

DATED

DAY OF

**CONSULTATION DRAFT WORKING DOCUMENT ONLY -
NOT INTENDED FOR USE**

BUILDING UPGRADE AGREEMENT

UNDER SCHEDULE 1B TO THE LOCAL GOVERNMENT ACT 1999

BETWEEN

[insert]

("Council")

-AND-

[insert]

("Finance Provider")

-AND-

[insert]

("Building Owner")

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1.1

SCHEDULE 1 DETAILS

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ANNEXURE 1 COUNCIL ENFORCEMENT PROCEDURE

ANNEXURE 2 DIRECT DEBIT AUTHORITY

**ANNEXURE 3 1-YEAR REPORT (BUILDING) TEMPLATE – ENVIRONMENTAL
UPGRADE WORKS**

ANNEXURE 4 [*PARTIES CAN INSERT FURTHER AGREED ANNEXURES]

Dated _____ day of _____

PARTIES:

of (“Council”)

AND

of (“Finance Provider”)

AND

of (“Building Owner”).

BACKGROUND:

- A. The Building Owner owns or is relevantly responsible for the land upon which the building is located (the Land) and wishes to carry out works to the building in accordance with Schedule 1B to the *Local Government Act 1999* (LGA) and the *Local Government (Building Upgrade Agreements) Regulations [20**]* (Regulations).
- B. The works are either Environmental Upgrade Works or prescribed Upgrade Works within the meaning of the LGA and the Regulations (the Works).
- C. The Finance Provider has agreed to advance money to the building owner for the purpose of financing those Works (the Finance).
- D. The Council has agreed to levy a charge on the Land pursuant to Schedule 1B of the LGA (Building Upgrade Charge), to be paid by the Building Owner, for the purpose of recouping the Finance provided by the Finance Provider.
- E. The Council has agreed to pay to the Finance Provider money paid to the Council by way of the Building Upgrade Charge, subject to the LGA and the Regulations and the deduction of certain administrative costs agreed under this Agreement and permitted under the LGA.

IT IS AGREED:**2. INTERPRETATION****2.1 Definitions**

In this Agreement—

Administrative Costs means as at a particular Charge Payment Date, any of the following to be paid as part of a Charge Payment to the Council by the Building Owner:

2.1.1 a Late Payment Fee; and

2.1.2 a Service Fee,

Agreed Repayment Arrangements means the details agreed between the parties in relation to the repayment of the Finance by the Building Owner, and includes the Charge Payment Dates, the Charge Payments, and the amount of, or method for calculating, the Administrative Costs, as set out in Schedule 4 and as amended from time to time in accordance with clause 12;

Building means the building to which the Works relate and identified in Schedule 1;

Building Owner has the same definition as under the LGA;

Building Upgrade Charge means the amount agreed by the parties and specified in Schedule 4 (including any interest or other charges payable to the Finance Provider), to be declared and levied as a charge on the Land by the Council following the date of this Agreement, payable by the Building Owner to the Council for the purpose of recouping the Finance in accordance with this Agreement, the LGA and Regulations;

Business Day means any day that is not a Saturday, Sunday or a public holiday in South Australia;

Capital Value has the same meaning as in section 5(1) of the *Valuation of Land Act 1971*;

Charge Payment means the amount of the Building Upgrade Charge payable by the Building Owner to the Council on a Charge Payment Date and any Administrative Costs that have been applied in respect of that Charge Payment Date, as set out in Schedule 4, and as amended or adjusted in accordance with clause 12;

Charge Payment Date means each date on which a Charge Payment is due from the Building Owner to the Council as set out in the Agreed Repayment Arrangements;

CLMA means the *Crown Land Management Act 2009*;

Commencement Date means the date this Agreement commences, being the date specified in Schedule 1;

Finance means the amount of money advanced to the Building Owner by the Finance Provider for the purpose of undertaking the Works under this Agreement;

Land means the land on which the Building is situated and identified in Schedule 1;

Late Payment Fee means the administrative fee to be retained by the Council for late payment of a Charge Payment, as agreed and determined in accordance with Schedule 4;

LGA means the *Local Government Act 1999*;

Party or Parties means a party or parties to this Agreement;

Penalty Interest means the interest (if any) payable by the Building Owner to the Council on any Charge Payment (but not on Administrative Costs that have been applied to the relevant Charge Payment) under clause 10.6;

Prepayment means each payment from the Building Owner to the Council by way of prepayment of all or part of the Building Upgrade Charge in accordance with clauses 10.4 and 10.5;

Proceeds means any amount received or recovered by the Council as a result of the exercise of its powers of enforcement with respect to the obligation of the Building Owner to pay the Building Upgrade Charge and any Penalty Interest, including the proceeds of a sale of the Land in accordance with Schedule 1B of the LGA, but excluding any Administrative Costs;

Regulations means the *Local Government (Building Upgrade Agreements) Regulations [20**]* (Regulations) [***not yet law - only consultation version released***] made under the LGA;

Total Value of the Building Upgrade Charge means that amount determined in accordance with Schedule 4 to this Agreement;

