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# NABERS Agreement to Rate

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Version 1.1 — February 2024

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Please complete all fields highlighted in yellow in the document and upload it to the Agreement to Rate application form at <https://agreements.nabers.gov.au/>

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## Background

- A NABERS is a federal government-backed program administered by the National Administrator which aims to:
- (a) stimulate market recognition and demand for buildings with improved greenhouse performance; and
  - (b) allow building owners, managers and tenants to understand the greenhouse impact of their buildings.
- B This Agreement details the process by which the Applicant registers its intention to develop a building project in the course of which a building will be measured by one or more of the NABERS rating tools to evidence its environmental sustainability and thereby obtain one or more Certified Performance Ratings.
- C As part of this Agreement, the following project milestones for the building must be completed:

<b>Certified Performance Rating</b>	In accordance with Clause 8(d) of the Agreement, the Applicant must notify the National Administrator when the Project has obtained a Certified Performance Rating which must be received within two years of the Occupancy Certificate Date.
<b>Occupancy Certificate Date</b>	The Applicant must notify the National Administrator of the Occupancy Certificate Date. In accordance with Clause 4(a) of the Agreement, this must be received within six years of the Agreement.

## Project details

ITEM #	PROJECT	
1	Project name	85 Martin Road
2	Project address (number, street, suburb and postcode)	85 Martin Road, Badgerys Creek, NSW 2555
3	Lot number or Parcel Identifier	Click to enter text
4	Project type	New build
5	Specification Refer to definitions	New project
6	Short description of project Type of project: <ul style="list-style-type: none"> <li>Predicted NLA/rated area</li> <li>Number of floors</li> <li>Number and type of buildings on site including mixed uses within the buildings (if more than one building type, then an Agreement to Rate is required for each building)</li> </ul>	Site area = 169,968 sqm Total Office Area (GLA) = 5,570 sqm m2  The development comprise of four(4) warehouses and nine(9) offices attached. <span style="float: right;">+</span>
7	Space type (select one only) <ul style="list-style-type: none"> <li>Offices</li> <li>Hotels</li> <li>Shopping centres</li> <li>Data centres</li> <li>Apartment buildings</li> <li>Residential aged care and retirement living</li> <li>Warehouses</li> <li>Schools</li> </ul>	Office base building
8	Rating Scope	Office base building
9	Rating Tool	<input checked="" type="checkbox"/> NABERS Energy <input checked="" type="checkbox"/> NABERS Water <input type="checkbox"/> NABERS Embodied Carbon <input type="checkbox"/> NABERS Indoor Environment (Offices only) <input type="checkbox"/> NABERS Waste (Offices only)
ITEM #	FURTHER PROJECT DETAILS	
10	Intended use/s of the Agreement to Rate	State requirement If other, click to enter text
11	Consent authority type	State government
12	Consent authority name	NSW Government
13	Project status at time of agreement	Design phase (<50%)

<b>APPLICANT DETAILS</b>	
Business name	ESR Developments (Australia) Pty Ltd
ABN/ACN	ABN 88 625 766 109
Postal Address	GPO BOX 4622, SYDNEY, NSW 2000
The Applicant is a Trustee company and wishes to benefit from Schedule 2 (Select "Not Applicable" if the Applicant is not a Trustee company)	Not applicable
Name of Applicant's contact	Olivia Ridgewell
Applicant's email address	olivia.ridgewell@esr.com
Applicant's position	Assistant Development Managert

<b>REPRESENTATIVE DETAILS</b> (Only to be completed if the Applicant wishes to appoint an external representative to act on its behalf: see Clause 15.6)	
Business name of Representative	Click to enter text
Name of Representative's contact	Click to enter text
Representative's position	Click to enter text
Representative's role in project	Click to enter text
Representative's email address	Click to enter text

<b>PAYMENT DETAILS</b> (Please complete the details of the company to be paying the invoice for this Agreement: see Clause 2)	
Trading Name	ESR Australia and New Zealand
ABN/ACN	ABN 88 625 766 109
Billing postal address	GPO BOX 4622, SYDNEY, NSW 2000
Billing email address	ap.properties@esr.com, olivia.ridgewell@esr.com

<b>NATIONAL ADMINISTRATOR DETAILS</b>	
Contact	Attn: NABERS Agreement to Rate Administrator
Postal address	Request via email postal address details if required
Contact email address	nabers@environment.nsw.gov.au

*For NABERS National Administrator use only*

<i>Agreement number</i>	<i>For National Administrator use only</i>
AR00063	
<i>Agreement Date</i>	<i>For National Administrator use only</i>
14/01/2025	

# Operative provisions

## 1 Interpretation

### 1.1 Definitions

- (a) Meanings apply to capitalised terms used in this Agreement as specified in this provision, unless the context otherwise requires.
- (b) The words outlined on the left of the below table have the meaning prescribed to them on the right of the below table:

<b>Accredited Assessor</b>	A person who is Independent, authorised by the National Administrator and listed on the Website, who determines the Certified Performance Rating in accordance with:  (a) the Rules; and  (b) applicable process determined by the National Administrator,  as updated from time to time.
<b>Agreement</b>	This NABERS Agreement to Rate, including all schedules and any policies, guidelines and other documents referred or attached to this NABERS Agreement to Rate.
<b>Agreement Date</b>	The date of signature by the National Administrator of this Agreement.
<b>Agreement Fee</b>	The relevant fee(s) required for payment by the Applicant under this Agreement, as specified by the National Administrator on the Website as at the Agreement Date.
<b>Agreement to Rate</b>	Agreements entered into by property owners and/or developers to design and construct buildings in a manner that results in one or more Certified Performance Ratings. This Agreement is classified as an Agreement to Rate.
<b>Applicant</b>	The entity identified in the project details.
<b>Applicants Personnel</b>	The employees, officers, agents, professional advisors, subcontractors of the Applicant.
<b>Authority</b>	Any governmental, semi-government, statutory, public, local government or other authority or body having jurisdiction under or in connection with this Agreement.
<b>Business Day</b>	A day which is not Saturday, Sunday or a public holiday in Sydney, New South Wales.
<b>Certified Performance Rating</b>	A rating of zero to six stars that may be awarded by the National Administrator for the Project, having assessed the actual operational performance of a Space Type in accordance with the Rules following the collection of data starting from the Data Collection Start Date.
<b>Claims</b>	Any claims, suits, liabilities, losses, damages, fines, costs, settlement payments or expenses (including legal costs on a solicitor and own client basis).

