

Funding Deed

Department NSW Department of Climate Change, Energy, the
Environment and Water

Agency/ Division Office of Energy and Climate Change/ Energy Division

Recipient [Organisation Name], [Site name]

Contract Number [Application ID]

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Template

Details

Table 1: Details

Department	Name	The Crown in right of the State of New South Wales acting through the NSW Department of Climate Change, Energy, the Environment and Water (ABN 55 437 667 728).
	Agency/ Division	Office of Energy and Climate Change/ Energy Division
	Address	4 Parramatta Square, 12 Darcy Street, Parramatta NSW 2150
Department Authorised Officer <i>(refer to clause 10.2 - Notices)</i>	Name	Click here to enter text.
	Position	Click here to enter text.
	Address	4 Parramatta Square, 12 Darcy Street, Parramatta NSW 2150
	Telephone	Click here to enter text.
	E-mail	Click here to enter text.
Recipient ('You')	Name	[Organisation name]
	Address	[Street address], [Suburb], [State] [Postcode]
	ABN	[ABN]
Your Authorised Officer <i>(refer to clause 10.2 - Notices)</i>	Name	[Name]
	Position	[Position title]
	Address	[Street address], [Suburb], [State] [Postcode]
	Telephone	[Telephone number]
	E-mail	[Email address]
Funds	Metering Plan Implementation Funds	A maximum total amount of [\$100,000] (GST exclusive) payable in Instalments.
Project		[insert name of the Project]
Commencement Date <i>(refer to clause 2 - Term)</i>		The date the contract is signed by both parties.
End Date <i>(refer to clause 2 - Term)</i>		[insert: 6 months from contract commencement date]

Additional Insurance Policies

Table 2: Additional Insurance Policies

Types of Insurances	Minimum Sum Insured	Tick if Required
Nil		<input type="checkbox"/>

Special Conditions

1.1 Covid-19

- (1) Both parties acknowledge the uncertainty arising from the current pandemic COVID-19, the measures taken by State and Commonwealth Governments in relation to the emergency, and the consequential effects on daily activities ("C-19 Emergency").
- (2) If either party becomes aware that it is, will be or has been materially affected in its ability to comply with any of its obligations on time under this Deed because of the C-19 Emergency, it must, as soon as possible, give the other party a written Notice which sets out:
 - (a) the nature and extent of the obligations affected by the C-19 Emergency;
 - (b) the ways in which the C-19 Emergency will affect its ability to perform those obligations; and
 - (c) a proposal that the parties either vary the Deed to mitigate the effects of the C-19 Emergency (for example, to change time frames and/or the scope of Services) or terminate by Deed.
- (3) When a party receives a Notice under **clause 1.1(2)**, it must respond to the Notice as soon as practicable, and the parties will attempt in good faith to reach Deed promptly to vary or terminate the Deed.
- (4) Despite any other provisions in this Deed, if the Department considers that, as a result of the C-19 Emergency:
 - (a) there is likely to be significant delay before you will be able to complete your obligations;
 - (b) the Department will no longer require the goods and/or services; or
 - (c) the Project is no longer viable;the Department may terminate the Deed by Notice, with effect on the date stated in the Notice.
- (5) You release the Department from any claims in respect of termination under this clause.

Terms

1 Definitions and Interpretation

1.1 Interpretation

Unless the context requires otherwise, in this Deed:

- (a) the terms set out in the left-hand column of the Details have the meaning ascribed to them in the right-hand column of the Details;
- (b) where any time limit pursuant to this Deed falls on a day which is not a Business Day then the time limit will be deemed to have expired on the next Business Day;
- (c) a reference to a statute, regulation, ordinance or by-law will be deemed to include a reference to all statutes, regulations, ordinances or by-laws amending, consolidating or replacing same from time to time;
- (d) the meaning of general words is not limited by specific examples introduced by “including” or “for example” or similar expressions;
- (e) references to persons include bodies corporate, government agencies and vice versa;
- (f) references to the parties include references to respective directors, officers, employees and agents of the parties;
- (g) nothing in this Deed is to be interpreted against a party solely on the ground that the party put forward this Deed or any part of it; and
- (h) where an expression is defined, any other grammatical form of that expression has a corresponding meaning.

1.2 Definitions

Activity means the activity (or activities) described in **Schedule A – Project Plan**, which aims to fulfil one or more of the Objectives of the Project.

Activity Period means the period specified in **Schedule A – Project Plan** within which the Activity must be completed.

Additional Funds has the meaning given to it in **clause 4.3(b)**.

Business Day means any day other than a Saturday, Sunday or public holiday in New South Wales.

Claim means any cost, expense, loss, damage, claim, action, proceeding or other liability (whether in contract, tort or otherwise), however arising and includes legal costs on a full indemnity basis.

Confidential Information of a party means all trade secrets, financial information and other commercially or scientifically valuable information of whatever description and in whatever form (whether written or oral, visible or invisible) which:

- (a) is by its nature confidential (or which a party knows or ought to know (acting reasonably) is confidential);
- (b) has been designated as confidential by a party;
- (c) is capable of protection at common law or equity as confidential information; or
- (d) is derived or produced partly from the information in paragraphs (a), (b) or (c) above,

but does not include information that:

- (e) is in the public domain; or
- (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.