Outstanding Charge Amount means, as at any date, the sum of all Charge Payments payable by the Building Owner under this Agreement, less the total amount of Charge Payments that have already been paid by the Building Owner as at that date;

Outstanding Finance means, at a particular date, the Finance that has been advanced by the Finance Provider to the Building Owner under this Agreement, less the aggregate of all amounts paid by the Building Owner to the Council under this Agreement prior to that date (excluding any Administrative Costs);

Service Fee means the amount, or part of the amount for the costs incurred by the Council in entering into, and administering this Agreement as agreed and determined in accordance with Schedule 4;

Works are those works to be undertaken under this Agreement and described in Schedule 2;

2.2 In this Agreement, unless a contrary intention is evident:

2.2.1 A reference to this Agreement is a reference to this Agreement as amended, varied, novated or substituted from time to time;

2.2.2 A reference to any legislation or to any provision of any legislation includes:

- (a) all legislation, regulations, proclamations, ordinances, by-laws and instruments issued under that legislation or provision; and
- (b) any modification, consolidation, amendment, re-enactment or substitution of that legislation or provision;

2.2.3 A word importing:

- (a) the singular includes the plural;
 - (b) the plural includes the singular; and
 - (c) a gender includes every other gender;
- 2.2.4 Words denoting individuals include corporations, unincorporated associations, partnerships, trusts and joint ventures;
- 2.2.5 A reference to a party includes that party's administrators, successors and permitted assigns;
- 2.2.6 If any act pursuant to this Agreement would otherwise be required to be done on a day which is not a Business Day then that act may be done on the next Business Day;
- 2.2.7 Where a word or phrase is given a defined meaning, any other part of speech or grammatical form in respect of that word or phrase has a corresponding meaning;
- 2.2.8 A reference to two or more persons is a reference to those persons jointly and severally;
- 2.2.9 A reference to a clause or schedule is a reference to a clause of, or a schedule to, this Agreement;
- 2.2.10 A reference to a clause number includes a reference to all of its subclauses;
- 2.2.11 A reference to dollars is to Australian dollars;
- 2.2.12 Where general words are associated with specific words which define a class, the general words are not limited by reference to that class;
- 2.2.13 The clause headings are for convenience only and they do not form part of this Agreement; and
- 2.2.14 The word "or" is not exclusive.
- 2.3 This Agreement comprises:
- 2.3.1 clauses 14, 15 and 16 of this Agreement;
 - 2.3.2 this Agreement (excluding clauses 14, 15 and 16 the Schedules and Annexures)
 - 2.3.3 the Schedules; and
 - 2.3.4 the Annexures,
- and in resolving inconsistencies, will have priority in that order unless expressly stated otherwise in this Agreement.

3. **CONDITIONS PRECEDENT**

- 3.1 The parties agree that no party will be bound by the terms of this Agreement (except this clause 3) unless:
- 3.1.1 The Council has satisfied itself of the following matters (and has given notice in writing to the other parties that):
 - (a) the Works are either Environmental Upgrade Works or prescribed Upgrade Works within the meaning of the LGA and the Regulations;

- (b) the Building is of a prescribed kind within the meaning of the LGA and Regulations;
- (c) the construction of the Building was completed at least two years before the Commencement Date;
- (d) the rates, taxes, charges and mortgages owing on the Land, when added to the Total Value of the Building Upgrade Charge, is an amount not exceeding 80 % of the Capital Value of the Land prior to the Works being undertaken under this Agreement;
- (e) the Building Owner has complied with its obligations under Schedule 1B of the LGA relating to the giving of notice to any existing mortgagee and the provision of a statutory declaration to the Council;
- (f) if the Building is located on:
 - (i) dedicated land or Crown leasehold land (both within the meaning of the CLMA); or
 - (ii) land subject to a licence or Crown condition agreement under the CLMA,
a Ministerial delegation is in place in accordance with Schedule 1B of the LGA.

3.1.2 In relation to the matters set out in clause 3.1.1, the Building Owner and Finance Provider must do all that is reasonably necessary and within their power to enable the Council to satisfy itself of those matters including but not limited to complying with the reasonable directions of the Council.

3.2 Immediately on satisfaction of the conditions set out in clause 3.1, this Agreement comes into full force and effect and binds the parties.

4. **TERM**

This Agreement commences on the Commencement Date and expires when all parties have discharged their obligations under this Agreement.

5. **VOLUNTARY BASIS**

The parties acknowledge and agree that entry into this Agreement is on a voluntary basis.

6. **ADVANCE OF FINANCE**

- 6.1 Subject to this Agreement, the Finance Provider agrees to advance the Building Owner the Finance as set out in Schedule 3.
- 6.2 The Building Owner must use the Finance only for the Works set out in Schedule 2.
- 6.3 The Finance Provider must notify the Council in writing of the first provision of the Finance to the Building Owner under this Agreement within three (3) Business Days of that provision of the Finance.

- 6.4 The interest payable on the Finance (which must be at a fixed rate) and which will form part of the Building Upgrade Charge is set out in Schedule 3.

