this Funding Agreement expressly states otherwise, a party may, in its absolute discretion, give conditionally or unconditionally, or withhold, any acceptance, agreement, approval or consent under this Funding Agreement.
- (b) Waiver of any provision of or right under this Funding Agreement must be in writing and signed by the party entitled to the benefit of that provision or right and is effective only to the extent set out in any written waiver.

29.11 No partnership

This Funding Agreement does not create a relationship of employment, agency or partnership between the parties. The parties must not represent themselves, and must ensure that their officers, employees, agents and Subcontractors do not represent themselves, as being an officer, employee, partner or agent of the other party, or as otherwise able to bind or represent the other party.

29.12 Consequential Loss

Neither party will be liable to the other party for Consequential Loss arising under or in connection with this Funding Agreement.

29.13 Indemnities

- (a) Each indemnity in this Funding Agreement is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion and expiry of this Funding Agreement.
- (b) It is not necessary for a party to incur expense or to make any payment before enforcing a right of indemnity conferred by this Funding Agreement.

29.14 Governing law

This Funding Agreement is governed by the law of New South Wales and each party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts of New South Wales.

29.15 Electronic execution

Subject to applicable Laws, the parties may execute this Funding Agreement and any document entered into under it, electronically (including through an electronic platform). Notwithstanding the manner in which a document under this Funding Agreement is submitted or accepted, the terms of this Funding Agreement will apply and any click-wrap, "pop-up" or other like terms and conditions of the Recipient appearing in the course of such submittal or acceptance will have no force or effect.

Schedule 1

The Project

1 Project

1.1 Project (clause 4(a))

Description of Project

Key aspects of the **XXXX** Project are set out below:

- (a) [insert details here]
- (b) [insert details here]

Name

Location

Estimated hydrogen production capacity (p.a.) and electrolyser capacity (where applicable)

Hydrogen offtake details

1.2 Outcomes (clause 4(a))

The objectives for the Project will be achieved through the following Outcomes:

[Drafting note: Insert Outcomes which the Recipient is required to achieve.]

1.3 Milestones (clause 4(a))

[Drafting note:

- the Recipient will need to satisfy the relevant Milestones, to be set out below, to be eligible to receive the Funds;*
- the below table should only set out a description of the Milestone and the timing for completion of the Milestone. Details regarding payment and quantum of the Milestone payment will be separately set out under item 2.2 further below;*
- satisfaction of Milestones may require the Recipient to have made actual payments.*

The form and substance of the Milestones should be proposed by the Recipient as a part of its Application. Applicants should note that this will be a material part of the Department's assessment of an Application. Note also that where Stages are used they must be clearly identified within the below Milestones table]

The Recipient must achieve the following Milestones, and provide the Milestone deliverables and Milestone Report, in a form and substance satisfactory to the Department, by the date for completion of the relevant Milestone or such other time as agreed between the parties in writing.

No.	Description of Milestone and Milestone deliverables	Milestone Long Stop Date	Milestone Reviewer
1	<p>Description of Milestone: <i>[Insert description of Milestone]</i></p> <p>Milestone deliverables: <i>[Drafting note: Milestone deliverables to be inserted.]</i></p>	DD MM YYYY	[insert name here]
2	<p>Description of Milestone: <i>[Insert description of Milestone]</i></p> <p>Milestone deliverables: <i>[Drafting note: Milestone deliverables to be inserted.]</i></p>	DD MM YYYY	[insert name here]
3	<p>Description of Milestone: <i>[Insert description of Milestone]</i></p> <p>Milestone deliverables: <i>[Drafting note: Milestone deliverables to be inserted.]</i></p>	DD MM YYYY	[insert name here]
4	<p>Description of Milestone: <i>[Insert description of Milestone]</i></p> <p>Milestone deliverables: <i>[Drafting note: Milestone deliverables to be inserted.]</i></p>	DD MM YYYY	[insert name here]

3 Reporting and Plans

3.1 Specific Reports

[Drafting note: Reporting requirements that are not needed will be deleted. Where possible, reporting requirements under this Funding Agreement may be aligned with corresponding requirements the Recipient may have under an agreement with ARENA. The Department may also require additional/alternative reporting requirements]

The Recipient must provide reports to the Department as follows:

