

Memorandum of Understanding

BETWEEN

EnergyAustralia NSW Pty Ltd

and

Lithgow City Council

MEMORANDUM OF UNDERSTANDING dated

2023 (MOU)

BETWEEN LITHGOW CITY COUNCIL (ABN 59 986 092 492) of 180 Mort Street, Lithgow NSW 2790
(Council)

AND ENERGYAUSTRALIA NSW PTY LTD (ACN 163 935 635) of [TO BE INSERTED] (Energy
Australia)

RECITALS

- A EnergyAustralia NSW Pty Ltd (**EnergyAustralia**) owns Lot1 in DP1181411 (**Lot 1**) situate at Magpie Hollow Road, South Bowenfels. An image showing Lot 1 is attached to this MOU as **Annexure A**. Lot 1 comprises part of the Lake Lyell dam, the spillway, the spillway bridge and land. *[EA Note: we understand that as a result of previous widening of the Spillway bridge, the Spillway bridge is located on land that is owned by EnergyAustralia and also extends to land that is owned by Council. Similarly, as a result of raising the dam wall, the raised dam wall is located on land that is owned by EnergyAustralia and also extends to land that is owned by Council. We also understand that this is not accurately reflected in the Title documents provided - to discuss clarifying the exact boundaries.]*
- B A Right of Way (**RoW**) benefitting Council was created on subdivision of Lot 55 in DP791926 and is recorded on deposited plan 1181411, a copy of which is attached as **Annexure B**. The RoW adjoins and facilitates Magpie Hollow Road, which is a public road vested in Council and governed by the *Roads Act 1993*.
- C The RoW is governed by the terms of easement shown secondly on the section 88B which created the RoW, a copy of which is attached to this MOU as **Annexure C**.
- D The parties consider that maintenance and refurbishment works on the surface seal of the RoW and replacement of related traffic furniture should be completed to ensure that the spillway bridge and the RoW meets:
- a) dam safety requirements as required by EnergyAustralia; and
 - b) a safe trafficable carriageway as required by Council.
- E EnergyAustralia and Council have agreed to enter into this non-binding MOU for the purposes of documenting their discussions to date and to facilitate the drafting of a binding agreement and a Variation of Easement that provides for:
- a) a one off contribution payable by EnergyAustralia to Council to be used for completing the refurbishment works referred to in item D above ; and
 - b) an arrangement that governs the ongoing maintenance of the Spillway bridge.

AGREED TERMS

1 Nature of MOU

Nothing in this MOU:

- (a) creates or intends to create a legally binding agreement or contract between EnergyAustralia and Council;
- (b) fetters or intends to fetter Council's powers and responsibilities under any legislation; or
- (c) creates or intends to create a partnership, joint venture or other similar such undertaking between EnergyAustralia and Council.

2 Binding agreement

The parties agree to negotiate in good faith and use reasonable endeavours to enter into a binding agreement and facilitate a Variation of Easement that reflect the terms of this MOU.

3 Duration of MOU

This MOU will commence from the date it is fully executed by both parties and will apply to the earlier of:

- (a) the parties enter into a binding agreement and a Variation of Easement that reflect the terms of this MOU; and
- (b) either party terminates this agreement by giving 30 days written notice to the other party.

4 Scope of refurbishment works

The binding agreement must set out an agreed scope of work for the RoW maintenance works, which must include, among other things:

- (a) milling the RoW road surface to the required profile;
- (b) laying a 14mm Stress Absorbing Membrane Interlayer (SAMI) followed by an Asphaltic Concrete wearing seal; and
- (c) upgrading road safety guardrail barriers and replacement of other traffic furniture, (together, the **Works**).

5 EnergyAustralia involvement in refurbishment works

The binding agreement must provide the following:

- (a) a mechanism for EnergyAustralia to contribute to the Works tender procurement process and tender evaluation panel, including in relation to the mix design and engineering design of the Works; and
- (b) a right for an EnergyAustralia representative to be on site during the completion of the Works and attend relevant status and update meetings between Council and the contractor(s) completing of the Works.

6 Scope of ongoing maintenance works

The binding agreement must provide that, upon completion of the Works:

- (a) EnergyAustralia will be responsible for:
 - (i) completion of dam safety inspections in accordance with its maintenance schedule; and

- (ii) reporting to Council any road pavement and traffic furniture defects within the RoW found during those dam safety inspections;
- (b) Council will be responsible for:
 - (i) traffic safety and traffic management within the RoW;
 - (ii) routine road surface maintenance and repair within the RoW including pothole patching and crack seal, noting that any work that penetrates the road base course requires consultation with EnergyAustralia's dam engineer prior to commencing such work;
 - (iii) rouge vegetation treatment, removal and management; and
 - (iv) maintenance of traffic signs and road safety guardrail barriers,
 and must ensure that the above are addressed in Council's scheduled maintenance program.