<b>Confidential Information</b>	<p>Any trade secrets, financial information, information relating to the operations, affairs or business and any other scientifically valuable information of whatever description and in whatever form (whether written or oral, visible or invisible) of a party but does not include information that:</p> <p>(a) is in the public domain; or</p> <p>(b) is independently known or developed by the party receiving the information other than as a result of a breach of this Agreement or any other obligation of confidentiality owed by or to any other person.</p>
<b>Existing Projects</b>	<p>Any project or refurbishment which:</p> <p>(a) does not require a development consent from any relevant Authority; and</p> <p>(b) is not a New Project.</p>
<b>GST</b>	Any tax levied under the GST Law.
<b>GST Law</b>	<i>A New Tax System (Goods and Services Tax) Act 1999 (Cth).</i>
<b>Independent</b>	<p>A person that has not had any direct or indirect:</p> <p>(a) involvement with the design, construction or commissioning of the Project;</p> <p>(b) interest (pecuniary or otherwise) in any part of the Project; or</p> <p>(c) involvement in any capacity with the Applicant.</p>
<b>Intellectual Property</b>	<p>Means all intellectual property rights, including:</p> <p>(a) copyright, patents, trademarks (including goodwill in those marks), designs, trade secrets, know how, rights in circuit layouts and domain names;</p> <p>(b) any application or right to apply for registration of any of the rights referred to in paragraph (a); and</p> <p>(c) all rights of a similar nature to any of the rights in paragraphs (a) and (b) which may subsist in Australia or elsewhere,</p> <p>whether or not such rights are registered or capable of being registered.</p>
<b>Law</b>	Any requirement of any statute, regulation, proclamation, ordinance or by-law, present or future, and whether state, federal or otherwise.
<b>NABERS</b>	The National Australian Built Environment Rating System.
<b>NABERS IP</b>	<p>Is the Intellectual Property that NABERS or the National Administrator makes available for the Project or purpose of this Agreement, whether upon commencement of this Agreement or during the term of this Agreement, which includes, without limitation:</p> <p>(a) The Rating Tool;</p>

	(b) any other Intellectual Property owned by or otherwise licensed to the National Administrator in relation to the NABERS program.
<b>National Administrator</b>	The Crown in the right of the State of New South Wales acting through The Treasury represented by the Office of Energy and Climate Change, as the entity responsible for administering, managing and developing the NABERS national government program.
<b>New Projects</b>	Any project and/or refurbishment which requires the attainment of, and compliance with, a development consent from the relevant Authority.
<b>Occupancy Certificate</b>	A document issued with respect to the Project by the relevant Authority certifying that the that the building(s): (a) work has been completed for the Project: (i) in accordance with the approved plans and development consent; and (ii) (all applicable Laws; and (b) is suitable for occupation.
<b>Occupancy Certificate Date</b>	In relation to: (a) New Projects: the date on which the Project in its entirety obtains an Occupancy Certificate; or (b) Existing Projects: the date on which all building work is complete and the premises is able to be occupied.
<b>Personal Information</b>	Means all information that is defined to be personal information in accordance with the Privacy Laws.
<b>Personnel</b>	Any employee, officer or agent of a party.
<b>Privacy Laws</b>	Means: (a) the <i>Privacy Act 1988</i> (Cth) as amended from time to time; and (b) the <i>Privacy and Personal Information Protection Act 1998</i> (NSW).
<b>Project</b>	The project as described in the project details.
<b>Project Specification</b>	Either a New Project or Existing Project and for this Project, is as specified in Item 4 of the project details.
<b>Rating Scope</b>	The rating scope selected in Item 7 of the project details.
<b>Rating Tool</b>	The NABERS rating tools that may be used for the purposes of assessing eligibility for a Certified Performance Rating, and at the date of this Agreement they are available at the Website and may be updated during the term of this Agreement.
<b>Representative</b>	The entity (if any) nominated by the Applicant as its representative, specified in the project details.

<b>Rules</b>	The NABERS rules applicable to the relevant Space Type as published on the Website as at the Agreement Date and as updated during the term of this Agreement.
<b>Space Type</b>	The category of building, or part of a building, that is: (a) specified in Item 6 of the project details; and (b) able to have its performance assessed through a NABERS rating system.
<b>Status</b>	The official status of this Agreement from time to time as determined by the National Administrator from time to time. The possible status identifiers are set out in Schedule 1.
<b>Termination Notice</b>	Means a written notice issued by the National Administrator to the Applicant terminating this Agreement in accordance with Clause 8.1.
<b>Website</b>	The NABERS website currently located at <a href="http://www.nabers.gov.au">www.nabers.gov.au</a> .

## 1.2 Interpretation of rules

The following rules of interpretation apply to this Agreement:

- (a) **(headings)**: headings and subheadings are for convenience only and do not affect interpretation, except for specified cross-references;
- (b) **(plurality)**: words denoting the singular number include the plural, and the converse also applies;
- (c) **(gender)**: words denoting any gender include all genders;
- (d) **(parties)**: any reference to a party to any agreement or document includes its:
  - (i) successors;
  - (ii) permitted assigns; and
  - (iii) substitutes by way of novation;
- (e) **(expressions)** an expression importing:
  - (i) a person, includes any company, partnership, joint venture, association, trust, corporation or other body corporate and any authority as well as an individual; and
  - (ii) an entity, includes any person, company, partnership, joint venture, association, trust, corporation or other body corporate and any authority as well as an individual;
- (f) **(amendments)**: any reference to any agreement or document includes that agreement or document as amended at any time;
- (g) **(provisions)**: any reference to a provision is a reference to a clause of, or schedule or annexure to, this Agreement including each subclause, paragraph and subparagraph of that provision;
- (h) **(references)**: any reference to:
  - (i) a clause, schedule or annexure is a reference to a clause of, or schedule or annexure to, this Agreement;

- (ii) any legislation includes all delegated legislation made under it and amendments, consolidations, replacements or re-enactments of any of them;
  - (iii) a reference to \$ is to Australian currency unless denominated otherwise; and
  - (iv) a document includes all amendments or supplements to, or replacements, assignments, transfers or novations of, that document;
- (i) **(time)**:
- (i) a period of time is specified and dates from a given day or the day of an act or event, it is to be calculated exclusive of that day;
  - (ii) if an act prescribed under this Agreement to be done by a party on or by a given day is done after 5.00 pm on that day, it is taken to be done on the next day; and
  - (iii) a reference to time is a reference to Sydney time; and
- (j) **(specifics)**: the use of the words “including” or “for example” or any similar expressions or derivatives are without limitation.

