

South Australia

Local Government (Building Upgrade Agreements) Amendment Act 2015

An Act to amend the *Local Government Act 1999*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Local Government (Building Upgrade Agreements) Amendment Act 2015*.

2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Local Government Act 1999*

4—Amendment of section 4—Interpretation

Section 4(1)—after the definition of *board member* insert:

building upgrade agreement—see Schedule 1B clause 2;

building upgrade charge—see Schedule 1B clause 2;

5—Amendment of section 44—Delegations

Section 44—after subsection (3) insert:

(3a) A council must not delegate—

- (a) the power to enter into, or to vary or terminate, a building upgrade agreement on behalf of the council; or
- (b) the power to declare and levy a building upgrade charge under a building upgrade agreement,

except to the chief executive officer and, despite subsection (4)(b), the chief executive officer cannot subdelegate these powers.

6—Amendment of section 187—Certificate of liabilities

Section 187—after "under this Part" wherever occurring insert:

or Schedule 1B

7—Insertion of Schedule 1B

After Schedule 1A insert:

Schedule 1B—Building upgrade agreements

1—Interpretation

(1) In this Schedule—

approved methodology means a methodology approved by the Minister by notice in the Gazette from time to time for the purpose of calculating a reasonable estimate of cost savings made or to be made by a lessee of a building as a consequence of upgrade works under a building upgrade agreement relating to the building;

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

environmental upgrade works means works that improve the energy, water or environmental efficiency or sustainability of a building;

Examples—

- 1 Works that increase the efficiency of the energy or water consumption of a building or reduce its energy or water consumption.
- 2 Works that prevent or reduce pollution or eliminate or reduce the discharges of wastes or other substances harmful to the environment.
- 3 Works that reduce the use of materials or enable the recovery or recycling of materials.

late payment fee means an administrative fee that may be retained by a council for late payment of a building upgrade charge;

primary parties to a building upgrade agreement means the parties referred to in clause 2(1);

relevant land means the land on which is situated a building that is, or is intended to be, the subject of a building upgrade agreement;

service fee means a fee that covers any costs incurred by a council in entering into, and administering, a building upgrade agreement;

upgrade works in relation to a building means—

- (a) environmental upgrade works; or
- (b) works of a kind prescribed by the regulations,

but does not include works of a kind excluded from the ambit of this definition by the regulations.

- (2) In this schedule—
- (a) *common property, community corporation, community lot, community scheme, lot entitlement, owner* and *strata plan* have the same respective meanings as in the *Community Titles Act 1996*;
 - (b) *strata corporation, strata scheme, unit, unit entitlement* and *unit holder* have the same respective meanings as in the *Strata Titles Act 1988*.
- (3) In this Schedule, a reference to a *building owner* is—
- (a) in the case of a building that is the subject of a community scheme—
 - (i) if the scheme is one under which the land is divided by a strata plan—a reference to the community corporation; or
 - (ii) in any other case—a reference to the owners of the community lots; or
 - (b) in the case of a building that is the subject of a strata scheme—a reference to the strata corporation; or
 - (c) in any other case—subject to subclause (4), a reference to the owner of the relevant land.
- (4) Despite subclause (3)(c), if, in relation to—
- (a) dedicated land or Crown leasehold land (both within the meaning of the *Crown Land Management Act 2009*); or
 - (b) land subject to a licence or Crown condition agreement under the *Crown Land Management Act 2009*,
- the Minister responsible for the administration of that Act delegates to the person or body the subject of the dedication, lease, licence or agreement the power to enter into, or to vary or terminate, a building upgrade agreement on behalf of the Crown in respect of a building on the land, a reference to a *building owner* in this Schedule is a reference to that person or body.
- (5) A delegation under subclause (4)—
- (a) must be by instrument in writing; and
 - (b) may be absolute or conditional; and
 - (c) is revocable at will.
- (6) A power delegated under this section may not be further delegated.