Correctly Rendered Invoice means an invoice rendered:

- (a) in accordance with the Department's requirements for invoices:
 - (i) found at <https://www.dpie.nsw.gov.au/contact/information-for-suppliers> (as amended from time to time); or
 - (ii) as otherwise notified by the Department to you; and
- (b) which satisfies the requirements for tax invoices under GST Law.

Debt Financier means:

- (a) a financial institution providing debt finance to you for the purpose of funding the Project; or
- (b) any security trustee or agent of any such financial institution.

Deed means this funding deed document and includes the Details, Terms, **Schedule A – Project Plan** and any other schedules, annexures or other documents cross-referenced in this deed.

End Date means the End Date specified in Table 1: Details.

Fund Amount means the amount payable for each Activity as specified in **Schedule A – Project Plan**.

Funding Cost Ratio Amount means the amount that is 50% of the Project Costs for each Activity completed (GST exclusive).

Funds means the funds as set out in the Details.

GST Law means *A New Tax System (Goods and Services Tax) Act 1999*.

Instalments means:

- (a) that part of the Funds which the Department pays to you for the completion of each Activity on the dates set out in **Schedule A – Project Plan**; and
- (b) for each Activity, is the lesser of:
 - (i) \$100,000 (GST exclusive);
 - (ii) the Funding Cost Ratio Amount; or
 - (iii) the Fund Amount specified in **Schedule A – Project Plan**.

Intellectual Property or IP includes:

- (a) all rights in relation to copyright, inventions, plant varieties, trademarks, designs, patents; and
- (b) all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields including trade secrets and know-how,

but does not include Moral Rights.

Legally Committed means a present or accrued obligation on you under contract or at law to pay money to a third party. This includes any future obligation to make a payment to a third party which:

- (a) is subject to any outstanding condition to payment or other contingency that has not been satisfied at the relevant time; and
- (b) you have the right to cancel, suspend or terminate under the contract or at law.

Modern Slavery has the meaning given in:

- (a) section 4 of the *Modern Slavery Act 2018* (Cth);
- (b) to the extent not covered in (a) above, as given in the *Modern Slavery Act 2018* (NSW); and
- (c) includes any form of slavery, servitude, debt bondage, deceptive recruitment practices, or forced labour to exploit children or other persons.

Modern Slavery Laws means any Australian law governing or otherwise dealing with Modern Slavery.

Moral Rights has the same meaning as in the *Copyright Act 1968* (Cth).

Notice means any approvals, consents, instructions, orders, directions, statements, requests and certificates, or other communication one party gives to another party in writing under this Deed.

Notifiable Incident means any act, event or circumstance which occurs in connection with the Project which is required by the WHS Law to be notified to a regulator, or results in, or as the potential to result in, serious injury to a person or serious damage to property.

Objectives means the objectives of the Activities described in **Schedule A – Project Plan**.

Personal Information has the same meaning as in the *Privacy and Personal Information Protection Act 1998* (NSW).

Progress Reports has the meaning given to it by clause 5.1(a).

Project Costs means the expenditure amount (exclusive of GST but less related input tax credits you are entitled to claim in relation to that expenditure) incurred by you by completing an Activity under this Project as evidenced by:

- (a) all invoices from contractors or suppliers; and
- (b) any other information requested by the Department.

Project Material means material created as part of or in performance of the Project including any documents or data.

Representatives of a party includes an employee, agent, officer, director, auditor, advisor, partner, consultant, joint venturer, contractor or sub-contractor of that party.

Schedule(s) means **Schedule A – Project Plan**.

2 Term

- (a) This Deed will commence on the Commencement Date.

- (b) Unless terminated earlier, this Deed will expire on the later of the:
 - (i) End Date; or
 - (ii) date on which you have:
 - (A) complied with all your obligations under this Deed; and
 - (B) completed the Project to the Department's satisfaction.

3 What you must do

3.1 Your obligations

You must:

- (a) ensure the Funds is used only for the Project;
- (b) not use any of the Funds towards an amount or equipment purchased, installed or otherwise Legally Committed to prior to the Commencement Date;
- (c) ensure each Activity is completed within the Activity Period;
- (d) at request of the Department, at your own cost, promptly give the Department and its Representatives safe access, or ensure the Department and its Representatives have safe access to the property where the Activities have been undertaken and take all reasonable steps to facilitate and enable the Department to perform an on-site inspection of equipment installed as part of the Activities. For the avoidance of doubt, this on-site inspection does not include an audit of your compliance with clause 7.1;
- (e) ensure the Project is completed by the End Date;
- (f) comply with the reporting requirements set out in this Deed;
- (g) comply with all Commonwealth, State and Local government laws that are relevant to the Project, this Deed, or your registration as an entity;
- (h) carry out your obligations under this Deed with a high degree of professional care and skill including in accordance with any performance standards specified in the Schedules; and
- (i) comply with all policies, guidelines and reasonable directions the Department provides to you.

3.2 Your representatives

You must ensure that all of your Representatives involved in the Project:

- (a) are suitably qualified, experienced and competent;
- (b) hold all licences, consents, permits or registrations required under any State, Territory or Commonwealth legislation for them to carry out their role in relation to the Project;
- (c) are fit and proper people to undertake the Project; and
- (d) comply with the obligations of this Deed.