## 2 Creating an agreement

### 2.1 When are the parties bound by this Agreement to Rate

An Agreement to Rate on the terms of this document as submitted to the National Administrator via the Website is agreed if all of the following have occurred:

- (a) the Applicant has completed the project details;
- (b) the document is signed by or on behalf of the Applicant by a person with authority to bind the Applicant to its terms;
- (c) the Applicant has successfully submitted the Agreement Fee via the Website using the payment methods provided and a receipt has issued; and
- (d) the National Administrator acknowledges receipt of the document and the Agreement Fee and returns a duly executed countersigned document.

### 2.2 Amending the project details to add further Certified Performance Ratings

- (a) The Applicant may request an amend the project details to add or delete a Rating Tool at any time prior to the Occupancy Certificate Date for no additional fees by email.
- (b) The amendment will become effective once the National Administrator sends an email acknowledging it has agreed to the request and the project details have been amended accordingly.
- (c) The Applicant is solely responsible for the performance of the Applicant’s obligations under this Agreement, including any monies payable to third parties (for example without limitation, all subcontractors, the Estimator, the Reviewer and the Accredited Assessor).

### 2.3 No refund of agreement fee

The Applicant acknowledges that the Agreement Fee is not refundable under any circumstance, and the Applicant will not be entitled to recover any or all of the Agreement Fee that has been paid to the National Administrator.

## 2.4 GST

- (a) Words used in this clause that are not defined in Clause 1.1 have the meaning given in the GST Law.
- (b) Unless otherwise specified, all amounts payable under this Agreement are exclusive of GST.
- (c) If a supply made under this Agreement is a taxable supply, the recipient of that taxable supply (**Recipient**) must, in addition to any other consideration, pay to the party making the taxable supply (**Supplier**) the amount of GST in respect of the supply.
- (d) The Recipient will only be required to pay an amount of GST to the Supplier if and when the Supplier provides a valid tax invoice to the Recipient in respect of the taxable supply.
- (e) If there is an adjustment to a taxable supply made under this Agreement, then the Supplier must provide an adjustment note to the Recipient.
- (f) The amount of a party's entitlement under this Agreement to recovery or compensation for any of its costs, expenses or liabilities is reduced by the input tax credits to which that party is entitled in respect of those costs, expenses or liabilities.

## 3 Term and purpose

This Agreement commences on the Agreement Date and expires on the date on which the last Certified Performance Rating is awarded to the Applicant for the Project, unless terminated earlier in accordance with these terms.

## 4 Certified Performance Ratings

- (a) The Applicant must promptly notify the National Administrator of the Occupancy Certificate Date once achieved, which must be within 6 years of the Agreement Date.
- (b) The Applicant must:
  - (i) arrange and pay for an Accredited Assessor to conduct, lodge and obtain a Certified Performance Rating for the Project;
  - (ii) inform the Accredited Assessor that this Agreement is in place so that "Agreement to Rate" option is selected when the Accredited Assessor lodges the Certified Performance Rating; and
  - (iii) comply with all applicable Rules relating to data collection for the:
    - (A) Certified Performance Rating generally; and
    - (B) Certified Performance Rating application process.
- (c) The parties acknowledge that the rights that the Applicant enjoys if a Certified Performance Rating is awarded, are governed by separate terms and conditions.
- (d) The Applicant must notify the National Administrator when the Certified Performance Rating has been obtained.
- (e) On and from the date that the last of the requested Certified Performance Rating is awarded the National Administrator may update the final Status of the Agreement on the Website and list the Certified Performance Ratings for the Project on the Website.

## 5 Publicity rights

- (a) On and from the Agreement Date, the National Administrator may at its discretion publish on the Website:

- (i) the Applicant's business name, Project Name, Space Type and Rating Scope as set out in the project details;
  - (ii) the applicable Status; and
  - (iii) if applicable the Certified Performance Rating for the Project.
- (b) Clause 5(a) survives expiry or earlier termination of this Agreement.
- (c) The National Administrator will endeavour to update the Applicant's Status on the Website every month.
- (d) Notwithstanding Clause 5(c) the National Administrator does not warrant the correctness of the information on the published on the Website. The Applicant must promptly notify the National Administrator if it becomes aware that any information relating to the Applicant on the Website is incorrect or otherwise misleading.

## 6 Applicant warranties, acknowledgements and indemnities

### 6.1 Warranties and undertakings

The Applicant warrants and undertakes that:

- (a) it has the corporate power to own its assets and to carry on its business as it is now being conducted;
  - (i) it has control of the Project and it has the right, power and authority to enter into, perform and observe its obligations under this Agreement;
  - (ii) to the best of its knowledge after making diligent inquiry, and except as otherwise disclosed to the National Administrator, no conflict of interest exists, may be perceived to exist or is likely to arise in the performance by the Applicant of its obligations under this Agreement;
  - (iii) all specifications and information that the Applicant provides to the National Administrator (including any employees, agents and independent contractors of those people) under this Agreement will be accurate and complete to the best of the Applicant's knowledge;
  - (iv) all information provided by the Applicant under or in connection with this Agreement is:
    - (A) true, correct and complete in all material aspects; and
    - (B) not misleading or deceptive;
  - (v) it has consulted with a legal adviser and obtained legal advice in respect of its rights and obligations under this Agreement or acknowledges that it has had the opportunity to do so; and
  - (vi) it will comply at all times with all applicable Laws in exercising its rights under this Agreement.
  - (vii) it will not reproduce, display or distribute any NABERS IP or any documents provided to it in connection with this Agreement in any way for any public or commercial purpose, including display on a website or in a networked environment unless with the prior written express authorisation of the National Administrator or otherwise in accordance with this Agreement.
- (b) The Applicant acknowledges that the National Administrator including its employees, agents and independent contractors, rely on the:
  - (i) information that the Applicant provides under this Agreement; and

- (ii) the warranties and undertakings provided by the Applicant under this Agreement.