7. WORKS

- 7.1 The Building Owner must cause the Works described in Schedule 2 to be undertaken in accordance with this Agreement.
- 7.2 The Building Owner must ensure that the Works are undertaken by competent and appropriately qualified persons and in full compliance with all applicable occupational, health, welfare and safety standards including without limitation the *Work Health and Safety Act 2012 (SA)* and *Work Health and Safety Regulations 2012 (SA)*).

8. [DECLARATION AND LEVY] OF BUILDING UPGRADE CHARGE

- 8.1 The parties acknowledge that the Building Upgrade Charge has been calculated in accordance with Schedules 3 and 4.
- 8.2 Within five (5) Business Days of the Commencement Date the Council must declare the Building Upgrade Charge in respect of the Land.
- 8.3 Within twenty-eight (28) days of declaring the Building Upgrade Charge in accordance with clause 8.2, the Council must provide to the Building Owner a notice that complies with the requirements of Schedule 1B of the LGA.
- 8.4 At the same time as sending the notice to the Building Owner under clause 8.3, the Council must send to the Finance Provider a notice confirming that the Building Upgrade Charge has been declared.

9. REGISTER OF BUILDING UPGRADE AGREEMENTS

- 9.1 The parties acknowledge that the Council has obligations under Schedule 1B of the LGA and the Regulations to keep and maintain a register of building upgrade agreements including this Agreement and must record entry of this Agreement on the register within 5 days of execution of this Agreement.

10. BUILDING UPGRADE CHARGE PAYMENTS

Building Owner to make Charge Payments and pay Penalty Interest

- 10.1 The Council must in accordance with Schedule 1B of the LGA send a notice to the Building Owner specifying the Charge Payment and any Penalty Interest amount to be paid, not later than twenty-eight (28) days prior to the date on which the relevant Charge Payment and any Penalty Interest is required to be made in accordance with the Agreed Repayment Arrangements.
- 10.2 The Building Owner must pay each Charge Payment and any Penalty Interest to the Council by direct debit on the date which is the later of:
- 10.2.1 the relevant Charge Payment Date in accordance with the Agreed Repayment Arrangements; or
 - 10.2.2 twenty-eight (28) days after the notice issued under clause 10.1 is sent by the Council,

and until such time as the Building Upgrade Charge has been fully paid by the Building Owner.

- 10.3 The Building Owner is not required to make any Charge Payment (other than relevant Administrative Costs) until after the date on which the first provision of the Finance has been provided by the Finance Provider to the Building Owner.

Prepayment

- 10.4 The Building Owner may prepay all or any part of the Outstanding Charge Amount (excluding any relevant Administrative Costs that have not yet been applied) ("Prepayment") by giving not less than twenty-eight (28) days prior written notice to the Council and the Finance Provider specifying the amount and the Charge Payment Date on which the Prepayment will be paid, provided that any Prepayment is not less than a Charge Payment.
- 10.5 On the proposed Charge Payment Date, the Building Owner must pay the Prepayment specified in the notice of prepayment given under clause 10.4.

Penalty Interest

- 10.6 If Schedule 3 provides that the Building Owner is liable to pay Penalty Interest, the Building Owner must pay Penalty Interest on any amount of a Charge Payment that has not been paid by the Building Owner by the Charge Payment Date (less any Administrative Costs that have been applied to the relevant Charge Payment), calculated at the rate for the time being prescribed in the Regulations, as notified by the Council under clause 10.1.

Direct Debit Authority by the Building Owner

- 10.7 For the purpose of paying the Charge Payment and any Penalty Interest, the Building Owner must provide to the Council a completed and signed copy of the direct debit authority included as Annexure 2.

When Agreed Repayment Arrangements Cease to Apply

- 10.8 The Agreed Repayment Arrangements cease to apply when the obligation to make Charge Payments and any Penalty Interest has been fully discharged by the Building Owner in accordance with the LGA, the Regulations and this Agreement.

If Charge Payment Not Paid in Full

- 10.9 If any portion of a Charge Payment amount (including any Administrative Costs that have been applied) or any Penalty Interest has not been paid by the Building Owner by the relevant Charge Payment Date (**Shortfall**), the Building Owner will remain liable to pay the Shortfall and the Council will include details of the Shortfall in the next notice to the Building Owner specifying the Charge Payment amount to be paid and the Shortfall amount, in accordance with clause 10.1.

11. COUNCIL TO RECOVER CHARGE AND PAY TO FINANCE PROVIDER

Council to Use Best Endeavours to Collect Building Upgrade Charge

- 11.1 The Council must use its best endeavours to recover the Building Upgrade Charge in accordance with the terms of this Agreement.

Administrative Costs

- 11.2 The Council may retain an amount equal to any Administrative Costs that have been applied in respect of a Charge Payment made by the Building Owner under clause 10.2.

