

**SUPPLEMENTARY GAZETTE**



**THE SOUTH AUSTRALIAN  
GOVERNMENT GAZETTE**

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**PUBLISHED BY AUTHORITY**

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**ALL PUBLIC ACTS appearing in this GAZETTE are to be considered official, and obeyed as such**

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**ADELAIDE, WEDNESDAY, 6 SEPTEMBER 2000**

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## PUBLIC FINANCE AND AUDIT ACT 1987

THE guarantee set out below has been given by the Treasurer pursuant to section 19 of the Public Finance and Audit Act 1987, Flinders Power Pty Ltd having been declared to be a 'semi-government authority' within the meaning of that Act by virtue of a proclamation made on 5 September 2000.

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## Osborne Deed Poll – Gas Sale Agreement

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<b>Date</b>	
<b>Made by</b>	The Treasurer of the State of South Australia (acting as a body corporate) for and on behalf of the State of South Australia (the <i>Treasurer</i> )
<b>In favour of</b>	Osborne Cogeneration Pty Ltd (ACN 072 027 331) ( <i>OCPL</i> )
<b>Recital</b>	The Treasurer for and on behalf of the State of South Australia agrees to guarantee to OCPL the obligations of the Counterparty under the Gas Sale Agreement on the terms set out in this Deed.

### 1. Definitions and Interpretation

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#### 1.1 Definitions

The following definitions apply unless the context requires otherwise.

*Cessation Conditions* as at a particular time means:

- (a) at that time, the Counterparty is reasonably capable of observing and performing the Financial Obligations imposed on it under the Gas Sale Agreement;
- (b) at that time, the Counterparty is no less technically and legally capable of observing and performing the Non-financial Obligations imposed on it under the Gas Sale Agreement than was ETSA Corporation at the date of the Gas Sale Agreement; and
- (c) if the consent of the Mortgagee under the Consent and Priority Deed had been sought to the transfer or assignment to the Counterparty of the whole of ETSA's interest in and obligations under the Gas Sale Agreement at that time and such consent was withheld, the Mortgagee would be withholding that consent unreasonably (as that term is used in clause 12.3(a) of the Consent and Priority Deed).

*Consent and Priority Deed* means the deed, originally between ETSA Corporation, OCPL and Westpac Banking Corporation, including all amendments made to it on or prior to the date of this Deed but excluding any amendments made to it (otherwise than where those amendments have been made with the prior written consent of the Treasurer) after the date of this Deed.

## Osborne Deed Poll – Gas Sale Agreement

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*Counterparty* means Flinders Power Pty Ltd (ACN 082 988 270) or, following such transfer, the person who is bound to perform the obligations of ETSA Corporation under the Gas Sale Agreement by reason of the liabilities of Flinders Power Pty Ltd under the Gas Sale Agreement being transferred to that person pursuant to section 13(3) of the Electricity Corporations (Restructuring and Disposal) Act 1999 (SA).

*Gas Sale Agreement* means the agreement entitled the Gas Sale Agreement, originally between OCPL and ETSA Corporation, including all amendments and supplements made to it on or prior to the date of this Deed but excluding any amendments or supplements made to it (otherwise than where those amendments or supplements have been made with the prior written consent of the Treasurer) after the date of this Deed and excluding any extension of the term of that Agreement where such extension requires the consent of the Counterparty.

*Loss* means any and all losses (including loss of profit and loss of expected profit), liabilities, damages, costs and expenses (whether consequential or otherwise).

### 1.2 Gas Sale Agreement

Definitions in the Gas Sale Agreement apply in this Deed, unless the term is otherwise defined in this Deed or the context requires otherwise.

### 1.3 Interpretation

Headings are for convenience only and do not affect interpretation. The following rules apply unless the context requires otherwise.

- (a) The *singular* includes the plural and conversely.
- (b) A *gender* includes all genders.
- (c) Where a *word* or *phrase* is defined, its other grammatical forms have a corresponding meaning.
- (d) A reference to a person, corporation, trust, partnership, unincorporated body or other entity includes any of them.
- (e) A reference to a *Clause* is a reference to a clause of this Deed.
- (f) A reference to an agreement or document (including, without limitation, any reference to this Deed) is to the agreement or document as amended, varied, supplemented or novated, except to the extent prohibited by this Deed or that other agreement or document.
- (g) A reference to a *party* to an agreement or document includes the party's successors and permitted substitutes or assigns.
- (h) A reference to any *Act* or *statutory instrument* or a particular *provision* of an Act or statutory instrument is taken to include:
  - (i) all regulations, orders or instruments issued under the Act, statutory instrument or provision;

## Osborne Deed Poll – Gas Sale Agreement

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- (ii) any modification, consolidation, amendment, re-enactment, replacement or codification of the Act, statutory instrument or provision; and
  - (iii) any substituted Act or statutory instrument or substituted provision.
- (i) A reference to *writing* includes a facsimile transmission and any means of reproducing words in a tangible and permanently visible form.
  - (j) A reference to *conduct* includes an omission, statement or undertaking, whether or not in writing.
  - (k) Mentioning anything after *include*, *includes* or *including* does not limit what else might be included.