7 EnergyAustralia contributions

- (a) EnergyAustralia proposes to provide the following amounts to Council (together, the **Contribution Amounts**):
 - (i) a one off contribution of an amount to be determined in accordance with clause (b), to be used by Council to facilitate the completion of the Works (**Works Amount**), and
 - (ii) an annual contribution of [\$5,000] to be used by Council for the purpose of providing ongoing maintenance of the RoW (**Maintenance Amount**).
- (b) The sum of the Works Amount will be equal to the final invoiced costs to Council for the Works, provided that the Works Amount will not exceed a total amount of [\$insert]. Any costs exceeding this total amount will be solely borne by Council. **[EA Note: we have not inserted a figure here as we expect new quotes will be required. We can determine the appropriate cap for this amount at that point.]**

8 Payment of Contribution Amounts

- (a) Payment of the Works Amount will be made by EnergyAustralia to Council within 30 days of the later of:
 - (i) practical completion of the Works;
 - (ii) evidence provided to EnergyAustralia of payment by Council to the contractor(s) engaged to complete the Works; and
 - (iii) the issuing of a valid tax invoice for the Works Amount.
- (b) Payment of the Maintenance Amount will be made by EnergyAustralia to Council within 30 days of the issuing of a valid tax invoice for the applicable Maintenance Amount.
- (c) The binding agreement will set out the details required to facilitate payment of the Contribution Amounts by EnergyAustralia, including submission by Council of valid tax invoices.
- (d) Council must provide all information and evidence reasonably requested by EnergyAustralia in respect of any valid tax invoice issued to EnergyAustralia for a Contribution Amount, including copies of the final invoiced costs issued to Council by the contractor(s) completing the Works.

9 Defects

The binding agreement must provide that:

- (a) the Works contract with the contractor(s) includes an appropriate defects liability period, during which the contractor must repair, replace or otherwise make good any defects in the Works notified to it;
- (b) an additional defects liability period in respect of the date that any part of the Works are repaired, replaced or made good, commencing from the date of that repair, replacement or making good; and
- (c) a mechanism under which EnergyAustralia may notify Council of any defects in the Works, upon which Council must in turn notify the contractor of those defects.

10 Warranties

[EA Note: We have set out below the standard warranties we would expect if we were engaging a third party under a works contract. We have included this obligation because we consider it an important requirement given that the majority of the Works will be completed on land owned by EA.]

Council must ensure that the contractors engaged to complete the Works provide appropriate warranties in respect of their completion of the works, including warranting that:

- (a) the Works will be performed:
 - (i) with all the skill and care to be expected of an appropriately qualified and experienced contractor with experience in performing works and activities of a similar size, type, nature and complexity to the Works; and
 - (ii) using workmanship of the highest standard which is fit for its intended purpose;
- (b) the Works will be performed in a timely and professional manner in accordance with the relevant contract, and in compliance with all relevant laws and authorisations, permits and licences;
- (c) the contractor has done everything that would be expected of a prudent, competent and experienced contractor in:
 - (i) assessing the risks which they are assuming under the relevant contract; and
 - (ii) ensuring that the price payable under the relevant contract contains allowances to protect the contractor against any of these risks eventuating,
- (d) the contractor will not make a claim for an increase in the price if any of those risks eventuate;
- (e) all materials provided by the contractor as part of the Works will be new and unused, fit for the intended purpose and of a quality reasonably expected in the process and manufacturing industries, free from defects and deficiencies of any kind, and free from any encumbrance or lien and must conform to the requirements set out in the relevant contract (if any);
- (f) the Works will be performed in accordance with the requirements of the relevant contract, for the price identified and by the date for practical completion;

- (g) the Works will be performed with the highest regard for safety and protection of the environment and so that the Works are capable of being operated and utilised in accordance with all applicable laws and the relevant contract;
- (h) the contractor has read and understood the relevant site arrangements, as well as any other details relating to site access contained or referred to in the relevant contract, and the contractor will comply with any conditions contained or referred to therein;
- (i) the contractor has made and will continue to make reasonable endeavours to consider the risks of modern slavery existing in it and its operations and:
 - (i) is not aware of any actual or suspected instances of modern slavery existing within its business operations or supply chain; and
 - (ii) will notify us of any suspected or actual instances of modern slavery you become aware of within your business operations or supply chain.

11 Liability and indemnities

[EA Note: Similarly to our note on the warranties clause above, we have included this obligation as EnergyAustralia cannot accept liability for claims or losses relating to the completion of the Works. As we do not expect to be party to the contracts with the relevant contractor(s), we will be removed from operational control and risks arising from the Works.]

The binding agreement must provide that:

- (a) EnergyAustralia must not and will not be liable for any loss or claim suffered by Council or the contractor(s) engaged to complete the Works, including loss or claim in relation to:
 - (i) bodily injury, disease, illness or death; or
 - (ii) loss of, loss of use of or damage to any third party property;

except to the extent that any loss or claim is caused or contributed to by the negligent, wilful or unlawful acts or omissions of EnergyAustralia.

