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Mutual Confidentiality Agreement

[Insert party name]

[Insert party name]



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Parties

[Insert party name] ABN [insert ABN] of [insert address]

[Insert party name] ABN [insert ABN] of [insert address]

Background

- A The parties have entered into a dispute resolution process in accordance with Chapter 8 of the National Electricity Code, for the purposes of resolving a dispute between them (**Dispute**).
- B This Deed sets out the terms and conditions on which Confidential Information is provided by each party for the purposes of resolving the Dispute.

Operative provisions

1 Confidentiality

Acknowledgement

- 1.1 The Recipient acknowledges that the Confidential Information is valuable to the Provider.
- 1.2 In consideration for the Provider providing the Confidential Information to the Recipient The Recipient accepts and agrees to be bound by the terms and conditions set out in this Deed.

Confidential Information

- 1.3 Subject to the terms set out in this Deed and any conditions imposed by the Provider in accordance with clause 1.4, the Recipient:
- 1.3.1 must keep the Confidential Information confidential ;
- 1.3.2 must not use Confidential Information for any purpose other than the Express Purpose;
- 1.3.3 must not disclose or permit the disclosure of Confidential Information to any person other than as permitted under clause 1.5;

Conditions

- 1.4 The Provider may provide all or specified parts of the Confidential Information to the Recipient in accordance with clause 1.3, subject to any conditions or restrictions that the Provider reasonably thinks necessary and that are specified in Schedule 1, which conditions and restrictions may include:

- 1.4.1 a condition that the confidential information may be inspected but not copied;
- 1.4.2 the time and location at which the Confidential Information may be inspected;
- 1.4.3 whether, how and to what extent, copies or notes of the Confidential Information may be made; and
- 1.4.4 the period for which the Confidential Information is provided
- 1.4.5 At the end of the agreement whether the Confidential Information be returned or destroyed by the Recipient

Permitted disclosures

- 1.5 This Deed permits the disclosure of all or specified parts of the Confidential Information by the Recipient in accordance with Clause 2 in any of the following circumstances:
 - 1.5.1 the Provider has consented in writing to such disclosure, and;
 - 1.5.2 the disclosure is to either or both of the following:
 - (a) a Representative or Representatives of the Recipient specified in Schedule to this Deed; or
 - (b) a member of a class of Representatives of the Recipient, specified in Schedule to this Deed; and
 - (c) the disclosure is in accordance with Clause 2 and complies with any conditions imposed by the Provider under Schedule 1
 - 1.5.3 the disclosure is required by law; or
 - 1.5.4 the disclosure is directed by a Dispute Resolution Panel (DRP) in accordance with Clause 8.2.6C(c) of the National Electricity Code, subject to any conditions imposed by that DRP.

Limitation on disclosure required by law

- 1.6 If the Recipient considers that disclosure is required by clause 1.5.3, it must:
 - 1.6.1 immediately notify the Provider of the requirement;
 - 1.6.2 assist and co-operate with the Provider if the Provider seeks to limit or resist the requirement for the Confidential Information to be disclosed; and
 - 1.6.3 at the time that the Confidential Information is disclosed, state to the person to whom the Confidential Information is disclosed that it is of a confidential or commercially-sensitive nature; and

2 Disclosure to Representatives

Provision of Confidential Information

- 2.1 The Recipient must ensure that, before any of its Representatives are provided with or have access to Confidential Information, the Representatives are made aware of the confidential nature of the Confidential Information and the terms and conditions set out in this Deed.

Confidentiality undertaking

- 2.2 The Recipient must ensure that its Representatives, who will be provided with or have access to Confidential Information, execute an undertaking in the form contained in Schedule 4 to this Deed and deliver the executed undertaking to the Provider before the information is provided to or accessed by the Representative.

Compliance by Representatives

- 2.3 The Recipient must take reasonable steps to ensure that its Representatives do not do or fail to do anything that, if done or not done by the Recipient, would amount to a breach of the Recipient's obligations set out in this Deed.