Council to Remit Monies to Finance Provider

- 11.3 Subject to clause 11.4, the Council must, in accordance with this Agreement and with the LGA and Regulations, distribute each amount it receives or recovers from the Building Owner (other than the amount for Administrative Costs referred to in clause 11.2) whether as a result of the exercise of its powers of enforcement or otherwise as:

11.3.1 a Charge Payment;

11.3.2 a Prepayment;

11.3.3 a Penalty Interest payment; or

11.3.4 Proceeds,

to the Finance Provider by way of electronic funds transfer into the nominated bank account specified in the Finance Provide Remittance Details set out in Schedule 5 no later than ten (10) Business Days after the Council has received or recovered funds from the Building Owner for that amount.

- 11.4 Clause 11.3 in no way detracts from the obligation of the Council to comply with Schedule 1B of the LGA in relation to the application of the proceeds of the sale of the land for non-payment of the Building Upgrade Charge under Schedule 1B of the LGA and the Regulations.

12. AMENDMENTS TO AGREED REPAYMENT ARRANGEMENTS AND REFUNDS

Change in Amounts Payable by Building Owner

- 12.1 Subject to clause 12.3, the Agreed Repayment Arrangements must be amended if any of the following events (**Adjustment Event**) occurs:

12.1.1 a Prepayment from the Building Owner to the Council;

12.1.2 the receipt or recovery of Proceeds by the Council; or

12.1.3 the termination of this Agreement before the Building Owner receives all of the Finance payable by the Finance Provider to the Building Owner under this Agreement.

- 12.2 In the event an Adjustment Event occurs, the Council and the Finance Provider agree to:

12.2.1 amend the Agreed Repayment Arrangements so that the total amount of the Outstanding Charge Amount (and any Penalty Interest) is equal to the sum of the Outstanding Finance and the Administrative Costs and Penalty Interest outstanding as at the date of the relevant Adjustment Event; and

12.2.2 provide the Building Owner with the amended Agreed Repayment Arrangements within five (5) Business Days of the Adjustment Date.

- 12.3 If the effect of the amendment is to reduce the amount outstanding to zero, no amendment is required.

Refund of Overpayments

- 12.4 If the Building Owner has made Charge Payments in excess of the Agreed Repayment Amount (as amended in accordance with clause 22 or adjusted in accordance with clause 12.2), then the Council must refund the excess amount to the Building Owner within twenty (20) Business Days of becoming aware of the overpayment and (if applicable) receiving remittance of the overpayment from the Finance Provider.
- 12.5 The Finance Provider must remit any overpayment received to the Council within ten (10) Business Days of being notified by the Council of the overpayment.

13. COUNCIL NOT LIABLE FOR FAILURE TO RECEIVE OR RECOVER FROM BUILDING OWNER

- 13.1 Provided that the Council has complied with its obligations under clause 11.1 of this Agreement and the terms of the LGA and Regulations, the Council is not liable:
- 13.1.1 for failure to receive or recover Charge Payments or Penalty Interest from the Building owner and any such failure does not make the Council liable to pay any outstanding amount to the Finance Provider;
 - 13.1.2 for any failure by the Building Owner to comply with its obligations under this Agreement to make the Charge Payments or make Penalty Interest payments and any such failure does not make the Council liable to pay any outstanding amount to the Finance Provider;
 - 13.1.3 to repay to the Finance Provider the Finance (or any part thereof) advanced by the Finance Provider to the Building Owner under this Agreement unless and until the Finance (or part thereof) has been received by the Council by way of paid Charge Payments and any Penalty Interest payments have been received; or
 - 13.1.4 to the Finance Provider for (and has no obligations in respect of) any Outstanding Finance.

14. MANDATORY REQUIREMENTS FOR THE PURPOSES OF THE LGA AND REGULATIONS

The parties acknowledge that the Minister has designated [***this formal designation not yet occurred and is draft position only***] for the purposes of clause 5(1)(f) of Schedule 1B of the LGA, the matters set out in regulation 7 of the Regulations and clauses 15 and 16 of this Agreement as mandatory requirements.

15. MANDATORY REQUIREMENT - BUILDING OWNER REPORTING¹

- 15.1 The Building owner must, using the relevant form set out in Annexure 3, report to the other parties to this Agreement:
- 15.1.1 for the purposes of regulation 7(1)(a)(i) of the Regulations, within 45 days of reaching practical completion of the Works, setting out:

¹ Mandatory requirements for the purposes of the LGA and Regulations.