4 About the Funds

4.1 Paying the Funds

- (a) The Funds is the maximum amount to be paid by the Department for or in connection with the Project. You agree that you:
- (i) have prepared or reviewed the scope of works and costs estimate for the Project before signing this Deed;
 - (ii) are responsible for any costs that exceed the Funds for the Project (whether you expected to incur such costs or not at any time before or after signing this Deed);
 - (iii) must obtain any additional funding necessary to carry out the Project at your own cost and risk (and at all times in accordance with **clause 4.3**);
 - (iv) must ensure that you have sufficient funds in addition to the Funds to complete the Project in accordance with this Deed; and
 - (v) are responsible for all costs associated with and arising from the Project.
- (b) The Department will pay an Instalment for each Activity in accordance with **Schedule A – Project Plan** on condition that:
- (i) the Department receives a Correctly Rendered Invoice from you following completion of the relevant Activity, which clearly identifies the Instalment you are claiming;
 - (ii) you have provided the Department with evidence (in form and substance acceptable to the Department) of:
 - (A) the Project Costs for that Activity up to the date of completion of that Activity; and
 - (B) compliance with **clause 5** and the Schedule(s) up to the date of the relevant Activity;
 - (iii) you have provided the Department with any other information reasonably requested by the Department;
 - (iv) the applicable Activity has been performed to the satisfaction of the Department within the Activity Period;
 - (v) the total amount requested under the Correctly Rendered Invoice, together with all other Instalments previously provided to you under this Deed, does not exceed the total amount of the Funds; and
 - (vi) the Department is not aware of any breach by you of this Deed at the time of payment.
- (c) The Department will pay an Instalment within 30 days of all conditions being satisfied under **clause 4.1(b)**.
- (d) Despite **clauses 4.2(a)** and **4.14.2(b)**:
- (i) no payment by the Department under this Deed:
 - (A) constitutes a waiver of any rights of the Department under this Deed;

- (B) constitutes an admission that the performance of the Project is in conformity with this Deed; or
- (C) will be deemed to release you from your obligations under this Deed; and
- (ii) without limitation to **clause 4.1(d)(i)** the Department may, in its absolute discretion, pay you an Instalment even where you have failed to comply with any of the requirements in **clause 4.2(a)**.

4.2 Withholding, Suspension, Changes to Instalments and Repayment

- (a) The Department may change the amount of the Instalment by issuing you with a Notice setting out the details of the changes.
- (b) If you are not complying with this Deed, the Department may withhold or suspend payment of an Instalment until you comply with your obligations to the Department's satisfaction.
- (c) If the Department withholds or suspends an Instalment, you must continue to perform your obligations under this Deed.
- (d) You must repay within 28 days of a demand being sent any:
 - (i) Instalment or part thereof spent in breach of this Deed;
 - (ii) money that is unspent from the Instalments;
 - (iii) overpayment; and
 - (iv) interest earned on any Instalment required to be repaid.
- (e) The Department may set off the amount of any overpayment or claim for repayment against any future Instalment due.
- (f) Any repayment the Department claims from you under this **clause 4.2** will be a debt due and owing by you to the Department.

4.3 Additional Funding

- (a) You acknowledge and agree that:
 - (i) prior to the execution of this Deed, you have not received funding from another NSW Government entity, agency or statutory body to undertake the Project; and
 - (ii) throughout the term of this Deed, you must not receive funding from another NSW Government entity, agency or statutory body to undertake the Project unless in accordance with the terms of this clause.
- (b) You must provide prior written Notice to the Department before receiving additional funding for this Project from another source, including without limitation a government or non-government organisation, but not a Debt Financier (**Additional Funds**).
- (c) The prior written Notice for the Additional Funds must include details about the funding source and the amount of the Additional Funds. You must promptly respond to any questions or request for further information from the Department following the Notice for Additional Funds.
- (d) Any such Additional Funds, combined with the Funds, must not exceed the Project Cost.

- (e) If, despite **clause 4.3(d)**, the Additional Funds combined with the Funds does exceed the Project Cost, then without limitation to any other remedies the Department may have in under this Deed or at law, the Department may, in its absolute discretion:
 - (i) require you, by issuing a written Notice, to repay some or all of the Funds already paid by the Department to you in accordance with the following formula:

Project Cost – Additional Funds = Repayment Amount

 Where the Repayment Amount is the amount required to be repaid to the Department and cannot be less than zero; or
 - (ii) withhold some or all of the Funds; or
 - (iii) terminate this Deed immediately for breach in accordance with **clause 9**.
- (f) You acknowledge that any amounts to be paid to the Department under **clause 4.3(e)(i)**:
 - (i) is a genuine pre-estimate of the losses incurred by the Department for the default described in this **clause 4.3**;
 - (ii) is a debt due and owing by you to the Department; and
 - (iii) must be paid to the Department within 10 Business Days following receipt of a written Notice by the Department under this **clause 4.3**.
- (g) The parties agree that the amount of any repayments payable under **clause 4.3(e)(i)** must not exceed the amount of the Funds paid to you at the relevant point in time by the Department.

4.4 Holding of Funds

Each Instalment must, from the date it is received, be held either:

- (a) in a separate bank account used solely in connection with the Fund; or
- (b) in a general bank account provided that sufficient accounting controls are in place to track the expenditure of the Funds in accordance with all applicable Australian accounting standards.