Recipient must maintain register

- 2.4 The Recipient must at all times maintain an up to date register of all of its Representatives to whom Confidential Information has been disclosed. On request, the Recipient must promptly provide a copy of the register to the Provider.

3 Protection and security

Security measures

- 3.1 The Recipient must establish and maintain appropriate security measures to protect the Confidential Information against unauthorised access, use or disclosure.

Unauthorised access, use or disclosure

- 3.2 If the Recipient becomes aware of any unauthorised access to, use or disclosure of Confidential Information, or any suspected or possible breach of this Deed, the Recipient must:
- 3.2.1 immediately notify the Provider in writing;
 - 3.2.2 use all reasonable endeavours to do everything necessary to remedy the unauthorised access to, use or disclosure of the Confidential Information, or to prevent the suspected or possible breach of this Deed;
 - 3.2.3 comply with all reasonable written directions from the Provider in relation to the actual, suspected or possible breach of this Deed; and

- 3.2.4 give the Provider all reasonable assistance required in connection with proceedings which the Provider may institute against any person for breach of confidence or otherwise.

4 Ownership of Confidential Information

- 4.1 The Recipient acknowledges that this deed does not convey to the Recipient or any of its Representatives any proprietary or other interest in the Confidential Information.

5 Return of Confidential Information

Return of Confidential Information

- 5.1 If the Provider reasonably requests the return of the Confidential Information at any time or if the Confidential Information is no longer required by the Recipient for the Express Purpose, the Recipient must immediately return to the Provider all material containing Confidential Information in the possession, power or control of the Recipient or any of its Representatives.

Destruction of Confidential Information

- 5.2 If requested by the Provider, the Recipient must destroy all material containing Confidential Information in the possession, power or control of the Recipient or any of its Representatives.

Material containing Confidential Information

- 5.3 For the purposes of clauses 5.1, 5.2 and 5.4, material containing Confidential Information includes:
- 5.3.1 any material created or generated by the Recipient which contains Confidential Information;
 - 5.3.2 material in any form of storage from which the Confidential Information can be reproduced; and
 - 5.3.3 material in any form in which the Confidential Information is embodied or encoded.

Confirmation

- 5.4 If requested by the Provider, the Recipient must give the Provider a written statement confirming that all material containing Confidential Information has been returned to the Provider or destroyed in accordance with this Deed.

6 Breach of obligations

Injunctive relief

- 6.1 The Recipient acknowledges that damages may not be an adequate remedy for any breach of this Deed.

6.2 The Recipient agrees to consent to:

- 6.2.1 the grant of any injunctive relief sought by the Provider to restrain any conduct or threatened conduct which is or will be a breach of this Deed; or
- 6.2.2 specific performance to compel the Recipient to perform its obligations under this Deed,

as a remedy for any breach or threatened breach and in addition to any other remedies available to the Provider.

Indemnity

6.3 The Recipient continually indemnifies the Provider against any claim, liability, loss, damage or expense (including legal costs on a full indemnity basis) that the Provider incurs or suffers directly or indirectly as a result of:

- 6.3.1 a breach of this Deed by the Recipient;
- 6.3.2 anything done or not done by a Representative of the Recipient which, if done or not done by the Recipient, would be a breach of this Deed; or
- 6.3.3 an unauthorised disclosure by a person who received the Confidential Information from the Recipient or any of its Representatives.

7 Continuing obligations

Survival of obligations

7.1 The Recipient's obligations set out in this deed continue to apply:

- 7.1.1 other than to the extent that the Provider specifically releases the Recipient in writing from any such obligations; or
- 7.1.2 to the extent that any information remains confidential.

8 Notices

Giving notices

8.1 A notice, consent, information, application or request that must or may be given or made to a party under this Deed is only given or made if it is in writing and is:

- 8.1.1 delivered or posted to that party at its address set out below; or
- 8.1.2 faxed to that party at its fax number set out below.
- 8.1.3 Emailed to that party at the address set out below

[insert party's details]

Name:

Address:

Fax number:

Attention:

Email:

[insert party's details]

Name:

Address:

Fax number:

Attention:

Email:

Change of address, email or fax number

- 8.2 If a party gives the other party 3 business days notice of a change of its address, email or fax number, a notice, consent, information, application or request is only given or made by that other party if it is delivered, posted, emailed or faxed to the latest address or fax number.