## 2. Guarantee and Indemnity

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### 2.1 Guarantee and Indemnity

The Treasurer:

- (a) unconditionally and irrevocably guarantees to OCPL on demand the due and punctual performance by the Counterparty of all of its obligations under the Gas Sale Agreement; and
- (b) separately indemnifies OCPL against any Losses which may be suffered or incurred by OCPL in connection with any default or delay by the Counterparty in the due and punctual performance of any of its obligations under the Gas Sale Agreement.

For the avoidance of doubt, the guarantee and indemnity contained in this Clause 2.1 does not require the Treasurer to pay an amount to OCPL in respect of a default or delay which would exceed the amount that the Counterparty would be required by the Gas Sale Agreement to pay OCPL in respect of that default or delay.

### 2.2 Extent of guarantee and indemnity

- (a) The obligations of the Treasurer under this Clause 2 do not extend to any change in the obligations of the Counterparty as a result of any amendment, supplement or renewal of the Gas Sale Agreement which is made without the prior written consent of the Treasurer.
- (b) The Treasurer may not unreasonably withhold consent to any amendment or supplement of the Gas Sale Agreement. For these purposes it would be unreasonable for the Treasurer to withhold consent to any such amendment or supplement unless that amendment or supplement may result in a material increase in the potential liability of the Treasurer under the guarantee and indemnity contained in Clause 2.1.

## Osborne Deed Poll – Gas Sale Agreement

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### 2.3 Avoidance of payments

- (a) If any payment, conveyance, transfer or other transaction relating to or affecting any obligation of the Counterparty under the Gas Sale Agreement is:
- (i) void, voidable or unenforceable in whole or in part; or
  - (ii) claimed to be void, voidable or unenforceable and that claim is upheld, conceded or compromised in whole or in part,
- the liability of the Treasurer under this Clause 2 is the same as if:
- (iii) that payment, conveyance, transfer or transaction (or the void, voidable or unenforceable part of it); and
  - (iv) any release, settlement or discharge made in reliance on any thing referred to in Clause 2.3(a)(iii),
- had not been made and the Treasurer will immediately take all action and sign all documents necessary or required by OCPL to restore to OCPL the benefit of this Clause 2.
- (b) Clause 2.3(a) applies whether or not OCPL knows, or ought to have known, of anything referred to in that clause.

### 2.4 Continuing guarantee and indemnity

Subject to Clause 2.5, this Clause 2 is a continuing obligation of the Treasurer, despite:

- (a) any settlement of account; or
- (b) the occurrence of any other thing,

and remains in full force and effect until all of the obligations of the Counterparty under the Gas Sale Agreement have been performed.

### 2.5 Expiry of Guarantee

- (a) The guarantee and indemnity contained in Clause 2.1 shall be of no further force and effect once each of the following conditions have been satisfied:
- (i) the Treasurer has given written notice to OCPL that the Treasurer is of the opinion that at the time of the giving of the notice the Cessation Conditions have been satisfied; and
  - (ii) any of the following conditions occur:
    - (A) OCPL and the Mortgagee under the Consent and Priority Deed have each given written notice to the Treasurer consenting to the guarantee and indemnity ceasing to be of force and effect; or
    - (B) within six months after the date of the notice referred to in Clause 2.5(a)(i) neither OCPL nor the Mortgagee under the Consent and Priority Deed has commenced legal proceedings seeking a declaration by a court of

