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Guidelines for Environmental Upgrade Agreements

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1 Introduction

1.1 Purpose of this document

This document provides guidelines for use in preparing Environmental Upgrade Agreements in accordance with the Local Government Amendment (Environmental Upgrade Agreements) Act 2010 (the Act) and the Local Government Amendment (Environmental Upgrade Agreements) Regulation 2010 (the Regulation).

1.2 Background

The Local Government Amendment (Environmental Upgrade Agreements) Act 2010 amends the Local Government Act 1993 to authorise councils to enter into Environmental Upgrade Agreements with building owners and finance providers.

An Environmental Upgrade Agreement is an agreement where:

- a) a building owner agrees to carry out environmental upgrade works in respect of a building to improve the energy, water or environmental efficiency or sustainability of the building, and
- b) a finance provider agrees to advance funds to the building owner to finance those environmental upgrade works, and
- c) the council agrees to levy a charge on the relevant land for the purpose of repaying the advance to the finance provider.

The agreement enables the council to make and levy an environmental upgrade charge on the land in accordance with an agreed repayment schedule. The council collects the environmental upgrade charge from the building owner and passes it onto the finance provider to repay the funds advanced.

The details of the retrofit activity and the total funds advanced are established by the finance provider and property owner and specified in the Environmental Upgrade Agreement.

Environmental upgrade charges are charges on the land. If building ownership changes hands the new owner agrees to be bound by the Environmental Upgrade Agreement and becomes liable to pay the environmental upgrade charges, unless the current owner repays the total amount outstanding. This is a required contractual obligation in any Environmental Upgrade Agreement.

1.3 Structure of this document

This document is structured as follows:

- a) Sections 1, 1.4 and 3 of this document cover interpretation, definitions and an introduction to Environmental Upgrade Agreements
- b) Sections 4 and 5 set out guidelines for entering into Agreements, and the acceptable methodology to be used for calculations of savings to lessees
- c) Sections 6 and 7 sets out administration and reporting arrangements for Agreements.

1.4 Mandatory provisions within these Guidelines

Sections 4, 5, 6 and 7 are mandatory for Environmental Upgrade Agreements, except for notes.

2 Interpretation and definitions

Where the Act or Regulations and these Guidelines differ on any point, the Act or Regulation prevails. Terms used in these Guidelines have the same meaning as set out in the Act or Regulation, unless otherwise stated.

3 About Environmental Upgrade Agreements

3.1 The parties to an Environmental Upgrade Agreement

3.1.1 Building owner

The building owner is responsible for implementing the environmental upgrade works, and paying environmental upgrade charges imposed on the building.

The building owner may pass on all or part of the payment of charges to lessees if lease provisions allow. The building owner remains liable to pay any environmental upgrade charges levied on the building by the due date, regardless of any payment by lessees or other third parties.

3.1.2 Finance provider

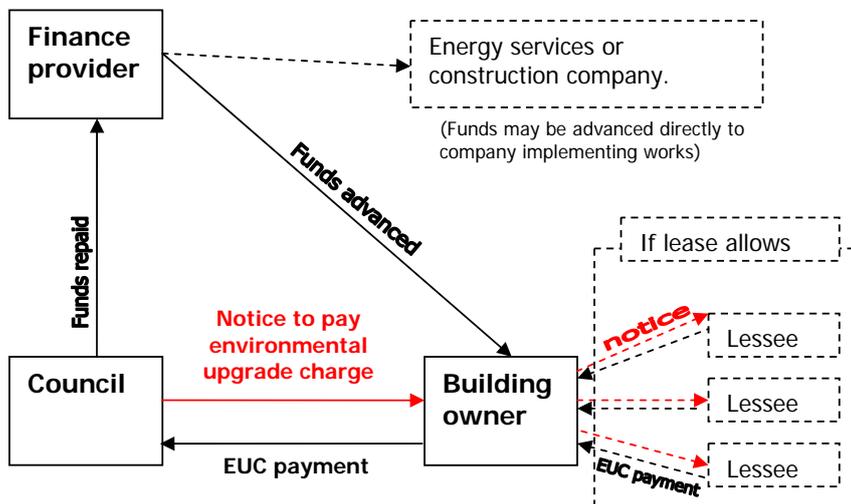
The finance provider agrees to advance funds to the building owner (including for example through an agent such as an engineering company) subject to the payment milestones in the Environmental Upgrade Agreement.

3.1.3 Council

Council forwards payments (including any late interest) towards environmental upgrade charges received from the building owner to the finance provider, aside from a portion retained as service fees under the Agreement. Council should forward these payments as soon as possible after receipt from the building owner.

