



Environmental Upgrade Agreement (NSW)

Dated

[To be inserted] (ABN **[to be inserted]**) ("Council")

[To be inserted] (ABN **[to be inserted]**) ("Building Owner")

[To be inserted] (ABN **[to be inserted]**) ("Finance Provider")

OEH 2011/0884

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Environmental Upgrade Agreement (NSW)

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Environmental Upgrade Agreement (NSW)

Details

Parties	Council, Building Owner and Finance Provider	
Council	Name	<i>[to be inserted]</i>
	ABN	<i>[to be inserted]</i>
	Address	<i>[to be inserted]</i>
	Telephone	<i>[to be inserted]</i>
	Fax	<i>[to be inserted]</i>
	Email	<i>[to be inserted]</i>
	Attention	<i>[to be inserted]</i>
Building Owner	Name	<i>[to be inserted]</i>
	ABN	<i>[to be inserted]</i>
	Address	<i>[to be inserted]</i>
	Telephone	<i>[to be inserted]</i>
	Fax	<i>[to be inserted]</i>
	Email	<i>[to be inserted]</i>
	Attention	<i>[to be inserted]</i>
Finance Provider	Name	<i>[to be inserted]</i>
	ABN	<i>[to be inserted]</i>
	Address	<i>[to be inserted]</i>
	Telephone	<i>[to be inserted]</i>
	Fax	<i>[to be inserted]</i>
	Email	<i>[to be inserted]</i>
	Attention	<i>[to be inserted]</i>
Recitals	A	The Building is owned by the Building Owner, who wishes to carry out the Environmental Upgrade Works to the Building in order to improve the energy, water or environmental efficiency or sustainability of the Building.

- B** The Building is not a strata building (as defined in section 54C of the Local Government Act).
- C** The Finance Provider has agreed to provide financial accommodation to the Building Owner on the terms set out in annexure 9 for the purpose of funding the Environmental Upgrade Works.
- D** The Building Owner will use the financial accommodation provided by the Finance Provider to carry out the Environmental Upgrade Works.
- E** The Council will make apply and levy an Environmental Upgrade Charge pursuant to Part 2A of Chapter 6 of the Local Government Act in relation to the land on which the Building is situated for the purpose of the Building Owner repaying the financial accommodation provided by the Finance Provider and paying other amounts to the Council.
- F** The Environmental Upgrade Charge will be payable by the Building Owner to the Council in accordance with the terms of this agreement.
- G** The Council will collect the Charge Payments from the Building Owner in accordance with the Agreed Repayment Arrangements and the other provisions of this agreement.
- H** The Council will pay to the Finance Provider a portion of the Charge Payments that it receives from the Building Owner (equal to the Actual Funding Amount) in accordance with the Agreed Repayment Arrangements and will comply with its other obligations under this agreement.
- I** The Council, the Finance Provider and the Building Owner have therefore entered into this agreement for the purpose of implementing the Environmental Upgrade Works in accordance with section 54D of the Local Government Act.
- J** In entering into this agreement, the Council, the Finance Provider and the Building Owner adopt the mandatory provisions of the environmental upgrade agreement template approved pursuant to clause 4.1.1(b) of the Guidelines by the Director-General of the Department of Premier and Cabinet as at the date of this agreement (“**Mandatory Provisions**”).

Date of agreement See Signing page

Environmental Upgrade Agreement (NSW)

General terms

1 Interpretation

1.1 Definitions

In this agreement, unless the context requires otherwise:

Actual Funding Amount means, at any time, if no Adjustment Funding Date has occurred, the Indicative Funding Amount or, if an Adjustment Funding Date has occurred, the Adjusted Funding Amount as determined as at the most recent Adjustment Funding Date.

ADI has the meaning it has in the Banking Act.

Adjusted Funding Amount means, at any time, the aggregate of the Funding Payments, following the most recent adjustment in accordance with clause 3.7.

Adjustment Funding Date means the date on which an Adjusted Funding Amount becomes effective.

Administrative Adjustment Date means the date on which the Council amends the amount of, or the method for calculating, the Administrative Costs.

Administrative Costs means, as at a particular date, any of the following:

- (a) a service fee, being a fee to cover any costs incurred by the Council in entering into, or administering, this agreement, calculated in accordance with section 610D of the Local Government Act; and
- (b) a late payment fee, being the amount, or a part of the amount, charged for late payment of a Charge Payment, such amount being limited to cost recovery; and
- (c) a fixed fee for amendments to this agreement or the Charge Payments,

payable by the Building Owner to the Council as set out in the Agreed Repayment Arrangements.

Other than as specified in paragraph (a) above, part 10 of chapter 15 of the Local Government Act does not apply in relation to the Administrative Costs.

AFSL Holder means a person who holds an Australian financial services licence issued under Chapter 7 of the Corporations Act.

Agreed Repayment Arrangements means:

- (a) the Charge Payment Dates;
- (b) the Charge Payments;
- (c) the Total Charge Amount;
- (d) the Actual Funding Amount;

- (e) the Funding Payments;
- (f) the amount of, or a method for calculating, the Administrative Costs; and
- (g) the Total Administrative Costs,

as set out in annexure 1, as amended from time to time in accordance with clause 3.7.

Annual Report (Building) means an annual report for each financial year in accordance with annexure 10 on the environmental performance of the Building that includes the following information:

- (a) if the Environmental Upgrade Works relate to energy or water consumption or efficiency improvements, actual energy and/or water use of the Building. If a NABERS rating is available for the Building, this should be in the form of an accredited NABERS rating for the Building; and
- (b) actual environmental savings relating to the Environmental Upgrade Works; and
- (c) financial savings and any costs incurred in relation to the Environmental Upgrade Works; and
- (d) where applicable, the total amount of Charge Payments passed to Lessees.

Annual Report (Council) means the Council's annual report as required by section 428 of the Local Government Act.

Approved Signatory means:

- (a) in the case of the Council, [*to be inserted*];
- (b) in the case of the Building Owner, a director or secretary of the Building Owner, or an officer of the Building Owner whose title contains the words [*to be inserted*], or a person performing the functions of any of them; and
- (c) in the case of the Finance Provider, a director or secretary of the Finance Provider, or an officer of the Finance Provider whose title contains the words "director", "chief", "head", "associate" or "manager", or a person performing the functions of any of them,

or any other person appointed by that party as an Approved Signatory for the purpose of the Transaction Documents and notified to the other parties, provided that no revocation of that appointment has been notified to the other parties.

Arrears means, as at any date, the aggregate of all Actual Funding Amounts due with respect to all Charge Payment Dates occurring on or prior to that date less the aggregate of all amounts paid by the Council to the Finance Provider under this agreement prior to that date excluding amounts with respect to Penalty Interest paid by the Council to the Finance Provider as contemplated by clauses 3.5(h) or 4.4.

Authorisations means all licences, consents, authorisations, permits or approvals (including all heritage, planning and environmental approvals) necessary to carry out, develop, construct, operate or maintain the Environmental Upgrade Works.

Banking Act means the Banking Act 1959 (Cth).

Building means the building located at [*to be inserted*]. [*Note: title description as appropriate.*]

Building Owner means the person or persons so described in the Details.

Business Day means a day on which banks are open for general banking business in Sydney (excluding Saturdays, Sundays and public holidays in that place).

Charge Expiry Date means the date on which the Charge Obligations have been fully discharged by the Building Owner.

Charge Obligations means the obligations of the Building Owner to the Council to pay the Environmental Upgrade Charge.

Charge Payment means each amount of the Environmental Upgrade Charge payable by the Building Owner to the Council on a Charge Payment Date, as set out in the Agreed Repayment Arrangements (either as a specified amount or as a method for calculating the amount).

Charge Payment Date means each date on which payment is due from the Building Owner to the Council in respect of the Charge Obligations, as set out in the Agreed Repayment Arrangements.

Charge Period means the period:

- (a) commencing on the Commencement Date; and
- (b) ending on the Charge Expiry Date.

Commencement Date means [*to be inserted*].

Contribution means the amount to be paid by the Lessee to the Building Owner towards a Charge Payment which amount must not exceed a reasonable estimate of the cost savings to be made by the Lessee as a result of the Environmental Upgrade Works in the period to which the Charge Payment relates, which, as at the Commencement Date, are described in the Lessee Cost Savings Estimation. Unless the relevant Lease contains provisions relating specifically to the relevant Lessee's contribution towards the Charge Payments, the Contribution of a Lessee is to be calculated in accordance with the Methodology and any provisions of the Lease relating to the Lessee's payment of Council rates or charges for the Building.

Controller has the meaning it has in the Corporations Act.

Corporations Act means the Corporations Act 2001 (Cth).

Council means the person so described in the Details.

Default means any default by the Building Owner in relation to the Charge Obligations, including a failure by the Building Owner to pay by the due date any amount payable under the Charge Obligations.

Details means the section of this agreement headed "Details".

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.

End-User Equipment means any equipment, process or system that:

- (a) directly consumes energy or water, causes a risk to human health or degrades the environment; or
- (b) controls or influences the impact that any other equipment, process or system has on the consumption of energy or water, human health or the environment.

Enforcement Procedure means the Council's procedure concerning the waiver, deferral, recovery and enforcement of the Environmental Upgrade Charge and any other charge made under Part 2A of Chapter 6 of the Local Government Act (by any means) as at the date of this agreement, as set out in annexure 6.

Environmental Improvement means any Environmental Upgrade Work (other than any Excluded Work) that:

- (a) increases the efficiency of energy or water consumption; or
- (b) reduces energy or water consumption; or
- (c) prevents or reduces pollution; or
- (d) eliminates or reduces to harmless levels, the discharge of wastes, or other substances, that are harmful to the environment; or
- (e) reduces the use of materials; or
- (f) enables the recovery or recycling of materials; or
- (g) enables the monitoring of environmental quality; or
- (h) reduces greenhouse gas emissions; or
- (i) encourages or facilitates alternative models of transportation to the use of a private motor vehicle (such as cycling or walking),

including any of the following if it results in an environmental improvement:

- (j) the replacement, modification, removal or installation of any End-User Equipment; or
- (k) the modification of the usage of any End-User Equipment.

Environmental Upgrade Charge means the charge payable by the Building Owner to the Council in relation to the Environmental Upgrade Works under the Local Government Act and this agreement.

Environmental Upgrade Works means the works set out in annexure 4 (which may include any works in relation to the Building that result in an Environmental Improvement), but these works do not include any works carried out prior to the date of this agreement.