## Osborne Deed Poll – Gas Sale Agreement

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- competent jurisdiction that any of the Cessation Conditions had not, at the time of the giving of that notice, been satisfied; or
- (C) if either OCPL or the Mortgagee under the Consent and Priority Deed has (within six months after the date of the notice referred to in Clause 2.5(a)(i)) commenced legal proceedings seeking a declaration by a court of competent jurisdiction that any of the Cessation Conditions had not, at the time of the giving of that notice, been satisfied, the court or (in the event of any appeal from that court or any court of appeal) the court to which the last such appeal was made does not make the declaration sought; and
- (iii) the Counterparty pays all additional costs incurred by OCPL (whether to the Financier or any other party) as a direct result of the guarantee and indemnity ceasing to be of force and effect, the incurring of such costs being established by the provision of reasonable evidence.
- (b) The guarantee and indemnity contained in Clause 2.1 shall cease to be of any further force and effect if:
- (i) the Counterparty Disposes of the whole or any part of its right, title and interest in, to or under the Gas Sale Agreement in accordance with the terms of the Gas Sale Agreement; and
- (ii) where the consent of the Mortgagee under the Consent and Priority Deed to the disposal referred to in Clause 2.5(b)(i) is required – the Mortgagee has consented to that disposal or, if it withholds that consent, is withholding that consent unreasonably (as that term is used in clause 12.3(a) of the Consent and Priority Deed).
- (c) Before giving a notice pursuant to Clause 2.5(a)(i) the Treasurer will give OCPL a reasonable opportunity to make submissions to the Treasurer on matters that are relevant to the Treasurer forming any opinion referred to in that clause.

### 3. Notices

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All notices, requests, demands, consents, approvals, agreements or other communications given under this Deed:

- (a) must be in writing addressed to the Treasurer at the address shown below or the address last notified by the Treasurer to OCPL:

The Treasurer

c/- Level 8

State Administration Centre

200 Victoria Square

## Osborne Deed Poll – Gas Sale Agreement

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Adelaide SA 5000

Attention: The Treasurer

Fax: 618 8226 1896

- (b) must be signed by a person duly authorised by OCPL; and
- (c) will be taken to be duly given or made when delivered, received or left at the above address or fax number but, if delivery or receipt is on a day on which business is not generally carried on in the place to which the communication is sent or is later than 4 pm (Adelaide time), it will be taken to have been duly given or made at the commencement of business on the next day on which business is generally carried on in that place.

### 4. Governing Law and Jurisdiction

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This Deed is governed by the laws of South Australia. The parties submit to the non-exclusive jurisdiction of the courts exercising jurisdiction there.

**EXECUTED** as a Deed in Adelaide, South Australia.

Dated 6 September 2000.

**THE COMMON SEAL of THE TREASURER** acting for and on behalf of the State of South Australia was duly affixed in the presence of:

(L.S.)    ROB LUCAS, Treasurer  
                  KIRSTY HAYLOCK, Witness

## PUBLIC FINANCE AND AUDIT ACT 1987

THE guarantee set out below has been given by the Treasurer pursuant to section 19 of the Public Finance and Audit Act 1987, Flinders Power Pty Ltd having been declared to be a 'semi-government authority' within the meaning of that Act by virtue of a proclamation made on 5 September 2000.

## Osborne Deed Poll – Power Purchase Agreement

<b>Date</b>	
<b>Made by</b>	The Treasurer of the State of South Australia (acting as a body corporate) for and on behalf of the State of South Australia (the <i>Treasurer</i> )
<b>In favour of</b>	Osborne Cogeneration Pty Ltd (ACN 072 027 331) ( <i>OCPL</i> )
<b>Recital</b>	The Treasurer for and on behalf of the State of South Australia agrees to guarantee to OCPL the obligations of the Counterparty under the Power Purchase Agreement on the terms set out in this Deed.

### 1. Definitions and Interpretation

#### 1.1 Definitions

The following definitions apply unless the context requires otherwise.

*Cessation Conditions* as at a particular time means:

- (a) at that time, the Counterparty is reasonably capable of observing and performing the Financial Obligations imposed on it under the Power Purchase Agreement;
- (b) at that time, the Counterparty is no less technically and legally capable of taking Energy from OCPL under the Power Purchase Agreement and observing and performing the Non-financial Obligations imposed on it under the Power Purchase Agreement than was ETSA Corporation at the date of the Power Purchase Agreement; and
- (c) if the consent of the Mortgagee under the Consent and Priority Deed had been sought to the transfer or assignment to the Counterparty of the whole of ETSA's interest in and obligations under the Power Purchase Agreement at that time and such consent was withheld, the Mortgagee would be withholding that consent unreasonably (as that term is used in clause 12.3(a) of the Consent and Priority Deed).

*Consent and Priority Deed* means the deed, originally between ETSA Corporation, OCPL and Westpac Banking Corporation, including all amendments made to it on or prior to the date of this Deed but excluding any amendments made to it (otherwise than where those amendments have

## Osborne Deed Poll – Power Purchase Agreement

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been made with the prior written consent of the Treasurer) after the date of this Deed.

