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LAWYERS

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Resilient Hills & Coasts
Community Energy Program Steering
Committee
c/- City of Victor Harbor
1 Bay Road
VICTOR HARBOR SA 5211

Attention: Shen Mann, Senior Strategy & Governance Officer, Alexandrina Council
Mark Przibilla, Acting Manager Economic & Tourism Development, City of Victor Harbor

Dear Sir/Madam

Resilient Hills & Coasts - Community Energy Program

1. Background

We understand that:

(a) the councils comprising Resilient Hills & Coasts, as represented by the City of Victor Harbour (**RH&C**), seek to establish a 'Community Energy Foundation' (**Foundation**).

(b) The Foundation's main objectives are to:

- reduce cost of living pressures for community constituents (including local residents and businesses);
- develop a self-funded model that localises the economic benefits of energy supply;
- procure energy services that reduce carbon emissions;
- empower the community to transition to a clean energy future; and
- identify the RH&C region as a region of choice for client-ready development and investment.

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2. Request for Advice

2.1 We have been instructed to advise RH&C in relation to the legal aspects of the proposed establishment of the Foundation and in particular to:

(a) review the proposed model as outlined in the Resilient Hills and Coasts Community Energy Program Final Report prepared by Moreland Energy Foundation and Tandem Energy dated September 2018 (**CEP Report**);

(b) identify legal risks to RH&C, and associated financial and governance risks, arising from the proposed model outlined in the CEP Report (including the likelihood and severity of such legal risks); and

(c) provide advice and/or recommendations (as applicable) in relation to:

- the structures available to establish a Foundation that minimise exposure to legal, financial and government risks;
- competition law issues, including having regard to recent compliance action taken by the Australian Competition and Consumer Commission (**ACCC**) against "One Big Switch";
- consumer law issues, including in the context of the ACCC's Report "Restoring electricity affordability & Australia's competitive advantage" dated June 2018;
- tax structuring and profiling; and
- energy licensing and regulation; and

(d) subject to the outcomes and recommendations of our advice in relation to the above, consider the implications for key governance structures and associated documents including:

- the composition of the governing body of the Foundation;
- the proposed constituent documents for the Foundation; and
- the optimal model for funding of the Foundation.

2.2 We confirm that, in preparing this advice, we have considered the following documents and resources:

(a) CEP Report;

(b) CEP Report supplement entitled "Governance Analysis - Report Supplement";

(c) CEP summary document entitled "Resilient Hills & Coasts Community Energy Program";

(d) various additional reports and resources contained in the "Resilient Hills and Coasts Public Resource Folder" referenced in Appendix I of the CEP Report including:

- Local Government Association of South Australia Information Paper "Corporate Structures Available to Councils" dated July 2018 (**Information Paper**);
- paper entitled "Governance Models Supportive of Distributed Green Infrastructure for Decarbonised Resilient Cities"; and
- Victorian Department of Planning and Community Development guide entitled "A Guide to Governing Shared Community Facilities" dated September 2010; and

(e) ACCC's Retail Electricity Pricing Inquiry Final Report dated June 2018 (**Final Report**).

3. Executive Summary

3.1 By way of summary, there are no fundamental legal barriers to the establishment of the Foundation in a manner which is broadly in accordance with the recommendations contained in the CEP Report.

3.2 Our advice recommends ongoing consideration and engagement by RH&C councils in relation to competition and consumer law issues. There may be a requirement to obtain authorisations for aspects of the proposed activities of the Foundation and the nature and timing of those authorisations will need to be the subject of further and more detailed advice once the final structure of the Foundation, and a formal business plan, are available.

3.3 The Foundation does not require any regulatory authorisations to engage in energy marketing activities to the extent the proposed operations of the Foundation amount to such activities. However, there are a number of regulations governing the manner in which energy marketing activities are conducted, and a robust compliance framework will be essential.

3.4 We consider that an incorporated association is the most appropriate legal structure for the Foundation. We have recommended that RH&C councils take a direct and active role in the governance of that entity for an initial 'transitional' period, to mitigate the risk that the strategic objectives of the Foundation are not properly supported in its early stages, with the associated risk that the Foundation may not ultimately succeed in achieving its objectives.

3.5 In our view, it is likely that the Foundation would be successful in achieving tax exempt status on the basis of self-assessment as a community service provider. Further detailed consideration of the objects and proposed activities of the Foundation will be required in order to confirm this preliminary assessment.

3.6 There are a number of aspects of the proposed governance documents for the Foundation that will need to be framed having regard to the desired governance and tax

outcomes. Our detailed advice highlights a number of matters for the further consideration of RH&C councils.

3.7 In summary, we do not consider there are any fundamental legal barriers which would prevent the RH&C councils from establishing the Foundation for the purposes described in paragraph 1(b) above. There are a number of commercial and legal risks which will need to be considered and addressed in the final structure of the Foundation and in due course in the execution of its activities, but these are capable of ongoing oversight and resolution.

4. Competition and Consumer Law

The section deals with the potential Competition and Consumer Law issues arising from the proposed activities of the Foundation.

Those issues will not prevent the Foundation from proceeding with its proposed activities but they involve important legal matters which must be addressed from the outset and monitored throughout the implementation and operation of the Foundation.

4.1 Competition Law

Certain business practices that limit or prevent competition are against the law. Accordingly, it is important that the legal restrictions and prohibitions are taken into account when planning how to proceed in situations where competition issues arise.

(a) *Foundation Program*

It is proposed that the Foundation's activities (**Program**) will involve pooling the individual electricity demand of RH&C councils and other participating groups, businesses and individuals within the council areas, collectively inviting tenders from and negotiating with electricity suppliers, entering into electricity supply agreement(s) with the preferred supplier(s) on the same (or substantially similar terms), and participating in joint activities and decisions regarding the operation and administration of the electricity supply agreement(s).

The Program has been devised in response to rapidly increasing prices for electricity faced by RH&C councils and their residents and ratepayers, which is having a significant adverse impact on the individuals, groups and businesses in their council areas. The RH&C councils consider that pooling their electricity demand will allow them to achieve a sufficient scale to access more competitive offers from electricity suppliers than would be possible from individual negotiations.

The launch of the Program is considered necessary in the present electricity supply market in Australia, which the Federal Government, the Australian Energy Regulator and the ACCC has each acknowledged is not presently operating in the most efficient manner for the benefit of end-users.

The likely public benefits from the Program include transaction costs savings, increased competition for the supply of electricity, increased incentives for investment in generating capacity, and the potential for electricity costs savings

for RH&C councils to improve their competitiveness and benefit their residents and ratepayers.