Environmental Upgrade Works Budget means the environmental upgrade works budget, as set out in annexure 5.

Environmental Upgrade Works Costs means the costs of implementing the Environmental Upgrade Works, as set out in the Environmental Upgrade Works Budget.

Excluded Work means, for the purpose of section 54E of the Local Government Act, works done in connection with a reduction in the production or service levels provided by a business operating in the Building (even if the works result in an Environmental Improvement).

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.

Finance Provider means the person or persons so described in the Details.

Foreign ADI has the same meaning as "foreign ADI" in the Banking Act.

Funding Adjustment Date (Environmental Upgrade Works) means the date on which an adjustment of the Indicative Funding Amount as a result of a variation in the Environmental Upgrade Works in accordance with the terms set out in annexure 9 becomes effective.

Funding Adjustment Date (Term) means the date on which an adjustment of the Indicative Funding Amount as a result of the extension of the term of the Indicative Funding Amount in accordance with the terms set out in annexure 9 becomes effective.

Funding Limit means the maximum amount of financial accommodation that may be provided to the Building Owner on the terms set out in annexure 9.

Funding Payment means the amount of a Charge Payment required to be paid by the Building Owner to the Council and, in turn, paid by the Council to the Finance Provider on the terms contemplated by this agreement.

Funding Payment Schedule means the schedule set out in annexure 2, as amended from time to time in accordance with clause 3.7, setting out each Funding Payment.

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.

Guidelines means the guidelines entitled "Guidelines for Environmental Upgrade Agreements" issued by the Minister of Environment.

Indicative Funding Amount means the aggregate of all amounts set out in the Funding Payment Schedule as at the Commencement Date.

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.

Lease means an agreement under which a person grants to another person for value a right of occupation of premises.

Lessee means each lessee (other than the Building Owner) of the Building under a Lease and each lessee (other than the Building Owner) of the Building which becomes a lessee (other than the Building Owner) under a Lease.

Lessee Cost Savings Estimation means the estimate of lessee cost savings set out in annexure 3, as amended from time to time in accordance with clause 3.4.

Local Government Act means the Local Government Act 1993 (NSW).

Local Government Regulation means the Local Government (General) Regulation 2005 (NSW).

Loss means any loss, damage, liability, cost or expense.

Mandatory Provisions has the meaning it has in paragraph J of the Recitals.

Material Adverse Effect means a material adverse effect on:

- (a) the value of the Building; or
- (b) a party's ability (including its administrative ability) to comply with its obligations under this agreement; or
- (c) the rights of a party under this agreement; or
- (d) the business or financial condition of a party.

Methodology means the methodology by which the environmental and cost savings to be made by a Lessee arising from the Environmental Upgrade Works are calculated as set out in the Lessee Cost Savings Estimation. The Methodology may permit both savings made directly by the Lessee and a proportion of savings made by all occupants of the Building to be counted towards the cost savings made by the Lessee.

NABERS means the National Australian Built Environment Rating System.

OEH means the Office of Environment and Heritage, Department of Premier and Cabinet.

Outstanding Funding means, at a particular date, the Actual Funding Amount less the aggregate of all amounts paid by the Council to the Finance Provider under this agreement prior to that date excluding amounts with respect to Penalty Interest paid by the Council to the Finance Provider as contemplated by clauses 3.5(h) or 4.4.

Penalty Interest has the meaning it has in clause 3.5(f).

Permitted Assignee means:

- a. any ADI;
- b. any Foreign ADI;
- c. any securitisation or funding vehicle managed by an ADI or a Foreign ADI; or
- d. any AFSL Holder.

Permitted Encumbrance means:

- (a) any lien created, or arising, by operation of law in the ordinary course of trading securing an obligation that is not yet due;
- (b) any lien for the unpaid balance of purchase money under an instalment contract entered into in the ordinary course of trading;
- (c) any lien for the unpaid balance of money owing for repairs;
- (d) any title retention arrangement entered into in the ordinary course of trading on the supplier's usual terms of sale (or on terms more favourable) so long as the debt secured is paid when due;
- (e) any Encumbrance arising solely by operation of the PPSA in the proceeds of an asset which is the subject of a lien or retention of title arrangement referred to in paragraph (d) of this definition or any commingled product or mass of which it becomes part, where the obligation secured by that Encumbrance is limited to the unpaid balance of the purchase money for the original asset and that unpaid balance is not yet due;
- (f) any Security Interest in relation to "personal property" that is created or provided for by:
 - (i) a transfer of an "account" or "chattel paper";
 - (ii) a "PPS lease"; or
 - (iii) a "commercial consignment",(as each of those terms is defined in the PPSA) that is not a security interest within the meaning of section 12(1) of the PPSA;
- (g) any lease of all or part of the Building entered into in the ordinary course of business;
- (h) any Encumbrance which exists at the date of this agreement and is described in annexure 11 so long as the principal amount secured is not increased nor refinanced or extended without the prior written consent of the Council and the Finance Provider;
- (i) any Encumbrance created or arising with the prior written consent of the Council and the Finance Provider,

in any such case which affects or relates to any of the assets of the Building Owner.

PPSA means the Personal Properties Security Act 2009 (Cth).

Prepayment means each payment from the Building Owner to the Council by way of prepayment of all or part of the Total Charge Amount (see clause 4.6).

Prepayment Date means each date on which the Council receives a Prepayment from the Building Owner.

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 Charge Obligations, including the proceeds of a sale of the Building but excluding amounts with respect to Penalty Interest paid by the Council to the Finance Provider as contemplated by clauses 3.5(h) or 4.4.

Proceeds Date means each date on which the Council receives or recovers any Proceeds.

Recitals means the section of this agreement so described in the Details.

Relevant Provisions has the same meaning as "relevant provisions" in section 54J(2) of the Local Government Act.

Strata Subdivision means the creation of a strata scheme under the Strata Schemes (Freehold Development) Act 1973 (NSW) or the Strata Schemes (Leasehold Development) Act 1986 (NSW) (as applicable).

Subsidiary has the meaning it has in the Corporations Act.

Tax includes 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.

Termination Date means the date of termination of this agreement as contemplated in clause 3.7(a)(iii).

Total Administrative Costs means, at any date, the total amount of Administrative Costs payable by the Building Owner to the Council, as set out in the Agreed Repayment Arrangements as at that date.

Total Charge Amount means, at any date, the total amount payable by the Building Owner under the Charge Obligations, as set out in the Agreed Repayment Arrangements as at that date.

Total Outstanding Administrative Costs means, as at any date, the Total Administrative Costs less the total amount of Administrative Costs that have already been paid as at that date.

Total Outstanding Charge Amount means, as at any date, the Total Charge Amount less the total amount of the Charge Payments that have already been paid as at that date.

Transaction Documents means:

- (a) this agreement; and
- (b) any document which the parties acknowledge in writing to be a Transaction Document; and
- (c) any other document connected with any of them.

1.2 References to certain general terms

In this agreement, unless the context requires otherwise:

- (a) the singular includes the plural and vice versa; and
- (b) words denoting any gender include all genders; and

- (c) where a word or phrase is defined, its other grammatical forms have a corresponding meaning; and
- (d) a reference to a party, clause, annexure or other like term is a reference to a party, clause, annexure or other like term to or of this agreement; and
- (e) a reference to this agreement includes any annexures (other than in clause 1.3); and
- (f) headings are for convenience and do not affect interpretation; and
- (g) the background or recitals to this agreement are adopted as and form part of this agreement; and
- (h) a reference to any deed or agreement includes a reference to that deed or agreement as amended, novated, supplemented, varied or replaced from time to time; and
- (i) a reference to "\$", "A\$" or "dollar" is a reference to Australian currency; and
- (j) a reference to a party includes its executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns; and
- (k) a reference to writing includes any method of representing words, figures or symbols in a permanent and visible form; and
- (l) words and expressions denoting natural persons include bodies corporate, trusts, managed investment schemes, partnerships, associations, firms, governments and governmental authorities and agencies and vice versa; and
- (m) the word "law" includes common law, principles of equity and legislation; and
- (n) a reference to any legislation or to any provision of any legislation includes:
 - i. any modification or re-enactment of the legislation; and
 - ii. any legislative provision substituted for, and all legislation, statutory instruments and regulations issued under, the legislation or provision; and
 - iii. where relevant, corresponding legislation in any Australian State or Territory; and
- (o) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this agreement or any part of it; and
- (p) the words "including", "for example", "such as" or other similar expressions (in any form) are not words of limitation; and
- (q) if the day on or by which any act, matter or thing is to be done is a day other than a Business Day, the act, matter or thing will be done on the next Business Day.

1.3 Inconsistency

To the extent that there is any inconsistency between any Transaction Documents, the order of priority of application is:

- (a) this agreement;
- (b) the annexures to this agreement; and

- (c) the other Transaction Documents.

1.4 Council's rights and remedies unfettered

- (a) The rights, powers and remedies of the Council under this agreement are in addition to other rights, powers and remedies provided to the Council by law independently of this agreement.
- (b) Nothing in this agreement limits or prevents the Council from exercising any rights, powers or remedies provided to the Council by law independently of this agreement, or otherwise obliges the Council to exercise its rights, powers or remedies in a manner which is inconsistent with its functions or powers.

[Note: limitation of liability provisions to be included for any party which enters into this agreement in its capacity as a trustee of a trust or a responsible entity of a managed investment scheme.]

2 Purpose and consideration

- a. Each party acknowledges entering into this agreement and granting rights and incurring obligations under this agreement for valuable consideration.
- b. Each party also acknowledges entering into this agreement for the purpose of giving effect to the transactions described in the Recitals.
- c. Without limiting clause 2(b):
 - (i) the Building Owner agrees to assume its obligations under this agreement in consideration of (amongst other matters) the Council agreeing to pay a portion of the Charge Payments in an amount equal to the Actual Funding Amount to the Finance Provider in accordance with this agreement; and
 - (ii) the Finance Provider agrees to comply with its obligations under clause 10.1 in consideration of (amongst other matters) the Council entering into this agreement.

3 Environmental Upgrade Charge

3.1 Status of this agreement

The Council, the Building Owner and the Finance Provider agree that this agreement is an environmental upgrade agreement within the meaning of section 54D of the Local Government Act.