## 6.2 If the Applicant is a Trust

- (a) Without limitation to Clause 6.1, if the Applicant enters into this Agreement as a trustee of a trust (**Trust**), the Applicant represents and warrants that:
  - (i) the Trust has been duly established;
  - (ii) it is the sole trustee of the Trust and no action has been taken to remove or replace it;
  - (iii) on demand by the National Administrator, it will provide a true and correct copy of the trust deed of the Trust;
  - (iv) the Applicant has been validly appointed as the sole trustee of the Trust unless otherwise notified and approved by the National Administrator;
  - (v) there has been no action taken, or to the Applicant's knowledge proposed, to remove the Applicant as trustee;
  - (vi) the Applicant has full and valid power and authority to enter into this Agreement, own the assets in connection with this Agreement, and perform the obligations under it on behalf of the Trust;
  - (vii) the Applicant has entered into this Agreement for the proper administration and benefit of the Trust;
  - (viii) the Applicant has obtained or duly satisfied all necessary resolutions, consents, approvals and procedures to enter into this Agreement and perform its obligations under it;
  - (ix) entry into this Agreement is for the benefit of the beneficiaries of the Trust and as trustee it is authorised and empowered under the Trust Deed to enter into and to perform its obligations and satisfy or discharge its liabilities under this Agreement;
  - (x) the Applicant is not in breach of the deed establishing the Trust (**Trust Deed**); and
  - (xi) the Applicant has the right to be indemnified out of the assets of the Trust for any and all liabilities incurred by it under this Agreement.
- (b) To the extent that the Applicant is a trustee company, the Applicant may have the benefit of Schedule 2 provided that the Applicant indicates its desire to benefit from Schedule 2 in the appropriate section of the project details.
- (c) Prior to the Trustee being replaced as the trustee of the Trust in accordance with the Trust Deed:
  - (i) the Trustee must procure that the replacement trustee enters into a new agreement with the National Administrator on the same terms as this Agreement;
  - (ii) the Trustee (as outgoing trustee) must procure an agreement from the National Administrator on terms acceptable to the National Administrator, under which the National Administrator releases the Trustee from the requirement to observe and perform any future obligation under this Agreement;
  - (iii) the Trustee (as outgoing trustee) must release the National Administrator, from the requirement to observe and perform any future obligation under this Agreement; and
  - (iv) the Trustee (as the outgoing trustee) must pay the reasonable costs and expenses of the National Administrator in relation to entering into a new agreement under this Clause 6.2(c).

- (d) Subject to any applicable limitations of liabilities under Schedule 2 (if applicable), the Trustee indemnifies the National Administrator, and agrees to keep the National Administrator indemnified, in respect of any loss or liability in any way connected with a breach of a warranty in Clause 6.1 above.

### 6.3 Reliance on Warranties

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

### 6.4 Acknowledgement

- (a) The Applicant acknowledges that: an assessment whether to grant a Certified Performance Rating, while regulated by specific rules developed by the National Administrator, also require discretion and judgment on the part of the National Administrator; and
- (b) the decision whether to grant or deny certification to a Project will be based on the results of an assessment by the National Administrator on any information that the National Administrator may reasonably require or use to determine the appropriateness of awarding a Certified Performance Rating for the Project. The National Administrator will act reasonably in exercising any such discretion or judgment.

### 6.5 Release and indemnity

- (a) The Applicant indemnifies and will keep indemnified the National Administrator and the State of NSW and their officers, employees and agents (**Indemnified Parties**) from and against any Claims incurred or threatened against the Indemnified Parties arising out of or in connection with:
  - (i) the carrying out of works for the Project;
  - (ii) a breach by the Applicant or the Applicants Personnel of this Agreement;
  - (iii) the negligent, wrongful or unlawful act or omission by or on the part of the Applicant or the Applicant's Personnel in connection with this Agreement; or
  - (iv) a breach of a warranty under Clause 6.2;
  - (v) any matter concerning a breach or alleged breach of Schedule 2 of the *Competition and Consumer Act 2010* (Cth) by the Applicant or its Personnel.
- (b) The Applicant's liability to indemnify the Indemnified Parties under Clause 6.5(a) will be reduced proportionally to the extent that the National Administrator caused any such Claim.
- (c) The Applicant releases the Indemnified Parties from all Claims and suits related to or arising from this Agreement and the Applicant's participation in the NABERS program, including but not limited to the use of, or reliance on, the Rating Tool:
- (d) The Applicant acknowledges that the Accredited Assessor is not an agent of the National Administrator.
- (e) The Applicant agrees that in no event that the National Administrator have any liability under this Agreement whatsoever, nor in respect of any decision by the National

Administrator to refuse a Certified Performance Rating to the Project (or a portion of the Project) for any reason.

## 6.6 Limitation of liability

To the extent permitted by Law, in no event will the National Administrator be liable to the Applicant for any indirect, special, incidental, economic or consequential damage or damages for negligence or any loss of profit however arising under this Agreement.

## 6.7 Survival of releases and indemnity

This Clause 6 survives the expiry or termination of this Agreement.

## 7 Transfer of rights in the project

- (a) If the Applicant wishes to sell, transfer or otherwise dispose of all or part of its rights in relation to the Project including the Project property (**Project Rights**), the Applicant must:
  - (i) notify the National Administrator in writing at least 30 Business Days' prior to the sale, transfer or other disposal of its Project (**Notice of Dealing**). The Notice of Dealing must include:
    - (A) the business details of the incoming party (Incoming Party), including a current ASIC company search; and
    - (B) details of any contracts, deeds or other agreements proposed to be entered into in respect of the sale, transfer or disposal (**Dealing**);
  - (ii) provide a copy of this Agreement to the Incoming Party; and
  - (iii) provide any other information requested by the National Administrator (acting reasonably), which may include, without limitation, copies of any proposed or finalised Dealings.
- (b) Without limitation to any other rights the National Administrator may have, the National Administrator may, in its absolute discretion, elect to:
  - (i) on written notice to the Applicant, terminate this Agreement without further liability to the National Administrator on and from the completion date of any Dealing (**Date of Completion**);
  - (ii) execute a deed of novation with the Applicant, Incoming Party and National Administrator, in which case the Applicant:
    - (A) must use reasonable endeavours to procure that the Incoming Party executes a deed of novation with the National Administrator and Applicant on terms on terms acceptable to the parties, acting in good faith; and
    - (B) is responsible for all costs associated with the negotiation and execution of the deed of novation; and
  - (iii) enter into a new Agreement to Rate to replace this Agreement with the Incoming Party.
- (c) If the National Administrator elects to:
  - (i) terminate this Agreement under Clause 7(b)(i), then on and from the Date of Completion this Agreement is terminated without the need for any further act, unless otherwise agreed by the parties to this Agreement;
  - (ii) novate this Agreement under Clause 7(b)(ii), then this Agreement will be subject to the deed of novation; or

- (iii) enter into a new Agreement to Rate with the Incoming Party, then this Agreement terminates on the date that the new Agreement to Rate takes effect, as notified by the National Administrator to the Applicant in writing, without the need for any further act unless otherwise agreed by the parties to this Agreement.
- (d) Termination of this Agreement under Clauses 7(b)(i) or 7(b)(iii), or novation under Clause 7(b)(ii) above, does not affect the rights, remedies or liabilities of the parties accruing prior to the date of termination or novation.
- (e) The Applicant consents, and must procure that the Incoming Party consents, to the National Administrator publicising on the Website any novation or termination of this Agreement pursuant to this clause.