-
- (a) that the Works have been completed to the specifications set out in this Agreement; and
 - (b) any variations from or defects (except for minor defects described in 15.3 below) associated with the Works as specified in this Agreement; and
- 15.1.2 for the purposes of and in accordance with regulation 7(1)(a)(ii) of the Regulations, within 15 months of reaching practical completion of the Works in relation to the environmental performance of the Building.
- 15.2 The parties acknowledge that the Minister has designated the National Australian Built Environment Rating System (NABERS) as the accredited rating system specified in regulation 7(1)(a)(ii)(D) of the Regulations for the purposes of this clause 15.
- 15.3 For this purposes of this clause 15, **practical completion** means a stage in the carrying out and completion of the Works when:
- 15.3.1 the Works are complete except for minor defects:
 - (a) which do not prevent the Works from being reasonably capable of being used for their stated purpose;
 - (b) which a suitably qualified expert determines the contractor performing the Works has reasonable grounds for not promptly rectifying; and
 - (c) where the rectification of which will not prejudice the convenient use of the Works;
 - 15.3.2 those tests which are required to be carried out and passed by the contractor performing the Works have been carried out and passed before the Works reach practical completion; and
 - 15.3.3 documents and other information required under the contract for Works which, in the suitable expert's opinion, are essential for the use, operation and maintenance of the Works have been supplied.
- 15.4 For the avoidance of doubt, if the Works consist of a number of components, for the purpose of reporting under this clause 15, the Works are considered to be completed only when the full scope of works as specified in this Agreement has reached practical completion.
- 16. MANDATORY REQUIREMENT - DISCLOSURE AND USE OF INFORMATION²**
- 16.1 The Building Owner acknowledges and agrees that the information and material contained in and related to this Agreement as well as the information and material reported under clause 15 of this Agreement:
- 16.1.1 may be reported by the Council to the Minister under Schedule 1B of the LGA and the Regulations or otherwise; and
 - 16.1.2 may be used and disclosed by the Council:
 - (a) for the purpose of council analysis and reporting;
-

² Mandatory requirements for the purposes of the LGA and Regulations.

- (b) where required by law or order of court; and/or
- (c) with the consent of the Building Owner, for any other purpose.

17. ENFORCEMENT

Council to give notice to Finance Provider

- 17.1 The Council must, as soon as reasonably practicable, give notice in writing to the Finance Provider if the Council becomes aware of a failure by the Building Owner to pay by the due date any amount payable under the Agreed Repayment Arrangements.

Council's Enforcement Procedure

- 17.2 The Council and the Finance Provider each agree to be bound by the Enforcement Procedure in Annexure 1. The parties agree that the Council will only vary the Enforcement Procedure if:
- 17.2.1 the Enforcement Procedure is or becomes inconsistent with applicable laws; or
 - 17.2.2 it obtains the prior written consent of the Finance Provider and the Building Owner.

Sale of Land by Council

- 17.3 [*Issue for consultation: for example, should the Council be required to give notice to the Finance Provider in the event it intends to use its power of sale?*
- 17.4 If the Council sells the Land in accordance with section Schedule 1B of the LGA and the Regulations:
- 17.4.1 the Building Upgrade Charge will cease to be a charge on the Land;
 - 17.4.2 following the application of proceeds of that sale in accordance with Schedule 1B of the LGA, the Regulations and this Agreement, if the Building Upgrade Charge and any unpaid Administrative Costs and Penalty Interest are not fully discharged (despite the Building Upgrade Charge no longer being a charge on the Land), the Building Owner remains liable to pay the outstanding amount;
 - 17.4.3 Notwithstanding the rest of this clause 17.4, the Council is not obliged to take any action against the Building Owner personally to recover any outstanding amount of the Building Upgrade Charge, Administrative Costs or Penalty Interest which remains unpaid; and
 - 17.4.4 [*issue for consultation: process to be followed in relation to the ongoing liability of the Building Owner as referred to in clause 17.4.2 above. For example, do the parties wish to include a process to ensure that the Building Owner enters into a further deed (for example, with the Finance Provider) to ensure that the Building Owner retains the ongoing liability to pay the outstanding amount? *
 - 17.4.5 The parties acknowledge that this clause has no application if the land the Building is located on is subject to the CLMA as described in clause 3.1.1(f).

18. BUILDING OWNER ACKNOWLEDGMENT REGARDING TENANT CONTRIBUTION

- 18.1 To the extent that the Building Owner has, under a Lease over the Land or part of the Land, sought or is seeking recovery from the lessee a contribution to the Building Upgrade Charge payable by the Building Owner under this Agreement, the Building Owner acknowledges and agrees that:
- 18.1.1 it must comply with the LGA and Regulations in relation to the recovery of that contribution; and
- 18.1.2 the arrangement with or conduct of the lessee in no way affects the Building Owner's obligations under this Agreement, including the obligation to pay the Building Upgrade Charge.