3.2 Making of Environmental Upgrade Charge

- (a) On or before the Commencement Date, the Council must make the Environmental Upgrade Charge apply to the land on which the Building is situated. For the avoidance of doubt:
 - i. the Council may make the Environmental Upgrade Charge apply only once during the Charge Period; and
 - ii. the Council may make more than one environmental upgrade charge under Part 2A of Chapter 6 of the Local Government Act apply to the land on which the Building is situated subject to the execution of a separate environmental upgrade agreement (as that term is defined in the Local Government Act) in relation to each additional environmental upgrade charge.

- (b) Within 2 Business Days of the Council applying the Environmental Upgrade Charge in accordance with clause 3.2(a), the Council must provide to each of the Building Owner and the Finance Provider a notice that the Environmental Upgrade Charge has been applied.
- (c) The Council must levy the Environmental Upgrade Charge on the land on which the Building is situated by sending a notice to the Building Owner not later than 28 days prior to the date on which each relevant payment is required to be made in accordance with the Agreed Repayment Arrangements.
- (d) The Building Owner must pay the amount specified in each notice referred to in clause 3.2(c) within 28 days after that notice is served on the Building Owner.
- (e) Notwithstanding any other provision of this agreement:
 - (i) the parties agree that this agreement (other than clause 3.2(a)) will be of no force or effect, and the parties will not be bound by this agreement (other than clause 3.2(a)), until the Council makes the Environmental Upgrade Charge apply to the land on which the Building is situated; and
 - (ii) the Building Owner is not required to make any Charge Payment (other than relevant Administrative Costs) until after the first date on which any financial accommodation has been provided by the Finance Provider to the Building Owner on the terms set out in annexure 9.
- (f) The Relevant Provisions apply in respect of the Environmental Upgrade Charge in the same way as they apply in respect of a charge levied under Chapter 15 of the Local Government Act.

3.3 Charge Obligations

The following provisions apply in relation to the Charge Obligations:

- (a) the Charge Obligations shall commence on the Commencement Date;
- (b) the Charge Obligations shall expire on the Charge Expiry Date; and
- (c) the Total Charge Amount shall, subject to clause 3.8, be equal to:
 - (i) the Actual Funding Amount; plus
 - (ii) the Total Administrative Costs.

3.4 Contributions

- (a) The Building Owner may require the Lessees to make Contributions.
- (b) Notwithstanding clause 3.4(a), the Building Owner remains liable for all of its obligations under this agreement (including those obligations under clause 3.5(a)).
- (c) The Lessee Cost Savings Estimation applies in relation to Contributions, in accordance with section 5.2 of the Guidelines.
- (d) The Lessee Cost Savings Estimation must be amended in accordance with clause 3.4(e) if the following event occurs: the estimate of the cost savings to be made by the Lessees as a result of the Environmental Upgrade Works in the period to which the Charge Payment relates becomes no longer reasonable.

- (e) The Building Owner shall:
 - (i) amend the Lessee Cost Savings Estimation if the event described in clause 3.4(d) occurs; and
 - (ii) provide the Council and the Finance Provider with the amended Lessee Cost Savings Estimation; and
 - (iii) provide the Lessees making the Contributions with the amended Lessee Cost Savings Estimation,within 5 Business Days after providing the relevant Annual Report (Building) to the Council in accordance with clause 7.1(c).
- (f) The Building Owner agrees to be bound by and to comply with the amended Lessee Cost Savings Estimation provided by it under clause 3.4(e).

3.5 Building Owner to make Charge Payments

- (a) The Building Owner shall make Charge Payments to the Council on the Charge Payment Dates in accordance with the Agreed Repayment Arrangements.

General payment provisions

- (b) Each Charge Payment shall be equal to:
 - (i) the Actual Funding Amount; plus
 - (ii) the Administrative Costs,payable on the Charge Payment Date on which that Charge Payment is to be made.
- (c) Each Charge Payment shall be paid or caused to be paid by the Building Owner to the Council by direct debit.
- (d) The proceeds of each Charge Payment must be paid by the Council to the Finance Provider in accordance with clause 4.3.
- (e) The amount of each Charge Payment payable to the Finance Provider in accordance with clause 3.5(d) does not include the Administrative Costs in relation to the Charge Payment Date on which that Charge Payment is to be made.

Penalty Interest provisions

- (f) The Building Owner shall pay penalty interest on any amount of a Charge Payment:
 - (i) which the Building Owner is liable to pay; and
 - (ii) which has not been paid by the Building Owner by the Charge Payment Date, calculated at the rate for the time being set under section 566 of the Local Government Act (“**Penalty Interest**”).
- (g) The Penalty Interest:
 - (i) is taken to be a Council rate or charge which is due and payable in accordance with section 566(4) of the Local Government Act; and

- (ii) is to be recovered by the Council in accordance with section 712 and division 5 of part 2 of the Local Government Act.
- (h) In addition to paying the amounts referred to in clause 3.5(d), the Council will pay to the Finance Provider by way of electronic transfer all Penalty Interest received or recovered by the Council whether as a result of the exercise of its powers of enforcement or otherwise within 8 Business Days after it has received that Penalty Interest.
- (i) The Council is not liable to the Finance Provider if the Council fails to receive or recover Penalty Interest from the Building Owner. Accordingly, any such failure does not make the Council liable to pay the Finance Provider any amount under clause 3.5(h) as if the Council had received or recovered that amount from the Building Owner.

3.6 Administrative Costs

The Council may:

- (a) as contemplated by clause 3.5(e), retain an amount from each Charge Payment equal to the Administrative Costs in relation to the Charge Payment Date on which that Charge Payment is made; or
- (b) retain an amount from the first Charge Payment equal to the Total Administrative Costs.

3.7 Amendments to Agreed Repayment Arrangements and Funding Payment Schedule

Change in amounts payable by Building Owner

- (a) The Agreed Repayment Arrangements must be amended in accordance with clause 3.7(b) if any of the following events occurs:
 - (i) a Prepayment from the Building Owner to the Council (unless the effect of the distribution of the relevant Prepayment in accordance with clause 4.6(b) is to reduce the amount of the Outstanding Funding to zero); or
 - (ii) the receipt or recovery of Proceeds by the Council (unless the effect of the distribution of the Proceeds in accordance with clause 4.4(a) is to reduce the amount of the Outstanding Funding to zero); or
 - (iii) the termination of this agreement before the Building Owner receives financial accommodation equal to the Funding Limit; or
 - (iv) an adjustment of the Indicative Funding Amount as a result of a variation in the Environmental Upgrade Works in accordance with the terms for providing financial accommodation set out in annexure 9; or
 - (v) an adjustment of the Indicative Funding Amount as a result of the extension of the term of the Indicative Funding Amount in accordance with the terms for providing financial accommodation set out in annexure 9; or
 - (vi) an adjustment of the Administrative Costs in accordance with section 610D of the Local Government Act.
- (b) The Council and the Finance Provider shall:
 - (i) amend the Agreed Repayment Arrangements so that the total amount of the remaining Charge Payments is equal to the sum of the Outstanding Funding and the Total Outstanding Administrative Costs:

- (A) as at the Prepayment Date, if the event described in clause 3.7(a)(i) occurs;
or
- (B) as at the Proceeds Date, if the event described in clause 3.7(a)(ii) occurs; or
- (C) as at the Termination Date, if the event described in clause 3.7(a)(iii) occurs;
or
- (D) as at the Funding Adjustment Date (Environmental Upgrade Works), if the event described in clause 3.7(a)(iv) occurs; or
- (E) as at the Funding Adjustment Date (Term), if the event described in clause 3.7(a)(v) occurs; or
- (F) as at the Administrative Adjustment Date, if the event described in clause 3.7(a)(vi) occurs; and

(ii) provide the Building Owner with the amended Agreed Repayment Arrangements,

within 5 Business Days after the relevant Prepayment Date, Proceeds Date, Termination Date, Funding Adjustment Date (Environmental Upgrade Works), Funding Adjustment Date (Term) or Administrative Adjustment Date (as applicable).

- (c) Within 5 Business Days after the amendment of the Agreed Repayment Arrangements under clauses 3.7(b)(i)(A), 3.7(b)(i)(B), 3.7(b)(i)(C), 3.7(b)(i)(D) or 3.7(b)(i)(E), the Finance Provider will provide to the Council and the Building Owner the amended Funding Payment Schedule which will, on and from that date, be the Funding Payment Schedule for the purpose of this agreement. For the avoidance of doubt, if an adjustment to the Administrative Costs occurs, this is not required to be reflected in any amended Funding Payment Schedule.
- (d) The Building Owner agrees to be bound by and to comply with the amended Agreed Repayment Arrangements provided to it under clause 3.7(b)(ii), whether or not the amended Agreed Repayment Arrangements increases or decreases the total amount of the remaining Charge Payments.
- (e) Despite clause 3.7(b), if the event described in clause 3.7(a)(vi) occurs but none of the events described in clauses 3.7(a)(i), 3.7(a)(ii), 3.7(a)(iii), 3.7(a)(iv) and 3.7(a)(v) occurs, then only the Council is required to:
 - i. amend the Agreed Repayment Arrangements so that the total amount of the remaining Charge Payments is equal to the sum of the Outstanding Funding and the Total Outstanding Administrative Costs; and
 - ii. provide the Building Owner and the Finance Provider with the amended Agreed Repayment Arrangements,

within 5 Business Days after the relevant Administrative Adjustment Date.

Interest rate change

- (f) At any time during the period commencing on the date of this agreement and expiring 10 Business Days before the Commencement Date (both inclusive), the Finance Provider may provide to the Council and the Building Owner an amended Funding Payment Schedule to reflect any change in interest rates that affects the Finance Provider's own cost of funds in respect of compliance with its obligations under this agreement. The Finance Provider's own cost of funds will be determined in good faith

by the Finance Provider. That amended Funding Payment Schedule will, on and from the date on which it is provided to the Council and the Building Owner, be the Funding Payment Schedule for the purpose of this agreement.

- (g) Not later than [1 Business Day] after the Finance Provider provides an amended Funding Payment Schedule to the Council and the Building Owner in accordance with clause 3.7(f), the Council and the Finance Provider will amend the Agreed Repayment Arrangements to reflect the amended Funding Payment Schedule. The Council will provide to the Building Owner that amended Agreed Repayment Arrangements on the date it is agreed and that amended Agreed Repayment Arrangements will be the Agreed Repayment Arrangements for the purpose of this agreement.
- (h) The Building Owner agrees to be bound by and to comply with the amended Agreed Repayment Arrangements provided to it under clause 3.7(g), whether or not the amended Agreed Repayment Arrangements increases or decreases the total amount of the remaining Charge Payments.