4.5 GST

- (a) Unless otherwise indicated, all consideration for any supply under this Deed is exclusive of any GST imposed in relation to the supply.
- (b) If:
 - (i) despite any other provision of this Deed, GST is imposed on a supply you make to the Department under this Deed; and
 - (ii) the Department is or will be entitled to receive an input tax credit (as defined in the GST Law) in relation to that supply,

the Department will pay you an additional amount equal to the GST imposed on that supply, at the time and in the manner payment is otherwise payable under this Deed in relation to that supply.
- (c) If you are not registered under the GST Law you will not be entitled to receive any additional amount as provided under this **clause 4.5**.

- (d) If for any reason the Department pays you an amount under this **clause 4.5** which is more than the GST imposed on the supply, you must repay the excess to the Department on demand or the Department may set off the excess against any other amounts due to you.

5 Material and Information

5.1 Reporting Requirements

- (a) You agree to provide the Department with written progress reports as set out under **Schedule A – Project Plan (Progress Report)**. The Progress Report must contain the information as set out in the Schedules or required reasonably by the Department.
- (b) Within 10 Business Days' of receipt of a written request from the Department, you must provide any other information the Department reasonably requires from time to time concerning the Project.
- (c) If any of the Progress Report or any other information provided to the Department contains information confidential to you, you should mark the relevant parts accordingly.
- (d) The Department may, within 30 Business Days' of receiving a Progress Report provide you with any further instructions the Department requires you to take to complete in association with the relevant Activity or Activities to the Department's satisfaction. Any such instruction given under this clause in no way:
 - (i) constitutes a waiver of any rights of the Department under this Deed;
 - (ii) constitutes an admission that the performance of the Project is in conformity with this Deed; or
 - (iii) will be deemed to release you from your obligations under this Deed.
- (e) You must provide evidence of income and expenditure in respect of the Funds to the Department within 60 Business Days after:
 - (i) completion of the Activity or any termination of this Deed, whichever is the earliest; and
 - (ii) the completion of each Financial Year in which a Fund is made.
- (f) All financial accounts and records must comply with Australian accounting standards and be based on proper accounts and records.
- (g) You must keep financial accounts and records relating to the Project so as to enable:
 - (i) all receipts and payments related to the Project to be identified in your accounts and reported in accordance with this Deed;
 - (ii) a certified, accurate and complete financial statement of income and expenditure to be provided to the Department on request; and
 - (iii) unless notified by the Department, the preparation of financial statements in accordance with Australian accounting standards.

5.2 Intellectual Property

- (a) Intellectual Property in all Project Material vests in you, unless otherwise stated in the Special Conditions.

- (b) You grant the Department a perpetual, irrevocable, transferable, sub-licensable and royalty free licence to use the IP in the Project Material and Progress Report for any purpose.
- (c) You warrant that, in carrying out any of the Activities, undertaking the Project and in granting the licence in clause 5.2(b), you have not and will not infringe the Intellectual Property or Moral Rights of any person.

5.3 Confidential Information

- (a) Subject to **clause 5.3(b)**, each party must maintain the confidentiality of all Confidential Information it receives from the other party, except in accordance with **clause 5.5** and **clause 5.6**, as required by law or as otherwise agreed in writing.
- (b) You agree that the Department may disclose your Confidential Information to:
 - (i) the relevant executive government of that government agency's jurisdiction for the purpose of that government's functions or duties;
 - (ii) the NSW Parliament or a NSW Parliamentary Committee; or
 - (iii) to NSW ministers and any employees of the office of the relevant NSW minister.

5.4 Privacy

You will:

- (a) ensure that Personal Information that is provided by the Department or collected by you under or in connection with this Deed is used only for the purposes of this Deed and is protected against loss, unauthorised access, use, modification and disclosure, or against other misuse;
- (b) not disclose any Personal Information without the written consent of:
 - (i) the individual to whom the Personal Information relates; or
 - (ii) the Department,unless otherwise required or authorised by law;
- (c) comply with the Information Protection Principles applying to NSW public sector agencies under the *Privacy and Personal Information Protection Act 1998* (NSW) when doing any act or engaging in any practice in relation to Personal Information as if you were an agency directly subject to that Act; and
- (d) include equivalent requirements regarding Personal Information (including this **clause 5.4**) in any subcontract entered into for the provision of any of the Activities under this Deed.

5.5 Public Announcements and Acknowledgement

- (a) You must consult with and seek the Department's written consent (in the Department's absolute discretion) prior to any public announcement, media releases or statements, or the release of any promotional-related materials about any of the Activities or the Project.
- (b) You must acknowledge the support of the Department, and the NSW Climate Change Fund, as directed by the Department from time to time:
 - (i) in any public statements about the Project;

- (ii) on the home page of any website established in connection with the Project;
- (iii) on any equipment or other facility funded wholly or in part by the Department.
- (c) You must acknowledge the Department's support of the Project and comply with all applicable NSW Government Guidelines, including without limitation the NSW funding acknowledgement guidelines, available as at the Commencement Date at <https://www.nsw.gov.au/branding/sponsorship-and-funding-acknowledgment-guidelines> (which may be updated or replaced from time to time).
- (d) The Department may publish Recipient Name and Address, the title and brief description, including aims, of the Project and the amount of the Funds.