Report Type	Date	Requirements
Milestone Report	By the completion date as specified in item 1.3 of this Schedule 1.	<p>Each Milestone Report must include:</p> <ol style="list-style-type: none"> 1. the name of the Recipient and all Subcontractors; 2. a contact name, telephone number and email address; 3. the Project title and number; 4. the Milestone and period to which the report relates; 5. a Project update, including an explanation of whether the Project is proceeding in accordance with the expected timelines and Milestone Dates. If not, the update must include an explanation of the reasons for the delay, the effect the delay will have on the Project and the action the Recipient proposes to take to address this; 6. a Budget update (including cost to completion) (in a format similar to that set out in Attachment [1]), including (without limitation): <ul style="list-style-type: none"> • a report on Eligible Expenditure (excluding GST) incurred to date against the heads of expenditure in the Budget; and • an explanation of whether the Project is proceeding in accordance with the Budget and, if it is not, an explanation of why the Budget is not being met, the effect this will have on the Project and the action the Recipient proposes to take to address this; 7. where payment of Funds will be determined based on payment in arrears and/or funds Legally Committed, reasonable evidence of those costs; 8. a statement of the Funds, Recipient Contributions and Other Contributions provided and spent including an itemised account of any amounts spent in connection

Report Type	Date	Requirements
		<p>with any arrangements with any Related Party of the Recipient, certified by an authorised officer of the Recipient;</p> <ol style="list-style-type: none"> 9. the amount remaining in the account referred to in clause 15.1(r); 10. details of any published reports, promotional material, media publicity, pamphlets or other documentation relevant to the Project; 11. a brief update on the progress of the Project (including achievements and Knowledge Sharing Deliverables) relevant to the Outcomes suitable for public dissemination; and 12. any other information reasonably requested by the Department for the purposes of evaluating the Project against the objectives set out in the Guidelines and/or the Outcomes.
<p>An acquittals statement certified by the Recipient's chief financial officer (or such other person approved by the Department)</p>	<p>The acquittals statement is to be provided by <i>[the Department and completed by the Recipient as part of the Final Report or such other date as may be agreed by the Department]</i></p>	<p>The acquittals statement must certify:</p> <ol style="list-style-type: none"> 1. that all the Funds, Recipient Contributions and Other Contributions were spent for the purpose of the Project in accordance with this Funding Agreement and that the Recipient has complied with this Funding Agreement; and 2. that salaries and allowances paid to persons involved in the Project are in accordance with any applicable award or agreement in force under any relevant law on industrial or workplace relations.
<p>Audited financial statements prepared by an Approved Auditor in accordance with Accounting Standards in respect of the Funds, Recipient Contributions and Other Contributions</p>	<p>Within <i>[insert]</i> after the end of each financial year during the term of this Funding Agreement or otherwise at the Department's request</p>	<p>The audited financial statements must include:</p> <ol style="list-style-type: none"> 1. a definitive statement as to whether the financial information for the Project represents the financial transactions fairly and is based on proper accounts and records; 2. a separate declaration from the Recipient's directors that the Recipient is solvent, a going concern and able to pay its debts as and when they fall due; and 3. detail of any of the Funds returned to the Department by the Recipient and the reasons for such refund.

In this item 3.1, the following terms have the following meaning:

- (a) **Accounting Standards** means the standards of that name maintained by the Australian Accounting Standards Board (referred to in section 227 of the *Australian Securities and Investments Commission Act 2001* (Cth)) or other accounting standards which are generally accepted and consistently applied in Australia;
- (b) An **Approved Auditor** is a person who is:
 - (1) registered as a company auditor under the Corporations Act or an appropriately qualified member of the Institute of Chartered Accountants in Australia, CPA Australia or the Institute of Public Accountants;
 - (2) not a principal, member, shareholder, officer, agent, Subcontractor or employee of the Recipient; and
 - (3) not the Recipient's accountant.