(b) *Market Context*

The Final Report relevantly identified significant challenges currently facing Australian business customers in relation to electricity markets, and the important role that collective buying groups can play in the ongoing commercial viability of participating businesses, including recognising that:

(i) "*…Electricity prices for businesses are… increasing rapidly, threatening their viability".*[1] *"Medium-sized businesses [have faced] dramatically increasing electricity costs, which have been reported anecdotally to the Inquiry of 200 –300 per cent from their most recent offers".*[2] *"Submissions from industrial users… confirm that they have seen substantial increases, in some cases a doubling or tripling, against their most recent electricity offer..."*[3]

(ii) "*…Increasing electricity costs have reduced the capacity of some businesses to grow or to stay competitive, and… passing on electricity costs to their customers is frequently not possible…*"[4]

(iii) "*…In response to higher retail prices, a number of groups of businesses have sought authorisation from the ACCC to collectively bargain for electricity… to create scale among the group by pooling their electricity demand to seek more competitive offers from suppliers…*"[5]

(iv) "*…Larger businesses, faced with higher electricity costs, have been doing what they can to lower these costs through formation of buying groups… There are some examples of these measures being effective, however it appears that more support for these arrangements could further reduce pressure on businesses' electricity costs...*"[6]

(v) "*…The ACCC is generally supportive of buying groups for electricity…", which "…can be an important avenue to new entry and consequently a new source of competition in wholesale markets…*"[7]

While the Final Report makes a number of recommendations which the ACCC considers may reduce prices and restore consumer confidence in electricity supply, it is likely that their impact, if implemented, may not be realised in the short to medium term. The Program provides an important solution to the

[1] Final Report, page 1.
[2] Final Report, page 348.
[3] Final Report, page 350.
[4] Final Report, page 336.
[5] Final Report, page 349.
[6] Final Report, page xiv. See also Final Report, p99: *"In recent times, smaller retailers and some corporate and industrial users have also backed new projects. For example… we have seen the successful culmination of the South Australian Chamber of Mines and Energy's (SACOME) process to jointly procure energy on behalf of some of its members through an agreement with SIMEC ZEN Energy… The ACCC welcomes these developments as they are bringing additional generation capacity to the market and enabling these customers to directly benefit from that generation through competitive prices…".*
[7] Final Report, page 350.

immediate challenges faced by RH&C councils in their individual acquisition of electricity, in advance of the further development and implementation of any such recommendations.

(c) *Proposed Conduct*

The RH&C councils intend to pool their individual demands for electricity and those of interested residents and businesses in their council areas and form the Community Energy Foundation (**Foundation**) as a joint electricity buyers' group (**Buyers Group**) to collectively negotiate with electricity suppliers, to secure cost competitive and reliable electricity supply.

Depending on the final model adopted, the RH&C councils may wish to:

(i) collectively consider potential electricity supply options for the pooled electricity load of the RH&C councils;

(ii) collectively conduct a tender process for the supply of the pooled electricity loads in order to select an electricity supplier(s) to supply their pooled electricity loads;

(iii) collectively negotiate an electricity supply contract with preferred electricity supplier(s);

(iv) enter into electricity supply agreements with the preferred electricity supplier(s) on the same (or substantially similar) terms and conditions; and

(v) following entry into supply agreements, participate in joint activities and decisions regarding the operation and administration of the agreement(s), including performance and/or pricing reviews, events which materially impact the performance of the agreement, the exercise of contract options, or any changes to terms and conditions,

(the **Proposed Conduct**).

(d) *Application of Competition Laws*

The Competition Laws are primarily found in Part IV of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

Under section 2BA of the CCA, Part IV "applies in relation to a local government body only to the extent it carries on a business, either directly or by an incorporated company in which it has a controlling interest".

'Carry on a business' has generally been interpreted by the courts to mean 'activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis' (although the CCA defines 'business' as also including 'a business not carried on for profit').

Depending on the final model, the activities of the RH&C councils in the implementation of the Program are likely to be considered the carrying on of a business and attract the provisions of Part IV of the CCA.

(e) *Potential Issues under the CCA*

The members of the Buyer's Group may be considered to be competitors in the acquisition of electricity for the purposes of the CCA.

Depending on the final structure adopted for implementation of the Program, it is possible that making and giving effect to the arrangements comprising the Proposed Conduct could potentially be challenged on the basis that they contain provisions that may contravene the prohibitions on cartel conduct under sections 45AF, 45AG, 45AJ, and 45AK of the CCA, for example provisions:

(i) having the purpose, effect or likely effect of fixing, controlling or maintaining the price of goods or services to be acquired by RH&C councils; or

(ii) having the purpose of allocating between RH&C councils the persons or classes of persons who are likely to supply goods or services to RH&C councils.

In addition, subsection 45(1)(c) of the CCA provides that a person must not:

> *…engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition.*

The Explanatory Memorandum to the Bill which amended the CCA to introduce the concept of concerted practices to section 45, explains that a concerted practice is:

> *"…any form of cooperation between two or more firms (or people) or conduct that would be likely to establish such cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of the uncertainty of competition."*

There are, therefore, potential legal risks associated with the Proposed Conduct.

(f) *Authorisations*

In some situations, the ACCC is able to authorise conduct where, notwithstanding the conduct may breach the provisions of the CCA, the public benefit of that conduct outweighs any public detriments.

Depending on the final structure adopted for the Foundation and the Program, it is likely that the RH&C councils would wish to have certainty provided by authorisation that the Proposed Conduct does not contravene these prohibitions above, and also cannot be challenged on the basis that it has the purpose, effect or likely effect of substantially lessening competition in contravention of

section 45 of the CCA, or the exclusive dealing provisions in section 47 of the CCA.

The ACCC has previously authorised the following similar collective bargaining and joint purchasing arrangements for electricity:

(i) On 22 November 2017, the ACCC authorised the Eastern Energy Buyers Group (**EEGB**), on behalf of its current and future members, to establish a joint energy purchasing group combining gas and electricity requirements, for a period of 11 years.[8] The ACCC found that the proposed conduct was likely to result in public benefits including transaction costs savings, potential for increased competition for the supply of electricity and gas, and incentives for investment in generating capacity.

(ii) On 17 May 2017, the ACCC authorised the South Australian Chamber of Mines and Energy (**SACOME**) and other organisations to form a joint electricity purchasing group in South Australia, for a period of 11 years.[9] The ACCC found that the proposed conduct was likely to result in public benefits including transaction cost savings and greater competition for generation and wholesale supply of electricity in South Australia. On 8 June 2018, SACOME announced that the joint purchasing group had awarded a long term supply contract to renewable energy retailer SIMEC ZEN Energy.[10]

(iii) On 27 July 2016, the ACCC authorised the Melbourne City Council and others to establish a joint electricity purchasing group, including running a joint tender, for a period of 15 years.[11] The ACCC found that the proposed conduct was likely to result in public benefits including transaction cost savings, economies of scale, the potential for increased competition for the supply of renewable electricity, and environmental benefits.

Given the public benefits of the Program, it is likely an application for authorisation would be successful.

If an application for authorisation were appropriate, interim authorisation would also be needed to enable the Buyers Group to carry out some of the preliminary steps (e.g. collectively considering potential electricity supply options, conducting the tender process and negotiating with preferred electricity supplier(s)). We would be happy to discuss the appropriate timing for obtaining this interim authorisation, noting that this will be one of the first regulatory steps to be considered once a decision is taken to progress with the establishment of the Foundation.

If the final model adopted does not require an application for authorisation to be lodged with the ACCC (which, at this stage and based on our conclusions in this

[8] Authorisations A91594 and A91595.
[9] Authorisations A91567 and A91568.
[10] See https://www.sacome.org.au/sacome-joint-electricity-purchasing-group-awards-long-term-supply-contract-to-sanjeev-guptas-simec-zen-energy.html
[11] Authorisations A91532 and A91533.

paper, we think would be unlikely), there will nevertheless be a need to ensure that discussions between the RH&C councils and arrangements reached regarding the implementation of the Program do not breach the Competition Law provisions in the CCA.

4.2 Competitive Neutrality

(a) "Principles of competitive neutrality" are principles designed to neutralise any net competitive advantage that a government or local government agency engaged in significant business activities would otherwise have by virtue of its control by the government or local government, over private business operating in the same market.[12]

(b) The broad intent of competitive neutrality is to ensure that where governments and local governments provide goods and services in a competitive market, those business activities do not have an unfair advantage over private sector businesses by virtue of their government or local government ownership. In that situation, those businesses should be subject to the same rules and regulations as private businesses.

(c) If the implementation of the Program constitutes a significant business activity, it may attract the principles of competitive neutrality. It would then be necessary to consider whether an unfair competitive advantage arises from the structure or operations of the Program. Advantageous government funding of business activities has been identified as a form of unfair advantage in other situations.