5.6 Disclosure of Information

- (a) You consent to the Department disclosing or otherwise using:
 - (i) your de-identified application data;
 - (ii) information contained in the Progress Report;
 - (iii) information presented by you in any evaluation, including under **clauses 5.6(d) and 5.6(e)**; and
 - (iv) any other de-identified project data,
 arising out of or in connection with this Deed for any purposes, including without limitation in training, evaluation and other portfolio purposes.
- (b) You acknowledge that, under the *Government Information (Public Access) Act 2009* (NSW), the Department may be required to publicly disclose information about this Deed at <https://tenders.nsw.gov.au> (or any replacement or equivalent website as updated, modified or amended from time to time). None of the disclosure obligations require the disclosure of:
 - (i) the commercial-in-confidence provisions of a contract;
 - (ii) any matter that could reasonably be expected to affect public safety or security; or
 - (iii) information which would be exempt from disclosure if it were the subject of an application under the *Government Information (Public Access) Act 2009*.
- (c) You may nominate any items you consider are confidential and why, to assist the Department in determining what items to disclose.
- (d) You agree to comply with, contribute to and participate in, the periodic evaluation (by way of interview or otherwise) of this Project on request by the Department.
- (e) You agree, on request of the Department, to coordinate with the Department in connection with any request received by the Department for the release of information under the *Government Information (Public Access) Act 2009* (NSW).

6 Dealing with Risk

6.1 Insurance

- (a) You must maintain, at your own cost:

- (i) a broadform public liability policy of insurance to the value of at least \$10 million in respect of each claim and in the aggregate as to the number of occurrences in the policy period;
 - (ii) workers' compensation insurance as required by all relevant laws of Australia relating to workers compensation; and
 - (iii) the Additional Insurance Policies listed in the Details for the minimum sum provided.
- (b) If specified as being required in the Details, a professional indemnity insurance policy must be maintained for a period of 7 years from the end of this Deed.
 - (c) You must not do, permit or suffer any act, matter or thing or omission whereby any of the policies referred to in this clause lapse or may be vitiated, rendered void or voidable.
 - (d) On request by the Department, you must provide a copy of valid and current certificates of currency for each or any of the policies described above.
 - (e) Without limitation to **clause 6.1(a)** each party warrants that it has and will maintain appropriate insurance to cover any liability it may incur in relation to this Deed.

6.2 Indemnities

- (a) You must indemnify and keep indemnified the Department, the Crown in right of the State of New South Wales and their officers, employees and agents from and against any loss (including legal costs and expenses on a solicitor/own client basis) or liability incurred or suffered by any of those indemnified arising directly or indirectly from any Claim by any person as a result of or in connection with:
 - (i) the Project or the use of any outcomes from the Project;
 - (ii) your breach of this Deed;
 - (iii) any unlawful or negligent act or omission by you, your employees or your subcontractors in connection with this Deed;
 - (iv) any illness, injury or death of any person you, your employees or your subcontractors cause or contribute to, in connection with this Deed;
 - (v) any loss or damage to real or personal property that you, your employees or your subcontractors cause or contribute to, in connection with this Deed; or
 - (vi) any act or omission by you, your employees or your subcontractors in connection with this Deed that is in infringement of any Intellectual Property or privacy rights of the Department or any third party.
- (b) Your liability to indemnify the Department under this clause will be reduced proportionately to the extent that any negligent or unlawful act or omission by the Department, its officers, employees or agents contributed to the relevant loss or liability.
- (c) Your liability to indemnify the Department under this clause does not exclude or reduce the liability of, or benefit to, a party that may arise by operation of the common law, statute or the other terms of this Deed.

7 Work, health and safety

7.1 Compliance with WHS Law

You must:

- (a) carry out the Project strictly in compliance with WHS Law;
- (b) in carrying out the Project, ensure the safety of all Representatives and other persons affected by any works carried out or procured by you in relation to the Project, so far as reasonably practicable;
- (c) implement, maintain and regularly review safety, management, supervisory and other systems to:
 - (i) identify health and safety risks and hazards at the site where the Project will be carried out;
 - (ii) assess health and safety risks and hazards at the site where the Project will be carried out;
 - (iii) eliminate health and safety risks and hazards at the site where the Project will be carried out so far as is reasonably practicable; and
 - (iv) if it is not reasonably practicable to eliminate health and safety risks and hazards, minimise health and safety risks so far as is reasonably practicable;
- (d) ensure that all plant and equipment used by you or your Representatives is adequate and safe for the task for which it is used, adequately guarded, adequately protected, approved, regularly serviced and maintained, and free from defect;
- (e) ensure that you do not do anything, allow to be done or fail to do anything that would cause the Department to be in breach of WHS Law;
- (f) consult with manufacturers, suppliers and relevant stakeholders to ensure that the proposed installation of new plant and equipment as part of the Project will meet all relevant laws and industry standards;
- (g) ensure, so far as is reasonably practicable, any activity or other work performed in connection with this Deed is without risk to the health and safety of persons who may in any way be affected by such activity or work; and
- (h) ensure that the Representatives employed or engaged in relation to the Project comply with your obligations under this **clause 7.1** (as relevant).

7.2 Department's Limited Control

The Department and you acknowledge and agree that:

- (a) the Department does not have any specialist expertise in coordinating, managing or undertaking the Project;
- (b) you are fully responsible for and bear all risks arising out of or in connection with the assets purchased using the Funds; and
- (c) you do not, and will not, rely on any representation made by the Department, either by act of omission, as to the adequacy of your compliance with WHS Law.

