PROFORMA VERSION 1.2

Novation Deed (Carbon Abatement Contract [*insert CAC number as on ERF register*])

[OutgoingParty]

Outgoing Party

[NewParty name]

New Party

THE COMMONWEALTH OF AUSTRALIA, as represented by the CLEAN ENERGY REGULATOR (a Commonwealth entity established by the *Clean Energy Regulator Act 2011* (Cth))

Continuing Party

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Details

**Date** [*insert date*]

**Parties** **[OutgoingParty]** **ABN [\*\* \*\*\* \*\*\* \*\*\*]** of [OutgoingParty Address] (**Outgoing Party**)

**[NewParty name]** **ABN [\*\* \*\*\* \*\*\* \*\*\*]** of [NewParty address] (**New Party**)

**The Commonwealth of Australia**, as represented by the **Clean Energy Regulator** (a Commonwealth entity established by the *Clean Energy Regulator Act 2011* (Cth)), ABN 72 321 984 210 of GPO Box 621, Canberra ACT 2601, Australia (**Continuing Party**)

Background

1. The Outgoing Party and the Continuing Party are parties to the Contract.
2. The Outgoing Party and the New Party are parties to the Sale Agreement.
3. The Outgoing Party and the New Party intend that, with effect from the Effective Date, the New Party should acquire the benefit of the Contract and should perform and discharge the Outgoing Party's obligations and liabilities under the Contract.
4. The parties wish to release and discharge the Outgoing Party from the Contract and to substitute the Contract with a new agreement between the New Party and the Continuing Party on the terms set out in this deed.

Operative provisions

# Definitions and interpretation

## Definitions

1. In this deed:
2. **Authorised Officer** means:

### in respect of the Outgoing Party, any person who is:

#### if the Outgoing Party is a company or other body corporate, a director or company secretary of the Outgoing Party;

#### if the Outgoing Party is an individual, the Outgoing Party; or

#### from time to time nominated as an “Authorised Officer” for the purposes of this deed by the Outgoing Party by notice to the Continuing Party accompanied by a certified copy of the nominated person’s signature;

### in respect of the New Party, any person who is:

#### if the New Party is a company or other body corporate, a director or company secretary of the New Party;

#### if the New Party is an individual, the New Party; or

#### from time to time nominated as an “Authorised Officer” for the purposes of this deed by the New Party by notice to the Continuing Party accompanied by a certified copy of the nominated person’s signature;

* 1. in respect of the Continuing Party, the Chair or any official of the Clean Energy Regulator whose title contains the word “Manager” (or a person performing the functions of any such person) or any attorney or other person nominated by the Continuing Party as an “Authorised Officer” for the purposes of this deed.
1. **Business Day** means any day (other than a Saturday or Sunday or any day between 26 December in a year and 1 January in the following year) on which commercial banks are open for general banking business in Sydney and the Australian Capital Territory.
2. **Code of Common Terms** means the document entitled “Carbon Abatement Contract Code of Common Terms” ([Version 1.0 of 11 February 2015/Version 2.0 of 21 August 2015]) agreed between the Outgoing Party and the Continuing Party before the date of this deed (which, for the sake of good order and identification as at the date of this deed, is annexed to this deed as Annexure A).
3. **Contract** means the Carbon Abatement Contract in relation to the Project having the Contract Date of [*insert date*] and Continuing Party allocated contract number CAC-[*insert number*], between the Outgoing Party (as Seller) and the Continuing Party (as Buyer) comprising:
	1. the Code of Common Terms;
	2. the Commercial Terms as agreed between the Outgoing Party and the Continuing Party before the date of this deed (which, for the sake of good order and identification as at the date of this deed, are annexed to this deed as Annexure B);
	3. the Delivery Terms as agreed between the Outgoing Party and the Continuing Party before the date of this deed (which, for the sake of good order and identification as at the date of this deed, are annexed to this deed as Annexure C); and
	4. the Financial Terms as agreed between the Outgoing Party and the Continuing Party before the date of this deed (which, for the sake of good order and identification as at the date of this deed, are annexed to this deed as Annexure D).
4. **Declaration Variation** means the Clean Energy Regulator’s decision, upon application made under subsection 24(2) of the *Carbon Credits (Carbon Farming Initiative) Rule 2015*,to vary the declaration for the Project such that it identifies the New Party as a project proponent for the Project.
5. **Effective Date** means:
	1. where the Declaration Variation has occurred before the date of this deed, the date of this deed;
	2. where the Declaration Variation has not occurred before the date of this deed, the date on which the notice referred to in clause 4.1 is given.
6. **Fallover Date** means the date which is 90 Business Days after the date on which the Continuing Party executes this deed, or such later date that may be agreed by the parties.
7. **GST** has the meaning given in the GST Act.
8. **GST Act** means the *A New Tax System (Goods and Services) Act 1999* (Cth).
9. **Project** means the eligible offsets project named [*insert project name*] which has been allocated the identification number [*insert CER project number*] by the Continuing Party.
10. **Regulatory Authority** means:
	1. any government or local authority and any department, minister or agency of any government; and
	2. any other authority, agency, commission or similar entity having powers or jurisdiction under any law or regulation or the listing rules of any recognised stock or securities exchange.
11. **Sale Agreement** means [*insert description of agreement*] dated ⚫ between [*insert names of parties to the agreement*].