Council is never liable to pay funds to the finance provider until they have received payment from the building owner.

3.2 Outline of a typical Environmental Upgrade Agreement



3.3 Acceptable environmental upgrade works

Environmental Upgrade Agreements are available for works to upgrade the environmental performance of the building. The Regulation defines environmental upgrade works, including any activity to:

- increase the efficiency of energy or water consumption, or
- reduce energy or water consumption, or
- prevent or reduce pollution, or
- eliminate or reduce the discharge of wastes, or other substances, that are harmful to the environment, or
- reduce the use of materials, or
- enable the recovery or recycling of materials, or
- enable the monitoring of environmental quality, or
- reduce greenhouse gas emissions, or
- encourage or facilitate alternative methods of transportation to the use of a private motor vehicle (such as walking and cycling).

Note: for example, acceptable environmental works would include:

- reducing greenhouse gas emissions and electricity demand by replacing existing equipment with low emissions or more efficient alternatives. For example replacing existing air conditioning and heating systems with new systems with improved efficiency, or low emission thermal energy alternative systems.
- reducing greenhouse gas emissions by installing low emission energy sources, or installing equipment to connect to low emission infrastructure
- increasing the efficiency of water consumption by installing equipment to capture, recycle or reuse water, or equipment to connect to recycled/reused water infrastructure.

4 Entering into Environmental Upgrade Agreements

4.1 Prerequisites for entering into Environmental Upgrade Agreements

4.1.1 Prerequisites for Councils

Prior to entering into any Environmental Upgrade Agreement, Council must:

- a) pass a resolution providing that Environmental Upgrade Agreements may be entered into generally within its Local Government Area. The Council must be satisfied of their capacity to implement the following:
 - a. issue of Environmental Upgrade Charge Notices including any penalty interest
 - b. issue of 603 certificates to accurately inform potential land buyers in relation to Environmental Upgrade Charges
 - c. correct delegation for entering Environmental Upgrade Agreement and making Environmental Upgrade Charges
 - d. issue of Environmental Upgrade Charge Notice to owners corporations where the Environmental Upgrade Agreement for multi-residential strata buildings is proposed.
 - e. Council's annual reporting arrangements to include Environmental Upgrade Agreement matters.
- b) in entering into Environmental Upgrade Agreements adopt the mandatory provisions of the Environmental Upgrade Agreement template approved by the Director General from time to time (the Director General may approve more than one template Environmental Upgrade Agreement), unless otherwise agreed by the Director General. Council must include a clause in the recitals to the effect that Council adopts the mandatory provisions of Environmental Upgrade Agreement template approved by the Director General of [certain date]. Council may include other provisions in an Environmental Upgrade Agreement, provided Council clearly identifies them in a separate schedule, and show that they cannot prevail against the mandatory provisions.

Where the Director General approves a revised Environmental Upgrade Agreement template then Environmental Upgrade Agreements signed before that revision do not need comply with the new revision.

4.2 Making of environmental upgrade charges

4.2.1 Schedule for advancement of funds

The Environmental Upgrade Agreement must set out the schedule by which the finance provider will advance funds, including details of any planning, approval or works milestone requirements to be reached prior to advancement of funds.

4.2.2 Disclosing the basis of environmental upgrade charges

The Environmental Upgrade Agreement must set out the basis of calculation for environmental upgrade charges, including:

- the funds advanced
- the term of the loan
- the rate of interest that applies to the payment schedule, and whether the rate is fixed or variable.
- any fees charged by the finance provider, including any penalties.
- service fees to be retained by council, as set out in section 4.2.4.
- late payment administration fees to be retained by council.

4.2.3 Payment schedule for environmental upgrade charges

The Environmental Upgrade Agreement must set out the schedule of payment of environmental upgrade charges, including:

- payment dates, and
- for each payment date, the environmental upgrade charge to be paid.

Note: The payment schedule must comply with section 562 of the Local Government Act requiring payment of council rates/charges by single or quarterly instalment, unless the parties agree otherwise.

4.2.4 Council service fees in environmental upgrade charges

Council must set out in the Environmental Upgrade Agreement a total amount of service fees that will be imposed by Council for functions carried out under the agreement. Service fees are for cost recovery only.

In setting the amount of service fees "cost recovery" extends to all internal administrative pre-contract and post-contract work, for example costs for establishing and amending agreements, as well as for the issuing and processing of Environmental Upgrade Charge payment notices. On-costs related to staffing costs may be included in service fee calculations.