7.3 Notifiable Incidents

- (a) If a Notifiable Incident occurs, you must:
 - (i) immediately report the matter to the Department, including all relevant details that are known to you; and
 - (ii) co-operate with the Department as required in relation to any Notifiable Incident, including by providing to the Department any information reasonably requested by the Department in relation to the Notifiable Incident.
- (b) Your obligation under this **clause 7** is in addition to any reporting obligations that you have under WHS Law.

7.4 Warranties as to timing and competence

- (a) You warrant that, to the best of your knowledge, there are no planning, construction, zoning or other impediments that exist which may impede its delivery of the Project on time.
- (b) You warrant that you have the necessary expertise (or can subcontract experienced and qualified personnel) to deliver the Project on time.

7.5 Subcontractors

You remain fully responsible for the performance of the Project if you subcontract the performance of any part of the Project.

8 Variations to the Deed

8.1 Variations

- (a) If you wish to vary the Project, including any Activity or other matter set out in the Schedules, such as (without limitation) changes to the:
 - (i) nature of the Project; or
 - (ii) timeframe for delivery of the Project, including extensions to the completion of Activities,you must first make a written request to the Department and provide such information as is reasonably required by the Department.
- (b) Following your request for a variation, the Department will consider whether to approve your request in its sole and absolute discretion. No variation is approved unless and until the Department approves the variation in writing.

9 Terminating the Deed

9.1 Termination

- (a) Where a party has breached this Deed:
 - (i) the other party may give a Notice to that party requiring it to rectify that breach within 10 days of receiving that Notice; and
 - (ii) if the party which received the Notice fails to rectify that breach in time, the other party may terminate this Deed immediately by giving a further Notice.
- (b) Without limiting **clause 9.1(a)** or **clause 9.1(c)**, the Department may terminate this Deed by Notice with effect on the date stated in the Notice, if:

- (i) you breach any of the following provisions: **clause 3** (What you must do), **clause 4.3** (Additional Funding), **clause 4.4** (Holding of Funds), **clause 5.1** (Reporting Requirements), **clause 6** (Dealing with Risk), **clause 7** (Work, health and safety), **clause 11.10** (Assignment) or **clause 11.11** (Modern Slavery);
 - (ii) the Department considers that the Project is no longer viable;
 - (iii) the Department considers that there has been a material change in circumstances in your financial position, your structure or your identity; or
 - (iv) you become insolvent, are the subject of a debtors or creditors petition under the *Bankruptcy Act 1966*, resolve to go into administration or liquidation, or if a summons for your winding up is presented to a Court or you enter into any scheme of arrangement with your creditors.
- (c) Either party may terminate this Deed at any time before the End Date by providing the other party at least 5 Business Days' prior written Notice.
- (d) This **clause 9.1** does not exclude or reduce the rights of a party to terminate the Deed arising by operation of the common law or statute or the other terms of this Deed.
- (e) On termination or expiry of this Deed:
- (i) accrued rights and obligations are not affected; and
 - (ii) the Department will pay any Instalments (or part thereof) due and payable in accordance with the terms of this Deed (after taking into account any Instalments already made prior to that date); or
 - (iii) the Department will not pay any Instalments or part thereof to you if you have not complied with or otherwise are in breach of this Deed.

10 Other Legal Matters

10.1 Dispute Resolution

- (a) If a dispute arises in relation to this Deed ("**a Dispute**"), a party must comply with this **clause 10.1** before starting arbitration or court proceedings except proceedings for urgent interlocutory relief.
- (b) A party claiming that a dispute has arisen must notify the other party in writing giving details of the dispute (**Dispute Notice**) in accordance with the requirements of **clause 10.2 (Notices)**.
- (c) Following receipt of a Dispute Notice, each party must refer the Dispute to a senior representative, who:
 - (i) does not have prior direct involvement in the Dispute; and
 - (ii) has authority to negotiate and settle the Dispute.
- (d) If the Dispute is not resolved within 10 Business Days from the date the Dispute Notice is received by the party to whom the Dispute Notice is given, the party which gave the Dispute Notice under **clause 10.1(b)** must refer the Dispute for mediation by the Australian Disputes Centre Limited (ADC) for resolution in accordance with the mediation rules of the ADC.

- (e) If the Dispute is not resolved within 40 Business Days after referral to mediation either party may initiate proceedings in court.
- (f) Each party must pay its own costs of complying with this clause and split the costs of the mediator evenly.

10.2 Notices

- (a) Unless otherwise stated in this Deed, all Notices to be given under this Deed must be in writing, and hand-delivered or posted and emailed to the Authorised Officer specified in the Details or as otherwise notified in writing.
- (b) The receiving party will be deemed to have received the Notice as follows:
 - (i) if hand delivered, on the day on which it is delivered or left at the relevant address;
or
 - (ii) if sent by post:
 - (A) if posted within Australia using Express Post, the priority letter service option of regular post, or the priority service option for Registered Mail, on the fourth Business Day after the day on which it is posted;
 - (B) if posted within Australia using the regular post option, on the fifth Business Day after the day on which it is posted;
 - (C) if posted to or from outside Australia, on the tenth Business Day after the day on which it is posted.or
 - (iii) if sent by email before 5.00pm on a Business Day, the first of the following occurring:
 - (A) when the sender receives an automated message confirming delivery; or
 - (B) four hours after the time sent (as recorded on the device from which the sender sent the email) unless the sender receives an automated message that the email has not been delivered;or
 - (iv) if sent by email after 5.00pm on a Business Day or on a day that is not a Business Day, then it will be deemed to be received on the next Business Day.
- (c) Any such mode of service will be in all respects valid notwithstanding that the party on whom service is affected may be in liquidation, bankruptcy or wound up and notwithstanding any other matter or event whatsoever.