(d) This element of the Program will need to be revisited once the likely structure and arrangements have become clearer.

4.3 Consumer Law

(a) The Australian Consumer Law (**ACL**) is a national law that aims to protect consumers and ensure fair trading in Australia. The ACL sets out rules for businesses to abide by when dealing with their customers. The ACL is part of the CCA.

(b) The application of Consumer Law provisions to the conduct of local councils was considered in the Supreme Court of NSW case of *Fabcot Pty Ltd v Port Macquarie-Hastings Council* [2010] NSWSC 726. As with the Competition Law provisions, the CCA applies to the commercial activities (as opposed to the governmental activities) of local government.

(c) Accordingly, to the extent the implementation of the Program can be characterised as the RH&C councils engaging in commercial activities, it is likely to attract the application of the ACL. Of course, non-government bodies involved in the Program will likely attract ACL obligations in the ordinary way.

(d) Under the ACL, it is unlawful to engage in conduct that misleads or deceives or is likely to mislead or deceive consumers or other businesses. This law applies

[12] Section 16, *Government Business Enterprises (Competitive) Act 1996 (SA).*

even if there is no intention to mislead or deceive or no one has suffered any loss or damage as a result of the conduct

(e) It is also unlawful to make false statements or claims about products or services.

(f) By way of example:

(i) businesses cannot wrongly compare products or services with other products or services in a way that misleads consumers;

(ii) generally speaking, where a price is advertised, it should be a total price of the goods or services and include all components;

(iii) reviews which are not based on genuine opinions about the products or services should not be used;

(iv) inaccurate premium or credence claims about the products or services cannot be made.

We can elaborate on the applicable restrictions as needed.

(g) The ACCC has taken an active approach in relation to misleading representations regarding energy prices and terms.[13] In 2018, Revtech Media, the company behind group-discount website One Big Switch, paid penalties of $25,200 after the ACCC issued two infringement notices for alleged false and misleading energy price representations.

(h) Between July and November 2017, One Big Switch advertised a 27 per cent discount for consumers in south east Queensland who switched to Click Energy's 'Big Switch Up' offer. The ACCC alleged that this representation was false or misleading because calculation of the 27 per cent discount was based on rates under the Big Switch Up offer which were higher than Click Energy's 'standing' offer rates. One Big Switch also advertised that consumers would save up to $372 a year if they switched to Click Energy. The ACCC alleged that the advertised savings were false or misleading because they were based on a comparison between Click Energy's discounted market offer and the undiscounted 'standing' offers of EnergyAustralia, Origin and AGL.

(i) The ACCC also alleged that One Big Switch did not know what a particular customer was paying under their current plan with another retailer, and so did not have reasonable grounds to estimate the savings which could be achieved by switching. It was alleged that the actual savings for some consumers were much less than the amount advertised by One Big Switch and that, as a result of these claims, consumers were misled into assuming they were getting bigger discounts and savings than they would actually receive.

[13] "Electricity costs are one of the most significant expenses households have to face. Businesses are reminded that any misrepresentations made to consumers about electricity prices will be met with ACCC action". Australian Competition and Consumer Commission, 'One Big Switch pays penalties over electricity discount and savings claims' (Media Release 135/18 ACCC 23 July 2018).

Care will need to be exercised to ensure that any dealings with and representations made to participants in the Program are fair and accurate. We can provide more specific guidance regarding contractual terms, advertising and promotional materials and selling practices as the Program is launched and implemented.

5. Energy Regulation and Energy Market Regulation

5.1 Background

(a) Persons who own, operate or control generation systems or power networks are required to be registered with the Australian Energy Market Operator (**AEMO**) and authorised by the Australian Energy Regulator (**AER**), subject to a range of exemptions.[14] Persons who retail energy (power or gas) are also required to be authorised by the AER, subject to a range of exemptions.[15]

(b) We understand that the proposed Foundation will not be engaged in owning, operating or controlling generation systems or power networks, nor carrying on business as a retailer of energy.

(c) However, the Foundation may act as an agent of a retailer of energy for the purpose of marketing that retailer's sale of energy under a proposed community energy offer, and, in that context, there are a number of legislative and regulatory requirements that apply to persons who act as a marketing agent for energy in South Australia.[16]

(d) The regulatory obligations are briefly summarised below. In providing this summary we have assumed that the Foundation will engage in door-to-door marketing of the retail sale of energy, and not telephone marketing. If the Foundation plans to use telephone marketing you should be aware that there are further regulatory obligations which are adapted to that activity.[17]

5.2 Conduct of the door-to-door marketing agent in relation to residents and other potential customers

(a) The agent must not call on a resident:

(i) at any time on a Sunday or public holiday;

(ii) before 9 am;

(iii) after 5 pm on a Saturday; or

(iv) after 6 pm on any other day,

[14] Section 11(2), National Electricity Law.
[15] Section 88, National Energy Retail Law.
[16] Division 2 of Part 3-2, Australian Consumer Law; Division 10 of Part 2, National Energy Retail Rules (version 19) 19 December 2019; *AER Retail Pricing Information Guidelines* (version 5.0) 23 April 2018.
[17] See for example: *Do Not Call Register Act 2006* (Cth); section 78(2), Australian Consumer Law.

except where the agent acts in accordance with the consent that was given by the resident to the agent or a person acting on the agent's behalf, and was not given in the presence of the agent or a person acting on the agent's behalf.[18]

(b) The agent must not make contact with a resident whose name is on the retailer's "no contact list".[19]

(c) The agent must pass on to the retailer a resident's indication that they wish to be placed on the "no contact list".[20]

(d) The agent must, as soon as practicable and in any event before starting to negotiate:

(i) clearly advise the person that the agent's purpose is to seek the person's agreement to the supply of goods or services concerned; and

(ii) clearly advise the person that the agent is obliged to leave the premises immediately on request;

(iii) provide the agent's name; and

(iv) provide the retailer's name and address.[21]

(e) The agent must leave the premises immediately on request by the resident.[22] The resident may indicate this request by signage, including:

(i) a "do not knock" sign;

(ii) a sign indicating that canvassing is not permitted on the premises; and

(iii) a sign indicating that no advertising or similar material is to be left at the premises.[23]

(f) If a resident makes a request for the agent to leave the premises:

(i) the agent must not contact the resident in relation to the services for at least 30 days; and

(ii) the retailer must not contact the resident for at least 30 days.[24]

5.3 Content and form of the agreement with a customer

(a) The agreement for the supply of goods and services (in this case electricity) must be signed by the customer.[25]

[18] Section 73, Australian Consumer Law.
[19] Rule 65(5), National Energy Retail Rules (version 19) 19 December 2019.
[20] Rule 65(4), National Energy Retail Rules (version 19) 19 December 2019.
[21] Section 74, Australian Consumer Law.
[22] Section 75(1), Australian Consumer Law.
[23] Rule 66, National Energy Retail Rules; *Australian Competition and Consumer Commission v Neighbourhood Energy Pty Ltd* [2012] FCA 1357.
[24] Section 75(2) and (3), Australian Consumer Law.
[25] Section 80(a), Australian Consumer Law.