3.8 Refund of overpayments

If, as a consequence of any of the events contemplated in clause 3.7(a) the Building Owner has, as at the time the adjustment to the Agreed Repayment Arrangement and the Funding Payment Schedule occurs under clause 3.7 as a result of the relevant event, made Charge Payments in excess of the adjusted amounts contemplated in clause 3.7(b), then:

- (a) to the extent that the Council has paid that excess amount to the Finance Provider, the Finance Provider must remit that excess amount to the Council within 8 Business Days after the Finance Provider has received that excess amount from the Council; and
- (b) to the extent that the Council:
 - (i) has not paid that excess amount to the Finance Provider; or
 - (ii) has paid that excess amount to the Finance Provider and has had that excess amount remitted to it by the Finance Provider under clause 3.8(a),

the Council must refund the excess amount to the Building Owner:

- (iii) in the case of clause 3.8(b)(i), within a reasonable time after the Council becomes aware that such overpayment has occurred; and
- (iv) in the case of clause 3.8(b)(ii), within a reasonable time after the Council has had such overpayment remitted to it by the Finance Provider.

For the avoidance of doubt, nothing in this agreement requires the Council to refund any excess amount to the Building Owner to the extent that the Council has paid that excess amount to the Finance Provider and the Finance Provider has not remitted that excess amount to the Council under clause 3.8(a).

3.9 Council to give notice to Finance Provider

The Council shall as soon as is reasonably practicable give notice in writing to the Finance Provider if:

- (a) the Council becomes aware of a failure by the Building Owner to pay by the due date any amount payable under the Charge Obligations.
- (b) the Council makes any decision as to the matters contemplated in clause 3.11.

3.10 Continuation of Charge Obligations

The Building Owner must continue to fulfil the Charge Obligations and make Charge Payments to the Council in accordance with the Agreed Repayment Arrangements even if the Building ceases to be rateable by the Council.

3.11 Council's discretion as to rights in relation to Charge Obligations

- (a) The parties agree that:
 - i. the Council's procedure concerning the waiver, deferral, recovery and enforcement of the Environmental Upgrade Charge (by any means) is set out in the Enforcement Procedure; and
 - ii. the Council will only vary the Enforcement Procedure if:
 - A. the Enforcement Procedure is or becomes inconsistent with applicable laws; or
 - B. it obtains the prior written consent of the Finance Provider and the Building Owner; and
 - iii. the Council will notify the Finance Provider and the Building Owner of any variation of the Enforcement Procedure under clause 3.11(a)(ii); and
 - iv. the Council will only waive or defer the imposition of the Environmental Upgrade Charge if the waiver or deferral is in accordance with both:
 - (A) the process contained in the Enforcement Procedure (as may be varied from time to time under clause 3.11(a)(ii)); and
 - (B) the Local Government Act and the Local Government Regulation (if applicable); and
 - v. the Council will notify the Finance Provider of any waiver or deferral of the Environmental Upgrade Charge it proposes to grant as contemplated under clause 3.11(a)(iv).
- (b) The Council and the Finance Provider each agree to be bound by the Enforcement Procedure.
- (c) If the Council waives or defers the imposition of the Environmental Upgrade Charge in accordance with clause 3.11(a)(iv), the Council is not liable to the Finance Provider for the Environmental Upgrade Charge which has been waived or deferred, unless that amount is actually received by the Council. Accordingly, any such waiver or deferral does not make the Council liable to pay the Finance Provider any Charge Obligations which are the subject of the deferral or waiver as if the Building Owner had paid those amounts to the Council.
- (d) The Council must use its best endeavours to take all necessary action to recover or enforce its rights for payment of the Environmental Upgrade Charge.
- (e) If the Council:
 - i. has used its best endeavours to take action to recover or enforce its rights against the Building Owner for payment of the Charge Obligations within the time specified in the Enforcement Procedure; but

- ii. has not received payment from the Building Owner of the Charge Obligations,
then the Council is not liable for:
 - iii. any failure to receive payment from the Building Owner of the Charge Obligations; or
 - iv. paying the Finance Provider any amount under clause 4.3 as if the Council had received that amount from the Building Owner.
- (f) Nothing in this clause 3.11 or any other provision of this agreement will prevent the Finance Provider from taking any action to enforce any of its rights against the Council (whether for breach by the Council of its obligations under this clause 3.11 or otherwise) including seeking declaratory orders, orders from a court for specific performance, the issue of an injunction or an award for damages.
- (g) Notwithstanding any other provisions of this clause 3.11, if the Council disposes, or procures the disposal, of the Building to recover payment of any amount of the Environmental Upgrade Charge then, following the application of proceeds of that disposal as contemplated by this agreement, the Council is not obliged to take any action against the Building Owner personally to recover any remaining amount of the Environmental Upgrade Charge or Penalty Interest which remains unpaid.
- (h) Notwithstanding any other provisions of this clause 3.11, if the Outstanding Funding and any Penalty Interest due and payable is less than the aggregate amount specified for the purpose of this clause 3.11 in the Enforcement Procedures, the Council may cease any action it has commenced to recover or enforce its rights for payment of those amounts.

3.12 When Agreed Repayment Arrangements cease to apply

- (a) The Agreed Repayment Arrangements cease to apply when the Charge Obligations have been fully discharged by the Building Owner.
- (b) The Building Owner must fully discharge the Charge Obligations before lodging a plan of Strata Subdivision for registration in respect of any part of the Building.

3.13 Notification of first funding payment

The Finance Provider must notify Council in writing upon the first provision of funding to the Building Owner pursuant to this agreement within 3 Business Days after that provision of funding occurs.

4 Collection by Council

4.1 Collection role

The Finance Provider acknowledges the role of the Council in the collection arrangements set out in this clause 4 and section 54M of the Local Government Act.

4.2 Subcontracting

- (a) The Council may subcontract with any person for the performance of any of its obligations under this clause 4.
- (b) If the Council subcontracts with any person for the performance of any of its obligations under this clause 4:

- I. the Council will notify the Finance Provider of the subcontracting arrangement; and
- II. the Council will remain liable for all of its obligations under this agreement notwithstanding the entering into of the subcontracting arrangement; and
- III. the Council will be liable for all of the acts and omissions of the person with whom it subcontracts to the extent that any such act or omission causes any Loss to the Building Owner or the Finance Provider under this agreement.

4.3 Charge Payments

- (a) The Council must, in accordance with this agreement and section 54G(4) of the Local Government Act, distribute any Charge Payment (other than the Administrative Costs) it has received to the Finance Provider.
- (b) The Council must distribute any Charge Payment (other than the Administrative Costs) to the Finance Provider by way of electronic funds transfer within 8 Business Days after the Council has received funds from the Building Owner for that Charge Payment. The Council is not liable to the Finance Provider or any other person under this clause 4.3 for any amounts other than those received by the Council as cleared funds for Charge Payments.

Penalty interest payable by Council

- (c) If the Council makes any payment to the Finance Provider pursuant to this clause 4.3 or any other provision of this agreement later than on the Business Day on which it is required to make that payment under this agreement, it will pay the Finance Provider interest on that amount, calculated daily at a rate equal to the Reserve Bank of Australia's overnight cash rate, determined on a daily basis, for the period from (but excluding) the last date on which it was required to pay the amount to the Finance Provider to (and including) the date on which it pays that amount to the Finance Provider, at the same time it makes the relevant payment to the Finance Provider.

4.4 Proceeds

- (a) Subject to clause 4.4(b), the Council must, within 8 Business Days after it has received any Proceeds, distribute those Proceeds to the Finance Provider by way of electronic funds transfer, in an amount equal to the Arrears as at the date of distribution.
- (b) If the amounts that the Council has received or recovered as Proceeds are less than the Arrears as at the Proceeds Date, those amounts are to be applied as specified in clause 4.4(a).
- (c) If the amounts that the Council has received or recovered as Proceeds are in excess of the Arrears as at the Proceeds Date, the Council must after it has complied with its obligations under Clause 3.5(h) refund the excess amount to the Building Owner within a reasonable time after the Council becomes aware that it has received or recovered such excess amount.
- (d) The Council is not liable to the Finance Provider or any other person under this clause 4.4 for any amounts other than those received or recovered by the Council as cleared funds for Proceeds.

4.5 Moneys held on trust

Moneys paid to the Council in relation to the Environmental Upgrade Charge (other than any Administrative Costs) must 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.

4.6 Prepayment of Total Charge Amount by Building Owner

- (a) Notwithstanding the other provisions of this agreement, the Building Owner may, upon at least 14 days prior notice in writing to the Council, make Prepayments to the Council but only on the Charge Payment Date (unless the effect of the distribution of the relevant Prepayment in accordance with clause 4.6(b) is to reduce the amount of the Outstanding Funding to zero, in which case the Prepayment can be made at any time during the Charge Period).
- (b) The Council must, within 8 Business Days after it has received funds from the Building Owner for any Prepayment, distribute that Prepayment (other than Administrative Costs included in that Prepayment) to the Finance Provider by way of electronic funds transfer. The Council is not liable to the Finance Provider or any other person under this clause 4.6 for any amounts other than those received or recovered by the Council as cleared funds for Prepayments.
- (c) For the avoidance of doubt, if a Prepayment is made, the Agreed Repayment Arrangements shall be amended in accordance with clause 3.7(b).
- (d) Any Prepayment must be equal to or greater than one Charge Payment.

4.7 Satisfaction of Actual Funding Amount

Payment by the Council in accordance with clauses 4.3, 4.4 or 4.6 constitutes satisfaction of the Actual Funding Amount by the Building Owner to the extent of that payment.

4.8 Administrative procedures

- (a) The Council agrees to create, implement and maintain administrative and operational procedures and records which are sufficient to allow it to ensure that the Total Outstanding Charge Amount is:
 - I. readily identifiable; and
 - II. capable of being collected and enforced.
- (b) The Building Owner and the Finance Provider agree to give the Council any document or other information that the Council reasonably requests from time to time to enable the Council to comply with its obligations under clause 4.8(a).
- (c) If an application is made in accordance with section 603(1) of the Local Government Act, the Council will ensure that the information referred to in section 603(3) of the Local Government Act is provided in respect of the Environmental Upgrade Charge to the applicant.