11 General

11.1 Electronic Execution

- (a) Each party consents to this Deed and any variations of this Deed being signed by electronic signature by the methods set out in this clause.
- (b) This clause applies regardless of the type of legal entity of the parties. If this Deed or any subsequent variations are signed on behalf of a legal entity, the persons signing warrant that they have the authority to sign.

- (c) For the purposes of this clause, the parties agree that the following methods validly identify the person signing and indicate that person's intention to sign this Deed and any variation of it:
- (i) insertion of an image (including a scanned image) of the person's own unique signature onto the Deed;
 - (ii) insertion of the person's name onto the Deed; or
 - (iii) use of a stylus or touch finger on a touch screen to sign the Deed;
provided that in each of the above cases, words to the effect of 'Electronic signature of me, [NAME], affixed by me on [DATE]' are also included on the Deed;
 - (iv) use of a reliable electronic signature and exchange platform (such as DocuSign or AdobeSign) to sign the Deed; or
 - (v) as otherwise agreed in writing (including via email) between the parties.
- (d) The parties agree that the above methods are reliable as appropriate for the purpose of signing this Deed and that electronic signing of this Deed by or on behalf of a party indicates that party's intention to be bound.
- (e) A signed copy of this Deed transmitted by email or other means of electronic transmission shall be deemed to have the same legal effect as delivery of an original executed copy of this Deed for all purposes.

11.2 Survival

The following clauses survive termination or expiry of this Deed: **clause 4.2** (Withholding, Suspension, Changes to Instalments and Repayment), **clause 4.3** (Additional Funding), **clause 4.5** (GST), **clause 5.1** (Reporting Requirements); **clause 5.2** (Intellectual Property); **clause 5.3** (Confidential Information); **clause 5.4** (Privacy); **clause 5.6** (Disclosure of Information); **clause 6.1** (Insurance); **clause 6.2** (Indemnities);, **clause 9.1** (Termination); **clause 10.1** (Dispute Resolution), **clause 10.2** (Notices), **clause 11.1** (Electronic Execution), **clause 11.3** (Keeping of records); this **clause 11.2** (Survival), and any other clause which by its nature is intended to survive this Deed.

11.3 Keeping of records, audit and rights of access to such records:

You:

- (a) must keep complete and accurate records and books of account with respect to your performance of the Project (the "**Records**"), and must retain such Records for a minimum of seven (7) years after expiry or termination of this Deed;
- (b) authorise the Department and any State or Commonwealth Government department or agency (the "**Auditors**") that has provided moneys to the Department for the purposes of the Project, to undertake audits, to examine and inspect, at reasonable times and on reasonable Notice, any records held by you and Records, and allow any such Records to be copied; and
- (c) provide all reasonable assistance in order for the Auditors to properly carry out the inspections and audits referred to in this clause.

11.4 Conflict of Interest

You must not carry on or be involved in any capacity in an activity or business which may conflict with, or adversely affect, your ability to carry out your obligations under this Deed, and

you will immediately notify the Department in writing if such a conflict or risk of such a conflict arises.

11.5 Statutory functions

Nothing in this Deed in any way:

- (a) fetters any powers or discretion of the Department;
- (b) restricts or affects the unfettered discretion of the Department to exercise any of its powers, functions or responsibilities under any law;
- (c) requires the Department to interfere with or influence the exercise by any person or Governmental Agency of any statutory function or responsibility;
- (d) requires the Department to exercise any power, function or responsibility or otherwise act in a manner that it regards as not in the public interest; or
- (e) requires the Department or any Department personnel to develop or implement policy, or take any steps to procure legislation, by reference only or predominantly to the interests, objectives or expected outcomes of this Deed.

11.6 Entire Deed

This Deed states all the express terms agreed by the parties as to the matters referred to in this Deed. It supersedes all prior contracts, obligations, representations, conduct and understandings between the parties relating to the subject matter of this Deed.

11.7 Inconsistency

If there is any inconsistency between provisions of this Deed, then the order of precedence will be:

- (a) the **Details**; then
- (b) any **Special Conditions**; then
- (c) these **Funding Terms**; then
- (d) any **Schedules**.

11.8 Negation of employment, partnership or agency

- (a) This Deed does not create a relationship of agency, partnership, and/or employment between the parties.
- (b) You must not represent yourself as being an employee or agent of the Department or as otherwise able to bind or represent the Department.

11.9 Waiver

- (a) If a party fails to exercise any of its rights under this Deed, or delays exercising those rights, that failure or delay will not operate as a waiver of those rights or any future rights or in any respect estop a party from relying on the terms of this Deed to their full force and effect.
- (b) Any waiver by a party of a breach of this Deed must be in writing and will not be construed as a waiver of any further breach of the same or any other provision.

11.10 Assignment

You must not assign or novate your obligations or interests under this Deed, without the prior written consent of the Department.