(b) The agent must give a copy of the agreement to the customer immediately after the customer signs the agreement.[26]

(c) The agreement must comply with the following requirements:

(i) the document must set out the full terms of the agreement, including the total consideration to be paid by the customer, or if this is not possible, the way in which total consideration is to be calculated;

(ii) the front page must include a notice that conspicuously and prominently informs the customer of their right to terminate the agreement, including the following texts:

"Important Notice to Customer"

"You have a right to cancel this agreement within 10 business days from and including the day after you signed or received this agreement"

"Details about your additional rights to cancel this agreement are set out in the information attached to this agreement"

(iii) the front page of the agreement must be signed by the customer;

(iv) the front page of the agreement must include the day on which the customer signed the document;

(v) the agreement must be accompanied by the prescribed form that may be used by the customer to terminate the agreement;

(vi) the agreement must conspicuously and prominently set out:

(A) the retailer's name;

(B) the retailer's ABN (or if the retailer does not have an ABN, the ACN);

(C) the retailer's business address;

(D) if the retailer has an email address - the retailer's email address; and

(E) if the retailer has a fax number - the retailer's fax number;

(vii) the agreement must state that the agent is acting on the retailer's behalf and must set out the agent's name, business address and email;

(viii) the agreement must not exclude, limit, modify or restrict the Australian Consumer Law, and attempt to modify the jurisdiction governing of the agreement;

[26] Section 78, Australian Consumer Law.

(ix) the document must be printed clearly and typewritten, apart from amendments which may be handwritten; and

(x) the agreement must be transparent.[27]

5.4 Additional documentation to be provided to the customer

(a) The agent must not enter into an agreement with a person unless before the agreement is made, the person is given information as to:

(i) the person's right to terminate the agreement during the 10 day cooling-off period under section 82 of the Australian Consumer Law; and

(ii) the way in which the person may exercise that right.

This information must be in writing, attached to the agreement, transparent and in the most prominent text on the document (other than the agent or retailer's name or logo).[28]

(b) The agent must provide the customer with:

(i) at the time of contact, the retailer's Basic Plan Information Document (**BPID**) (which will contain a link to the retailer's Detailed Plan Information Document (**DPID**)); and

(ii) a hard copy of the DPID on request.[29]

(c) The agent must provide a written disclosure statement as soon as practicable after the formation of the contract. The written disclosure statement must contain the following information:

(i) a copy of the retailer's relevant "market retail contract";

(ii) all applicable prices, charges and benefits to the customer (to the extent both are not otherwise part of prices), early termination payments and penalties, security deposits, service levels, concessions or rebates, billing and payment arrangements and how any of these matters may be changed (including, where relevant, when changes to prices will be notified by the retailer to the customer);

(iii) the commencement date and duration of the contract, the availability of extensions, and the termination of the contract if the customer moves out of the premises during the term of the contract;

(iv) if any requirement is to be or may be complied with by an electronic transaction—how the transaction is to operate and, as appropriate, an indication that the customer will be bound by the electronic transaction

[27] Sections 79, 80(b) and 89, Australian Consumer Law.
[28] Section 82, Australian Consumer Law.
[29] Section 93, *AER Retail Pricing Information Guidelines* (version 5.0) 23 April 2018.

or will be recognised as having received the information contained in the electronic transaction;

(v) the rights that a customer has to withdraw from the contract during the cooling off period, including how to exercise those rights; and

(vi) the customer's right to complain to the retailer in respect of any energy marketing activity of the agent conducted on behalf of the retailer and, if the complaint is not satisfactorily resolved by the retailer, of the customer's right to complain to the energy ombudsman.[30]

5.5 Summary

The application of the regulatory obligations summarised above to the Foundation will ultimately be dependent on the precise operational structure of the Foundation's activities and the nature of the agreement reached between the energy retailer and the Foundation in relation to the community energy offer.

Once the operational detail of the Foundation's activities is better understood, we would be happy to confirm the application of these obligations, and to assist in designing a compliance program.

6. Legal Structures

6.1 Council involvement

(a) We understand from discussions with RH&C and from the CEP Report that council stakeholders who were consulted as a part of the preparation of the CEP Report indicated a clear preference that the Foundation be structured 'at arms-length' from councils and that it become self-funding over time. The key driver for this view was, we understand, to minimise council exposure to risks associated with the proposed operations of the Foundation which, despite receiving strong support from councillors and other key stakeholders within council, it was acknowledged are outside of the core business of council. The CEP Report contemplates the establishment of an "interim committee", on which RH&C councils are represented but which is separate to the founding board of the Foundation.

(b) In our view, a structure that, from the outset, does not involve the direct participation of councils in the governance of the Foundation presents certain commercial risks to RH&C which must be carefully considered. For example, it may be practically difficult to attract and recruit a sufficient number of suitably qualified community participants and stakeholder representatives to establish the founding board of the Foundation and then to drive forward a strategic agenda which they have not themselves initiated (and in respect of which they may have differing views than RH&C councils). Although the CEP Report contemplates that, from the outset, there will be Funding Agreements in place to govern the relationship between the Foundation and the RH&C councils, there are some limits to the control RH&C councils will be able to exert over the

[30] Section 64, National Energy Retail Rules (version 19) 19 December 2019.

operation of the Foundation by way of those Funding Agreements. By way of explanation:

(i) if RH&C councils have some representation on the initial Foundation board, there will be regular visibility of, and participation in, the commercial and operational decisions taken by the Foundation. One or more RH&C representative on the Foundation board will have the ability to directly influence commercial and operational outcomes and, for example, ensure that the strategic plan is being implemented as expected; however

(ii) if there is no RH&C representation on the Foundation board, it is more likely that any deviation from, or failure to properly implement, the strategic plan or other concerns with the operation of the Foundation will only become apparent after they have already occurred (e.g. via periodic reporting or review mechanisms under the Funding Agreement). This will leave RH&C councils less time and flexibility to manage issues and thereby ensure the success of the Foundation.

In our view, during the critical establishment phase of the Foundation, RH&C councils may find their investment and the overall goals of the Foundation put at undue risk in circumstances where the governance and management of the Foundation is not controlled, or at least directly participated in, by RH&C council representatives.

(c) We believe an appropriate balance between risk mitigation and control can be struck by incorporating transitional provisions into the constituent documents for the Foundation (e.g. constitution or rules) which contemplate that RH&C representation will be maintained for an initial establishment period (e.g. 2 years) and then reduced over time to make way for community control. This structure could be complemented by a separate community-led advisory board which is established upon commencement of the Foundation and which has as its function to provide advice and information to the Foundation on community requirements and expectations. These advisory board members may become the initial community representatives on the Foundation board, following the transitional period. We provide our further comments in relation to this structure in paragraph 8.2 below.

(d) In light of our conclusion that a legal structure which exists completely separately from council control is not in the best interests of the RH&C councils, or the Foundation, any legal structure to be used for the Foundation must therefore have regard to the statutory limitations imposed on councils in relation to the establishment of separate incorporated structures. Paragraph 6.2 considers these limitations and appropriate available structures.

6.2 Local Government Act - Restrictions and Available Structures

(a) As noted in the Information Paper, because councils are constituted under the *Local Government Act 1999* (SA) (**LG Act**), they may only act within the boundaries of the powers expressly conferred on them by that legislation. As RH&C would be aware, the LG Act restricts the types of corporate structure that can be employed by councils to execute their statutory functions and other

commercial activities or enterprises. Notably, a council must not participate in the formation of a company or acquire shares in a company.[31] Unlike in some other jurisdictions[32], the LG Act does not empower the relevant Minister to provide his or her consent to a council's participation in the formation of, or acquisition of shares in, a company (for example, where to do so would serve the public interest).[33]

(b) As a result of this statutory limitation, unlike many of the community energy projects discussed and referenced in the CEP Report and ancillary materials reviewed, it is not open to RH&C to structure the Foundation as a proprietary company limited by shares or as a public company (whether limited by shares or by guarantee). In particular public companies limited by guarantee are commonly used in the not-for profit context but are unavailable in the present context.

(c) The LG Act instead specifically empowers councils to establish committees, subsidiaries and regional subsidiaries as the key structures through which to execute council business. We do not propose to consider section 41 committees in any detail in this advice given that we understand a committee is unsuited for use for the proposed Foundation on the basis that committees are only available to be established by individual councils[34] and do not adequately support the collaborative nature of RH&C.