4.9 No liability

Notwithstanding clauses 4.2 to 4.8 (both inclusive) but without limiting in any way clauses 3.5(h) and 3.11:

- (a) the Council is not liable to the Finance Provider for any amounts not received or recovered by the Finance Provider in relation to any Transaction Document; and
- (b) the Council's obligations under this clause 4 in respect of each Charge Payment, any Prepayment and any Proceeds do not come into effect until the Building Owner has paid the Charge Payment or the Prepayment to the Council or the Council has received or recovered Proceeds.

5 Payment by Council

5.1 Payment role

The Building Owner acknowledges the role of the Council in the payment arrangements set out in this clause 5 and section 54M of the Local Government Act.

5.2 No subcontracting

- (a) The Council must not, without the prior written consent of the Finance Provider (such consent not to be unreasonably withheld), subcontract with any person for the performance of any of its obligations under this clause 5.
- (b) If the Council subcontracts with any person for the performance of any of its obligations under this clause 5, the Council will remain liable for all of its obligations under this agreement notwithstanding the entering into of the subcontracting arrangement.

5.3 Prepayments

The Council must pay the Finance Provider each amount received from the Building Owner as a Charge Payment or a Prepayment and each amount received or recovered as Proceeds (in each case, other than relevant Administrative Costs) in accordance with this agreement.

5.4 No liability

Notwithstanding clauses 5.1 to 5.3 (both inclusive) but without limiting in any way clauses 3.5(h) and 3.11:

- (a) the Council is not liable to the Building Owner for any amounts not received or recovered by the Finance Provider in relation to any Transaction Document; and
- (b) the Council's obligations under this clause 5 in respect of each Charge Payment, any Prepayment and any Proceeds do not come into effect until the Building Owner has paid the Charge Payment or the Prepayment to the Council or the Council has received or recovered Proceeds.

6 Confirmations

6.1 Confirmations from Building Owner

The Building Owner confirms that:

- (a) in the event that the Building Owner requires a Lessee to make a Contribution to any Environmental Upgrade Charge, the Lease:
 - i. contains the specific agreement of the Lessee to make such Contribution; or

- ii. requires the Lessee's payment of Council charges for the Building; and
- (b) the Council is not taken to have provided, or to have agreed to provide, any Authorisation solely by virtue of the Council being a party to this agreement.

6.2 Confirmation from Building Owner and Finance Provider

Each of the Building Owner and the Finance Provider confirms that:

- (a) a default by any party under this agreement will not in itself constitute a default under any Transaction Document (other than this agreement); and
- (b) a default by any person under any Transaction Document (other than this agreement) will not in itself constitute a default under this agreement.

7 Reporting requirements

7.1 Reporting by Building Owner

- (a) Within 45 days after the completion of the Environmental Upgrade Works, the Building Owner must provide to the Council and the Finance Provider a notice which states that:
 - i. the Environmental Upgrade Works have been completed (subject to clause 7.1(a)(iii) (if applicable));
 - ii. all commissioning tests in relation to the Environmental Upgrade Works have been carried out successfully (subject to clause 7.1(a)(iii) (if applicable)); and
 - iii. any Environmental Upgrade Works that have not been completed or any defects in the Environmental Upgrade Works:
 - A. cannot be completed or rectified (as applicable) practicably at that time;
 - B. are only minor in nature and number; and
 - C. will not adversely affect the use of the Environmental Upgrade Works or the Building,
- in each case, operating to specifications set out in this agreement.
- (b) The notice referred to in clause 7.1(a) must be prepared by a suitably qualified professional person, being a member of a recognised industry association relevant to the type of Environmental Upgrade Works which are the subject of the notice.
 - (c) On 1 September each year, the Building Owner must provide an Annual Report (Building):
 - i. to the Council. The Council must, in turn, promptly provide such Annual Report (Building) to OEH; and
 - ii. to any Lessee who has made a Contribution during the year to which the Annual Report (Building) relates.
 - (d) The Building Owner agrees that the Council and OEH may use information in the Annual Report (Building) for any of the following purposes:

- i. without the consent of the Building Owner, for the purpose of internal Council and OEH analysis which is not publicly available; and
- ii. without the consent of the Building Owner, for the purpose of public reporting by OEH; and
- iii. with the consent of the Building Owner, for any other purpose.

7.2 Reporting by Council

- (a) On 1 December each year, the Council must include in the Annual Report (Council):
 - i. a list of the buildings within the Council's local government area in respect of which an environment upgrade agreement has been executed during the financial year to which the report relates;
 - ii. a summary of the Environmental Upgrade Works carried out during the financial year to which the report relates; and
 - iii. the total cost of the Environmental Upgrade Works carried out during the financial year to which the report relates.
- (b) Each of the Building Owner and the Finance Provider agrees that the Council may use information in connection with this agreement for the purpose of preparing the Annual Report (Council).

8 Reinstatement of rights

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.

9 Representations and warranties

9.1 General representations and warranties

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 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.

9.2 Further representations and warranties from Building Owner

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) **(existing Building):** the Building:
 - i. is an existing building in [*Council jurisdiction to be inserted*]; and
 - ii. is used entirely or predominantly for non-residential purposes; and
- (f) **(efficiency or sustainability):** the purpose of the Environmental Upgrade Works is to improve the energy, water or environmental efficiency or sustainability of the Building; and
- (g) **(Environmental Upgrade Works Costs):** it will carry out the Environmental Upgrade Works and will use the financial accommodation provided to it on the terms set out in annexure 9 only for the purpose of paying the Environmental Upgrade Works Costs; and
- (h) **(no dealings):** without prior written consent from the Finance Provider and the Council (such consent not to be unreasonably withheld or delayed), it will not and will not agree to, either in a single transaction or a series of transactions, sell, transfer, lease or otherwise dispose of the Building or any part of the Building, or create or permit to exist any Encumbrance (other than any Permitted Encumbrance) over the Building or any part of the Building; and
- (i) **(Authorisations):**

- I. it holds all Authorisations which are required at the time for the conduct of the Environmental Upgrade Works; and
 - II. each such Authorisation is in full force and effect, and has not been revoked or suspended; and
 - III. it is not aware of any material breach of the terms of any such Authorisation; and
- (j) **(statutory requirements):** it has complied with all statutory requirements that apply to any Environmental Upgrade Works, including any conditions for major refurbishments; and
 - (k) **(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.

9.3 Further representations and warranties from Finance Provider

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 annexure 9.

9.4 Repetition of representations and warranties

The representations and warranties provided by the Building Owner in this clause 9 are taken to be made (by reference to the then current circumstances):

- (a) on each date on which the Finance Provider provides financial accommodation to the Building Owner; and
- (b) every three months after the date of this agreement.

[Note: clause 9.4 is necessary in order to ensure that the representations and warranties provided by the Builder Owner in clause 9 apply both on and after the date of this agreement.]

[Note: if the Building Owner or the Finance Provider is a trust, a managed investment scheme, a partnership or an individual, the representations and warranties in this clause 9 will need to be adapted in accordance with the applicable provisions in annexure 8 and then all applicable clause references in this agreement will need to be updated.]

10 Undertakings

10.1 Provision of funding

- (a) Each of the Finance Provider and the Building Owner agrees to comply with the terms and conditions of annexure 9. For the avoidance of doubt, the Council has no rights or obligations under annexure 9.
- (b) The Finance Provider will promptly notify the Council in writing each time it provides financial accommodation to the Building Owner in accordance with annexure 9.

10.2 General undertaking

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 or consent to the variation, replacement, amendment or termination of any Transaction Document to which it is a party or any provision (including this clause 10.2) of any Transaction Document to which it is a party:

- (a) without the prior written consent of each other party to this agreement where such variation, replacement, amendment or termination will or may have a Material Adverse Effect; and
- (b) in a manner which is inconsistent with the Mandatory Provisions.

10.3 Further undertakings from Building Owner

- (a) The Building Owner undertakes to provide the Council with access to the Building and the land on which the Building is situated:
 - (i) as the Council, upon at least 48 hours prior notice in writing to the Building Owner, reasonably requires from time to time in order to ensure that the Building Owner is complying with its obligations under this agreement (including the representation and warranty in clause 9.2(j)); and
 - (ii) as the Council requires after a Default occurs and while the Default subsists.
- (b) The Building Owner undertakes to, on written request by a Lessee, provide the Lessee with a copy of this agreement, except annexures 1, 2 and 5, and those parts of annexure 3 that do not relate to the relevant Lessee.

10.4 Further undertakings from Finance Provider

(a) 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 permitted in accordance with this clause 10.4.

(b) Where, in the reasonable opinion of the Finance Provider, a change in law occurs that has or is likely to have an Adverse Effect, then:

- (i) the Finance Provider undertakes to promptly notify the Council in writing of the occurrence of the change in law; and
- (ii) the Finance Provider may make a demand on the Building Owner under the indemnity granted by the Building Owner to the Finance Provider under annexure 9 and may take any action to enforce any of its rights against the Building Owner in respect of that indemnity as the Finance Provider determines in its absolute discretion. [*Note: for the purpose of this clause, annexure 9 will need to include an indemnity from the Building Owner to the Finance Provider.*]

(c) An “Adverse Effect” will be taken to have occurred for the purpose of this clause 10.4 if a change in law:

- (i) adversely affects, in any way, the ability of the Finance Provider to receive payment of the Outstanding Funding on the terms contemplated by this agreement; or
- (ii) results in a variation of the Enforcement Procedure as contemplated by clause 3.11(a)(ii)(A) which adversely affects, in any way, the Finance Provider; or

(iii) adversely affects, in any way, the first ranking priority claim that the Council has in relation to the land upon which the Building is situated in accordance with section 550 and Division 5 of Part 2 of Chapter 17 of the Local Government Act for the Environmental Upgrade Charge.

11 Dealing with interests

- (a) Subject to clause 11(b), the Council must not assign or otherwise deal with its rights or obligations under any Transaction Document to which it is a party or allow any interest in them to arise or be varied.
- (b) The Council may (without the consent of the Building Owner or the Finance Provider) assign or otherwise deal with its rights or obligations under any Transaction Document to which it is a party or allow any interest in them to arise or be varied if the Council amalgamates, merges or becomes subject to any similar arrangement with another council (as defined in the Local Government Act).
- (c) Neither the Building Owner nor the Finance Provider may assign or otherwise deal with its rights or obligations under any Transaction Document to which it is a party or allow any interest in them to arise or be varied, in each case, without:
 - i. the prior written consent of each other party to this agreement (such consent not to be unreasonably withheld or delayed) provided that, each of the Council and the Building Owner consents to the Finance Provider assigning or otherwise dealing with its rights or obligations to a Permitted Assignee and no additional consent of any other party will be required in those circumstances; and
 - ii. whether or not consent is required under clause 11(b)(i), in the case of a transfer of all of the rights and obligations of that party under this agreement, the transferee first entering into and delivering to each other party to this agreement a deed poll in the form of annexure 7 under which the transferee agrees to be bound, with effect on and from the date of the deed poll, by the terms of this agreement as if it was originally named as a party to this agreement instead of the applicable party. On the date on which that executed deed poll is delivered to each other party to this agreement the relevant transferor is released from all of its future obligations under this agreement (but for the avoidance of doubt is not released from any prior breach of this agreement).