3.2 Specific Plans

[Drafting note: Where a particular plan is not required for the Project then that row can be deleted in the table below. Where no plans are required for the Project this item can be deleted. The Department may also require additional/alternative plans]

Plan, and date for providing plan	Requirements

3.3 Reporting on Knowledge Sharing Deliverables

- (a) Each Milestone Report must include a description of:
 - (1) the Knowledge Sharing Deliverables completed during the period to which the report relates, including a list of any public reports or knowledge sharing reports;
 - (2) the outcomes of those Knowledge Sharing Deliverables;
 - (3) any data or documentation developed from the Project during the period to which the report relates; and

- (4) a 'lessons learnt' knowledge sharing report (using the template provided by the Department) for each Knowledge Sharing Deliverable since the previous report.
- (b) The Final Report must include details of:
 - (1) all of the Knowledge Sharing Deliverables completed as at the date of the Final Report;
 - (2) analysis of the effectiveness of each of the Knowledge Sharing Deliverables completed; and
 - (3) for any on-going Knowledge Sharing Deliverables, an update of progress in undertaking each Knowledge Sharing Deliverable.

Schedule 2

Operating Parameters

Schedule 3

Eligible Expenditure

1 General principles

- (a) Eligible Expenditure is expenditure related directly to the undertaking of the Project in accordance with this Funding Agreement (which may include capital expenses and operational expenses), calculated as the GST inclusive amount less any GST credits the Recipient, or its representative member is entitled to claim.
- (b) Eligible Expenditure will not include:
 - (1) non-cash contributions (in-kind contributions) noted in the Budget submitted with the Application under the program;
 - (2) expenditure prior to the execution of the Funding Agreement or after the completion date for the Project; and
 - (3) any opportunity costs.
- (c) Where resources are used on a Project and on unrelated activities elsewhere in the Recipient organisation, the cost of those resources must be apportioned to the Project, based on the proportion of those resources that were used by the Recipient in undertaking the Project
- (d) Related Party transactions must be treated on an 'at-cost' basis, without mark-up, unless the Recipient can demonstrate to the satisfaction of the Department, that the transaction has been calculated on an arm's-length basis
- (e) Eligible Expenditure must be:
 - (1) proven against generally accepted accounting principles; and
 - (2) possible to track through the Recipient's accounting system, to meet any financial reporting and audit requirements in the Funding Agreement or as notified by the Department from time to time.

2 Eligible Expenditure

Eligible Expenditure includes the following:

- (a) Eligible Contract Expenditure entered into for the purposes of undertaking the activities required for the conduct of the Project as set out more fully in clause 5 below, subject to the Ineligible Expenditure constraints detailed in the following clause 3 below;
- (b) Eligible Labour Expenditure (as defined in clause 4 below), such as salaries and wages, including reasonable on-costs for Personnel employed directly on the Project;

- (c) administrative expenses, including expenses incurred on communications, accommodation, computing facilities, travel, recruitment, printing and stationery, where such expenses are related directly to the Project;
- (d) expenditure for plant installed for the Project at the full delivered cost of the plant GST inclusive, less any GST credits the recipient is entitled to claim;
- (e) expenditure on plant used for the construction of the Project, calculated on the basis of hire or lease costs, and running costs directly related to the construction of the Project, such as rent, power, fuel and repairs and maintenance;
- (f) expenditure on activities that directly contribute to, or enable knowledge sharing, including database development, websites, applications and reports;
- (g) expenditure on legal, audit and accounting costs related directly to the Project;
- (h) expenditure related to the raising of funds for the Project, or the formation of consortia or joint ventures or other partnering arrangements, where such activities can be related directly to the Project; and
- (i) expenditure such as relevant licence fees or Intellectual Property purchase costs, where the recipient needs to access specific technology to undertake the Project.

3 Ineligible expenditure

'Ineligible expenditure' includes, but is not limited to, the following:

- (a) activities that directly relate to NSW Government planning assessment processes, such as: biodiversity studies; heritage studies; noise, air quality and traffic studies; and water, waste and hazardous material studies;
- (b) expenditure related to the general operations and administration of the Recipient entity that the Recipient could reasonably be expected to be undertaken in the normal course of business;
- (c) expenditure on activities that a local, state, territory or Commonwealth government agency has the responsibility to undertake;
- (d) interest on loans for new and pre-existing capital items used for the Project;
- (e) expenditure on the acquisition of land for a Project;
- (f) sales or promotional activities that do not support directly the successful completion of the Project;
- (g) membership fees, donations, or any other expenditure that the Department determines does not support directly the successful completion of the Project; and
- (h) expenditure that does not support directly the successful completion of the Project.