(d) Relevantly, however, the regional subsidiary structure available under section 43 of the LG Act could be used as a basis for the Foundation in that it would enable the RH&C participants to legally separate certain activities from the councils' broader operations, while ensuring councils retain ultimate control of those activities.[35] Furthermore, the LG Act establishes certain statutory immunities for the members of the boards of regional subsidiaries, offering those involved in the governance of those organisations protection from personal civil liability arising out of their honest acts or omissions in the context of performing their role as a board member. Importantly, the board of a regional subsidiary may include persons who are not members of a council, such that interested community stakeholders would be able to participate in the governance of a regional subsidiary.

(e) Despite some of the obvious benefits of the regional subsidiary structure (in particular concerning personal liability and council control and visibility), for the

[31] Section 47, *Local Government Act 1999* (SA) (**LG Act**). A 'company' is defined for the purposes of the LG Act as a company incorporated under the *Corporations Act 2001* (Cth), which includes proprietary companies, and public companies (whether limited by shares or by guarantee).

[32] See, for example section 358 of the *Local Government Act 1993* (NSW) which relevantly provides that "*A council must not form or participate in the formation of a corporation or other entity, or acquire a controlling interest in a corporation or other entity, except:…(a) with the consent of the Minister and subject to such conditions, if any, as the Minister may specify;…*".

[33] Note that, notwithstanding our conclusion at paragraph 6.1 that RH&C councils should be directly involved in the governance of the Foundation, at least for a transitional period, even if we had concluded that this involvement was not required, our view remains that RH&C councils would be limited in the corporate structures available to them by virtue of section 47 of the LG Act. Specifically, section 47(1)(a) prohibits a council from *'participating* in the formation of a company'. We consider that, if the result of the current activities of the RH&C councils is the establishment of a Corporations Act company, this would amount to the councils 'participating' in the formation of the company in a way which would be contrary to the requirements of the LG Act.

[34] See section 41(1) LG Act which provides that 'A *council may establish committees*'.

[35] We note that regional subsidiaries have the advantage of being able to have delegated to them certain council powers and functions. However, we have assumed for the purposes of this advice that it will not be necessary for the Foundation to be capable of having any such powers or functions delegated to it.

reasons described in paragraph 6.1(a) above, we understand that it is not an appropriate structure for the Foundation in the longer term (i.e. beyond the end of any initial 'transitional' period during which control moves from council to the community).

(f) As such, it would appear that adopting any of the structures available under the LG Act will not meet the requirements of RH&C, relevant council stakeholders and the recommendations of the CEP Report. It is therefore necessary to consider the available alternative legal structures.

6.3 Other Available Legal Structures

(a) Section 36(1)(a) of the LG Act prescribes that a council has the legal capacity of a natural person and, as such, may enter into any kind of contract or arrangement and act in conjunction with another council or authority or a person. As such, while councils may be expressly prohibited from establishing or acquiring an interest in a company established under the *Corporations Act 2001* (Cth) (**the section 47 prohibition**), they have the necessary power to participate in other types of incorporated entities, such as incorporated associations or co-operatives, or to participate in unincorporated structures such as joint ventures, trusts and partnerships, in connection with commercial projects.

(b) For the same reasons noted in paragraph 6.1(a) above, we have assumed that unincorporated structures such as unincorporated joint ventures, trusts and partnerships will be viewed by RH&C councils and relevant stakeholders as being unsuitable structures for the Foundation. Notably, each of these structures would require the direct involvement and potentially legal liability of councils (for example, as trustees, joint venturers or partners), and as such the goals of risk mitigation and legal and operational separation would not be achieved by these means. There are also practical issues associated with the fact that the RH&C councils cannot utilise a corporate entity to act as a trustee or joint venturer.[36] Even though councils could cease to be trustees, joint venturers or partners in future, it would be administratively complex to effect such an exit (for example, jointly held property would need to be transferred to remaining participants), and there may be insufficient support or interest from other parties to enable the continuation of the Foundation without direct council involvement (that is, unless there are other individuals or corporate entities willing to step in as trustees, joint venturers or partners to carry on the work of the Foundation, it may need to be dissolved).

(c) As such, in our view the most appropriate legal structures available to RH&C councils to establish the Foundation are those incorporated entity types which do not contravene the section 47 prohibition, namely incorporated

[36] Note, for example, that because of the section 47 prohibition, a Corporations Act company could not be established by RH&C councils to act as trustee of a trust through which the Foundation could be operated. This would mean that individual persons (or councils themselves) would need to be appointed to act as trustees of the Foundation, in doing so assuming fiduciary obligations to the beneficiaries of the trust. Where multiple trustees are appointed, they must agree unanimously to any course of action to be taken on behalf of the trust (known as the rule of unanimity) - this requirement may present practical difficulties for the Foundation in achieving its objects and transacting necessary business. By contrast, a single corporate trustee can act upon the majority decision of its board, thereby avoiding the need for all decisions to be unanimous.

associations[37] and co-operatives.[38] We consider each of these structures in turn below.

6.4 Incorporated Associations

(a) Incorporated associations are relatively simple incorporated structures being a body corporate with perpetual succession, the power to acquire, hold and dispose of property subject to relevant legislation and the power to sue and be sued in its corporate name. Incorporated associations are commonly employed in the not-for-profit and charitable sectors. Incorporated associations are typically considered to be unsuitable for ordinary commercial business activities principally because:

(i) as they are established under State laws, they cannot operate nationally; and

(ii) an incorporated association will be ineligible for registration under the *Associations Incorporation Act 1985* (SA) (**AI Act**) where its principal or a subsidiary objects include:

(A) securing a profit for members of the association[39]; or

(B) engaging in 'trade or commerce'.[40]

Similar restrictions do not apply to traditional corporate structures like, for example, a company limited by shares, or to registered co-operatives.

(b) Despite the above statutory limitations, an incorporated association may conduct profit making activities (for example, receiving commissions from the selected retailer as a result of the conduct of a community energy offer, or the provision of consulting services on a fee-for-service basis), however these activities must be ancillary to the principal objects of the association, and profits made must be used to further the association's purposes. You have instructed us that it is not the intention that surpluses in the Foundation will be distributed to members, but rather that they will be strategically re-invested in planned Foundation activities to achieve broader community benefit.

(c) Unlike the unincorporated structures discussed in paragraph 6.3 above, an incorporated association has a separate legal identity, offering RH&C councils the benefit of asset protection and risk separation through limited liability (i.e. Foundation assets and liabilities will be entirely separate to councils' business as usual assets and operations). Incorporated associations also offer the benefit of perpetual succession, meaning that the membership, both of the association itself and of its management committee, can change over time without the practical complexities faced by trusts, joint ventures and other unincorporated structures concerning the transfer of property (as to which, see our comments at paragraph 6.3(b) above).

[37] See the *Associations Incorporation Act 1985* (SA) (**AI Act**).
[38] See the *Co-operatives National Law (South Australia) Act 2013* (SA).
[39] See section 18(5)(a), AI Act and the further prohibitions in section 55.
[40] See section 18(5)(b), AI Act.

(d) To be eligible for incorporation as an incorporated association, one of the purposes listed in section 18(1) of the AI Act must be met. Relevantly:

(i) section 18(1)(e) states that an association will be eligible for incorporation under the AI Act if it is formed "for the purposes of establishing, carrying on, or improving a community centre, or promoting the interests of a local community or a particular section of a local community"; and

(ii) section 18(1)(f) states that an association will be eligible for incorporation under the AI Act if it is formed "for conserving resources or preserving any part of the environmental, historical or cultural heritage of the State".

