

Additional Conditions for Environmental Upgrade Agreement

[Drafting Note: the clause below are optional clauses which may be included by the Parties if the Parties consider them necessary to supplement the terms of the Template EUA]

1. Environmental Upgrade Agreements Policy

- 1.1 The Building Owner and the Financial Provider agree to be bound by Council's Environmental Upgrade Agreements Policy as amended from time to time.
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2. General Undertakings

- 2.1 Each of the Council, the Building Owner and the Finance Provider undertakes that it will not, and will not agree to, vary, replace, amend or terminate any Transaction Document in a way that would have a material adverse effect upon this agreement without the prior written consent of each other party to this agreement.
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3. Reinstatement of rights

- 3.1 Under law relating to a person who is Insolvent, a person may claim that a transaction (including a payment) in relation to this agreement is void or voidable. If a claim is made and upheld, conceded or compromised, then:
- (a) each of the Council and the Finance Provider is immediately entitled as against the Building Owner to the rights in respect of the Charge Payments and the Prepayments (as applicable) to which it was entitled immediately before the transaction; and
 - (b) the Agreed Repayment Arrangements as at the Charge Payment Date or the Prepayment Date (as applicable) which are deemed to be void or voidable are taken to be reinstated without the requirement that any further act, matter or thing takes place.
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4. Further representations and warranties from the Building Owner

- 4.1 The Building Owner represents and warrants that:
- (a) (benefit): it benefits by entering into the Transaction Documents to which it is a party; and
 - (b) (solvency): there are no reasonable grounds to suspect that it or any of its Subsidiaries is unable to pay its debts as and when they become due and payable; and
 - (c) (not a trustee): unless stated in the Details, it does not enter into any Transaction Document to which it is a party as trustee; and
 - (d) (no immunity): neither it nor any of its Subsidiaries has immunity from the jurisdiction of a court or from legal process; and
 - (e) (Authorisations): all Authorisations required for the Environmental Upgrade Works are held in full force and effect and it is not aware of any material breach of the terms of any such Authorisation; and
 - (f) (statutory requirements): it has complied with all statutory requirements that apply to any Environmental Upgrade Works, including any conditions for major refurbishments; and

- (g) (Existing Secured Financiers): it is not in breach of the terms of any of its obligations in relation to the Existing Secured Financiers as a result of its entry into the Transaction Documents to which it is a party.
 - 4.2 The Building Owner warrants that it is the registered proprietor of the Land, described in Item 4 of the Details, upon which the Building is located.
 - 4.3 The Building Owner warrants that it has notified its Existing Secured Financiers of the intention to enter into this agreement and the Transaction Documents and provided them with twenty one (21) days within which to advise of any objections.
 - 4.4 The Building Owner warrants that it has consulted with a suitably qualified professional to determine the Environmental Upgrade Works, and its corresponding budget, as indicated in Schedule 5 to this agreement and will provide details of that person upon request.
 - 4.5 The Building Owner warrants that all calculations and reports that are required to be prepared and submitted to Council under the terms of this agreement will be prepared by a suitably qualified person and in accordance with any legislative requirements..
 - 4.6 The Building Owner warrants that it will provide written notification of the Environmental Upgrade Charge to:
 - (a) Each prospective purchaser of the Land or any part of the Land prior to the execution by that prospective purchaser of any contract for sale in relation to the Land or any part of the Land; and
 - (b) Each prospective secured financier of the Land or any part of the Land prior to the execution by that prospective secured financier of any loan or funding agreement in relation to the Land or any part of the Land.
 - 4.7 The Building Owner indemnifies the Council against any Loss which the Council suffers, incurs or is liable for in respect of any failure by the Building Owner to comply with clause 4.6 of these additional conditions.
 - 4.8 The representations and warranties provided by the Building Owner in this clause 4 are taken to be made on each date on which the Finance Provider provides financial accommodation to the Building Owner.
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5. Costs, Expenses and Taxes

- 5.1 The Building Owner must immediately pay on demand all reasonable costs and expenses of the Council and the Finance Provider in connection with:
 - (a) the negotiation, preparation, execution, delivery, registration or completion of this agreement;
 - (b) any variation or discharge of this agreement;
 - (c) the giving by the Council or the Finance Provider of a consent or approval in connection with this agreement;
 - (d) obtaining advice from a professional person or consultant about any matter of concern to it in connection with this agreement; and
 - (e) including any legal costs and expenses (on a full indemnity basis) and any professional consultant's fees.

- (f) including any legal costs and expenses (on a full indemnity basis) and any professional consultant's fees.