*Counterparty* means Flinders Power Pty Ltd (ACN 082 988 270) or, following such transfer, the person who is bound to perform the obligations of ETSA Corporation under the Power Purchase Agreement by reason of the liabilities of Flinders Power Pty Ltd under the Power Purchase Agreement being transferred to that person pursuant to section 13(3) of the Electricity Corporations (Restructuring and Disposal) Act 1999 (SA).

*Loss* means any and all losses (including loss of profit and loss of expected profit), liabilities, damages, costs and expenses (whether consequential or otherwise).

*Power Purchase Agreement* means the agreement entitled the Power Purchase Agreement, originally between OCPL and ETSA Corporation and dated 4 June 1996, including all amendments and supplements made to it on or prior to the date of this Deed but excluding any amendments or supplements made to it (otherwise than where those amendments or supplements have been made with the prior written consent of the Treasurer) after the date of this Deed and excluding any extension of the term of that Agreement where such extension requires the consent of the Counterparty.

### 1.2 Power Purchase Agreement

Definitions in the Power Purchase Agreement apply in this Deed, unless the term is otherwise defined in this Deed or the context requires otherwise.

### 1.3 Interpretation

Headings are for convenience only and do not affect interpretation. The following rules apply unless the context requires otherwise.

- (a) The *singular* includes the plural and conversely.
- (b) A *gender* includes all genders.
- (c) Where a *word* or *phrase* is defined, its other grammatical forms have a corresponding meaning.
- (d) A reference to a person, corporation, trust, partnership, unincorporated body or other entity includes any of them.
- (e) A reference to a *Clause* is a reference to a clause of this Deed.
- (f) A reference to an agreement or document (including, without limitation, any reference to this Deed) is to the agreement or document as amended, varied, supplemented or novated, except to the extent prohibited by this Deed or that other agreement or document.
- (g) A reference to a *party* to an agreement or document includes the party's successors and permitted substitutes or assigns.
- (h) A reference to any *Act* or *statutory instrument* or a particular *provision* of an Act or statutory instrument is taken to include:

## Osborne Deed Poll – Power Purchase Agreement

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- (i) all regulations, orders or instruments issued under the Act, statutory instrument or provision;
  - (ii) any modification, consolidation, amendment, re-enactment, replacement or codification of the Act, statutory instrument or provision; and
  - (iii) any substituted Act or statutory instrument or substituted provision.
- (i) A reference to *writing* includes a facsimile transmission and any means of reproducing words in a tangible and permanently visible form.
  - (j) A reference to *conduct* includes an omission, statement or undertaking, whether or not in writing.
  - (k) Mentioning anything after *include, includes* or *including* does not limit what else might be included.

## 2. Guarantee and Indemnity

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### 2.1 Guarantee and Indemnity

The Treasurer:

- (a) unconditionally and irrevocably guarantees to OCPL on demand the due and punctual performance by the Counterparty of all of its obligations under the Power Purchase Agreement; and
- (b) separately indemnifies OCPL against any Losses which may be suffered or incurred by OCPL in connection with any default or delay by the Counterparty in the due and punctual performance of any of its obligations under the Power Purchase Agreement.

For the avoidance of doubt, the guarantee and indemnity contained in this Clause 2.1 does not require the Treasurer to pay an amount to OCPL in respect of a default or delay which would exceed the amount that the Counterparty would be required by the Power Purchase Agreement to pay OCPL in respect of that default or delay.

### 2.2 Extent of guarantee and indemnity

- (a) The obligations of the Treasurer under this Clause 2 do not extend to any change in the obligations of the Counterparty as a result of any amendment, supplement or renewal of the Power Purchase Agreement which is made without the prior written consent of the Treasurer.
- (b) The Treasurer may not unreasonably withhold consent to any amendment or supplement of the Power Purchase Agreement. For these purposes it would be unreasonable for the Treasurer to withhold consent to any such amendment or supplement unless that amendment or supplement may result in a material increase in the

## Osborne Deed Poll – Power Purchase Agreement

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potential liability of the Treasurer under the guarantee and indemnity contained in Clause 2.1.