In our view, the proposed objects and activities of the Foundation as described in the CEP Report are consistent with either or both of these purposes and would justify incorporation of the Foundation under the AI Act.

(e) Incorporated associations are governed by a committee (comparable to the board of a Corporations Act company). Under the AI Act, the rules of an incorporated association may, but need not, provide for membership. That is, an association can be constituted without members, in which case all matters are determined by the committee. Members of an incorporated association have no right or interest in the assets of the association and, unless the rules of the association specify otherwise, no member is liable to contribute to the payment of debts and liabilities of the association in the event of a winding up. This limited liability makes an incorporated association an attractive vehicle for broad community participation.

(f) It should be noted that, unlike corporate structures provided for under the LG Act (such as regional subsidiaries), councils have no statutory ability to delegate their powers and functions to incorporated associations. Given the nature of the proposed activities of the Foundation, we do not understand this to be a limitation which would materially affect the RH&C councils' decision as to which is the most appropriate available corporate structure. Furthermore, members of the committee of an incorporated association do not have available to them any of the statutory immunities conferred on members of the board of a LG Act entity (see our comments at paragraph 6.2(d) above). If the RH&C councils were to elect to appoint their own representatives as the members of the initial Foundation committee, with a subsequent transition to community leadership, those persons would be exposed to potential legal liability if they failed to comply with their duties under the AI Act (see section 39A) or at common law.

6.5 Co-operatives

(a) In considering which available incorporated structures might be suitable for the Foundation, we have also considered whether a co-operative structure may be appropriate. In South Australia, co-operatives are incorporated under and governed by the *Co-operatives National Law (South Australia) Act 2013* (SA) (**Co-op Act**). Co-operatives are distinct legal entities and may be established for a wide range of purposes, but are generally formed to meet the common economic, social or cultural goals of members. Co-operatives differ from

traditional corporate structures (such as Corporations Act companies) in that they are democratically owned - each member has one vote - rather than votes based on the number of shares held. This structure is in many respects similar to an incorporated association with members.

(b) However, co-operatives do differ from both companies and incorporated associations in that they include the concept of 'active membership', under which members must meet 'active membership requirements' as set out in the co-operative's rules in order to be entitled to receive and maintain their membership - inactive members may have their membership cancelled. Depending on the structure of the co-operative (see paragraph 6.5(c)(ii) below), active membership requirements may include that the member uses an activity of the co-operative (for example pooling of commodities for sale e.g. grain storage, marketing and sales) on an ongoing basis, or simply that the member pays a regular subscription fee to the co-operative.

(c) The key differences between a co-operative and an incorporated association are:

(i) a co-operative can operate nationally, whereas an incorporated association's operations must be restricted to South Australia; and

(ii) a co-operative can be structured as a 'distributing co-operative', meaning that it is empowered to distribute surplus funds to its members, or as a non-distributing co-operative where extra funds are re-invested to support the ongoing activities of the co-operative.

(d) A co-operative is governed by a board of directors, which has the power to manage the business of the co-operative. A majority of directors of a co-operative must be active members. The Co-Op Act requires that a meeting of a co-operative board must be held at least once every 3 months. Directors of a co-operative are bound by personal duties to the co-operative and its members which mirror those which apply to Corporations Act companies and incorporated associations (for example, the duty to act with due care and diligence and to avoid a conflict of interest).

(e) The Co-op Act and associated regulations are significantly more lengthy and complex than the legislation which governs incorporated associations. This includes imposing obligations on co-operatives to prepare disclosure statements for the benefit of members or prospective members in certain circumstances (including prior to formation, prior to issuing new shares etc.). These statements are akin to (but less complex than) a prospectus for Corporations Act companies, with the necessary information to be disclosed prescribed by the Co-op Act, and must be registered with the relevant registrar responsible for the regulation of co-operatives (in SA, the office of Consumer and Business Services). There are certain provisions within the Co-op Act which have been modified and simplified in their application to 'small co-operatives'[41], including reporting and audit obligations.

[41] A *'small co-operative*' is defined by the Co-operatives National Regulations. A co-operative will be a small co-operative where it satisfies at least 2 of the following tests for a given financial year (a) the consolidated revenue of the entity and its controlled entities is less than $8M; (b) the value of the gross assets of the entity and its controlled entities

(f) On balance, given the greater complexity of the co-operative structure when compared with an incorporated association, we would not recommend this structure for the Foundation unless RH&C requires the Foundation (whether from the outset or in future) to be capable of one or more of the following:

(i) raising funds by means of issuing shares and on the basis that the shareholders may receive a return on their investment in the form of a distribution of profits/rebates etc. This flexibility may be desirable if it is anticipated that other sources of revenue (such as government grants, fee-for service income or commissions) will be insufficient in the medium to long term in achieving RH&C goal of becoming self-funding; or

(ii) operating outside of South Australia.

If neither of these outcomes is important to RH&C councils in terms of the Foundation's ability to deliver on its strategic objectives, then we consider that an incorporated association is the most appropriate structure for the Foundation.

7. Tax Considerations

7.1 General considerations

(a) There are a number of ways the Foundation can be set up in order to be exempt from income tax. This will depend on the following:

(i) its legal structure;

(ii) the Foundation's principal purpose;

(iii) whether it will be set up as a *charity*; and

(iv) whether the Foundation wishes for any donations made to it be tax deductible for the donors.

Considering the Foundation's main objectives as set out in 1(b) as well as the CEP Report, we have considered the following options in detail below:

(i) the Foundation self-assesses itself as income tax exempt on the basis that it is a 'community service organisation'; or

(ii) the Foundation is endorsed as a Deductible Gift Recipient (**DGR**), on the basis that it is 'advancing the natural environment' with the principal purpose of protecting and enhancing the natural environment or a significant aspect of it.

We have noted, for completeness, other relevant available options we considered but which we have concluded are not available to the Foundation. Having regard to the discussion in section 6 above concerning appropriate legal

is less than $4M at the end of the financial year; and (c) the co-operative and the entities it controls have fewer than 30 employees at the end of the financial year.

structures, we confirm that for the two options outlined above, the Foundation may be set up as either an incorporated association or a co-operative.

7.2 Foundation is a 'community service organisation'

(a) If the Foundation is considered a 'community service organisation', its income tax status may be self-assessed as tax exempt provided certain conditions are satisfied.

(b) Self-assessment does not require endorsement by the Australian Taxation Office (**ATO**), however the Foundation will need to meet the requirements of one of the types of income tax exempt organisations.

(c) We have reviewed the various types of organisations together with the Foundation's main objectives as set out in 1(b) and consider the category which the Foundation may be most aligned with is a 'community service organisation' under section 50-10 of the *Income Tax Assessment Act 1997* (**ITAA 1997**).

(d) Community service organisations, under section 50-10 of the ITAA 1997, promote, provide or carry out activities, facilities or projects for the benefit or welfare of the community or any members who have a particular need by reason of youth, age, infirmity or disablement, poverty or social or economic circumstances. However, organisations that seek to advance the common interests of their members are not altruistic and cannot be community service organisations.

(e) Practically, this means that in order for the Foundation to be considered a community service organisation, the projects and activities it undertakes must be for the benefit of the community or its members and cannot be carried on for the profit or gain of its individual members. For instance, reducing the cost of living pressures for community constituents is likely to be considered a project or activity which is aimed at benefiting the community.

(f) The Foundation can be considered exempt from income tax, and self-assess its exemption under the 'community service organisation' category provided it meets all of the following requirements:

(i) it is a not-for-profit (**NFP**) society, association or club;

(ii) it is established for community service purposes (except political or lobbying purposes);

(iii) it is not a charity;

(iv) it meets one of the following three tests:

(A) physical presence in Australia test;

(B) deductible Gift Recipient (**DGR**) test; or

(C) prescribed by law test;

(v) it complies with all the substantive requirements in its governing rules; and

(vi) it applies its income and assets solely for the purpose for which it was established.