5.2 The Building Owner must pay, or immediately on demand reimburse the Council and the Finance Provider for, all Taxes which may be payable or determined to be payable by the Building Owner, the Council or the Finance Provider (as applicable) in connection with this agreement or a payment, receipt or other transaction contemplated by this agreement

6. Building Owner's Relationship with Lessees

6.1 Where the Building Owner requires its Lessees to pay a Contribution to the Environmental Upgrade Charge:

- (a) the Building Owner must provide a separate Schedule 4 for each Lessee that:
 - (i) nominates the name of the Lessee and their contact address and phone number; and
 - (ii) provides a summary of the total estimated cost savings to all Lessees and maximum contribution that may be charged for the whole building for each Charge Payment period;
 - (iii) provides a summary of the total estimated cost savings and maximum contribution that may be charged to the nominated Lessee for each Charge Payment period; and
 - (i) includes the relevant calculations used to derive at the cost savings estimation for each Lessee; and
- (b) where the Lessee Cost Savings Estimations are amended, the Building Owner must provide the relevant calculations used to derive the Lessee Cost Savings Estimations for each Lessee that appear in the amended Schedule 4.
- (c) upon request, the Building Owner agrees to provide the Lessee with a copy of this agreement, excluding those Schedules and Annexures that do not relate to the relevant Lessee.

6.2 The Building Owner agrees to provide a copy of the following documents to its Lessees upon submission to Council:

- (a) Schedule 4 – Cost Savings Estimation (for the nominated Lessee only);
- (b) Annual Report (Building); and
- (c) Any Lessee Cost Savings Estimations that are amended.

6.3 In the event that the Building Owner fails to provide the documents in clause 6.2 of these additional conditions, the Building Owner authorises the Council to provide the Lessee with those documents, upon the Lessee's request.

6.4 On 1 August each year, the Building Owner must provide an Annual Report (Building) to any Lessee who has made a Contribution during the year as a result of this agreement.

7. Energy Performance Contracts

- 7.1 The Parties agree that if an Energy Performance Contract is entered into between the Building Owner and an energy services company then the following variations to this agreement will apply: [*Drafting Note: Parties to select which of the following will apply*]
- (a) the Energy Performance Contract shall comprises Annexure 3 to this agreement;
 - (b) the energy services company named in the Energy Performance Contract shall be added as a Party to the agreement and its details shall be added to the Details in clause 1 of this agreement;
 - (c) the Finance Provider shall, upon a written request by the Building Owner, advance the Funding Amount directly to the energy services company named in the Energy Performance Contract; and
 - (d) the energy performance calculations that form the basis of the energy performance guarantee in the Energy Performance Contract shall provide the calculation methodology for the recovery of Lessee Contributions.

8. Penalty Interest

- 8.1 If the Building Owner defaults in payment of the outstanding Environmental Upgrade Charge, the Building Owner agrees that Council may charge Penalty Interest which will be calculated from the date of payment default up to the date when the next direct debit will be processed.

9. Registration of Caveat

- 9.1 The Building Owner consents to the registration of a caveat on the title to the Land which is the subject of this Agreement disclosing Council's interest in the Land and the total amount of the Environmental Upgrade Charge which will be levied on the Land.

10. Use of Reported Information

- 10.1 The Building Owner agrees that the Council and OEH may use information in the Annual Report (Building) for any of the following purposes:
- (a) without the consent of the Building Owner, for the purpose of:
 - (i) internal Council and OEH analysis which is not publicly available; and
 - (ii) public reporting by OEH; and
 - (b) with the consent of the Building Owner, for any other purpose.

11. Further obligations of the Finance Provider

- 11.1 The Finance Provider shall provide the Building Owner and the Council an amended Agreed Repayment Arrangement document whenever the Building Owner decides to make Prepayments that would require changing the Charge Payment Dates and/or Charge Payment amount.

- 11.2 The Finance Provider will provide a written notification to Council every time funds are released to the Building Owner based on the drawdown arrangements set out in **Schedule 2 - Funding Amount Schedule**.
- 11.3 The Finance Provider shall provide a written notification to the Council if it issues any demand or otherwise seeks to exercise its rights under any Transaction Document.
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12. Further undertakings from the Finance Provider

- 12.1 The Finance Provider undertakes that it will not, and will not agree to, take any action to enforce any of its rights against the Building Owner under the Transaction Documents except where, in the reasonable opinion of the Finance Provider, a change in law occurs that has or is likely to have a material adverse effect on:
- (a) the ability of the Finance Provider to receive payment of any Outstanding Charge Amount;
 - (b) the timing within which the Council can exercise its enforcement procedures; or
 - (c) the first ranking priority claim that the Council has in relation to the land upon which the Building is situated.
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13. Requirement for a Surveyor report

- 13.1 The Building Owner and the Finance Provider agree that:
- (a) the Building Owner must provide a report prepared by a registered Surveyor in relation to the Land to the Finance Provider before it is to receive the Funding Amount; and
 - (b) the Finance Provider is not required to provide the Funding Amount to the Building Owner until after the date on which a report by a registered Surveyor in relation to the Land has been provided by the Building Owner to the Finance Provider.
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14. Service

- 14.1 It is expressly agreed between the parties that the Council may effect service or any originating court process for the purpose of this agreement on the Building Owner or the Building Owners' Authorised Representative as identified in Item 2 of the Details in clause 1 of this agreement.
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15. Administrative procedures by the Council

- 15.1 The Council agrees to create, implement and maintain administrative and operational procedures and records which are sufficient to allow it to ensure that the Outstanding Charge Amount is:
- (a) readily identifiable; and
 - (b) capable of being collected and enforced.