## 8 Termination

### 8.1 Termination by the National Administrator

Without prejudice to any of the National Administrators other rights, the National Administrator may terminate this Agreement by providing the Applicant with a Termination Notice, with effect on and from the date specified in the Termination Notice, if:

- (a) the Applicant is in breach of any term of this Agreement and that breach objectively is:
  - (i) incapable of remedy;
  - (ii) capable of remedy but the Applicant has failed to remedy the breach within a reasonable period (having regard to the nature of the breach) after the National Administrator has given written notice requiring it to do so;
- (b) the NABERS program ceases;
- (c) the National Administrator no longer administers the NABERS program;
- (d) the Applicant engages in any conduct with respect to, or in connection with, this Agreement (including with respect to any NABERS IP) that is:
  - (i) misleading or deceptive (including by omitting relevant facts); or
  - (ii) in the National Administrator's reasonable opinion is likely to, or does, mislead or deceive (including by omitting relevant facts);
- (e) the Applicant:
  - (i) infringes or breaches the NABERS IP;
  - (ii) has not been awarded an Occupancy Certificate within six years after the Agreement Date; or
  - (iii) has not been awarded all the Certified Performance Ratings by a date two years after the Occupancy Certificate Date;
- (f) to the extent permitted by Law, any of the following events occur by or in relation to the Applicant:
  - (i) an administrator is appointed;
  - (ii) any legal action, not being in the reasonable estimation of the National Administrator a disputed action, is commenced, a judicial order is made, or resolution is passed for the liquidation of the Applicant;
  - (iii) the Applicant ceases business, or a proposal is put for cessation of the Applicant's business; or

- (iv) the Applicant, if a natural person, becomes the subject of a sequestration order or entering into a composition, deed of assignment or deed of arrangement pursuant to Part X of the *Bankruptcy Act 1966* (Cth) with his or her creditors.

## 8.2 Termination by the Applicant

- (a) The Applicant may immediately terminate this Agreement, by written notice to the National Administrator, if the Applicant sells, transfers or otherwise disposes of its rights in the Project and the Incoming Party does not wish to be bound by this Agreement or enter into a similar agreement with the National Administrator.
- (b) The Applicant may terminate this Agreement by written notice to the National Administrator if the National Administrator breaches this Agreement and fails to remedy such breach within a reasonable period (having regard to the nature of the breach) following receipt of notice from the Applicant requiring the breach to be remedied.
- (c) The Applicant may terminate this Agreement at any time with the consent of the National Administrator, which consent may be given or refused in the National Administrator's absolute discretion.

## 8.3 Consequences of termination

- (a) A party's right of termination under this Agreement does not exclude or otherwise diminish the rights of that party to terminate this Agreement arising from common law, statute or any other term of this Agreement.
- (b) Termination of this Agreement:
  - (i) does not affect the rights, obligations and liabilities of the parties accrued prior to the date that the termination is effected; and
  - (ii) does not constitute a waiver of, and is without limitation to, any other rights or remedies of National Administrator, including without limitation, the right to seek and obtain damages for any breach of this Agreement by the Applicant or the Applicant's Personnel.

# 9 Confidentiality

## 9.1 Confidential Information

- (a) Both parties must:
  - (i) keep confidential all the Confidential Information provided to it by the other party; and
  - (ii) not disclose any Confidential Information to a third party,
  - (iii) unless with the disclosing parties prior written consent or otherwise in accordance with this Agreement.
- (b) One party may disclose the Confidential Information of the other, if:
  - (i) such disclosure is required by Law;
  - (ii) such disclosure is necessary to perform the obligations under this Agreement and provided the recipient of the Confidential Information agrees to keep it confidential;
  - (iii) such disclosure is required to be made to prospective purchasers and capital partners of the Applicant, provided that the Applicant procures that each recipient of the Confidential Information strictly observes the obligations of the Applicant under this clause;

- (iv) the Confidential Information is or becomes generally available in the public domain through no breach of this Agreement; or
- (v) the National Administrator or the Applicant can demonstrate that it knew the Confidential Information before the other party to this Agreement disclosed such Confidential Information.
- (vi) The National Administrator may disclose Confidential Information to:
  - (vii) the relevant executive government of the National Administrator and/or the NABERS program (being either an Australian State Government or Australian Commonwealth Government) (Relevant Government) for the purpose of that government's functions or duties;
  - (viii) the Parliament or a Parliamentary Committee of the Relevant Government; and
  - (ix) present Ministers and their personnel of the Relevant Government.
- (c) The parties agree that negotiations relating to this Agreement constitutes Confidential Information until the Agreement Date.
- (d) This Clause 9 continues to apply after expiry or termination of this Agreement.

## 9.2 Privacy

- (a) The Applicant will:
  - (i) ensure that Personal Information that the National Administrator provides, or the Applicant collects under or in connection with this Agreement is used only for the purposes of this Agreement and is protected against loss and against unauthorised access, use, modification or disclosure or against other misuse;
  - (ii) unless the National Administrator is otherwise required or authorised by law to do so, not disclose any Personal Information without the written consent of:
    - (A) the individual to whom the Personal Information relates; or
    - (B) the National Administrator; and
  - (iii) comply with all Privacy Laws and any other applicable privacy laws and data protection laws as may be in force from time to time which regulate the collection, storage, use, access and disclosure of Personal Information.
- (b) The Applicant consents to the National Administrator disclosing or otherwise dealing with any data, Personal Information or other information more generally collected under this Agreement for the purposes of administering the NABERS program, reporting on the NABERS program, statistical and accounting purposes and otherwise performing the National Administrators functions and duties. This may include disclosure to NSW State and Commonwealth government agencies, parliament, executive, or present Ministers (and their offices employees) for the purposes noted above, acknowledging that the Commonwealth government owns and funds the NABERS program. The Applicant may obtain details of any Personal Information about the Applicant that the National Administrator holds by contacting the National Administrator.