(g) If the Foundation satisfies the above criteria, it can self-assess its income tax status as tax exempt. The ATO has provided a worksheet to assist with the review, specifically NAT 74141 *"Income tax status review worksheet for self-assessing non-profit organisations"* **https://www.ato.gov.au/assets/0/104/1909/2003/bba2a60f-db06-4d61-9fef-ec6ea0f0cea2.pdf**.

(h) Once this is completed, it should then be submitted to the management committee/board of the Foundation for approval.

(i) If the Foundation self-assesses as a community service organisation, it will not be required to lodge an income tax return.

(j) It is worth noting that whilst the ATO allows for self-assessment, it will review the self-assessment to ensure that the Foundation has correctly assessed its income tax status.

(k) Based on our review of the Foundation's objections and the CEP Report, we consider that the Foundation should satisfy the requirements of a community service organisation. This is on the basis that the Foundation will:

(i) carry out projects or activities to achieve its main objectives which are aimed at benefiting the community through the pursuit of identifying, developing and procuring a lower cost and cleaner energy supply;

(ii) comply with all the substantive requirements in its governing rules; and

(iii) apply its income and assets solely for the purpose for which it was established.

(l) We consider this to be the case regardless of the Foundation's objectives being delivered through various phases (whether distinct or integrated). This is because we consider all three phases to include activities or projects which are aimed at benefiting the community.

(m) Despite this preliminary conclusion, we do recommend seeking a private ruling from the Commissioner of Taxation (**Commissioner**) requesting the ATO to confirm this position.

7.3 Government

(a) Municipal corporations, local government bodies and public authorities constituted under an Australian law are exempt from income tax under section 50-25 of the ITAA 1997.

(b) However, the Commissioner in ATO ID 2004/757 (**ATO ID 2004/757**) confirmed that a company established by a local council to run a building complex was not itself a municipal corporation or local government body. ATO ID 2004/757 confirms that a 'local governing body' is defined by section 995-1 of the ITAA 1997 as meaning 'a local governing body established by or under a State law or Territory law'. ATO ID 2004/757 further states that:

Obviously, most entities which have legal status are constituted or established under a law of a state or territory. This does not mean that all entities so constituted are local governing bodies. Rather, the test requires that the body be constituted or established as a local governing body…..The company has not been given the characteristics and powers of a local governing body under a law of a State. Neither the incorporation of an entity nor the mere ownership of a corporation by a local council means the corporation is established as a local governing body.

(c) Further, in order to be a "public authority", a body must perform a function of government (see *Coal Mining Industry Long Service Leave (Funding) Corporation* 99 ATC 4326). For instance, delegation of the tax collecting function is a powerful indication that a body is performing such a function.

(d) Accordingly, considering the Commissioner's comments in ATO ID 2004/757 and that it is unlikely the Foundation will be considered to be performing a function of the government given its main objectives, the Foundation is not likely to be deemed exempt from income tax under section 50-25 of the ITAA 1997.

7.4 Foundation as a State/Territory Body

(a) Where the Foundation is deemed a State/Territory body (**STB**), its income will be exempt from income tax, unless it is considered an "Excluded STB" (see sections 24AM and 24AN of the ITAA 1936).

(b) An Excluded STB is defined in section 24AT of the ITAA 1936 to include local governing bodies (as discussed above) public hospitals and superannuation funds.

(c) There are a number of ways in which a body can be deemed an STB. On the basis that the Foundation is established by SA legislation and is not a company limited solely by shares, it will be an STB provided the legislation gives the power to appoint or dismiss its governing person or body only to one or more government entities (see section 24AQ of the ITAA 1936).

(d) We note however, that the SA legislation through which the Foundation would be established, either as an:

(i) incorporated association by virtue of the AI Act; or a

(ii) co-operative pursuant to the Co-op Act,

would not give one or more government entities the power to appoint or dismiss the Foundation's governing body. Therefore, the Foundation will not satisfy the requirements of being an STB.

7.5 Foundation as a DGR

(a) If the Foundation is to be set up as a charity, and subsequently endorsed by the Commissioner under Subdivision 50-B of the ITAA 1997, it will be entitled to an income tax exemption.

(b) In order for the Foundation to be a charity, it must be:

(i) a NFP;

(ii) have a charitable purpose; and

(iii) be for the public benefit.

(c) There are a number of categories of charitable purpose. Considering the Foundation's main objectives, the most relevant category as listed in section 12 of the *Charities Act 2013* (Cth), is 'advancing the natural environment'.

(d) To fall within this category, the principal purpose of the Foundation must be to "protect and enhance the natural environment or a significant aspect of it". This principal purpose must also be reflected in the Foundation's constituent documents.

(e) The Commissioner in Taxation Ruling TR 2011/4 (**TR 2011/4**), notes that an organisation undertaking commercial or business-like activities can maintain its charitable status provided:

(i) its sole purpose is charitable and it carries on a business or commercial enterprise to give effect to that charitable purpose;

(ii) it has a business or commercial purpose that is simply incidental or ancillary to its charitable purpose;

(iii) its activities are intrinsically charitable but they are carried on in a commercial or business-like way; or

(iv) it holds passive investments to receive a market return to further its charitable purpose.

(f) A purpose is for the public benefit if the achievement of the purpose would be of public benefit and the purpose is directed to a benefit that is available to the members of the general public or a sufficient section of the general public: section 6 of the *Charities Act 2013* (Cth).

(g) It is worthwhile noting that the Commissioner TR 2011/4, also confirms that an organisation that can distribute surpluses to its members can still satisfy the public benefit requirement provided:

(i) its sole purpose is charitable;

(ii) its constituent documents allow it to distribute its surplus or profit to another organisation in order to effect that sole charitable purpose; and

(iii) the owners or member who can receive the distributions are themselves charitable organisations that have the same charitable purpose as the organisation itself.

(h) In order for the Foundation to be entitled to an income tax exempt status, it must first register with and be endorsed by the Australian Charities and NFP Commission (**ACNC**) and the Commissioner. Where an application is made to the ACNC, the Foundation may also use the same application form to request endorsement by the Commissioner.

(i) Once endorsed, the Foundation can receive donations that will be tax deductible for the donors. This means that the donor can deduct the amount of their donation form their taxable income when they lodge their tax return.

(j) Based on the CEP Report, specifically the three phases in which the program is proposed to be implemented, we consider there to be a risk that the Foundation will not receive DGR endorsement.

(k) This is on the basis that the Foundation is unlikely to show that the principal purpose of the Foundation is to "protect and enhance the natural environment or a significant aspect of it" purely by, for instance the implementation of phase 1 only, that is securing a competitive energy price for members through a community energy retailer. In this respect, it is activities such as the empowering of the community to transition to a cleaner energy future which are more likely to support a principal purpose of protecting and enhancing the natural environment or a significant aspect of it.

(l) We note however that the CEP Report does state that following the initial model (which outlined distinct Phases 1, 2 and 3), it is now recommended that the Foundation's activities be delivered in a more integrated manner, rather than as separate phases. In this regard, to increase the likelihood of receiving DGR endorsement, we recommend that all three phases should be clearly outlined in the constituent documents. This is so that the activities such as those which focus on transitioning to cleaner energy are captured and are more likely to support the position that the Foundation's principal purpose is to "protect and enhance the natural environment or a significant aspect of it".

(m) If the Foundation considers making relevant applications to the ACNC and the Commissioner for the purposes of DGR endorsement, **we recommend requesting the ACNC and the Commissioner to provide their preliminary views as to whether they are likely to endorse the Foundation as DGR based on its purpose, objectives and constituent documents**.