4.2.5 Penalties for late payment of environmental upgrade charges

The Environmental Upgrade Agreement may include penalties for late payment. Penalties may comprise two components:

- a) the finance provider may impose a penalty interest rate on overdue environmental upgrade charges. Penalty interest must be paid to the Council, from where it will be paid to the lender. The maximum rate for penalty interest is prescribed under section 566 of the Local Government Act.

- b) the Council may charge separate late payment fees for the recovery of costs incurred in relation to late payments, including reasonable fees relating to enforcement measures, such as preparing letters of demand to recover unpaid charges. The Environmental Upgrade Agreement must specify how late payment fees are calculated. These late payment fees are for cost recovery only.

4.2.6 Meaning of non- residential buildings

Buildings that can be considered as “non-residential” include services apartments, hotel or motel accommodation, and backpackers accommodation. An Environmental Upgrade Agreement may be entered into for a non-residential building or multi-residence strata building regardless of whether it is categorised as residential for rating purposes under section 516 of the *Local Government Act 1993*.

4.3 Energy Performance Contracts

Note: Environmental Upgrade Agreements may specify the use of an Energy Performance Contract. This is a contract between the building owner and an energy services company to improve the energy efficiency of a building. The energy service company takes on the project management role and is responsible for hiring, managing and paying the third parties required to carry out the works (which may include engineers, installation contractors, commissioning agents and builders).

Where an Energy Performance Contract is used:

- The Energy Performance Contract should be included as a schedule to the Environmental Upgrade Agreement
- The finance provider may advance funds directly to the energy services company if agreed by all parties under the Environmental Upgrade Agreement.
- The energy services company may be a party to the Environmental Upgrade Agreement
- The energy calculations forming the basis of the energy performance guarantee are considered an acceptable calculation methodology for the recovery of contributions from lessees (see section 5.2).

5 Recovery of contributions from lessees

5.1 Basis of recovery

The building owner may require lessees to the building to pay a contribution to environmental upgrade charges payable under an environmental upgrade agreement in two ways:

- By specific agreement to make such a contribution through new lease provisions.
- By existing lease provisions requiring payment of the lessee of council rates or charges for the building.

Calculations must meet the standards outlined in section 5.3 of this Guideline.

The Environmental Upgrade Agreement must include a copy of all relevant calculations as an attachment.

Note: for buildings subject to retail leases, the *Retail Leases Act 1994* applies to landowners. However, the Regulation modifies section 12 and 24A of that Act in respect of Environmental Upgrade Agreements. These provisions relate to disclosure statements and the recoverability of interest on borrowings.

5.2 Calculation methodology for contributions

5.2.1 Maximum contributions from lessees

For each payment period in the payment schedule, the contribution that may be recovered by the building owner from lessees must not exceed the expected cost savings for the lessees attributable to the environmental upgrade works in that period.

5.2.2 Calculation period

The Environmental Upgrade Agreement must calculate the maximum contribution for each period in the payment schedule, based on the expected environmental and cost savings arising from the environmental upgrade works for each period in the payment schedule.

5.2.3 Calculation of maximum contribution and presentation in the Environmental Upgrade Agreement

The calculations must be summarised in the Environmental Upgrade Agreement in an easily referenced format, showing savings for all payment periods and the maximum total contribution amount that may be collected from lessees to environmental upgrade charges per charge payment, for example:

Charge Number	Charge payment period	Cost Savings to Lessees			Maximum contribution in charge period
		Type of cost savings	Savings per annum	Estimated savings	
1	1.1.2012 to 31.12.2012	Electricity bill savings	100 MWh	\$12,500	\$17,500
		Water bill savings	1,800 kL	\$5,000	
2	1.1.2013 to 31.12.2013	Electricity bill savings	100 MWh	\$12,875	\$18,025

		Water bill savings	1,800 kL	\$5,000	
3	1.1.2014 to 31.12.2014	Electricity bill savings	100 MWh	\$13,260	\$18,560
		Water bill savings	1,800 kL	\$5,300	

The charge payment period means the period from one charge payment date to the next.