4 Labour

- (a) **'Eligible Labour Expenditure'** means is the gross amount paid or payable to an employee of the Recipient entity, including labour on-costs, which includes:
 - (1) workers' compensation insurance,

- (2) employer contributions to superannuation,
- (3) recreation and sick leave,
- (4) long service leave accrual; and
- (5) payroll tax.

Eligible salary includes any components of the employee's total remuneration package that are itemised on their Pay As You Go annual payment summaries submitted to the Australian Taxation Office.

- (b) Recipients must provide evidence to demonstrate Eligible Labour Expenditure and the amount of time that an employee spent on the Project. Evidence to support Eligible Labour Expenditure could include timesheets, job cards or diaries. Labour costs cannot be claimed based on an estimation of the employee's worth to the company, where no cash has changed hands.

5 Contract expenditure

- (a) Eligible Contract Expenditure is the cost of any activities to support the Project performed for the Recipient by another organisation. Work to be performed on a Project must be the subject of a written contract, including a letter or purchase order, which specifies the nature of the work to be performed for the Recipient and the applicable fees, charges and other costs payable. The written contract must be executed prior to the commencement of the work undertaken under the contract.
- (b) It is not a requirement for contracts to be in place at the time an Applicant submits an Application to the Department. However, for major items of contract expenditure, such as purchases of major items of hardware to be incorporated in the Project, Applicants will be expected to have some form of documentary evidence, such as written quotes from suppliers, to substantiate the expenditure included in the financial estimates.
- (c) Where the contractor and the recipient are not at 'arm's-length', the amount assessed for work performed will be an amount considered to be a reasonable charge for that work and contain no unacceptable overheads and no element of 'in group profit'. Organisations considered not at 'arm's-length' include related companies and companies with common directors or shareholders.

6 Overseas and interjurisdictional expenditure

- (a) Permitted Overseas and Interjurisdictional Expenditure may be incurred by the Recipient in accordance with the terms of this Funding Agreement. Any Overseas and Interjurisdictional Expenditure that is not Permitted Overseas and Interjurisdictional Expenditure must be justified by the Recipient and agreed to in writing by the Department before the expenditure takes place.
- (b) On and from the Commencement Date of this Funding Agreement, any Overseas and Interjurisdictional Expenditure on goods and services overseas (with respect to the Project) may be subject to approval by the Department as specified in the Funding Agreement.

7 Accounting systems

- (a) In addition to any other the obligations specified in this Funding Agreement relating to accounting systems and audits, the Recipient is required to have in place suitable accounting systems to provide to the Department assurances that the accounting system used by the Recipient allows for the separate and accurate identification of contributions and Eligible Expenditure on the Project.
- (b) A clear audit trail of all Funds and Eligible Expenditure must also be available on request and as required to meet the requirements in the Funding Agreement.

Schedule 4

Form of Funds payment request

To: The Department of Planning, Industry and Environment, NSW
Government (ABN 20 770 707 468) (the **Department**)

Attention: *[insert]*

Date: *[insert]*

Funds Payment Request – Department of Planning, Industry and Environment, Hydrogen Hub Initiative – Reference number *[insert]* dated *[insert]* between *[insert name of Recipient]* (**Recipient**) and the Department (**Funding Agreement**)

This is a Funds Payment Request for the purposes of the Funding Agreement.

Terms used but not defined in this Funds Payment Request have the meaning given to them in the Funding Agreement.

1 Submission of invoice

- (a) The Recipient submits the **attached** invoice for payment in accordance with the Funding Agreement.
- (b) The invoice is for the amount of A\$*[insert]* and is for *[identify Milestone to which the invoice relates]*.

2 Other matters

The Recipient warrants to the Department as of the date of this Funds Payment Request:

- (a) all Payment Criteria in respect of this Funds Payment Request have been met;
- (b) the Warranties set out in the Funding Agreement are true and correct in all material respects as at the date of this Funds Payment Request *[other than: *[insert]*]*;
- (c) no breach of the Funding Agreement by the Recipient is continuing or would result from the payment;
- (d) the Recipient has complied with all of its obligations in connection with the Knowledge Sharing Plan; and
- (e) the Recipient is able, and has sufficient funds, to complete the Project by the Project Completion Date in accordance with the Funding Agreement.