- (b) Council will indemnify EnergyAustralia against any loss or claim suffered or incurred by EnergyAustralia in respect of:
 - (iii) the death, illness or injury of any person; or
 - (iv) loss of or damage to any property, including loss of use,

arising out of or resulting from either Council's or the contractors acts or omissions in connection with the Works and the relevant contract, except to the extent that any loss or claim is caused or contributed to by the negligent, wilful or unlawful acts or omissions of EnergyAustralia..

12 Insurance

The binding agreement must provide that the contractor(s) engaged to complete the Works must effect and maintain appropriate levels of insurance, including:

- (a) in respect of public and products liability insurance: at least \$10 million per occurrence and, for product liability claims, also in the aggregate for all occurrences in any 12 month policy period;
- (b) in respect of workers' compensation insurance: the amount required by law; and

- (c) in respect of motor vehicle insurance: The amount required by law for compulsory third party motor vehicle insurance. At least \$5 million per occurrence for third party property damage (and in the case of unregistered vehicles, injury).

13 Meetings

- (d) This MOU and the proposed binding agreement will be added as an agenda item for the bi-monthly scheduled meeting currently being held between EnergyAustralia and Council.
- (e) Meeting minutes will be kept and circulated to both parties within 5 days of each meeting being held.

14 Confidentiality

The parties acknowledge that information disclosed by one party to the other (the **Disclosing Party**) in the course of the subject matter of this MOU may be confidential and unless required by law must not be disclosed to a third party except with the prior written consent of the Disclosing Party.

15 Dispute resolution

If a dispute or difference arises between the parties out of or in connection with this MOU, either party may give the other a written notice specifying the dispute or difference.

Within 30 days of the date of the notice, a person holding a position of senior management of each party must meet and undertake negotiations in good faith and on a without prejudice basis with a view to resolving the dispute or difference.

16 Variation

The parties may agree to vary any of the requirements of this MOU. Such agreement must be in writing and signed by both parties.

17 GST

- (a) In this section:
 - (i) **GST** means the tax payable on taxable supplies under the GST Law.
 - (ii) **GST Law** has the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- (b) Words defined in the GST Law have the same meaning in this section, unless the context makes it clear that a different meaning is intended.
- (c) Unless a Contribution Amount (or other consideration payable) is expressed to be GST inclusive it is taken to be GST exclusive.
- (d) The recipient of a taxable supply must, subject to the issue of a valid Tax Invoice by the supplier to the recipient or creation of a Recipient Created Tax Invoice by the recipient (as the case may be), pay to the supplier in addition to a Contribution Amount or other amounts payable an additional amount on account of any GST payable on the taxable supply calculated in accordance with the GST Law.
- (e) Whenever an adjustment event occurs in relation to any taxable supply to which clause 13(d) applies:

- (i) the supplier must determine the amount of the GST component of the consideration payable; and
 - (ii) if the GST component of that consideration differs from the amount previously paid, the amount of the difference must be paid by, refunded to or credited to the recipient as applicable, and an adjustment note issued in accordance with the requirements of the GST law.
- (f) The supplier must issue a Tax Invoice to the recipient of a supply to which clause 13(d) applies on or before the due date for payment of the underlying supply, except where the parties agree that the recipient will create a valid Recipient Created Tax Invoice.
- (g) If one of the parties is entitled to be reimbursed or indemnified for a loss, cost, expense or outgoing incurred in connection with this this Non-Binding Heads of Agreement or a binding agreement:
 - (i) the amount of the reimbursement or indemnity payment must first be reduced by an amount equal to any input tax credit or fuel tax credit to which the party being reimbursed or indemnified (or its representative member) is entitled in relation to that loss, cost, expense or outgoing; and
 - (ii) if the amount of the payment is consideration or part consideration for a taxable supply, it must then be increased on account of GST in accordance with clause 13(d).
- (h) Where the purchase price is expressed in a currency other than Australian dollars and GST is payable, the supplier must display on the tax invoice the amount of GST payable in Australian dollars, or the conversion rate used by the supplier to calculate the GST amount and which must comply with the requirements in GST Ruling 2001/2 (foreign exchange conversions) and any replacement or substitute ruling issued.

SIGNATURES

Signed for **EnergyAustralia NSW Pty Ltd** by
its authorised representative:

Signature of authorised representative

Name of authorised representative

DATE:

Signed for **Lithgow City Council** by its
authorised representative:

Signature of authorised representative

Name of authorised representative

DATE:

ANNEXURE A – IMAGE SHOWING LOT 1 IN DP1181411



ANNEXURE B - DEPOSITED PLAN 1181411

ANNEXURE C

SECTION 88B CREATED BY DP791926 - TERMS OF EASEMENT SECONDLY