Time notice is given

- 8.3 A notice, consent, information, application or request is to be treated as given or made at the following times:
- 8.3.1 if it is delivered, when it is left at the relevant address;
 - 8.3.2 if it is sent by post, 2 business days after it is posted; or
 - 8.3.3 if it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.
 - 8.3.4 If it is sent by email.
- 8.4 A notice must be received by 5pm on a business day in the place of the party to whom it is sent, or it is to be treated as having served at the beginning of the next business day.

Costs

- 8.5 Except as otherwise set out in this Deed, each party must pay its own costs in relation to preparing, negotiating and executing this Deed and any document related to this Deed.

Deed to benefit and bind successors

- 8.6 This Deed continues for the benefit of, and binds, a successor in title of a party, including a third party to whom a party's rights and obligations are assigned in accordance with this Deed.

Entire agreement

- 8.7 This Deed contains everything the parties have agreed in relation to the matters it deals with.
- 8.8 No party can rely on an earlier document, or anything said or done by another party, or by a director, officer, agent or employee of that party, before this Deed was executed, except as permitted by law.

Execution of separate Deeds

- 8.9 This Deed is properly executed if each party executes either this Deed or an identical Deed.
- 8.10 If the parties execute identical Deeds, this Deed takes effect when the separately executed Deeds are exchanged between the parties.

Further acts

- 8.11 Each party must promptly execute all documents and do all things that another party from time to time reasonably requests to effect, perfect or complete this Deed and all transactions incidental to it.

Governing law and jurisdiction

- 8.12 This Deed is governed by the law of [New South Wales]¹. The parties submit to the non-exclusive jurisdiction of the courts of [New South Wales] and courts of appeal from them. The parties will not object to the exercise of jurisdiction by the courts of [New South Wales] on any basis.

Joint and individual liability and benefits

- 8.13 Except as otherwise set out in this Deed, any agreement, covenant, representation or warranty under this Deed by 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

Remedies cumulative

- 8.14 The rights, powers and remedies set out in this Deed are cumulative with and not exclusive of the rights, powers or remedies provided by law independently of this Deed.

Severability

- 8.15 If a clause or part of a clause of this Deed can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way.
- 8.16 If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Deed, but the rest of this Deed is not affected.

¹ The State in which the providers of the information has its head office.

Variation

- 8.17 No variation of this Deed will be of any force or effect unless it is in writing and signed by the parties to this Deed.

Waiver

- 8.18 The fact that a party fails to do, or delays in doing, something the party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or breach of obligation by, another party.
- 8.19 A waiver by a party is only effective if it is in writing.
- 8.20 A written waiver by a party is only effective in relation to the particular obligation or breach in respect of which it is given and it is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

9 Definitions and interpretation

Definitions

- 9.1 In this Deed the following definitions apply:

Confidential Information means any information marked as confidential and provided by the Provider or any of its Representatives to the Recipient or any of its Representatives, including:

- (a) all confidential business information, documents, records, financial information, reports, product specifications, technical information and forecasts which relate to the Provider or its Related Entities or their business, products or processes ;
- (b) all intellectual property of the Provider or its Related Entities;
- (c) the fact that the Confidential Information may be or has been provided;

but does not include:

- (d) information which is in or becomes part of the public domain, other than through a breach of this Deed or an obligation of confidence owed to the Provider or any Representative of the Provider; and
- (e) information which the Recipient can prove by contemporaneous written documentation was independently acquired or developed without breaching any of the Recipient's obligations set out in this Deed.

Dispute Resolution Panel means a panel established under clause 8.2.6A of the National Electricity Code.

Express Purpose means the purpose As set out in Schedule 1B.

National Electricity Code means the code of conduct as approved by the Ministers of the States of South Australia, Victoria, New South Wales, Queensland and the Australian Capital Territory for the purposes of the *National Electricity Law*, as amended and in operation for the time being.