### 2.3 Avoidance of payments

(a) If any payment, conveyance, transfer or other transaction relating to or affecting any obligation of the Counterparty under the Power Purchase Agreement is:

- (i) void, voidable or unenforceable in whole or in part; or
- (ii) claimed to be void, voidable or unenforceable and that claim is upheld, conceded or compromised in whole or in part,

the liability of the Treasurer under this Clause 2 is the same as if:

- (iii) that payment, conveyance, transfer or transaction (or the void, voidable or unenforceable part of it); and
- (iv) any release, settlement or discharge made in reliance on any thing referred to in Clause 2.3(a)(iii),

had not been made and the Treasurer will immediately take all action and sign all documents necessary or required by OCPL to restore to OCPL the benefit of this Clause 2.

(b) Clause 2.3(a) applies whether or not OCPL knows, or ought to have known, of anything referred to in that clause.

### 2.4 Continuing guarantee and indemnity

Subject to Clause 2.5, this Clause 2 is a continuing obligation of the Treasurer, despite:

- (a) any settlement of account; or
- (b) the occurrence of any other thing,

and remains in full force and effect until all of the obligations of the Counterparty under the Power Purchase Agreement have been performed.

### 2.5 Expiry of Guarantee

(a) The guarantee and indemnity contained in Clause 2.1 shall be of no further force and effect once each of the following conditions have been satisfied:

- (i) the Treasurer has given written notice to OCPL that the Treasurer is of the opinion that at the time of the giving of the notice the Cessation Conditions have been satisfied; and

(ii) any of the following conditions occur:

- (A) OCPL and the Mortgagee under the Consent and Priority Deed have each given written notice to the Treasurer consenting to the guarantee and indemnity ceasing to be of force and effect; or

## Osborne Deed Poll – Power Purchase Agreement

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- (B) within six months after the date of the notice referred to in Clause 2.5(a)(i) neither OCPL nor the Mortgagee under the Consent and Priority Deed has commenced legal proceedings seeking a declaration by a court of competent jurisdiction that any of the Cessation Conditions had not, at the time of the giving of that notice, been satisfied; or
  - (C) if either OCPL or the Mortgagee under the Consent and Priority Deed has (within six months after the date of the notice referred to in Clause 2.5(a)(i)) commenced legal proceedings seeking a declaration by a court of competent jurisdiction that any of the Cessation Conditions had not, at the time of the giving of that notice, been satisfied, the court or (in the event of any appeal from that court or any court of appeal) the court to which the last such appeal was made does not make the declaration sought; and
  - (iii) the Counterparty pays all additional costs incurred by OCPL (whether to the Financier or any other party) as a direct result of the guarantee and indemnity ceasing to be of force and effect, the incurring of such costs being established by the provision of reasonable evidence.
- (b) The guarantee and indemnity contained in Clause 2.1 shall cease to be of any further force and effect if:
- (i) the Counterparty Disposes of the whole or any part of its right, title and interest in, to or under the Power Purchase Agreement in accordance with the terms of the Power Purchase Agreement; and
  - (ii) where the consent of the Mortgagee under the Consent and Priority Deed to the disposal referred to in Clause 2.5(b)(i) is required – the Mortgagee has consented to that disposal or, if it withholds that consent, is withholding that consent unreasonably (as that term is used in clause 12.3(a) of the Consent and Priority Deed).
- (c) Before giving a notice pursuant to Clause 2.5(a)(i) the Treasurer will give OCPL a reasonable opportunity to make submissions to the Treasurer on matters that are relevant to the Treasurer forming any opinion referred to in that clause.

### 3. Notices

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All notices, requests, demands, consents, approvals, agreements or other communications given under this Deed:

- (a) must be in writing addressed to the Treasurer at the address shown below or the address last notified by the Treasurer to OCPL:

## Osborne Deed Poll – Power Purchase Agreement

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The Treasurer  
c/- Level 8  
State Administration Centre  
200 Victoria Square  
Adelaide SA 5000  
Attention: The Treasurer  
Fax: 618 8226 1896

- (b) must be signed by a person duly authorised by OCPL; and
- (c) will be taken to be duly given or made when delivered, received or left at the above address or fax number but, if delivery or receipt is on a day on which business is not generally carried on in the place to which the communication is sent or is later than 4 pm (Adelaide time), it will be taken to have been duly given or made at the commencement of business on the next day on which business is generally carried on in that place.

### 4. Governing Law and Jurisdiction

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This Deed is governed by the laws of South Australia. The parties submit to the non-exclusive jurisdiction of the courts exercising jurisdiction there.

**EXECUTED** as a Deed in Adelaide, South Australia.

Dated 6 September 2000.

**THE COMMON SEAL of THE TREASURER** acting for and on behalf of the State of South Australia was duly affixed in the presence of:

(L.S.) ROB LUCAS, Treasurer  
KIRSTY HAYLOCK, Witness