12 Costs and expenses

12.1 Building Owner to pay costs and expenses

- (a) The Building Owner must immediately pay on demand all reasonable costs and expenses of the Council and the Finance Provider in connection with:
 - i. the negotiation, preparation, execution, delivery, registration or completion of this agreement; and
 - ii. any variation or discharge of this agreement; and
 - iii. the giving by the Council or the Finance Provider of a consent or approval in connection with this agreement; and

- iv. obtaining advice from a professional person or consultant about any matter of concern to it in connection with this agreement,

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

- (b) The Building Owner must immediately pay on demand all costs and expenses of the Council and the Finance Provider in connection with the enforcement of, or the preservation of any rights under, this agreement.

12.2 Building Owner to pay Taxes

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.

13 Notices and other communications

13.1 Form - all communications

- (a) Unless expressly stated otherwise in this agreement, all notices, certificates, consents, approvals, waivers and other communications in connection with this agreement must be in writing, signed by an Approved Signatory of the sender and marked for the attention of the person identified in the Details or, if the recipient has notified otherwise, then marked for attention in the way last notified.
- (b) Notwithstanding any other provision of this agreement (including clause 13.1(a)), all notices provided by the Council in connection with this agreement may be provided by the Council in accordance with the Local Government Act and the Local Government Regulation (if applicable).

13.2 Form - communications sent by email

Communications sent by email need not be marked for attention in the way stated in clause 13.1. However, the email must state the first and last name of the sender.

Communications sent by email are taken to be signed by the named sender.

13.3 Delivery

Communications must be:

- (a) left at the address set out or referred to in the Details; or
- (b) sent by prepaid ordinary post (airmail, if appropriate) to the address set out or referred to in the Details; or
- (c) sent by fax to the fax number set out or referred to in the Details; or
- (d) sent by email to the address set out or referred to in the Details.

However, if the intended recipient has notified a changed address or fax number, then communications must be to that address or number.

13.4 When effective

Communications take effect from the time they are received or taken to be received under clause 13.5 (whichever happens first) unless a later time is specified.

13.5 When taken to be received

Communications are taken to be received:

- (a) if sent by post, three days after posting (or seven days after posting if sent from one country to another); or
- (b) if sent by fax, at the time shown in the transmission report as the time that the whole fax was sent; or
- (c) if sent by email:
 - i. when the sender receives an automated message confirming delivery; or
 - ii. four hours after the time sent (as recorded on the device from which the sender sent the email) unless the sender receives an automated message that the email has not been delivered,

whichever happens first.

13.6 Receipt outside business hours

Despite clauses 13.4 and 13.5, if communications are received or taken to be received under clause 13.5 after 5.00 pm in the place of receipt or on a non-Business Day, they are taken to be received at 9.00 am on the next Business Day and take effect from that time unless a later time is specified.

13.7 Communications by email preferred

Notwithstanding clause 13.1 to 13.6 (both inclusive), each party acknowledges that the preferred means of communication is by email.

14 General

14.1 Partial exercising of rights

If a party does not exercise a right or remedy under this agreement fully or at a given time, the party may still exercise it later.

14.2 Remedies cumulative

The rights and remedies of the parties under this agreement are in addition to other rights and remedies given by law independently of this agreement.

14.3 Inconsistent law

To the extent permitted by law, this agreement prevails to the extent it is inconsistent with any law.

14.4 Variation

A provision of this agreement must not be varied except in writing signed by each party.

14.5 Termination

- (a) At any time, this agreement may be terminated in writing signed by each party.
- (b) If the Building Owner uses the financial accommodation provided to it on the terms set out in annexure 9 for any purpose other than for the purpose of paying the Environmental Upgrade Works Costs in accordance with clause 9.2(g), the Council may:
 - i. with the prior written consent of the Finance Provider; and
 - ii. upon at least 1 month's prior notice in writing to the Finance Provider and the Building Owner,

terminate this agreement.
- (c) If this agreement is terminated under clauses 14.5(a) or 14.5(b), the Building Owner must, on or prior to the date the termination takes effect, make a Prepayment of the aggregate amount of all Charge Payments which are then outstanding in accordance with clause 4.6.

14.6 Waiver

Without limitation to clause 3.11, a right created under this agreement is only waived, or a consent under this agreement is only given, if in writing signed by the party or parties to be bound.

14.7 Confidentiality

- (a) Each party agrees not to disclose information provided by any other party that is not publicly available (including the existence of or contents of this agreement) except:
 - i. the identity of the parties to any person for the purpose of promoting or marketing the Environmental Upgrade Works; or
 - ii. to any person in connection with an exercise of rights or a dealing with rights or obligations under any Transaction Document (including when the Finance Provider negotiates with any potential assignee, potential sub-participant or other person who is considering contracting with the Finance Provider in connection with any Transaction Document); or
 - iii. to officers, employees, legal and other advisers and auditors of the parties; or
 - iv. to any party or any related entity of any party, provided the recipient agrees to act consistently with this clause 14.7; or
 - v. with the consent of the party who provided the information (such consent not to be unreasonably withheld or delayed); or
 - vi. under section 603 of the Local Government Act in relation to certificates as to rates, charges and other amounts; or
 - vii. as required by any law, regulation, regulatory or statutory body or stock exchange; or
 - viii. to rating agencies to the extent required by them.
 - ix. in the case of the Building Owner, as required by clauses 3.4(e), 7.1 or 10.3.

Each party consents to disclosures made in accordance with this clause 14.7(a).

- (b) Notwithstanding clause 14.7(a) and in addition to the rights of the parties to disclose information under clause 14.7(a):
 - i. the Council may disclose:
 - D. information about this agreement to the Chief Executive of OEH without the consent of the Building Owner or the Finance Provider; and
 - E. each Annual Report (Building) to the Chief Executive of OEH; and
 - ii. the Building Owner may disclose the existence or contents of the Charge Obligations to a prospective purchaser or a prospective lessee of the Building without the consent of the Council or the Finance Provider.

14.8 Further steps

Each party agrees, at its own expense, to do anything (such as obtaining consents, signing and producing documents and getting documents completed and signed) that another party may reasonably request to give effect to this agreement.

14.9 Entire agreement

This agreement constitutes the entire agreement between the parties in relation to its subject matter. All prior discussions, undertakings, agreements, representations, warranties and indemnities in relation to that subject matter are replaced by this agreement and have no further effect.

14.10 No merger

The provisions of this agreement will not merge on completion of any transaction contemplated in this agreement and, to the extent any provision has not been fulfilled, will remain in force.

14.11 Severability

Part or all of any provision of this agreement that is illegal or unenforceable will be severed from this agreement and will not affect the continued operation of the remaining provisions of this agreement.

14.12 No revocation of power of attorney

Each person who executes this agreement on behalf of a party under a power of attorney warrants that he or she has no notice of the revocation of that power or of any fact or circumstance that might affect his or her authority to execute this agreement under that power.

14.13 Counterparts

This agreement may consist of a number of copies, each signed by one or more parties. If so, the signed copies are treated as making up the one document.

14.14 Governing law

This agreement is governed by the law in force in New South Wales and each party submits to the non-exclusive jurisdiction of the courts of that place.

EXECUTED as an agreement

Environmental Upgrade Agreement (NSW)

Annexure 1 - Agreed Repayment Arrangements

[To be inserted]

Environmental Upgrade Agreement (NSW)

Annexure 2 - Funding Payment Schedule

[To be inserted]

Environmental Upgrade Agreement (NSW)

Annexure 3 - Lessee Cost Savings Estimation

[To be inserted in accordance with section 5 of the Guidelines, for each Lessee]

Environmental Upgrade Agreement (NSW)

Annexure 4 - Environmental Upgrade Works

[To be inserted]

Environmental Upgrade Agreement (NSW)

Annexure 5 - Environmental Upgrade Works Budget

[To be inserted]

Environmental Upgrade Agreement (NSW)

Annexure 6 - Enforcement Procedure

[To be inserted]

Environmental Upgrade Agreement (NSW)

Annexure 7 – Accession Deed Poll

Accession Deed Poll dated []

By: [Insert full name of relevant transferee] [Insert ABN] (Transferee)

In favour of: Each other party to the Environmental Upgrade Agreement, as defined below (**Beneficiary**)

1 Definitions and interpretation

- (a) **Environmental Upgrade Agreement** means the agreement entitled "Environmental Upgrade Agreement (NSW)" dated on or about [] between the Council, [] and [].
- (b) Unless otherwise defined, expressions used in this deed poll have the meanings given to them in the Environmental Upgrade Agreement.
- (c) Clause 1.2 of the Environmental Upgrade Agreement applies in this deed poll as if it was set out in full in this deed poll and as if all references in that clause to "this agreement" were references to this deed poll.

2 Agreements, confirmations and representations

The Transferee:

- (d) enters this deed poll for valuable consideration, the receipt of which is acknowledged; and
- (e) agrees to:
 - (i) become, with effect on and from the date of this deed poll, [the Council /the Building Owner/the Finance Provider] under the Environmental Upgrade Agreement;
 - (ii) be bound by the Environmental Upgrade Agreement in that capacity with effect on and from the date of this deed poll; and
 - (iii) comply with and perform its obligations as [the Council /the Building Owner/the Finance Provider] under the Environmental Upgrade Agreement.

3 Governing law

This deed poll is governed by the law applying in New South Wales.

4 Deed Poll

This document is executed as a deed poll by the Transferee in favour of each Beneficiary. Each Beneficiary has the benefit of this deed poll and is entitled to enforce this deed poll, whether itself or with any one or more other Beneficiaries even though it is not a party to this deed poll.

5 Attorneys

Each person who executes this deed poll on behalf of the Transferee under a power of attorney warrants that he or she has no notice of the revocation of that power or of any fact or circumstance that might affect his or her authority to execute this deed poll under that power.