Provider means the party providing Confidential Information to the other party.

Recipient means the party receiving Confidential Information from the other party.

Related Entity has the same meaning as under the Corporations Act 2001 (Cth).

Representative means any director, officer, employee or partner of a party or of any agent, contractor, financier, legal adviser or professional adviser of a party that is listed in Schedule 2.

Interpretation

9.2 In the interpretation of this Deed, the following provisions apply unless the context otherwise requires:

- 9.2.1 a reference in this Deed to a business day means as defined in the National Electricity Code;
- 9.2.2 If the day on which any act, matter or thing is to be done under this Deed is not a business day, the act, matter or thing must be done on the next business day;
- 9.2.3 an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- 9.2.4 where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- 9.2.5 references to the word 'include' or 'including' are to be construed without limitation;
- 9.2.6 a reference to this Deed includes the agreement recorded in this Deed; and
- 9.2.7 any schedules and attachments form part of this Deed.

Execution and date

Executed as a Deed by

Signed sealed and delivered for and on behalf
of [] in the presence of:

.....
Signature of witness

.....
Signature of authorised person

.....
Name of witness (print)

.....
Name of authorised person (print)

DRAFT

Schedule 1A

Conditions and restrictions on disclosure

(Insert any conditions or restrictions that apply to the time, manner or form in which disclosure will be given. See clause 1.4)

Tick as appropriate

- ☐ a condition that the confidential information may be inspected but not copied
- ☐ the time and location at which the Confidential Information may be inspected
- ☐ whether, how and to what extent, copies or notes of the Confidential Information may be made
- ☐ the period for which the Confidential Information is provided
- ☐ the end of the agreement whether the Confidential Information must be returned or destroyed by the Recipient, and if so where, when and how.

Schedule 1B

List the purpose for which the Confidential Information can be used

DRAFT

Schedule 2

Representatives

[List named Representatives to whom Confidential Information may be disclosed by the Recipient (See clause 1.5.1)]

DRAFT

Schedule 3

Class of Representatives

[List class or classes of Representatives to whom Confidential Information may be disclosed by the Recipient (See clause 1.5.1(b))]

DRAFT

Schedule 4

Confidentiality Undertaking

Parties

By:

[name of Representative] of [address of Representative]

In favour of:

[name of Provider] of [address of Provider]

Background

- A The Provider and the Recipient have executed the Confidentiality Deed relating to the provision of Confidential Information by the Provider to the Recipient in connection with the Express Purpose.
- B The Provider has agreed to the Recipient disclosing Confidential Information to the Representative on the condition that the Representative executes this Deed and delivers it to the Provider.

Operative provisions

1 Acknowledgement

- 1.1 The Representative acknowledges having received a copy of the Confidentiality Deed and having read the Confidentiality Deed in full.
- 1.2 The Representative confirms that he or she understands each of the obligations of the Recipient set out in the Confidentiality Deed and the restrictions on the disclosure and use of Confidential Information.

2 Undertaking

- 2.1 The Representative undertakes to observe all of the provisions set out in the Confidentiality Deed in all respects as if the Representative was named as the Recipient in the Confidentiality Deed in place of the Recipient.
- 2.2 The Representative undertakes to observe any conditions specified by the Provider in accordance with the Confidentiality Deed.

3 Terms reproduced

- 3.1 To give effect to clause 2.1, all provisions of the Confidentiality Deed are deemed to be set out in full in this Deed on the basis that all references to the Recipient in the Confidentiality Deed are, for the purposes of this Deed, deemed to be references to the Representative.

4 Definitions

- 4.1 In this Deed the following definitions apply:

Confidentiality Deed means the mutual confidentiality deed between the Provider and the Recipient pursuant to which the parties have disclosed or intend to disclose Confidential Information to each other for the Express Purpose.

Confidential Information has the meaning set out in the Confidentiality Deed.

Express Purpose has the meaning set out in the Confidentiality Deed.

Recipient means: _____
[name, ABN and address of Recipient]

Execution and date

Executed as a deed by

Date:

The Representative

Signature of Representative

.....

Name of witness

Signature of witness