19. LIMITATION OF LIABILITY

- 19.1 [*issue for consultation. Proposed clause below. For example, if either or both the Building Owner or the Finance Provider are entering into the Agreement in the capacity of a trustee of a trust, do the parties wish to include a specific provision to ensure that the other party is able to meet its obligations (in its capacity of trustee) under the Agreement? Ordinarily, a trustee must at least provide assurance that it can be paid from the assets of the trust and sometimes a trustee must agree that it is liable both personally and in its capacity as trustee. This may either be left silent or the parties may wish for the clause to simply provide for an obligation for one or more parties to comply with specific 'Trust' clauses which, on agreement by all parties, form an annexure to the Agreement.*]
- 19.2 *[Proposed clause]* If the Building Owner/Finance Provider enters into this Agreement as trustee of a trust or trusts ("the Trust"), then the Building Owner/Finance Provider represents and warrants that:
- 19.2.1 it is liable both personally, and in its capacity as trustee of the Trust;
- 19.2.2 it must not retire, resign nor by act or omission effect or facilitate a change to its status as the sole trustee of the Trust;
- 19.2.3 the Trust has been duly established and currently exists;
- 19.2.4 it is the duly appointed, current and only trustee of the Trust;
- 19.2.5 as trustee of the Trust it has the power to enter into and perform its obligations under this Agreement;
- 19.2.6 it has an unqualified right of indemnity out of the assets of the Trust in respect of its obligations under this Agreement other than in relation to gross negligence or bad faith by it as trustee of its Trust;
- 19.2.7 a conflict of interest and duty affecting it as trustee of the Trust (and/or its directors, if any) does not arise by virtue of its being a party to this Agreement as trustee of the Trust, or otherwise is overcome by the terms of the relevant trust deed of the Trust; and
- 19.2.8 no breach of the relevant trust deed for the Trust exists or will arise as a result of the Building Owner/Finance Provider being a party to this Agreement.

20. ASSIGNMENT

Assignment by Council

- 20.1 The Council may only assign its rights or obligations under this Agreement if the Council amalgamates, merges or becomes subject to any similar arrangement with another council (as defined in the LGA).
- 20.2 An assignment under clause 20.1 does not require the consent of the Building Owner or the Finance Provider.

Assignment by Finance Provider

- 20.3 The Finance Provider must not assign or otherwise deal with its rights or obligations under this Agreement or allow any interest in them to arise or be varied, in each case, without the prior written consent of the Council and the Building Owner (such consent not to be unreasonably withheld or delayed).

Assignment by Building Owner

- 20.4 Subject to clause 21, the Building Owner must not assign or otherwise deal with its rights or obligations under this Agreement or allow any interest in them to arise or be varied, in each case, without the prior written consent of the Finance Provider and the Council (such consent not to be unreasonably withheld or delayed).

20.5 [*issue for consultation: conditions around Building Owner assignment and consent of other parties. For example, what conditions do the Councils and Finance Providers consider are necessary for any conditions or process to be set out in the template, or is it more appropriate for the template to simply provide that Council and Finance Provider consent if necessary to any assignment of the Agreement?*

Assignment Deed

- 20.6 If an assignment contemplated by this clause 20 involves the transfer of all of the rights and obligations of a party under this Agreement, the transferee must enter into and provide to each other party, a deed in the form of Schedule 6 [*terms of Deed to be considered in consultation*] under which the transferee agrees to be bound, with effect on and from the date of the deed, by the terms of this Agreement as if it was originally named as a party to this Agreement instead of the applicable party.

Release

- 20.7 On the date on which an executed deed under clause 20.6 is delivered to each other party to this Agreement, the relevant transferor is released from all of its future obligations under this Agreement.

21. SALE OF LAND, SUBDIVISION AND CHANGE OF USE

Sale of Land

- 21.1 Subject to clause 21.4, the Building Owner must notify the Council and the Finance Provider within two (2) Business Days of entering into a contract for the sale of the Land.
- 21.2 The Building Owner must provide the Finance Provider with the details of the prospective purchaser of the Land and provide all reasonable assistance to

enable the Finance Provider to undertake its [*issue for consultation: regarding the types of checks to be undertaken. For example, will it be necessary to specify the types of checks or due diligence undertaken by the Finance Provider, noting that the obligation is for the Building Owner to 'provide all reasonably assistance'?*] checks on the prospective purchaser.

21.3 On or before the date of completion of the contract of sale, the Building Owner must either:

21.3.1 repay the Outstanding Charge Amount and any Penalty Interest in full to the Council in accordance with a notice that the Council will issue; or

21.3.2 procure the execution of a deed in the form set out at Schedule 6 to this Agreement.

21.3.3 [*issue for consultation: other conditions, procedures and processes for sale by consent during term. For example, while it is appropriate that an agreement/deed be entered into by the Building Owner and the purchaser, to ensure that all of the rights and obligations under the current Agreement are assigned to the purchaser, are there any specific requirements for that agreement/deed?*

Subdivision

21.4 The Building Owner must not lodge a plan of subdivision for approval at the Lands Titles Office or the Development Assessment Commission in respect of the Land unless:

21.4.1 the Building Owner has received written confirmation from the Council that the Council is satisfied the proposed subdivision will have no impact on the eligibility conditions set out in clause 3.1 of this Agreement; and

21.4.2 the Building Owner has obtained the prior written consent of both the Finance Provider and the Council (with any such consent not to be unreasonably withheld or delayed); or

21.4.3 its obligation to make Charge Payments and pay Penalty Interest (if any) under this Agreement have been fully discharged.