## 10 Records, access and disclosure of information

- (a) The Applicant must maintain and keep in good condition records, books of account and documents relating to the Project that are relevant to this Agreement (**Records**) for a minimum of 7 years after expiry or termination of this Agreement, including:
  - (i) project architectural drawings and specifications (design and as-built);

- (ii) project services drawings and specifications (design and as-built);
  - (iii) the Project's progress against key milestones; and
  - (iv) any other information relevant to this Agreement.
- (b) The National Administrator may request copies of the Records. The Applicant must promptly provide the requested Records to the National Administrator.
- (c) If requested by the National Administrator, the Applicant must:
- (i) authorise the National Administrator and any Australian State Government or Australian Commonwealth Government department or agency that has provided moneys to the National Administrator for the purposes of the Project, to undertake audits, to examine and inspect, at reasonable times and on reasonable Notice, any records held by the Applicant, and allow any such Records to be copied; and
  - (ii) provide all reasonable assistance in order for the any Australian State Government or Australian Commonwealth Government department or agency to properly carry out the inspections and audits referred to in this clause.
- (d) The Applicant acknowledges that under the *Government Information (Public Access) Act 2009 (NSW)*, the National Administrator may be required to publicly disclose information about this Agreement. 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*.
- (e) The Applicant may nominate any items the Applicant considers are confidential and why, to assist the National Administrator in determining what items to disclose.

## 11 Duties, taxes, levies and charges

The Applicant must promptly pay:

- (a) any duty, taxes, levies or charges payable in relation to the execution and performance of this Agreement, or any agreement or document executed or effected under this Agreement; and
- (b) any taxable supply subject to the receipt of an appropriate tax invoice and/or that is imposed upon either party as a result of entering into and/or performing that party's obligations under this Agreement.

## 12 Assignment

### 12.1 General

Subject to Clause 7, the Applicant may not assign, transfer or novate any right or liability under this Agreement without the written prior consent of the National Administrator. The Applicant must comply with all requirements of the National Administrator in respect of any such assignment, transfer or novation.

### 12.2 Change in National Administrator

- (a) If the National Administrator ceases to be the NSW Treasury represented by the Office of Energy and Climate Change (acting for and on behalf of the State of New South Wales) for

any reason prior to termination or expiry of this Agreement, then the National Administrator may require the Applicant to enter into a deed:

- (i) to vary this Agreement to replace the definition of “National Administrator” with the new National Administrator; or
  - (ii) of assignment or novation with the new National Administrator, to effect an assignment or novation of this Agreement on the same terms and conditions as this Agreement to the new National Administrator (with only those changes required to effect the assignment or novation, or as otherwise agreed by the parties), for the balance of the term of this Agreement.
- (b) The Applicant acknowledges that the National Administrator may be subject to a Machinery of Government change throughout the term of this Agreement. Without limiting the options available to the National Administrator under Clause 12.2(a), the Applicant acknowledges that changes made to the title, structure, department, legal entity, function or operations of the National Administrator as a result of an order made under State legislation may automatically apply to this Agreement on the terms specified in the State legislation without the need for further action.

## 13 Notices

### 13.1 Form

Any notice to or by a party under this Agreement must be in writing and signed by the sender or, if a corporate party, an authorised officer of the sender, including any director, secretary or person notified in that capacity by that corporate party, or under the seal of or any power of attorney conferred by the sender.

### 13.2 Service method

Service of communication by mail will be deemed to have been effected on the fifth Business Day after posting to the address nominated in the project details.

### 13.3 Change of address

Either party may change the address to which communications are to be directed by giving written notice to the other party of such changes by serving notice pursuant to this clause.

### 13.4 Email

A communication will be sufficiently served for the purposes of this Agreement if such communication is sent by email to the email address nominated in the project details and will be deemed to be duly given or made, when the email is opened and receipt acknowledged except where the time of dispatch is not between 09:00 am and 5:00 pm on a Business Day, in which case the notice will be deemed to have been received at the commencement of business on the next Business Day.

## 14 Dispute resolution

### 14.1 Notice of dispute

- (a) If a dispute arises in relation to this Agreement (**Dispute**), a party must comply with this Clause 14 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 within 5 to 10 Business Days of that party becoming aware the Dispute has arisen (**Dispute Notice**).

- (c) Within 15 Business Days' of the Dispute Notice, a senior representative from each party must meet to discuss the Dispute and use all reasonable endeavours acting in good faith to resolve the Dispute by joint discussions.

## **14.2 Mediation**

- (a) If the Dispute is not resolved:
  - (i) within 20 Business Days of notification under Clause 14.1; or
  - (ii) such longer period as agreed by the parties in writing,either party may refer Dispute to mediation in accordance with Clause 14.1 and the other party must submit to the mediation.
- (b) The mediation will be administered by Resolution Institute (RI) ACN 008 651 232.
- (c) The mediator will be a person who is independent of the parties and who is appointed by agreement of the parties or, failing agreement within five Business Days from the day on which the matter has been referred to mediation, by a person nominated by RI through its nomination service. The fees in respect of the nomination service provided by RI are to be borne equally by the parties.
- (d) Any mediation meetings or proceedings under this clause must be held in Sydney.
- (e) The RI Mediation Rules (as amended from time to time) will apply to the mediation.
- (f) Unless otherwise stated in the RI Mediation Rules (as amended from time to time) the remuneration of the mediator will be split evenly by the parties. Each party to a dispute must pay its own costs of complying with this clause.
- (g) All communications during the mediation are confidential and must be treated as made in the course of compromise and settlement negotiations for the purposes of the applicable rules of evidence.
- (h) It is a condition precedent to the right of either party to commence arbitration or litigation, that it has first offered to submit the Dispute to mediation.

## **14.3 Commencing proceedings**

A party must not start court proceedings in relation to a Dispute until it has exhausted the procedures in this Clause 14 unless the party seeks injunctive or other urgent interlocutory relief.

## **14.4 Continuation of rights and obligations**

Despite the existence of a Dispute, each party must continue to perform this Agreement.

## **14.5 Exception**

Despite the provisions of this Clause 14, the National Administrator will not be required to comply with this clause and may terminate this Agreement with immediate effect or exercise its other rights under this Agreement or at Law if the National Administrator determines, in its absolute discretion, that the Applicant is responsible for or involved with any false, misleading or deceptive conduct or conduct that is likely to be false, misleading or deceptive in respect of any matter arising from this Agreement.

# **15 Miscellaneous**

## **15.1 Survival**

The parties agree that Clauses 1, 2.3, 2.4, 5, 6, 8.3, 9, 13, 14 and 15 of this Agreement will survive termination of this Agreement.