11.11 Modern Slavery

- (a) You acknowledge that you are not aware of any Modern Slavery in your supply chain.
- (b) Throughout the term of this Deed, if you become aware of any Modern Slavery:
 - (i) risks in your supply chain or operations, you must notify the Department of those risks and advise the Department of the steps you are taking to eliminate or minimise those risks; or
 - (ii) practices being carried out within your operations or supply chain, you must:
 - (A) in writing, immediately notify the Department of those practices and of the remediation action you propose to take; and
 - (B) at your cost, take any such additional remediation action required.
- (c) If you are a 'reporting entity' for the purposes of any State or Commonwealth Modern Slavery legislation, you must:
 - (i) comply with such legislation; and
 - (ii) throughout the term of this Deed provide the Department with a copy of any reports you are required to prepare under that legislation when requested by the Department.
- (d) Within 30 days of a request by the Department, you agree to provide the Department any information and other assistance requested by the Department to enable the Department or the NSW Government to meet any of their obligations under:
 - (i) Modern Slavery Laws; or
 - (ii) NSW Government policies relating to Modern Slavery.
- (e) You must cooperate and procure that any of your subcontractors cooperates in any Modern Slavery audit undertaken by:
 - (i) the Department; or
 - (ii) the New South Wales Government,
 - (including by a third party on behalf of any of the above listed above) and providing reasonable access to the auditors to your premises to interview any staff or personnel.

11.12 Counterparts

This Deed may be signed in any number of counterparts which taken together will constitute one instrument.

11.13 Governing Law

The laws of New South Wales govern this Deed and the parties submit to the non-exclusive jurisdiction of the courts in that State.

Executed as a deed

Signed, sealed and delivered for and on behalf of the Crown in right of the State of New South Wales acting through the **Department** by its authorised signatory but not so as to incur personal liability:

Electronic signature of me
[name] affixed by me on
00/00/00 [time pm/am]

Electronic signature of me
[name] affixed by me on
00/00/00 [time pm/am]

Signature of Authorised Signatory

Signature of Witness

Name of Authorised Signatory

Name of Witness

Position of Authorised Signatory

Address of Witness

By signing this document, the witness states that it witnessed the signing of this document over audio visual link (and signed as a witness in counterpart if applicable) in accordance with section 14G of the Electronic Transactions Act 2000 (NSW).

Date

Use this if signing on behalf of a company with more than one director or a director and secretary.

Signed, Sealed and delivered for on and on behalf of [Organisation name] in accordance with section 127 of the *Corporations Act 2001* by:

Electronic signature of me
[name] affixed by me on
00/00/00 [time pm/am]

Electronic signature of me
[name] affixed by me on
00/00/00 [time pm/am]

Signature of Director(1)

Signature of Director(2)/Company Secretary

Name of Director (1)

Name of Director(2)/Company Secretary

Date

Date

Use this if signing on behalf of a company with a sole director.

Signed, Sealed and delivered for on and on behalf of [Organisation name] in accordance with section 127 of the *Corporations Act 2001* by:

Electronic signature of me
[name] affixed by me on
00/00/00 [time pm/am]

.....
Signature of Sole Director

.....
Name of Sole Director

.....
Date

Use this if signing as an individual.

Signed, Sealed and delivered by enter name of individual.

Electronic signature of me
[name] affixed by me on
00/00/00 [time pm/am]

.....
Signature

.....
Date

Electronic signature of me
[name] affixed by me on
00/00/00 [time pm/am]

.....
Signature of Witness

.....
Name of Witness

.....
Address of Witness

By signing this document, the witness states that it witnessed the signing of this document over audio visual link (and signed as a witness in counterpart if applicable) in accordance with section 14G of the Electronic Transactions Act 2000 (NSW).

Use this if signing as an authorised representative.

By entering into this Deed the signatory warrants that the signatory is duly authorised to execute this Deed on behalf of **[Organisation name]**.

Signed, sealed and delivered for and on behalf of **[Organisation name]** by its authorised signatory:

Electronic signature of me
[name] affixed by me on
00/00/00 [time pm/am]

Electronic signature of me
[name] affixed by me on
00/00/00 [time pm/am]

Signature of authorised signatory

Signature of Witness

Name of authorised signatory

Name of Witness

Position of authorised signatory

Address of Witness

By signing this document, the witness states that it witnessed the signing of this document over audio visual link (and signed as a witness in counterpart if applicable) in accordance with section 14G of the Electronic Transactions Act 2000 (NSW).

Date

Schedule A – Project Plan

Table 3: Schedule A – Project Plan

Description of Activities		Fund Amount (excluding GST)	Project Cost (excluding GST)	Activity Period	When to send invoice
1	<p>Install and commission the items as approved by the Department in your application [Application ID]</p> <p>Upload reporting documentation in SmartyGrants [insert link]:</p> <ul style="list-style-type: none"> • Commissioning report • Invoices from suppliers and installers • Before and after photo(s) of installed submeter(s). 	[Amount of co-funding requested \$]	[Total project cost]	Must be completed before [Date]	On completion of activities
2	<p>Promote metering and monitoring benefits expected to be achieved or achieved through this project:</p> <p>[Include actions from the application form]</p>				
Objectives of the Project		[Briefly describe how the implementation of the proposed solutions will lead to improved energy performance]			
Invoicing Requirements (if required)		Refer to clause 4.1(b)			