8. Governance Issues

You have asked us to consider and advise on key matters relevant to the development of governance documents to be prepared to support the establishment of the Foundation. This section provides our initial comments and recommendations in relation to the structure of these documents and key decision points for RH&C councils in relation to them.

8.1 Foundation Membership

We have recommended above that the Foundation be constituted as an incorporated association. As noted in paragraph 6.4(e) above, under the AI Act, an incorporated association may be established either with or without a membership.

The RH&C councils should consider whether the Foundation should be structured to include members, and if so, the role those members should play in the governance of the Foundation. For example if membership is to be provided for in the Rules of the Foundation:

(a) would the Foundation consider charging an annual subscription or membership fee, payment of which would entitle members to the benefit of the products and services the Foundation is providing? In our view, this approach makes commercial sense in that it would provide an additional source of funding for the Foundation and reduce reliance on external sources of funding such as RH&C councils, available grant funding and commercially generated revenue which, in the early years may be more difficult to secure. It is also more likely that the people and organisations that are prepared to pay a membership fee are more likely to be committed to using the services of the Foundation and to becoming involved in its governance to ensure its ongoing success;

(b) should the Foundation have separate classes of membership? For example, should certain members be restricted in their membership rights (such as being restricted in their right to vote to certain issues such as the election of representatives on the committee);

(c) to what extent should members be entitled to representation on the association's management committee? The RH&C councils should have regard to the proper mix of skills and appropriate stakeholder representation when determining the structure of the management committee; and

(d) apart from key matters like changes to the rules of the Foundation, are there matters fundamental to the operation of the Foundation which should be reserved to a decision of members.

8.2 Foundation Committee

We have recommended above that the Foundation be constituted as an incorporated association and that the governance of that association, in the first instance, be via a management committee that includes RH&C council representatives (see our recommendations at paragraph 6.1(b) above).

To support this structure, the rules of the Foundation (**Rules**) will need to be drafted to clearly contemplate these governance arrangements. In our view, the structure of the management committee may best be considered in 2 parts - the founding committee structure and the final committee structure, which we think should be implemented after a suitable transitional period. RH&C councils will be best placed to determine the appropriate transitional period in light of the final activities to be implemented by the Foundation. There are no strict legal requirements regarding the membership of the committee. RH&C councils should consider the following factors when designing the initial committee and the ultimate committee structure:

(a) appropriate size of the committee - depending on required skills mix and representation requirements, 5 - 9 board members is usually an optimal size. Fewer committee members may be appropriate in the early stages of the Foundation;

(b) the desired degree of representation/control by RH&C council representatives in the transitional period (i.e. total control, majority representation or non-majority representation);

(c) member representation - should this be structured by region (i.e. a representative for each RH&C council area) or as a set number - e.g. 2 committee members in total;

(d) should the CEO of the Foundation be appointed as a committee member ex-officio (this is a common structure and ensure a clear and direct line of communication from management to the board);

(e) what are the other desired skills for the committee - e.g. financial, legal, energy sector expertise. These decisions will drive the optimum number of committee members as well as the recruitment process.

There may be other factors specifically relevant to RH&C councils or the community energy sector that will influence the governance structure of the committee and we are happy to discuss these in further detail as the structure is developed.

As noted above, a community-led advisory board could be established to support the work of the founding committee of the Foundation. RH&C councils are free to structure that advisory board as they see fit to meet the requirements of the Foundation through its preliminary stages. A charter outlining the mandate of that group will be critical to ensuring it adds most value to the Foundation, but also to ensuring a clear distinction between the advisory nature and capacity of that group, as compared with the legally-founded governance role of the Foundation committee.

8.3 Foundation Rules

(a) In addition to incorporating the structural matters outlined above, the Rules of the Foundation will also need to clearly identify the objects of the Foundation. These objects will guide the activities of the Foundation moving forward and must be framed to incorporate the current intention of the Foundation's activities, but also be sufficiently broad to allow the Foundation to achieve its longer term strategic objectives.

(b) Where the Foundation's preference is to self-assess as tax exempt on the basis that it is a community service organisation, the relevant constituent documents will need to evidence that the Foundation is established for community service purposes. Provided the Foundation's main objectives and purpose (which are outlined in the CEP Report) are disclosed in the relevant constituent documents, we consider that the Foundation should satisfy this requirement. However, prior to the establishment of the Foundation, we recommend first seeking a private ruling from the Commissioner requesting the ATO to confirm this position.

(c) Subject to our comments above, where the Foundation's preference is to be established as a charity and in turn apply to the ACNC and the ATO to be endorsed as a DGR, it must first ensure that the principal purpose of the Foundation is clearly stated in the relevant constituent documents as 'protecting and enhancing the natural environment or a significant aspect of it'. To give effect to this principal purpose, the Foundation's main objectives should also be included in its constituent documents, evidencing the Foundations objectives are in support of the Foundation's environmental purposes. This is in accordance with Taxation Ruling TR 95/27.

(d) For DGR endorsement purposes, the Commissioner would also require certain specific clauses to be included in the Foundation's constituent documents, such as a winding-up clause which should state that *in case of the winding-up of the Foundation, any surplus assets are to be transferred to another fund with similar objectives that is on the Register of Environmental Organisations.*

8.4 Other documentation

RH&C councils anticipate that, in due course, an Inter-Council Funding Agreement will be required as well as an RFQ and resultant agreement with the selected energy retailer.

At this early stage, we are not able to provide any detailed advice on these documents. The appropriate structure and content of these documents will be influenced by the ultimate agreed structure for the Foundation (including council involvement/control) and, moreover, the concrete business plans to be adopted by the Foundation for the commencement of operation.

We would be happy to provide further and more detailed advice on these more operational documents as the Foundation's implementation progresses.

9. Key Recommendations

Our key recommendations can be summarised as follows:

(a) During the development and implementation of the Foundation, RH&C councils should continually evaluate the development of the Foundation structure, and the detail of its proposed Programs in light of the competition and consumer law requirements. Although the relevant statutory frameworks may place restrictions on some joint aspects of the proposed activities of the Foundation, these potential issues can be addressed by obtaining appropriate authorisations. The need for authorisations may influence how Foundation programs are designed and implemented and this will need to be monitored over time. Once a final decision on the Foundation structure is reached, further confirmation of any relevant competition or consumer law issues should be obtained. During the establishment period for the Foundation, RH&C councils should be cautious about sharing of sensitive pricing or energy procurement information relevant to their businesses or making decisions based on information received from other RH&C councils, without obtaining further competition advice or in the absence of an interim authorisation.

(b) Following establishment of the Foundation, consumer law issues in particular will remain an ongoing compliance consideration and should be a key focus area for the Foundation management committee/board.

(c) Once the proposed arrangements with the selected energy retailer in relation to the community energy offer are clarified, the Foundation should ensure that it has appropriate systems and processes in place to ensure it complies with its statutory obligations in the context of engaging in energy marketing activities.

(d) The Foundation should be structured as an incorporated association. RH&C councils should determine whether the structure should contemplate a membership and the terms of such membership (e.g. membership fees).

(e) The founding committee of the Foundation should include (and possibly be controlled by) RH&C council representatives to ensure effective implementation of the Program. A supporting community advisory committee should be considered as a means by which a line of communication with the community can be established from the outset, and to act as incubator for the transition to a community led committee.

(f) The Foundation should determine whether it wishes to self-assess as tax exempt on the basis that it is a community service organisation, or wishes to apply for DGR endorsement.

(g) RH&C councils should revisit the requirements of documents such as inter-council funding agreements and retailer arrangements once a clear strategy for the Foundation is determined.

Yours faithfully

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