Executed as a deed poll.

[Insert signing panel]

Annexure 8 - Representations and warranties

[Applicable provisions for trusts]

9 Representations and warranties

9.1 General representations and warranties

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 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 (including any authorisations required under its constitution) 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.

9.2 Trust representations and warranties

The [Building Owner/Finance Provider] represents and warrants that:

- (a) **(existence):** the Trust has been duly established; and
- (b) **(sole trustee):** it is the only trustee of the Trust; and
- (c) **(appointment and no removal):** it has been validly appointed as trustee of the Trust and no action has been taken or proposed to remove it as trustee of the Trust; and
- (d) **(disclosure of terms):** true copies of the Trust Deed (including any amending documents) have been provided to the [Building Owner/Finance Provider] and the Council and disclose all terms of the Trust; and

- (e) **(power):** it has power under the terms of the Trust to enter into the Transaction Documents to which it is a party and comply with its obligations under them; and
- (f) **(authorisations):** it has in full force and effect the authorisations (including any authorisation required under the Trust Deed) necessary for it to enter into the Transaction Documents to which it is a party, perform obligations under them and allow them to be enforced; and
- (g) **(indemnity):** it has a right to be fully indemnified out of the Trust Property in respect of obligations incurred by it under the Transaction Documents to which it is a party; and
- (h) **(adequacy of Trust Property):** the Trust Property is sufficient to satisfy the right of indemnity referred to in clause 9.2(g) and all other obligations in respect of which the [Building Owner/Finance Provider] has a right to be indemnified out of the Trust Property; and
- (i) **(no default):** [it is not in default under the Trust Deed (in the case of the Building Owner) and] no action has been taken or proposed to terminate the Trust Deed [(in the case of the Building Owner and the Finance Provider)]; and
- (j) **(exercise of powers):** it has not exercised its powers under the Trust Deed to release, abandon or restrict any power conferred on it by the Trust Deed; and
- (k) **(benefit):** entry into the Transaction Documents to which it is a party is a valid exercise of its powers under the Trust Deed for the benefit of beneficiaries of the Trust.

9.3 Further representations and warranties from Building Owner

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) **(no immunity):** neither it nor any of its Subsidiaries has immunity from the jurisdiction of a court or from legal process; and
- (d) **(existing Building):** the Building:
 - (i) is an existing building in [*Council jurisdiction to be inserted*]; and
 - (ii) is used entirely or predominantly for non-residential purposes; and
- (e) **(efficiency or sustainability):** the purpose of the Environmental Upgrade Works is to improve the energy, water or environmental efficiency or sustainability of the Building; and
- (f) **(Environmental Upgrade Works Costs):** it will carry out the Environmental Upgrade Works and will use the financial accommodation provided to it on the terms set out in annexure 9 only for the purpose of paying the Environmental Upgrade Works Costs; and
- (g) **(no dealings):** without prior written consent from the Finance Provider and the Council (such consent not to be unreasonably withheld or delayed), it will not and will not agree to, either in a single transaction or a series of transactions, sell, transfer, lease or otherwise dispose of the Building or any part of the Building, or create or permit to exist any Encumbrance (other than any Permitted Encumbrance) over the Building or any part of the Building; and

- (h) **(Authorisations):**
 - (i) it holds all Authorisations which are required at the time for the conduct of the Environmental Upgrade Works; and
 - (ii) each such Authorisation is in full force and effect, and has not been revoked or suspended; and
 - (iii) it is not aware of any material breach of the terms of any such Authorisation; and
- (i) **(statutory requirements):** it has complied with all statutory requirements that apply to any Environmental Upgrade Works, including any conditions for major refurbishments; and
- (j) **(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.

9.4 Further representations and warranties from Finance Provider

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 annexure 9.

9.5 [Repetition of representations and warranties

The representations and warranties provided by the Building Owner in this clause 9 are taken to be made (by reference to the then current circumstances):

- (a) on each date on which the Finance Provider provides financial accommodation to the Building Owner; and
- (b) every three months after the date of this agreement.]

In this clause 9, these meanings apply:

Trust means [*to be inserted*].

Trust Deed means [*to be inserted*].

Trust Property means all the [Building Owner's/Finance Provider's] rights, property and undertaking which are the subject of the Trust:

- (a) of whatever kind and wherever situated; and
- (b) whether present or future.

Environmental Upgrade Agreement (NSW)

[Applicable provisions for managed investment schemes]

9 Representations and warranties

9.1 General representations and warranties

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 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 (including any authorisations required under its constitution) 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.

9.2 Scheme representations and warranties

The [Building Owner/Finance Provider] represents and warrants that:

- (a) **(existence):** the Scheme has been validly constituted as a Managed Investment Scheme; and
- (b) **(sole responsible entity):** it is the only responsible entity of the Scheme; and
- (c) **(appointment and no removal):** it has been validly appointed as the responsible entity of the Scheme and no action has been taken or proposed to remove it as responsible entity of the Scheme; and
- (d) **(disclosure of terms and compliance):**
 - (i) true copies of the Scheme Constitution (including any amending documents) have been provided to the [Building Owner/Finance Provider] and the Council and disclose all terms of the Scheme; and
 - (ii) the Scheme Constitution complies with the Corporations Act; and
- (e) **(power):** it has power under the terms of the Scheme Constitution to enter into the Transaction Documents to which it is a party and comply with its obligations under them; and

- (f) **(authorisations):** it has in full force and effect the authorisations (including any authorisation required under the Scheme Constitution) necessary for it to enter into the Transaction Documents to which it is a party, perform obligations under them and allow them to be enforced; and
- (g) **(Compliance Plan):**
 - (i) true copies of the Compliance Plan (including any amending documents) have been provided to the [Building Owner/Finance Provider] and the Council; and
 - (ii) the Compliance Plan complies with the Corporations Act; and
- (h) **(indemnity):** it has a right to be fully indemnified out of the Scheme Property in respect of obligations incurred by it under the Transaction Documents to which it is a party; and
- (i) **(adequacy of Scheme Property):** the Scheme Property is sufficient to satisfy the right of indemnity referred to in clause 9.2(h) and all other obligations in respect of which the [Building Owner/Finance Provider] has a right to be indemnified out of the Scheme Property; and
- (j) **(no default):** [it is not in default under the Scheme Constitution (in the case of the Building Owner) and] no action has been taken or proposed to terminate the Scheme [(in the case of the Building Owner and the Finance Provider)]; and
- (k) **(priority):** each of the Council's and the [Building Owner's/Finance Provider's] rights under the Transaction Documents it enters into with the [Building Owner/Finance Provider] rank in priority to the interests of the members of the Scheme; and
- (l) **(exercise of powers):** it has not exercised its powers under the Scheme Constitution to release, abandon or restrict any power conferred on it by the Scheme Constitution; and
- (m) **(benefit):** entry into the Transaction Documents to which it is a party is a valid exercise of its powers under the Scheme Constitution for the benefit of the members of the Scheme.

9.3 Further representations and warranties from Building Owner

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) **(no immunity):** neither it nor any of its Subsidiaries has immunity from the jurisdiction of a court or from legal process; and
- (d) **(existing Building):** the Building:
 - (i) is an existing building in the [*Council jurisdiction to be inserted*]; and
 - (ii) is used entirely or predominantly for non-residential purposes; and
- (e) **(efficiency or sustainability):** the purpose of the Environmental Upgrade Works is to improve the energy, water or environmental efficiency or sustainability of the Building; and

- (f) **(Environmental Upgrade Works Costs):** it will carry out the Environmental Upgrade Works and will use the financial accommodation provided to it on the terms set out in annexure 9 only for the purpose of paying the Environmental Upgrade Works Costs; and
- (g) **(no dealings):** without prior written consent from the Finance Provider and the Council (such consent not to be unreasonably withheld or delayed), it will not and will not agree to, either in a single transaction or a series of transactions, sell, transfer, lease or otherwise dispose of the Building or any part of the Building, or create or permit to exist any Encumbrance (other than any Permitted Encumbrance) over the Building or any part of the Building; and
- (h) **(Authorisations):**
 - (i) it holds all Authorisations which are required at the time for the conduct of the Environmental Upgrade Works; and
 - (ii) each such Authorisation is in full force and effect, and has not been revoked or suspended; and
 - (iii) it is not aware of any material breach of the terms of any such Authorisation; and
- (i) **(statutory requirements):** it has complied with all statutory requirements that apply to any Environmental Upgrade Works, including any conditions for major refurbishments; and
- (j) **(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.

9.4 Further representations and warranties from Finance Provider

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 annexure 9.

9.5 [Repetition of representations and warranties

The representations and warranties provided by the Building Owner in this clause 9 are taken to be made (by reference to the then current circumstances):

- (a) on each date on which the Finance Provider provides financial accommodation to the Building Owner; and
- (b) every three months after the date of this agreement.]

In this clause 9, these meanings apply:

Compliance Plan means the compliance plan of the Scheme established in accordance with part 5C.4 of the Corporations Act.

Managed Investment Scheme has the meaning it has in the Corporations Act.

Scheme means *[to be inserted]*.

Scheme Constitution means *[to be inserted]*.

Scheme Property means all the [Building Owner's/Finance Provider's] rights, property and undertaking which are the subject of the Scheme:

- (a) of whatever kind and wherever situated; and
- (b) whether present or future.

Environmental Upgrade Agreement (NSW)

[Applicable provisions for partnerships]

9 Representations and warranties

9.1 General representations and warranties

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 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 (including any authorisations required under its constitution) 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.

9.2 Partnership representations and warranties

The [Building Owner/Finance Provider] represents and warrants that:

- (a) **(disclosure of terms):** true copies of the Partnership Agreement (including any amending documents) have been provided to the [Building Owner/Finance Provider] and the Council and disclose all terms of the Partnership; and
- (b) **(power):** it has power under the terms of the Partnership Agreement to enter into the Transaction Documents to which it is a party and comply with its obligations under them; and
- (c) **(authorisations):** it has in full force and effect the authorisations (including any authorisation required under the Partnership Agreement) necessary for it to enter into the Transaction Documents to which it is a party, perform obligations under them and allow them to be enforced; and
- (d) **(no default):** [it is not in default under the Partnership Agreement (in the case of the Building Owner) and] no action has been taken or proposed to terminate the Partnership [(in the case of the Building Owner and the Finance Provider)]; and

- (e) **(priority):** each of the Council and the [Building Owner's/Finance Provider's] rights under the Transaction Documents it enters into with the [Building Owner/Finance Provider] rank in priority to the interests of the members of the Partnership; and
- (f) **(benefit):** entry into the Transaction Documents to which it is a party is a valid exercise of its powers under the Partnership Agreement; and
- (g) **(no contravention):** the Transaction Documents to which it is a party and the transactions under them which involve it do not contravene the Partnership Agreement or any law or obligation by which it is bound; and
- (h) **(proper administration):** it enters into the Transaction Documents to which it is a party as part of the proper administration of the Partnership; and
- (i) **(internal management):** all acts of internal management of the Partnership in respect of into the Transaction Documents to which it is a party and the assumption by it of liability for the performance of its obligations under the Transaction Documents to which it is a party have been performed.