## Interpretation

In this deed headings are for convenience only and do not affect interpretation and, unless the contrary intention appears:

### the singular includes the plural and vice versa;

### a reference to any gender includes all genders;

### the words “include”, “including”, “for example” or “such as” are not used as, nor are they to be interpreted as, words of limitation, and, when introducing an example, do not limit the meaning of the words to which the example relates to that example or examples of a similar kind;

### if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;

### a reference to a person includes an individual, the estate of an individual, a corporation, an incorporated or unincorporated association or parties in a joint venture, a partnership, a state, a government, a Regulatory Authority and a trust;

### a reference to a party includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation and, in the case of a trustee, includes any substituted or additional trustee;

### a reference to any agreement or document is to that agreement or document (and, where applicable, any of its provisions) as amended, novated, supplemented or replaced from time to time, except where that occurs in contravention of this deed;

### a reference to this deed is a reference to this deed as varied, novated, ratified or replaced from time to time;

### a reference to a party, clause, schedule, exhibit, attachment or annexure is a reference to a party, clause, schedule, exhibit, attachment or annexure to or of this deed, and a reference to this deed includes all schedules, exhibits, attachments and annexures to it;

### a reference to any law, legislation or legislative provision includes any statutory modification or re-enactment of, or legislative provision substituted for, and any statutory instruments issued under that legislation or legislative provision;

### an agreement, representation or warranty in favour of two or more persons is for the benefit of them jointly and each of them individually; and

### this deed must not be construed adversely to a party just because that party prepared it or caused it to be prepared.

# Novation

## Fallover

This clause 2 is subject to the provisions of clause 4.2 of this deed.

## Rights and obligations of New Party

With effect on and from the Effective Date the New Party:

### is entitled to all rights, benefits, powers and interests under or in connection with the Contract to which, but for this deed, the Outgoing Party would have been entitled at and after the Effective Date;

### must perform all obligations and discharge all liabilities and responsibilities under or in connection with the Contract which, but for this deed, the Outgoing Party would have been required to perform or discharge at and after the Effective Date; and

### is bound by and must comply with all other provisions of the Contract by which, but for this deed, the Outgoing Party would have been bound at and after the Effective Date,

as if the New Party had been a party to the Contract instead of the Outgoing Party.

## Rights and obligations of Continuing Party

With effect on and from the Effective Date the Continuing Party:

### is entitled to all rights, benefits, powers and interests under or in connection with the Contract to which, but for this deed, it would have been entitled at and after the Effective Date;

### must perform all obligations and discharge all liabilities and responsibilities under or in connection with the Contract which, but for this deed, it would have been required to perform or discharge at and after the Effective Date; and

### is bound by and must comply with all other provisions of the Contract by which, but for this deed, it would have been bound at and after the Effective Date,

as if the New Party had been a party to the Contract instead of the Outgoing Party.