16. Moneys to be paid to the Council held on trust

- 16.1 Moneys paid to the Council in relation to the Environmental Upgrade Charge (other than any Administrative Costs) may be held, pending its payment to the Finance Provider, in a separate account in the Council's trust fund on trust for the Finance Provider.
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17. General Representations and Warranties

- 17.1 Each of the Building Owner and the Finance Provider represents and warrants that:
- (a) (incorporation and existence): it has been incorporated in accordance with the laws of its place of incorporation, is validly existing under those laws and has power and authority to carry on its business as it is now being conducted; and
 - (b) (power): it has power to enter into the Transaction Documents to which it is a party and comply with its obligations under them; and
 - (c) (no contravention or exceeding power): the Transaction Documents to which it is a party and the transactions under them which involve it do not contravene its constituent documents (if any) or any law or obligation by which it is bound or to which any of its assets are subject, or if incorporated cause a limitation on its powers or the powers of its directors to be exceeded; and
 - (d) (authorisations): it has in full force and effect the authorisations necessary for it to enter into the Transaction Documents to which it is a party, to comply with its obligations and exercise its rights under them and to allow them to be enforced; and
 - (e) (validity of obligations): its obligations under the Transaction Documents to which it is a party are valid and binding and are enforceable against it in accordance with their terms, subject to any equitable principles and laws generally affecting creditors' rights (including laws relating to bankruptcy, insolvency, liquidation, receivership, administration, reorganisation, reconstruction, fraudulent transfer or moratoria); and
 - (f) (arm's length terms): it enters into the Transaction Documents to which it is a party in good faith and on reasonable and arm's length commercial terms.
- 17.2 The Finance Provider represents and warrants that:
- (a) (credit assessment): it has prepared, or procured the preparation of, a credit assessment of the Building Owner for the purpose of the credit approval processes of the Finance Provider; and
 - (b) (Funding Limit): it will provide financial accommodation to the Building Owner equal to the Funding Limit on the terms set out in **Schedule 2 - Funding Amount Schedule**.

Additional Definitions

Confirmation Date means the date on which the Council receives final confirmation of the Agreed Repayment Arrangement and Funding Amount.

Default means a default of payment under this agreement.

Encumbrance means an interest or power:

- (a) reserved in or over any interest in any asset including any retention of title; or
- (b) created or otherwise arising in or over any interest in any asset under a bill of sale, mortgage, charge (whether fixed or floating), hypothecation, lien, pledge, caveat, trust or power

by way of security for the payment of debt or any other monetary obligation or the performance of any other obligation and includes any agreement to grant or create any of the above.

Energy Performance Contract means the contract between the Building Owner and an energy services company to undertake the Environmental Upgrade Works and in which the energy services company guarantees the energy savings that will result from those works.

Existing Secured Financier means any person in favour of whom the Building Owner has granted an Encumbrance in relation to the Building before the date of this agreement.

Government Authority includes the Crown, any government and any governmental, semi-governmental, public, administrative, regulatory or judicial entity. It also includes a statutory corporation, a self regulatory organisation or a supervisory authority established by statute and any market licensee of a financial market (as defined in Chapter 7 of the Corporations Act) and any overseas stock or futures exchange.

A person is **Insolvent** if:

- (a) it is (or states that it is) an insolvent under administration or insolvent (each as defined in the Corporations Act); or
- (b) it is in liquidation, in provisional liquidation, under administration or wound up or has had a Controller appointed to its property; or
- (c) it is subject to any arrangement, assignment, moratorium or composition, protected from creditors under any statute, or dissolved; or
- (d) an application or order has been made (and, in the case of an application, it is not stayed, withdrawn or dismissed within 30 days), resolution passed, proposal put forward, or any other action taken, in each case in connection with that person, which is preparatory to or could result in any of (a), (b) or (c) above; or
- (e) it is taken (under section 459F of the Corporations Act) to have failed to comply with a statutory demand; or
- (f) it is the subject of an event described in section 459C(2)(b) or section 585 of the Corporations Act; or
- (g) it is otherwise unable to pay its debts when they fall due; or
- (h) something having a substantially similar effect to any of paragraphs (a) to (g) above (both inclusive) happens in connection with that person under the law of any jurisdiction

Surveyor means a surveyor registered under the Surveying and Spatial Information Act 2002 (NSW) and the Licensing and Registration (Uniform Procedures) Act 2002 (NSW).

Transaction Document means any document, or associated document, entered into for the purpose of this agreement.

Tax means a tax, levy, duty or charge (and associated penalty or interest) imposed by a Government Authority. It also includes stamp duty and other taxes of a similar nature, and income, withholding and transaction taxes and duties.