Change of Use

21.5 Subject to receiving the written consent of both the Finance Provider and the Council (such consent not to be unreasonably withheld or delayed), the Building Owner must not lodge an application for development approval for change in the use of the Land under the *Development Act 1993* unless:

21.5.1 the Building Owner has received written confirmation from the Council that the Council is satisfied the proposed development will have no impact on the eligibility conditions set out in clause 3.1 of this Agreement; and

21.5.2 the Building Owner has obtained the prior written consent of both the Finance Provider and the Council (with any such consent not to be unreasonably withheld or delayed); or

21.5.3 its obligation to make Charge Payments or pay Penalty Interest under this Agreement have been fully discharged.

22. **VARIATION OF AGREEMENT**

This Agreement may only be varied by written agreement of the parties and in full compliance with the requirements of the LGA and the Regulations.

23. **COSTS**

Subject to the Administrative Costs recoverable by the Council under this Agreement, each party will pay its own costs of and incidental to the negotiation, preparation and operation of this Agreement.

24. **COMPLY WITH LAWS**

All parties must comply with the laws in force in South Australia in the course of performing this Agreement.

25. **COUNTERPARTS**

This Agreement may be executed in any number of counterparts each of which is taken to be an original. All of those counterparts taken together constitute one (1) instrument. An executed counterpart may be delivered by email.

26. **SURVIVAL**

All clauses that by necessary implication should survive, survive any expiry or termination of this Agreement.

27. **PROPER LAW**

The laws in force in South Australia, including laws with respect to capacity to contract and the manner of performance, apply to this Agreement.

28. **JURISDICTION OF COURTS**

28.1 The courts of South Australia and the Federal Court of Australia have exclusive jurisdiction to determine any proceedings in relation to this Agreement.

28.2 Any proceedings brought in a Federal Court must be instituted in the Adelaide Registry of that Federal Court.

28.3 The supplier undertakes not to apply to transfer any proceedings to another registry of the Federal Court.

29. **NOTICES**

29.1 A “**notice**” means:

29.1.1 a notice; or

29.1.2 a consent, approval or other communication required to be in writing under this Agreement.

- 29.2 A notice or other communication is properly given or served if the Party delivers it by hand, posts it or transmits it by electronic mail to the other Party to the address specified in Schedule 1.
- 29.3 A notice or other communication is taken to be received if:
- 29.3.1 delivered by hand before 5.00 pm on a Business Day, on the day of delivery, otherwise on the next Business Day;
- 29.3.2 sent by pre-paid mail, on the sixth Business Day after posting;
- 29.3.3 transmitted by electronic mail:
- (a) when the relevant email appears in the sender's sent log with properties disclosing an appropriate routing; and
 - (b) the sender does not receive a message from the system operator to the effect that the relevant email was undeliverable.
- 29.4 If the result under clause 29.3 is that a notice would be taken to be given on a day that is not a Business Day in the place to which the notice is sent, then it will be taken to have been given on the next Business Day in that place.
- 29.5 A party may from time to time notify of a change to its contact details by written notice to the other party.

EXECUTED AS AN AGREEMENT

*If a Party is a **company**, use any of the following three execution blocks - delete inapplicable:*

EXECUTED by **THE PARTY NAMED IN ITEM**)
[x] OF SCHEDULE 1 in accordance with section)
127 of the *Corporations Act 2001* (Cth) by two)
directors or by one director and the company)
secretary:

.....
Director signature

.....
Director/Company Secretary signature

.....
Director name

.....
Director/Company Secretary name

THE COMMON SEAL of **THE PARTY NAMED**)
IN ITEM [x] OF SCHEDULE 1 was hereunto)
affixed in the presence of:)

.....
Witness signature

.....
Witness name

EXECUTED by **THE PARTY NAMED IN ITEM**)
[X] OF SCHEDULE 1 by a duly authorised)
officer in accordance with section 126 of the)
Corporations Act 2001 (Cth):)

.....
Authorised officer signature

.....
Authorised officer name

If a Party is a sole director company use the following execution block- delete inapplicable:

EXECUTED by THE PARTY NAMED IN ITEM [X])
OF SCHEDULE 1 in accordance with section 127)
of the Corporations Act 2001 (Cth):)

Director and Sole Company Secretary signature

Director and Sole Company Secretary name

If the Party is a natural person or sole trader use the following execution block- delete inapplicable

EXECUTED by THE PARTY NAMED IN ITEM)
[X] OF SCHEDULE 1 in the presence of:)

Witness signature Party signature

Witness name Party name

If the Party is a partnership use the following execution block - delete inapplicable:

EXECUTED by a partner in the partnership)
trading as THE PARTY NAMED IN ITEM [X] OF)
SCHEDULE 1 in the presence of:)
)

Witness signature Partner signature

Witness name Partner name

If the Party is a trustee use the following execution block - delete inapplicable:

EXECUTED by **THE PARTY NAMED IN ITEM [x]**)
OF SCHEDULE 1 as trustee of the trust named in)
Item 2 of Attachment 1 by a duly authorised)
officer in accordance with section 126 of the)
Corporations Act 2001 (Cth):)

.....
Authorised officer

.....
Authorised officer name



CONSULTATION DRAFT

SCHEDULE 1**DETAILS**

No.	Item	Details
1	Council	Name Address Phone Email Authorised Representative Contact Person
2	Building Owner	Name Address Phone Email Authorised Representative Contact Person
3	Finance Provider	Name Address Phone Email Authorised Representative Contact Person
4	Building	[address and local government area]
5	Land	[Land on which Building is located - title details etc]
6	Commencement Date	[date]
7	Funding Amount	The amount set out in Schedule 3.
8	Funding Term	The term set out in Schedule 3.
9	Works	The works described in Schedule 2.