9.3 Further representations and warranties from Building Owner

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) **(existing Building):** the Building:
 - (i) is an existing building in [*Council jurisdiction to be inserted*]; and
 - (ii) is used entirely or predominantly for non-residential purposes; and
- (f) **(efficiency or sustainability):** the purpose of the Environmental Upgrade Works is to improve the energy, water or environmental efficiency or sustainability of the Building; and
- (g) **(Environmental Upgrade Works Costs):** it will carry out the Environmental Upgrade Works and will use the financial accommodation provided to it on the terms set out in annexure 9 only for the purpose of paying the Environmental Upgrade Works Costs; and
- (h) **(no dealings):** without prior written consent from the Finance Provider and the Council (such consent not to be unreasonably withheld or delayed), it will not and will not agree to, either in a single transaction or a series of transactions, sell, transfer, lease or otherwise dispose of the Building or any part of the Building, or create or permit to exist any Encumbrance (other than any Permitted Encumbrance) over the Building or any part of the Building; and
- (i) **(Authorisations):**
 - (i) it holds all Authorisations which are required at the time for the conduct of the Environmental Upgrade Works; and

- (ii) each such Authorisation is in full force and effect, and has not been revoked or suspended; and
- (iii) it is not aware of any material breach of the terms of any such Authorisation; and
- (j) **(statutory requirements):** it has complied with all statutory requirements that apply to any Environmental Upgrade Works, including any conditions for major refurbishments; and
- (k) **(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.

9.4 Further representations and warranties from Finance Provider

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 annexure 9.

9.5 [Repetition of representations and warranties

The representations and warranties provided by the Building Owner in this clause 9 are taken to be made (by reference to the then current circumstances):

- (a) on each date on which the Finance Provider provides financial accommodation to the Building Owner; and
- (b) every three months after the date of this agreement.]

In this clause 9, these meanings apply:

Partnership means [*to be inserted*].

Partnership Agreement means [*to be inserted*].

Partnership Assets means all the [Building Owner's/Finance Provider's] rights, property and undertaking which are the subject of the Scheme:

- (a) of whatever kind and wherever situated; and
- (b) whether present or future.

Environmental Upgrade Agreement (NSW)

[Applicable provisions for individuals]

9 Representations and warranties

9.1 Individual representations and warranties

The [Building Owner/Finance Provider] represents and warrants that:

- (a) **(power):** it has power to enter into the Transaction Documents to which it is a party and comply with its obligations under them; and
- (b) **(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, perform obligations under them and allow them to be enforced; and
- (c) **(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; and
- (d) **(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; and
- (e) **(no contravention):** the Transaction Documents to which it is a party and the transactions under them which involve it do not contravene any law or obligation by which it is bound or to which any of its assets are subject; and
- (f) **(litigation):** there is no pending or threatened proceeding affecting it or its assets before a court, authority, commission or arbitrator.

9.2 Further representations and warranties from Building Owner

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) **(bankruptcy):** it is not bankrupt; 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):** it does not have immunity from the jurisdiction of a court or from legal process; and
- (e) **(existing Building):** the Building:
 - (i) is an existing building in the [*Council jurisdiction to be inserted*]; and
 - (ii) is used entirely or predominantly for non-residential purposes; and
- (f) **(efficiency or sustainability):** the purpose of the Environmental Upgrade Works is to improve the energy, water or environmental efficiency or sustainability of the Building; and
- (g) **(Environmental Upgrade Works Costs):** it will carry out the Environmental Upgrade Works and will use the financial accommodation provided to it on the terms set out in annexure 9 only for the purpose of paying the Environmental Upgrade Works Costs; and

- (h) **(no dealings):** without prior written consent from the Finance Provider and the Council (such consent not to be unreasonably withheld or delayed), it will not and will not agree to, either in a single transaction or a series of transactions, sell, transfer, lease or otherwise dispose of the Building or any part of the Building, or create or permit to exist any Encumbrance (other than any Permitted Encumbrance) over the Building or any part of the Building; and
- (i) **(Authorisations):**
 - (i) it holds all Authorisations which are required at the time for the conduct of the Environmental Upgrade Works; and
 - (ii) each such Authorisation is in full force and effect, and has not been revoked or suspended; and
 - (iii) it is not aware of any material breach of the terms of any such Authorisation; and
- (j) **(statutory requirements):** it has complied with all statutory requirements that apply to proposed environmental upgrade works, including any conditions for major refurbishments; and
- (k) **(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.

9.3 Further representations and warranties from Finance Provider

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 annexure 9.

9.4 [Repetition of representations and warranties

The representations and warranties provided by the Building Owner in this clause 9 are taken to be made (by reference to the then current circumstances):

- (a) on each date on which the Finance Provider provides financial accommodation to the Building Owner; and
- (b) every three months after the date of this agreement.]

Environmental Upgrade Agreement (NSW)

Annexure 9 – Terms for providing financial accommodation

[To be inserted]

Environmental Upgrade Agreement (NSW)

Annexure 10 - Annual Reporting Template

Annual Report (Building) template

Assessment Number:Reporting Year (Financial): ..

Building Owner (name, address):

Building address (name, street, suburb, post code):

Building use (tick one box):

offices shopping centre serviced apartments

hotel motel backpackers accommodation

Do you recover contributions from Lessees? Yes / No

If yes, total contribution amount recovered from Lessees in Reporting Year: (AUD)

ENVIRONMENTAL UPGRADE WORK (EUW) PERFORMANCE:

Report performance for each relevant category of EUW undertaken in the Reporting Year. For work carried over several years, report only work performed in the Reporting Year. Actual savings to be based on measured data, estimates only acceptable where direct measurements are not possible. Anticipated savings are based on estimates in current Annexure 3

ENERGY: Work aiming at increasing energy efficiency or/and reducing energy consumption

Description of Environmental Upgrade Work:

Cost incurred: AUD

Cost savings that were anticipated for reporting year:.....AUD

Actual cost savings: AUD

Energy savings that were estimated at Commencement Date for reporting year: ...Joules

Actual energy saved: Joules

Actual Greenhouse gas emissions saved: Tonnes CO₂-e

Has the building achieved a NABERS Energy Accredited Rating? Yes / No

If yes, number of stars in Reporting Year: Stars

WATER: Work aiming at increasing water efficiency or/and reducing water consumption

Description of Environmental Upgrade Work:

Cost incurred: AUD

Cost savings that were anticipated for reporting year:.....AUD

Actual cost savings: AUD

Water savings that were estimated at Commencement Date for reporting year: m³

Actual water saved: m³

Has the building achieved a NABERS Water Accredited Rating? Yes / No

If yes, number of stars in Reporting Year: Stars

WASTE: Work aiming at eliminating or reducing the discharge of wastes, or other substances, that are harmful to the environment or aiming at enabling the recovery or recycling of materials

Description of Environmental Upgrade Work:

Cost incurred: AUD

Actual cost savings: ..AUD

Volume of waste diverted from landfill or no longer being discharged to the environment:

Category	Volume or weight (specify unit: tonnes or m3)
Office Paper	
Dry Cardboard Packaging	
Food/kitchen	
Glass - containers	
Plastic - containers recyclable	
Metal – ferrous (steel)	
Computers / office equipment	
Other electrical and electronic	
Toner cartridges	
Construction materials	
Hazardous/Special – chemicals, clinical waste	
Other: specify	

Has the building achieved a NABERS Waste Accredited Rating? Yes / No

If yes, number of stars in Reporting Year: Stars

TRANSPORT: Work aiming at encouraging or facilitating alternative methods of transportation to the use of a private motor vehicle (such as walking and cycling)

Description of Environmental Upgrade Work:

Cost incurred: AUD

Has the building achieved a NABERS Commuter Transport Accredited Rating (available in September 2011)?
Yes / No

If yes, number of stars in Reporting Year: Stars

If able to measure or estimate, greenhouse gas emissions saved: ...Tonnes CO₂-e

MATERIALS: Work aiming at reducing the use of materials

Description of Environmental Upgrade Work:.....

Cost incurred: AUD

Actual cost savings: AUD

Type and volume/weight of materials no longer used:

Type of materials	Volume or weight (specify unit: tonnes or m3)

If able to measure or estimate, greenhouse gas emissions saved: .Tonnes CO₂-e

POLLUTION: Work aiming at preventing or reducing pollution

Description of Environmental Upgrade Work:

Cost incurred: AUD

Actual cost savings: AUD

If able to measure or estimate, pollutant emissions saved: (please specify unit used either ppm or mg/m³)

Has the building achieved a NABERS Indoor Environment Accredited Rating? Yes / No

If yes, number of stars in Reporting Year: Stars

MONITORING: Work aiming at enabling the monitoring of environmental quality

Description of Environmental Upgrade Work:

Cost incurred: AUD

Actual cost savings: AUD

If able to measure or estimate, greenhouse gas emissions saved: Tonnes CO₂-e

OTHER: Other work qualifying as an EUW not falling within the above categories

Description of Environmental Upgrade Work:

Cost incurred: AUD

Actual cost savings: AUD

If able to measure or estimate, greenhouse gas emissions saved: ... Tonnes CO₂-e

SUMMARY:

Total cost incurred for all Environmental Upgrade Works carried out in the reporting year:
.....AUD

Total actual cost savings as a result of all Environmental Upgrade Works carried out in the reporting year:AUD

Signed by Building Owner:

Date:

Environmental Upgrade Agreement (NSW)

Annexure 11 – Existing Encumbrances

[To be inserted]

Environmental Upgrade Agreement (NSW)

Signing page

DATED: _____

COUNCIL

[Signing panel to be inserted]

BUILDING OWNER

[Signing panel to be inserted]

FINANCE PROVIDER

[Signing panel to be inserted]