## Release of Outgoing Party

With effect on and from the Effective Date, the Continuing Party releases the Outgoing Party from all obligations, liabilities and responsibilities under or in connection with the Contract to be performed or discharged at or after the Effective Date, subject to clause 2.6.

## Release of Continuing Party

With effect on and from the Effective Date, the Outgoing Party releases the Continuing Party from all obligations, liabilities and responsibilities under or in connection with the Contract to be performed or discharged at or after the Effective Date, subject to clause 2.6.

## Obligations and liabilities arising before the Effective Date

Nothing in this deed:

### releases the Outgoing Party or the Continuing Party from any obligation, liability or responsibility under or in connection with the Contract arising before the Effective Date;

### releases the Outgoing Party or the Continuing Party from the obligations of or in connection with clause 11 of the Code of Common Terms of the Contract;

### releases the Outgoing Party from the obligations of or in connection with clause 15.1 of the Code of Common Terms of the Contract;

### waives any rights of the Continuing Party in respect of any misrepresentation, omission or other act of the Outgoing Party occurring prior to the Effective Date, which may constitute or contribute to an Event of Default (as defined in the Code of Common Terms of the Contract) giving rise to a right of termination of the Contract by the Continuing Party in its capacity as the Buyer; or

### waives any rights of the Continuing Party against the Outgoing Party in respect of any misrepresentation, omission or other act of the Outgoing Party occurring prior to the Effective Date, which may give rise to any cause of action at law by the Continuing Party against the Outgoing Party.

# Amendments to the Contract

## Fallover

This clause 3 is subject to the provisions of clause 4.2 of this deed.

## Seller change

With effect on and from the Effective Date, the text in Item 1 of the Commercial Terms of the Contract is replaced with the following:

“Name: [*insert name of the New Party*]

ABN/DoB: [*insert details of the New Party*]

Client ID: [*insert details of the New Party*]”.

## Additional Event of Default

With effect on and from the Effective Date, the Contract is amended by inserting the following clause below clause 9.2.1.a.viii of the Code of Common Terms of the Contract:

“**9.2.2** **Representation or warranty by [*insert name of Outgoing Party*].** Where any representation or warranty made, or deemed to have been made, by [*insert name of Outgoing Party*] in the Contract proves to have been recklessly, wilfully or intentionally false or materially misleading at the time it was made or was deemed to have been made, the occurrence of that event will be an Event of Default with respect to the Seller.”

## Extension of termination rights

With effect on and from the Effective Date, the Contract is amended as follows:

### the full stop at the end of clause 9.5.1.e of the Code of Common Terms of the Contract is replaced with a semi-colon; and

### the following is inserted below clause 9.5.1.e of the Code of Common Terms of the Contract:

 “f. immediately upon notice given at any time by the Buyer, following the occurrence of an Event of Default under clause 9.2.2.”.

## Bank account details

For the purposes of clause 5.2.2 of the Code of Common Terms of the Contract, the New Party hereby notifies the Continuing Party, with effect on and from the Effective Date, of the following bank account as the bank account of the New Party:

Account name: [*insert – please ensure that this is an account in a bank in Australia*]

Account BSB number: [*insert – please ensure that this is the BSB number of a bank in Australia*]

Account number: [*insert – please ensure that this is an account in a bank in Australia*]

## Notices

For the purposes of clause [13.1.1.b]/[13.1.2.b] of the Code of Common Terms of the Contract, the New Party hereby notifies the Continuing Party, with effect on and from the Effective Date, of the following notice details as the notice details of the New Party:

Attention: [*insert*]

Address: [*insert*]

Email: [*insert*].

## Updated Commercial Terms of the Contract

As soon as reasonably practicable after the Effective Date, the Continuing Party will provide to the New Party a copy of the Commercial Terms of the Contract updated pursuant to the terms of clause 3.2 of this deed and reflecting for the sake of good order the information provided in clauses 3.5 and 3.6 of this deed.

# Effective Date

## Notice by Continuing Party

If the Declaration Variation has not occurred before the date of this deed but occurs before the Fallover Date, the Continuing Party must, as soon as reasonably practicable after the Declaration Variation occurs, give notice of the Declaration Variation to the New Party and the Outgoing Party.