5.3 Acceptable calculation standards

5.3.1 Energy saving calculations

For environmental upgrade works delivering energy savings, the Environmental Upgrade Agreement must include energy savings calculations that would comply with the Energy Savings Scheme Rule, as made under Part 9 Division 13 of the *Electricity Supply Act* and published in the Gazette from time to time. Calculations must comply with either:

- the Project Impact Assessment Method, or
- the Deemed Energy Savings Method

with any modifications needed to calculate energy savings for each period of the environmental upgrade charge (eg annual energy savings). Therefore, the following calculations in the Energy Savings Scheme Rule do **not** apply to Environmental Upgrade Agreements:

- Number of certificates
- Bringing forward energy savings
- Lifetime savings

5.3.2 Energy savings calculations for agreements including an Energy Performance Contract

For Environmental Upgrade Agreements which include an Energy Performance Contract, the energy savings calculations for guarantees in that contract are considered acceptable calculations.

5.3.3 Engineering assessments for other environmental savings

Estimates of savings other than energy savings must be based upon an engineering assessment of reduced consumption in a similar manner to the Project Impact Assessment Method of the Energy Savings Scheme Rule, as described below:

The Environmental Upgrade Agreement must calculate the reduced consumption of only the equipment, process, or system that is the subject of the environmental upgrade works using an engineering assessment or model:

- a) that uses reasonable assumptions and generally accepted engineering methods, models, and formulae;
- b) in which the methods, models and formulae used to assess the environmental upgrade works are chosen by the parties to the Environmental Upgrade Agreement,

but the assessment is assigned a Confidence Factor using the methods set out in clause 7.3 of the Energy Savings Scheme Rule reflecting the accuracy of the engineering assessment conducted; and

- c) that takes account of:
- i) the consumption of the existing equipment, systems or processes;
 - ii) the performance of the equipment, systems or processes, including degradation over time; and
 - iii) the operating characteristics of the equipment, systems or processes, including hours of use, degree of loading, usage, operating patterns and behaviour, ambient conditions and any other relevant factors.

All calculations must apply the relevant Confidence Factors that would be assigned if the method was an Energy Savings calculation under the Project Impact Assessment Method of the Energy Savings Scheme Rule, reflecting the accuracy of the assessment.

5.3.4 Utility cost saving calculations

Financial savings attributable to utility savings such as electricity, gas or water arising from environmental upgrade works must be based upon the contracted utility rates to be paid at the time of the charge by the building owner. Where the Environmental Upgrade Agreement extends beyond current utility contracts, the last contracted utility price is to be applied from that date. Where the utility supplier has published anticipated future prices, these may be used in the calculations for the relevant periods. In the absence of published future rates, a CPI of +3% per annum may be incorporated in the calculations.

6 Administration of Environmental Upgrade Agreements

6.1 Amendment and termination of an Environmental Upgrade Agreement

The Environmental Upgrade Agreement must include amendment procedures that apply to environmental upgrade charges under the Agreement. This includes allowing for amendment to accommodate changes to the term or amount of an agreed payment schedule, actions such as pre-payments of amounts owing, and termination.

6.2 Sale and lease of land

6.2.1 Agreement to provide for sale, and lease, of land

The Environmental Upgrade Agreement must provide that if the building owner leases the relevant land, the owner must disclose the amount and schedule of any future environmental upgrade charges due to be paid by the lessee.

Note: the Environmental Upgrade Agreement template approved by the Director General will include a clause requiring that no party may assign its rights under it without the prior written consent of each other party (such consent not to be unreasonably withheld or delayed) and that party and its assignee have entered into a deed in a form satisfactory to each other party in which the assignee agrees to be bound by the terms of the Environmental Upgrade Agreement.

7 Reporting requirements for parties to Environmental Upgrade Agreements

7.1 Reporting by building owner

The Environmental Upgrade Agreement must include a clause requiring the building owner to report to the other parties to the agreement when environmental improvements have been implemented in accordance with the EUA. This may include notice that the works have been completed (and independently verified) if so specified.

The Environmental Upgrade Agreement must include a clause requiring the building owner to provide on the 1 August each year to the Council an annual report on the environmental performance of the building to the Council. The Environmental Upgrade Agreement must also include a clause allowing Council to forward this report to the Department of Environment, Climate Change and Water or relevant NSW Government agency. At a minimum, this report is to include:

- If the environmental upgrade works relates to energy or water consumption or efficiency improvements, actual energy and/or water use of the whole building. If a NABERS rating is available for the building, this should be in the form of an accredited NABERS rating for the building.
- Actual environmental savings relating to the environmental upgrade works (eg metered energy or water savings etc). Where possible, this should be measured data. Estimates are acceptable only where direct measurements are not possible.
- Financial savings and any costs incurred in relation to the environmental upgrade works.

Where applicable, total amount of environmental upgrade charges passed to lessees of the building.

The template agreement will include a reporting template for building owners to use for the purposes of this Section.