2—Building upgrade agreement

- (1) Subject to this clause, a council may, in relation to a building situated on land within the area of the council, enter into an agreement (a *building upgrade agreement*) under which—
 - (a) the building owner agrees to undertake upgrade works in respect of the building; and
 - (b) a finance provider agrees to advance money to the building owner for the purpose of funding those upgrade works; and
 - (c) the council agrees—
 - (i) to levy a charge on the relevant land (a *building upgrade charge*), to be paid by the building owner, for the purpose of recouping the money advanced by the finance provider for the upgrade works (and any interest or other charges payable to the finance provider under the agreement); and
 - (ii) to pay to the finance provider any money paid to the council by way of the building upgrade charge (other than any service fee or late payment fee that the council is permitted by the agreement to deduct and retain).
- (2) A building upgrade agreement may only be made in respect of a building of a prescribed kind, the construction of which was completed at least 2 years before the making of the agreement.
- (3) If a building upgrade agreement includes provision for payment to the finance provider of penalty interest on money advanced by the finance provider under the agreement, the rate of such interest will be—
 - (a) if the regulations provide for the determination of the rate—determined in accordance with the regulations; or
 - (b) if the regulations do not provide for the determination of the rate—determined in accordance with the agreement.
- (4) If the primary parties to a building upgrade agreement agree, the agreement may be entered into by any other persons that the primary parties consider should be parties to the agreement.
- (5) A council must not enter into a building upgrade agreement unless—
 - (a) the total amount of taxes, rates, charges and mortgages owing on the relevant land, when added to the total value of the building upgrade charge as set out in the proposed building upgrade agreement, is an amount not exceeding 80% of the capital value of the relevant land prior to any works that would be undertaken as part of the agreement; and

- (b) the building owner has complied with subclause (6) and with any additional requirements prescribed by the regulations.
- (6) A building owner who intends to become a primary party to a building upgrade agreement with a council must—
 - (a) give any existing mortgagee in respect of the relevant land written notice—
 - (i) of the building owner's intention to enter into a building upgrade agreement; and
 - (ii) of the particulars of any proposed building upgrade charge that is to be levied by the council under the proposed agreement; and
 - (iii) of any prescribed matters; and
 - (b) provide the council with the following information verified by statutory declaration:
 - (i) particulars of all mortgages (both registered and unregistered) over the relevant land, including—
 - (A) the total amount owing in respect of each mortgage; and
 - (B) if a relevant mortgage is held against 2 or more properties including the relevant land—the proportion of the debt secured by the mortgage that applies to that land calculated in accordance with subclause (7);
 - (ii) particulars of all taxes, rates and charges owing on the relevant land (including the total amount owing in respect of each tax, rate or charge) imposed by or under an Act;
 - (iii) a statement that the building owner has complied with paragraph (a).
- (7) For the purposes of subclause (6)(b)(i)(B), the proportion of the debt secured by the mortgage that applies to the relevant land must be calculated by distributing the debt between all the properties against which the mortgage is held in proportion to the relative capital values of the properties.

3—Agreement to be made on voluntary basis

- (1) Entry into a building upgrade agreement is voluntary.
- (2) A council cannot require any person to enter into a building upgrade agreement, whether as a condition of a development authorisation under the *Development Act 1993* or by any other means.

4—Variation or termination of agreement

A building upgrade agreement may be varied or terminated by further agreement between the primary parties.

5—Contents of agreement

- (1) A building upgrade agreement must be made in writing and specify—
 - (a) the upgrade works to be undertaken by or on behalf of the building owner under the agreement; and
 - (b) the amount of money to be advanced by the finance provider under the agreement; and
 - (c) the amount of the building upgrade charge to be levied by the council under the agreement; and
 - (d) the schedule for the payment, by the building owner, of a building upgrade charge to the council; and
 - (e) the amount of, or a method for calculating the amount of, any service fee or late payment fee that the council may deduct and retain; and
 - (f) any prescribed matters.
- (2) A building upgrade agreement may—
 - (a) provide for the early repayment of any amount payable under the agreement; and
 - (b) include such other provisions as may be agreed to by the parties to the agreement.
- (3) The regulations may provide that certain matters which must be specified in a building upgrade agreement under subclause (1) are to prevail against other matters provided for in the agreement to the extent of any inconsistency.

6—Declaration of building upgrade charge

- (1) After a council enters into a building upgrade agreement, the council must, in accordance with the terms of the agreement, declare a building upgrade charge in respect of the relevant land (being a charge of the agreed amount specified in the building upgrade agreement).
- (2) If a council declares a building upgrade charge, the council must within 28 days after the declaration give the building owner written notice specifying—
 - (a) the name and address of the building owner; and
 - (b) a description of the relevant land in respect of which the building upgrade charge is being levied; and
 - (c) the building upgrade agreement under which the building upgrade charge is being levied; and

- (d) the amount for which the building owner is liable; and
 - (e) the manner of payment of the amount; and
 - (f) the due date for payment of the amount, in accordance with the schedule for the payment of the building upgrade charge to the council (specified in the building upgrade agreement); and
 - (g) the amount of, or method of calculating, any service fee of the council authorised by the building upgrade agreement and any late payment fee that may be imposed by the council if the building owner fails to pay an amount for which the building owner is liable by the due date; and
 - (h) any prescribed matters.
- (3) A notice under subclause (2) must comply with any requirements prescribed by the regulations.
 - (4) A council must, in relation to each payment in respect of a building upgrade charge for which a building owner is liable, give a notice under subclause (2) to the building owner at least 28 days before the date for payment specified in the notice.