SCHEDULE 2
WORKS AND BUDGET

[*Consultation feedback required: contents and form of Works and Budget Schedule*]

Example:

Upgrade Works	Schedule of Items / Equipment	Budget	Environmental Benefit

CONSULTATION DRAFT

SCHEDULE 3

FINANCE

[*Consultation feedback required: contents and form of Finance Schedule*]

Example:

Finance Amount Terms

Building Owner	Finance Amount
_____	Advanced _____
Bank Interest Rate	Total Interest
_____	_____
Penalty Interest Applicable?	
_____	_____
Funding Term (years)	
_____	_____
Bank Establishment Fee	
_____	_____

Finance Amount to be advanced by Finance Provider to Building Owner

Drawdown Date	Drawdown

CONSULTATION DRAFT

SCHEDULE 4**AGREED REPAYMENT ARRANGEMENTS**

[*Consultation feedback required: contents and form of Agreed Repayment Arrangements Schedule*]

Example:

Repayments from Building Owner				
Payment Period	Charge Payment Date	Charge Payment (breakdown)	Administrative Costs	Charge Payment
Building Upgrade Charge Payment				[insert total sum of all Charge Payments]

Administrative Costs

Service Fee
(as applicable) _____

Late Payment Fee
(as applicable) _____

CONSULTATION DRAFT

SCHEDULE 5

FINANCE PROVIDER REMITTANCE DETAILS

[*Consultation feedback required: contents and form of Finance Provider Remittance Details Schedule*]

Example:

Loan Reference	
Account Name	
BSB	
Account Number	
Email for remittance advice	
Fax for remittance advice	
Contact Name	
Contact Number	
Signed by Finance Provider:	Date:

CONSULTATION DRAFT

SCHEDULE 6
ASSIGNMENT DEED

[*Consultation feedback required: contents/structure of Assignment Deed*]

CONSULTATION DRAFT

CONSULTATION DRAFT

ANNEXURE 1

COUNCIL ENFORCEMENT PROCEDURE

[*Council to annex enforcement procedure*]

CONSULTATION DRAFT

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ANNEXURE 2
DIRECT DEBIT AUTHORITY

[*Council to annex direct debit authority form*]

CONSULTATION DRAFT

CONSULTATION DRAFT

ANNEXURE 3**FIRST YEAR PERFORMANCE REPORT TEMPLATE – ENVIRONMENTAL UPGRADE****WORKS****Reporting Year:****Section 1: Building Details**

Street Number:	Street Name:
Suburb:	Postcode:
Council LGA:	
Primary Building Use (please circle): Office Retail Industrial Accommodation Other (please specify)	

Section 2: Owner Details

Name:	Contact Number:
Address:	
Email:	

Section 3: Completion

Environmental Upgrade Works completion date _____

Provide details of any variations:

Section 4: Environmental Upgrade Works Performance

The Building Owner is required, fifteen (15) months after the completion of Works, to report to the parties of the Agreement on the environmental performance of the Building in the first twelve (12) months after the works have been completed, compared with the performance before the works (refer to the LGA and the Regulations for specific requirements).

Please report energy savings in kWh or Megajoules AND tonnes of CO₂-e, water savings in kL, waste or material savings in tonnes or m³ for each type of waste or material, transport savings in tonnes of CO₂-e, pollution savings in ppm or mg/m³, and monitoring or other savings in tonnes of CO₂-e, if relevant.

If works undertaken had more than one environmental benefit, please duplicate following table for each type of environmental benefit.

Environmental Benefit:	
Description of Environmental Upgrade Works:	
Date Commenced:	Cost Incurred:
Date Completed	
Estimated anticipated cost savings*: *Anticipated savings which are based on estimates in Schedule 2 –Works and Budget.	Actual Cost Savings:
Estimated anticipated environmental Savings**: **Anticipated savings are based on estimates in Schedule 2 –Works and Budget.	Actual Environmental Savings:

Section 5: NABERS Details

Post-upgrade Works, has the Building achieved a NABERS accredited rating? Yes No
(please circle)

If yes, please circle the relevant NABERS categories and note the number of stars achieved for that category:

Category	Type	Star Rating
Energy (without GreenPower)	Base Tenant Whole building	
Energy (with GreenPower) Water	Base Tenant Whole building	
Waste	Base Tenant Whole building	
Indoor Environment	Base Tenant Whole building	

Signed by Owner:

Date:

CONSULTATION DRAFT

ANNEXURE 4

[*PARTIES CAN INSERT FURTHER AGREED ANNEXURES,

Example might include applicable Energy Performance Contracts relating to the

Works*]