## 15.2 National Administrator assignment, novation or transfer

- (a) Nothing in this Agreement restricts or otherwise limits the National Administrators rights to transfer, assign, novate, dispose of or encumber any of its rights, obligations or interests under this Agreement (**Dealing**). The Applicant acknowledges that the National Administrator may undertake any Dealing at any time on notice to the Applicant. The Applicant must promptly undertake and execution any action required to effect the required Dealing, including executing any required documentation (on terms acceptable to the National Administrator).
- (b) The Applicant acknowledges that:
- (i) the National Administrator may be subject to a machinery of government change by executive order made under New South Wales legislation (**Order**); and
  - (ii) an Order is not an assignment, transfer, novation or disposal of any part of this Agreement; and
  - (iii) each Order will be effected in accordance with the terms of the relevant Order.

Without limitation, a machinery of government change may include changes to the title, structure, department, function or operations of the National Administrator as a result of the relevant Order.

The parties will promptly undertake and execute any action required to comply with each relevant Order.

## 15.3 Applicable law

This Agreement is governed by and construed under the laws of the State of New South Wales.

## 15.4 Jurisdiction

Each party agrees to submit to the non-exclusive jurisdiction of the courts of New South Wales, including without limitation, with respect to both itself and its property.

## 15.5 Third parties

This Agreement confers rights only upon a person expressed to be a party or expressed to benefit from this Agreement, and not upon any other person, including an Applicant's Representative or the Applicant's Personnel.

## 15.6 Applicant's Representative

If the Applicant nominates a Representative:

- (a) the Applicant confirms that the Representative has been granted authority to administer the Agreement in relation to the Project on its behalf, and with the full knowledge of the Applicant;
- (b) the Applicant accepts that it will be liable under this Agreement for the actions of its Representative, as if those same actions were taken by the Applicant;
- (c) the Applicant must notify the National Administrator promptly of the revocation of authority of any Representative;
- (d) the National Administrator may rely on instructions and information provided by the Representative as if they were provided by the Applicant;

- (e) any information or instructions provided by the Representative to the National Administrator, the Estimator, the Reviewer or the Accredited Assessor will be deemed to have been given by the Applicant; and
- (f) the National Administrator may discuss the Project and all matters arising under this Agreement with the Representative as if the Representative were the Applicant.

## **15.7 Pre-contractual negotiation**

This Agreement constitutes the entire agreement and understanding of the parties with respect to the subject matter. It sets out the only conduct, representations, warranties, covenants, conditions or understandings (collectively, the “**Conduct**”) relied on by the parties and supersedes all earlier Conduct between the parties in connection with its subject matter. Neither party has relied on nor is relying on any other Conduct in entering into this Agreement and completing the transactions contemplated by it.

## **15.8 Further assurance**

Each party must execute any document and perform any action necessary to give full effect to this Agreement, whether prior or subsequent to performance of this Agreement.

## **15.9 Waivers**

Any failure or delay by any party to exercise any right under this Agreement does not operate as a waiver and the single or partial exercise of any right by that party does not preclude any other or further exercise of that or any other right by that party.

## **15.10 Remedies**

The rights of a party under this Agreement are cumulative and not exclusive of any rights provided by Law.

## **15.11 Severability**

Any provision of this Agreement which is invalid in any jurisdiction is invalid in that jurisdiction to that extent, without invalidating or affecting the remaining provisions of this Agreement or the validity of that provision in any other jurisdiction.

## **15.12 Joint and several liability**

Any obligation to be performed or restriction to be observed under this Agreement by two or more persons binds them jointly and severally.

## **15.13 Counterparts**

This Agreement may be executed in any number of counterparts. All counterparts taken together constitute one agreement.

## **15.14 Electronic Executions**

- (a) Each party consents to this document and any variations of this document 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 document 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 document and any variation of it:
- (i) insertion of the person's name on to the document;
  - (ii) insertion of the person's name on to the document; or
  - (iii) use of a stylus or touch finger on a touch screen to sign the document 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 document;
  - (iv) use of a reliable electronic signature and exchange platform (such as DocuSign or AdobeSign) to sign the document; 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 document and that electronic signing of this document by or on behalf of a party indicates that party's intention to be bound.
- (e) A signed copy of this document 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 document for all purposes.

## Executed as an Agreement

Signed for and on behalf of National Administrator by its authorised signatory but not so as to incur personal liability:



Signature of Authorised Signatory

Signature of Witness

Carlos Flores

Ryan Flack

Name of Authorised Signatory

Name of Witness

Director, NABERS and Building Sustainability,  
Communities and Greater Sydney Delivery  
Division

12 Darcy Street, Parramatta NSW 2150

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).

14/01/2025

Date

Insert correct execution block for the Applicant entity, e.g. see various execution blocks below.

**Executed as an Agreement**

by **[Name of individual]** in the presence of:

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 witness

\_\_\_\_\_  
Signature of **[Name of individual]**

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)

\_\_\_\_\_  
Name of witness in full

\_\_\_\_\_  
Address of witness

\_\_\_\_\_  
Occupation of witness


Where an individual is executing in its personal capacity:

Where a company is executing under section 127(1) of the *Corporations Act* and the company has multiple officers:

**Executed by ESR Developments (Australia) Pty. Ltd**(ACN 625 766 109) in accordance with section 127(1) of the *Corporations Act 2001*:

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



\_\_\_\_\_  
Signature of Director/ Secretary

\_\_\_\_\_  
Anthony Lenehan

\_\_\_\_\_  
Name of Director in full

\_\_\_\_\_  
Yasothara Yoganathan

\_\_\_\_\_  
Name of Director/Secretary in full

Where a company is executing under section 127(1) of the *Corporations Act* and the company has a sole director/secretary:

**Executed** by **[Name of Developer]** (ACN [ACN#]) in accordance with section 127 of the *Corporations Act 2001* (Cth):

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

---

Signature of Director/Secretary

---

Name of Director/Secretary in full

## Schedule 1 Rating licence period, rights and status

Possible Status options are as follows:

STATUS NAME	DESCRIPTION
<b>In progress</b>	<ul style="list-style-type: none"> <li>• The Agreement to Rate document has been counter-signed by NABERS.</li> <li>• Awaiting performance ratings to be certified for all rating types associated with the Agreement to Rate.</li> </ul>
<b>Complete</b>	<ul style="list-style-type: none"> <li>• Performance ratings for all of the rating types associated with the Agreement to Rate have been certified.</li> <li>• This is a final status for the Project.</li> </ul>
<b>Not valid — terminated by the National Administrator</b>	<ul style="list-style-type: none"> <li>• If the National Administrator terminated an Agreement to Rate.</li> <li>• This status is a final status for the Project.</li> </ul>
<b>Not valid — terminated by Applicant</b>	<ul style="list-style-type: none"> <li>• If the Applicant terminates an Agreement to Rate.</li> <li>• This status is a final status for the Project.</li> </ul>
<b>Not valid — terminated due to Project transfer</b>	<ul style="list-style-type: none"> <li>• If the Applicant sells some or all of the Project and the purchaser does not sign a deed of novation of the Agreement.</li> </ul>

## Schedule 2 Liability limitations

### Option 1: Limitation of Trustee Liability

For Schedule 2, this Option 1 should be used when the Applicant is a trustee company for a Trust. If however, the Trust involves a Custodian, then Option 2 (next page) will be more suitable.

This Schedule is only applicable to a trustee company.

- 1 The Trustee enters into this Agreement in its capacity as the trustee for the Trust constituted by a trust deed (**Trust Deed**).
- 2 Subject to Clause 4 of this Schedule, liability arising under or in connection with this Agreement (except under or in connection with Clause 1 of this Schedule above) is limited and can be enforced against the Trustee only to the extent to which the Trustee, having sought indemnification to the maximum extent possible, is actually indemnified in respect of that liability out of the assets of the Trust. This limitation of the Trustee's liability extends to all liabilities and obligations of the Trustee in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to this Agreement.
- 3 No party to this Agreement or any person claiming through or on behalf of them will be entitled to:
  - (a) claim from or commence proceedings against the Trustee in respect of any liability in any capacity other than as the trustee of the Trust;
  - (b) seek the appointment of a receiver, receiver and manager, liquidator, an administrator or any similar office-holder to the Trustee, or prove in any Liquidation, administration or arrangement of or affecting the Trustee, except in relation to the assets of the Trust; or
  - (c) enforce or seek to enforce any judgment in respect of a liability under this Agreement or otherwise against the Trustee in any capacity other than as Trustee of the Trust,except under or in connection with Clause 1 of this Schedule above.
- 4 Notwithstanding any other provision of this Agreement, Clauses 2 and 3 of this Schedule do not apply to any obligation or liability of the Trustee to the extent to which there is, in respect of that obligation or liability, whether under the Trust Deed or by operation of Law, a reduction in the extent of the Trustee's indemnification, or loss of the Trustee's right of indemnification, out of the assets of the Trust as a result of Trustee's failure to properly perform its duties as trustee of the Trust.
- 5 Nothing in Clause 4 of this Schedule will make the Trustee liable for any claim for an amount greater than the amount which the National Administrator would have been able to claim and recover from the assets of the Trust in relation to the relevant obligation or liability if the Trustee's right of indemnification, out of the assets of the Trust had not been prejudiced by the failure of the Trustee to properly perform its duties.

## Option 2: Limitation of Custodian and Trustee liability

For Schedule 2, this Option 2 should be used when the Applicant involves a Custodian of a trust.

This Schedule is only applicable to a custodian and a trustee company

### Definitions

1 A reference to “Custodian” and “Trustee” means the entities identified in the project details.

### The Custodian

- 2 The Custodian enters into this Agreement as agent of the Trustee. The Custodian only acts in accordance with the terms and conditions of the document under which it is appointed as the Trustee’s agent and is not liable under any circumstances to any party under this Agreement.
- 3 The Custodian must carry out the obligations under this Agreement to the extent that the same are capable of being carried out by it as Custodian and are not capable of being carried out by the Trustee (**Custodian Obligations**).
- 4 The Trustee must perform the obligations under this Agreement with the exception of the Custodian Obligations and must procure that the Custodian performs the Custodian Obligations.
- 5 This limitation of the Custodian’s liability applies despite any other provision of this Agreement and extends to all liabilities and obligations of the Custodian in any way connected with any obligation including representation or warranty arising out of this Agreement.
- 6 The Custodian is not required to do or refrain from doing anything under this Agreement unless the Custodian’s liability is limited in the same manner as set out in Clause 2.
- 7 No attorney, agent, receiver or receiver and manager appointed under this Agreement has authority to act on behalf of the Custodian in a way which exposes the Custodian to any liability.
- 8 If, whether by the express provisions of this Agreement or by implication of law, the Custodian makes or is taken to have made any representation or warranty then, those representations and warranties are taken to have been made by the Trustee.

### The Trustee

- 9 The Trustee enters into this Agreement in its capacity as the trustee for the Trust constituted by a trust deed (**Trust Deed**).
- 10 Subject to Clause 11 of this Schedule, liability arising under or in connection with this Agreement is limited and can be enforced against the Trustee only to the extent to which the Trustee, having sought indemnification to the maximum extent possible, is actually indemnified in respect of that liability out of the assets of the Trust. This limitation of the Trustee’s liability extends to all liabilities and obligations of the Trustee in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to this Agreement.
- 11 No party to this Agreement or any person claiming through or on behalf of them will be entitled to:
- (a) claim from or commence proceedings against the Trustee in respect of any liability in any capacity other than as the trustee of the Trust;
  - (b) seek the appointment of a receiver, receiver and manager, liquidator, an administrator or any similar office-holder to the Trustee, or prove in any Liquidation, administration or arrangement of or affecting the Trustee, except in relation to the assets of the Trust; or

- (c) enforce or seek to enforce any judgment in respect of a liability under this Agreement or otherwise against the Trustee in any capacity other than as Trustee of the Trust,

except under or in connection with Clause 10 of this Schedule above.

- 12 Notwithstanding any other provision of this Agreement, Clauses 10 and 11 of this Schedule do not apply to any obligation or liability of the Trustee to the extent to which there is, in respect of that obligation or liability, whether under the Trust Deed or by operation of Law, a reduction in the extent of the Trustee's indemnification, or loss of the Trustee's right of indemnification, out of the assets of the Trust as a result of Trustee's failure to properly perform its duties as trustee of the Trust.
- 13 Nothing in Clause 10 of this Schedule will make the Trustee liable for any claim for an amount greater than the amount which the National Administrator would have been able to claim and recover from the assets of the Trust in relation to the relevant obligation or liability if the Trustee's right of indemnification, out of the assets of the Trust had not been prejudiced by the failure of the Trustee to properly perform its duties.