7—Payment of building upgrade charge

- (1) An amount for which a building owner is liable in respect of a building upgrade charge is due and must be paid by the date specified in the relevant notice under clause 6.
- (2) On payment of money in respect of a building upgrade charge to a council, the council may deduct and retain any service fee and late payment fee authorised by the building upgrade agreement.
- (3) Money paid to a council in respect of a building upgrade charge, other than any service fee and late payment fee retained by the council, must—
 - (a) be held by the council on behalf of the finance provider pending payment to the finance provider; and
 - (b) be paid by the council to the finance provider in accordance with the terms of the building upgrade agreement under which the charge was levied.

8—Building upgrade charge is a charge against land

- (1) A building upgrade charge is, until paid in full, a charge on the relevant land.

- (2) However, if a building upgrade charge relates to the common property, or part of the common property, of a community scheme or strata scheme, the charge is not a charge on the common property but is, instead, a charge on each of—
 - (a) in the case of a community scheme—the community lots of the community scheme in proportion to the lot entitlements of the respective lots; or
 - (b) in the case of a strata scheme—the units of the strata scheme in proportion to the unit entitlements of the unit holders.

9—Sale of land for non-payment of building upgrade charge

- (1) Subject to this clause, if an amount for which a building owner is liable in respect of a building upgrade charge remains unpaid for more than 3 years, the council may sell the relevant land in accordance with the regulations.
- (2) Any money received by the council in respect of the sale of land under this clause will be applied as follows:
 - (a) firstly—in paying the costs of the sale and any other costs incurred in proceeding under this clause;
 - (b) secondly—in discharging any liabilities to the council in respect of the land (other than any building upgrade charge, service fee or late payment fee in relation to a building upgrade charge);
 - (c) thirdly—in discharging any liability to the council for a building upgrade charge, service fee or late payment fee in relation to a building upgrade charge;
 - (d) fourthly—in discharging any liability to the Crown for rates, charges or taxes, or any prescribed liability to the Crown in respect of the land;
 - (e) fifthly—in discharging any liabilities secured by registered mortgages, encumbrances or charges;
 - (f) sixthly—in discharging any other mortgages, encumbrances or charges of which the council has notice;
 - (g) seventhly—in payment to the owner of the land.
- (3) If the owner cannot be found after making reasonable inquiries as to his or her whereabouts, an amount payable to the owner must be dealt with as unclaimed money under the *Unclaimed Moneys Act 1891*.
- (4) If land is sold in pursuance of this clause, an instrument of transfer or conveyance (as appropriate) under the council's common seal will, on registration, operate to vest title to the land in the purchaser.
- (5) The title vested in a purchaser under subclause (4) will be free of—
 - (a) all mortgages and charges; and

- (b) all leases and licences.
- (6) An instrument of transfer or conveyance in pursuance of a sale under this clause must, when lodged with the Registrar-General for registration, be accompanied by a statutory declaration made by the chief executive officer of the council stating that the requirements of this clause and the regulations in relation to the sale of the land have been observed.
- (7) If it is not reasonably practicable to obtain the duplicate certificate of title to land that is sold in pursuance of this clause (or other relevant instrument), the Registrar-General may register a transfer or conveyance despite the non-production of the duplicate (or instrument), but in that event will cancel the existing certificate of title for the land and issue a new certificate in the name of the transferee.
- (8) Despite this clause and clause 1(4), nothing in this Schedule authorises the sale of—
 - (a) any estate or interest of the Crown in land; or
 - (b) any interest in Crown land (within the meaning of the *Crown Land Management Act 2009*).

10—Repayment of advances to finance provider

- (1) A council is not liable to repay to a finance provider an amount advanced by the finance provider to a building owner under a building upgrade agreement until the amount has been paid to or recovered by the council by way of the building upgrade charge.
- (2) If a building upgrade agreement is terminated before all the money that the finance provider agreed to advance to the building owner is advanced, the council must—
 - (a) adjust the building upgrade charge to reflect the lower amount advanced to the building owner; and
 - (b) give the building owner written notice of the adjustment.
- (3) If, as a result of an adjustment being made to a building upgrade charge under this clause—
 - (a) the building owner has made payment in respect of the charge in excess of the adjusted amount; and
 - (b) the excess amount has been paid by the council to the finance provider,then—
 - (c) the finance provider must repay the excess amount to the council; and
 - (d) the council must refund the building owner the excess amount paid.