## Failure to give notice terminates novation and amendment

Where:

### the Declaration Variation has not occurred before the date of this deed and the Continuing Party has not given notice to the New Party and the Outgoing Party under clause 4.1 on or before the Fallover Date, clauses 2 and 3 of this deed will be of no effect;

### the Declaration Variation has occurred before the date of this deed, clauses 2 and 3 of this deed will come into effect on the date of this deed.

## Avoidance of doubt – Notice

For avoidance of doubt, nothing in this deed obligates the Continuing Party to give the notice referred to in clause 4.1 if the Declaration Variation has not occurred.

## Avoidance of doubt – Decision

For avoidance of doubt, nothing in this deed obligates the Clean Energy Regulator to make the Declaration Variation.

# Warranties

## Authority and capacity

Each of the Outgoing Party and the New Party severally warrant to the Continuing Party as at the date of execution of this deed and as at the time immediately before the Effective Date that:

### if it is a company or a body corporate, it is a company or body corporate properly incorporated and validly existing under the laws of [Australia]/[the country or jurisdiction of its incorporation];

### it has the legal right and full [corporate] power and capacity to:

#### execute and deliver this deed; and

#### perform its obligations under this deed,

and has obtained all necessary authorisations and consents and taken all other actions necessary to enable it to do so;

### it is entering into this deed as principal (and not as agent or in any other capacity);

### (in the case of the New Party only) it has entered into this deed after a full review of its terms and conditions and the terms and conditions of the Contract, has a full understanding of those terms and conditions and of their risks, and is capable of assuming those risks;

### this deed constitutes (or will when executed constitute) valid legal and binding obligations of that party in accordance with its terms;

### the execution, delivery and performance of this deed by that party does not and will not result in a breach of or constitute a default under:

#### any agreement to which it is party;

#### any provision of its constitution, if any; or

#### any law or regulation or any order or judgment of any court or Regulatory Authority to which it is a party or by which it is bound.

## Reliance

The parties acknowledge that in entering into this deed they have each relied on the warranties in clause 5.1.

# GST

## Interpretation

The parties agree that:

### except where the context suggests otherwise, terms used in this clause have the meanings given to those terms by the GST Act; and

### any consideration that is specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purpose of this clause 6.

## Reimbursements and similar payments

Any payment or reimbursement required to be made under this deed that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which an entity is entitled for the acquisition to which the cost, expense or amount relates.

## GST payable

If GST is payable in relation to a supply made under or in connection with this deed then:

### any party (**Recipient**) that is required to provide consideration to another party (**Supplier**) for that supply must pay an additional amount to the Supplier equal to the amount of that GST at the same times as other consideration is to be provided for that supply; and

### the Supplier must provide a tax invoice to the Recipient no later than 7 days after the day on which any consideration is to be first provided for that supply.

## Variation

If the GST payable in relation to a supply made under or in connection with this deed varies from the additional amount paid by the Recipient under clause 6.3 so that:

(a) a further amount of GST is payable in relation to the supply; or

(b) a refund or credit of GST is obtained in relation to the supply,

then the Supplier must provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from, the Recipient. Any payment, credit or refund under this paragraph is deemed to be a payment, credit or refund of the additional amount payable under clause 6.3.

# Notices and other communications

## Form – all communications

Unless expressly stated otherwise in this deed, all notices, certificates, consents, approvals, waivers and other communications in connection with this deed must be in writing, signed by an Authorised Officer of the sender and marked for attention as identified in clause 7.4 or, if the recipient has notified otherwise, then marked for attention in the way last notified.

## Form – communications sent by email

Communications in connection with this deed sent by email need not be marked for attention in the way stated in clause 7.1. However, the email must state the first and last name of the sender.

Communications in connection with this deed sent by email are taken to be signed by the named sender.

## Delivery

Communications in connection with this deed must be:

### left at the address of the intended recipient set out in clause 7.4;

### sent by prepaid ordinary post (airmail, if appropriate) to the address of the intended recipient set out in clause 7.4; or

### sent by email to the email address of the intended recipient set out in clause 7.4.

### However, if the intended recipient has notified a changed address, then communications in connection with this deed must be sent to that address.