Schedule 5

Adjustment of Total Funds

1 Adjustment procedure

1.1 Acknowledgement

The parties acknowledge and agree that:

- (a) the Department determined the Total Funds that could be provided under this Funding Agreement on the basis that the Recipient would be required to expend the Total Estimated Costs as set out in the Initial Budget to deliver the Project;
- (b) if the Final Costs for each Milestone are less than the Estimated Milestone Costs, the Total Funds may be adjusted such that the Department receives a refund of a portion of the Funds provided to the Recipient in accordance with this Schedule 5; and
- (c) if the Final Costs for each Milestone are greater than the Estimated Milestone Costs, the Total Funds will not be increased.

1.2 Recipient calculation of adjustment to Total Funds

- (a) Following each Financial Close, the Recipient must calculate in good faith:
 - (1) the Final Costs for that Milestone;
 - (2) any difference between the Final Costs for that Milestone and the Estimated Milestone Costs (**Cost Savings**);
 - (3) if the Final Costs for that Milestone are less than the Estimated Milestone Costs, the amount equal to Grant Funding Percentage of the Cost Savings (**Draft Adjustment Amount**);
 - (4) the Total Funds less the Draft Adjustment Amount (**Adjusted Total Funds**); and
 - (5) the aggregate amount of all Funds distributed to the Recipient under this Funding Agreement as at Financial Close (**Distributed Funds**).
- (b) If the Final Costs for that Milestone are greater than the Estimated Milestone Costs, the Draft Adjustment Amount will be deemed to be zero.
- (c) The Recipient must notify the Department in writing of all amounts described in clause 1.2(a) of this Schedule 4 (**Draft Calculations**) along with reasonable supporting detail outlining the basis for those calculations (including an itemised breakdown of any variances between Final Costs and Estimated Costs) within 20 Business Days' of each Financial Close.
- (d) No later than 30 Business Days' after the Recipient notifies the Department of the Draft Calculations, the Department must provide notice to the Recipient confirming whether the Department accepts or rejects the Draft Calculations.

- (e) If within the required period for notification under clause 1.2(d) of this Schedule 5:
 - (1) the Department notifies the Recipient that it accepts the Draft Calculations, or the Department fails to give a notification under clause 1.2(d) of this Schedule 5, then the Total Funds will be deemed to be the Adjusted Total Funds with effect on and from Financial Close; or
 - (2) if the Department notifies the Recipient that it rejects the Draft Calculations then clause 1.3 of this Schedule 5 will apply.

1.3 Review of Draft Calculations

- (a) If the Department provides notice to the Recipient under clause 1.2(e)(2) of this Schedule 5 (**Adjustment Dispute Notice**) then the parties must appoint an Expert under clause 26(f) of this Funding Agreement as soon as practicable. If the parties have not appointed an Expert within 20 Business Days' after the date of the Adjustment Dispute Notice, either party may submit the matter to Dispute resolution under clause 26 of this Funding Agreement.
- (b) The Recipient must provide to the Expert (with a copy to the Department):
 - (1) a copy of the Initial Budget which clearly identifies the Total Estimated Costs and the Estimated Milestone Costs as at the Commencement Date;
 - (2) all evidence reasonably required by the Expert of all Final Costs incurred by the Recipient; and
 - (3) details of the Recipient's process and calculations in determining the Draft Calculations.
- (c) Within 20 Business Days' of receipt of the information under clause 1.3(b) of this Schedule 5, the Expert must:
 - (1) undertake a process review of the Draft Calculations;
 - (2) provide confirmation by way of notice to the Department and the Recipient that based on its review it either:
 - (A) agrees that the Recipient's process and the Draft Calculations comply with clause 1.2(a) of this Schedule 5; or
 - (B) does not agree that the Recipient's process and the Draft Calculations comply with clause 1.2(a) of this Schedule 5.
- (d) If the Expert gives a notice under clause 1.3(c)(2)(A) of this Schedule 5 then the Total Funds will be deemed to be the Adjusted Total Funds with effect on and from Financial Close.
- (e) If the Expert gives a notice under clause 1.3(c)(2)(B) of this Schedule 5 then the Recipient must re-perform its obligations under clauses 1.2(a) and 1.3(a) of this Schedule 5 within 10 Business Days' and the Expert must repeat the steps under clause 1.3(c) of this Schedule 5 until the Expert gives a notice under clause 1.3(c)(2)(A) of this Schedule 5.
- (f) The parties agree that the calculations and determinations made by the Expert under clause 1.2 of this Schedule 5 will not be subject to the Dispute resolution procedures under this Funding Agreement and that the determination of the Expert will be final and binding on the parties.