11—Liability of council to recover building upgrade charge

- (1) A council must use its best endeavours to recover a building upgrade charge in accordance with the terms of the building upgrade agreement under which the charge is authorised.
- (2) However, a council is not liable for any failure by a building owner to pay a building upgrade charge and any such failure does not make the council liable to pay any outstanding amount to the finance provider.

12—Recovery of contribution towards building upgrade charge from lessee

- (1) Subject to this clause, a provision of a lease may require a lessee to pay to the lessor a contribution towards a building upgrade charge payable under a building upgrade agreement that relates to premises that are the subject of the lease.
- (2) A lessor is not entitled to recover a contribution from a lessee towards a building upgrade charge payable under a building upgrade agreement unless—
 - (a) if the lessee requests a copy of the agreement, the lessor has provided the lessee with a copy of the upgrade agreement; and
 - (b) the lessor has given the lessee—
 - (i) written notice of—
 - (A) the amount of the contribution that the lessee will be required to pay; and
 - (B) the period within which the contribution will be required to be paid,and the lessee consents to the payment of the contribution; or
 - (ii) at least 30 days before payment of the first contribution by the lessee is due, written notice of—
 - (A) the amount of the contribution that the lessee will be required to pay; and
 - (B) the period within which the contribution will be required to be paid; and
 - (C) a reasonable estimate (calculated in accordance with an approved methodology) of cost savings that may be made by the lessee, as a consequence of the upgrade works provided for by the building upgrade agreement, during the period to which the contribution relates (a *reasonable estimate*); and

- (D) evidence of the calculations made in accordance with the particular approved methodology used to calculate the reasonable estimate,
- and the contribution specified in the notice does not exceed the reasonable estimate.
- (3) The regulations may make further provision in relation to the recovery under a lease of a contribution from a lessee towards a building upgrade charge payable under a building upgrade agreement (including provisions relating to the entitlement of a lessor to recover such contributions and provisions that impose further requirements on a lessor or lessee in relation to the recovery of such contributions).
- (4) This clause applies subject to the operation of section 73 of the *Residential Tenancies Act 1995* (so that a lessee who is a tenant under a residential tenancy agreement (within the meaning of that Act) cannot be required to pay a contribution under this clause).
- (5) This clause applies despite section 13 of the *Retail and Commercial Leases Act 1995* and, to avoid doubt, a contribution under this clause—
- (a) is to be taken to be an outgoing for the purposes of that Act; and
 - (b) in the case of a lease to which that Act applies entered into prior to the execution of a building upgrade agreement relating to premises the subject of the lease—may be recovered (despite section 26 of the *Retail and Commercial Leases Act 1995*) whether or not the contribution is disclosed in a disclosure statement given to the lessee in accordance with Part 3 of that Act.

13—Register of building upgrade agreements

- (1) A council must keep a register of building upgrade agreements.
- (2) The register must include the information prescribed by the regulations.
- (3) The register must be available for inspection (without charge) by a member of the public at the principal office of the council during ordinary office hours.
- (4) A person is entitled to an extract from the register (without charge).

14—Minister may require council to report on building upgrade agreements

The Minister may require a council to provide a report containing the information specified by the Minister relating to building upgrade agreements entered into by the council.

15—Regulations

The Governor may, by regulation, make further provision in relation to building upgrade agreements.

8—Amendment of Schedule 6—Charges over land

Schedule 6, clause 1(2)—after "Chapter 10" insert:

or a building upgrade charge under Schedule 1B

Schedule 1—Transitional provision

1—Variation of term of lease—contribution towards building upgrade charge

- (1) If a provision of a lease entered into before the commencement of Schedule 1B clause 12 of the *Local Government Act 1999* (as inserted into that Act by section 7 of the *Local Government (Building Upgrade Agreements) Amendment Act 2015*) requires a lessee to pay to the lessor any rates or charges imposed under the *Local Government Act 1999*, the provision of the lease will be taken to require the lessee to pay to the lessor a contribution towards a building upgrade charge payable under a building upgrade agreement that relates to premises that are the subject of the lease.
- (2) Schedule 1B clause 12 of the *Local Government Act 1999* applies in respect of the contribution.
- (3) The contribution is to be paid on the date or dates on which a rate or charge imposed under the *Local Government Act 1999* is payable or as otherwise agreed by the parties to the lease.
- (4) Nothing in this clause prevents the parties to a lease from agreeing—
 - (a) to a variation of the provision that is, under this clause, taken to require the payment of a contribution; or
 - (b) that the provision does not apply.