## Addresses and addressees

Communications in connection with this deed to:

### the Outgoing Party must be sent as follows:

Address: [insert mailing address for communications to Outgoing Party]

Attention: [insert name/title of addressee for communications to Outgoing Party]

Email: [insert email address for communications to Outgoing Party];

### the New Party must be sent as follows:

Address: [insert mailing address for communications to New Party]

Attention: [insert name/title of addressee for communications to New Party]

Email: [insert email address for communications to New Party];

### the Continuing Party must be sent as follows:

Address: Clean Energy Regulator

 GPO Box 621

 Canberra ACT 2601

 Australia

Attention: Emissions Reduction Fund Contracts

Email: erf-contracts@cleanenergyregulator.gov.au

## When effective

Communications in connection with this deed take effect from the time they are received or taken to be received under clause 7.6 (whichever happens first) unless a later time is specified.

## When taken to be received

Communications in connection with this deed are taken to be received:

### if sent by post – 3 days after posting (or 7 days after posting if sent from one country to another);

### if sent by email:

#### when the sender receives an automated message confirming delivery; or

#### 4 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,

whichever happens first.

## Receipt outside business hours

Despite clauses 7.5 and 7.6, if communications in connection with this deed are received or taken to be received under clause 7.6 after 5.00 pm in the place of receipt or on a non-Business Day, they are taken to be received at 9.00 am on the next Business Day and take effect from that time unless a later time is specified.

## Reliance on communications

Any communication in connection with this deed sent in accordance with this clause 7 can be relied on by the recipient if the recipient reasonably believes the communication is genuine and if it bears what appears to be the signature (original or facsimile) of an Authorised Officer of the sender (without the need for further enquiry or confirmation). Each party must take reasonable care to ensure that no forged, false or unauthorised communications are sent to another party.

# General

## Amendments

This deed may only be varied by a deed executed by or on behalf of each party.

## Counterparts

This deed may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same instrument.

## Costs

Except as otherwise provided in this deed, each party must pay its own costs and expenses in connection with negotiating, preparing, executing and performing this deed.

## Further acts and documents

Each party must promptly do, and procure that its employees and agents promptly do, all further acts and execute and deliver all further documents (in form and content reasonably satisfactory to that party) required by law or reasonably requested by another party to give effect to this deed.

## Stamp duties

The New Party:

### must pay all stamp duties and any related fines and penalties in respect of this deed, the performance of this deed and each transaction effected by or made under this deed; and

### must pay to each other party on demand the amount of any loss, cost, damage, expense or other liability suffered or incurred by that party including all legal and other professional expenses on a solicitor-client basis arising out of or in connection with any failure to comply with clause 8.5(a).

# Governing law and jurisdiction

This deed is governed by the law of the Australian Capital Territory. Each party irrevocably submits to the non-exclusive jurisdiction of the courts having jurisdiction in that territory and the courts competent to determine appeals from those courts, with respect to any proceedings that may be brought at any time relating to this deed and waives any objection it may have now or in the future to the venue of any proceedings, and any claim it may have now or in the future that any proceedings have been brought in an inconvenient forum, if that venue falls within this clause 9.

**EXECUTED** as a deed.

– Code of Common Terms

Next follows the Code of Common Terms

– Commercial Terms

Next follow the Commercial Terms

– Delivery Terms

Next follow the Delivery Terms

– Financial Terms

Next follow the Financial Terms

Signing pages

**Continuing Party**

|  |  |  |
| --- | --- | --- |
| **EXECUTED** for and on behalf of the Commonwealth of Australia by a delegate of the accountable authority of the Clean Energy Regulator by authority of section 23(1) of the *Public Governance Performance and Accountability Act 2013* (Cth) read with section 110 of that Act, on:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_(insert date of execution)in the presence of: Signature of witness Name of witness (block letters) | )))))))))))))))))))))) |  Signature of delegate of accountable authority Name of delegate (block letters) |

**Outgoing Party**

[insert appropriate execution block for the Outgoing Party]

**New Party**

[insert appropriate execution block for the New Party]