1.4 Reduction or refund

- (a) If the Total Funds are adjusted under clause 1.3(d) of this Schedule 5 and the amount of the Adjusted Total Funds is greater than the amount of Distributed Funds, the Department will continue to make Milestone Payments under the Funding Agreement as scheduled, up to the amount of the Adjusted Total Funds (or such greater amount as the Department may determine in its absolute discretion).
- (b) If the Total Funds are adjusted under clause 1.3(d) of this Schedule 5 and the amount of the Distributed Funds is greater than the Adjusted Total Funds, the Department may, in its absolute discretion, require the Recipient to refund the difference between the Distributed Fund and the Adjusted Total Funds to the Department pursuant to clause 25.1(e) of this Funding Agreement (up to the total amount of Funds actually distributed to the Recipient by the Department) (**Refund Amount**).

2 Definitions

The meanings of the terms used in this Schedule 4 are set out below.

Term	Meaning
Total Estimated Costs	means the total amount of Eligible Expenditure estimated for the Project as set out in the Initial Budget.
Estimated Milestone Costs	means the total amount of Eligible Expenditure estimated for the Project at each Financial Close (including for the final Milestone) as set out in the Initial Budget.
Final Costs	means the total amount of Eligible Expenditure for the Project as set out in the Financial Close Budget.
Financial Close	means the dates on which each Milestone is achieved. For the avoidance of doubt, Financial Close applies to the final Milestone.
Financial Close Budget	means the updated Budget for the Project as at each Financial Close.
Grant Funding Percentage	means the Total Estimated Costs as a percentage of the Total Funds as established in the Initial Budget.
Initial Budget	means the Budget for the Project as at the Commencement Date.

Schedule 6

1 Knowledge Sharing Plan

2 Knowledge Sharing Deliverables

Schedule 7

1 Guidelines

Signing page

Executed as an agreement [*Drafting note: to be updated prior to execution*]

Signed for **The Crown in Right of the State of New South Wales, acting through the Department of Planning, Industry and Environment**

by its authorised representative

in the presence of

sign here ► _____
Representative

sign here ► _____
Witness

print name _____

print name _____

Signed by
[insert Recipient full name]
by

sign here ► _____
Company Secretary/Director

sign here ► _____
Director

print name _____

print name _____

Attachment 1

Budget

Attachment 2

Variations record

The parties refer to the funding agreement between the Crown in Right of the State of New South Wales, acting through the Department of Planning and Environment, and [insert Recipient name] dated [●] (**Funding Agreement**).

Unless stated or the context requires otherwise, a capitalised term used in this document has the meaning given to it in the Funding Agreement, and a reference to a provision in this document is a reference to a provision in the Funding Agreement.

Per clause 10.1, the parties agree that the Funding Agreement is varied in accordance with the table set out below, on and from the date that both parties have executed this document (unless agreed otherwise).

Variation No.	Date of variation	Reason for variation	Variation
4	[insert]	[insert]	[Drafting note: Insert clear description of variation. For example: 'The date for completion of Milestone 1 in item 1.3 of Schedule 1 is varied to ...']
5			
6			
7			
8			
9			
10			

Executed as an agreement

[Drafting note: NOT for executing at the time that the parties execute the Funding Agreement. The below execution blocks are to be used in the event that the parties execute a variation in accordance with this Attachment]

**Signed for The Crown in Right of
the State of New South Wales,
acting through the Department
of Planning and Environment**
by its authorised representative

in the presence of

sign here ► _____
Representative

sign here ► _____
Witness

print name _____

print name _____

Signed by
[insert Recipient full name]
by

sign here ► _____
Company Secretary/Director

sign here ► _____
Director

print name _____

print name _____