



Development Agreement Standard Conditions

Western Water

[These standard conditions are incorporated in each Developer Agreement]

October 2017

DEVELOPMENT AGREEMENT STANDARD CONDITIONS

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DEVELOPMENT AGREEMENT STANDARD CONDITIONS

1. INTERPRETATION

1.1 Definitions

The following definitions apply in this document.

"Acceptance of Works Certificate" has the meaning given in clause 12.2.

"Accreditation" means the status of being an Accredited Consultant or an Accredited Contractor.

"Accredited Consultant" means a consultant accredited by WW in specified categories of services or for a particular Development.

"Accredited Contractor" means a contractor accredited by WW in specified categories of works or for a particular Development.

"Approved Products List" means the list of products approved by WW to be used in the Development Works, as shown on WW website at the Commencement Date and as updated from time to time.

"Business Day" means a day (other than a Saturday, Sunday or a public holiday) in Victoria.

"Certificate of Completion" means a certificate of completion issued under clause 12.4.

"Change of Control" means in relation to a body corporate or entity (the "body") where:

- (a) an entity that Controls the body ceases to Control the body; or
- (b) an entity that does not Control the body comes to Control the body,

however, no Change of Control occurs if:

- (a) the entity that ceases to Control the body under paragraph (a)(i) was, immediately beforehand, a wholly-owned subsidiary of a body corporate that Controls the body; or
- (b) the entity that comes to Control the body under paragraph (a)(ii) is, immediately afterward, a wholly-owned subsidiary of a body corporate that previously Controlled and continues to Control the body.

"Claim" means, in relation to a person, any claim, cause of action, proceeding, suit or demand made against the person concerned however it arises and whether it is present or future, fixed or unascertained, actual or contingent.

"Commencement Date" means the date on which WW signs this agreement.

"Conditions of Connection" means the conditions WW sets as part of giving consent for water and sewerage plumbing works to be connected to the WW water or sewerage system.

"Conditions of Consent" means the conditions relating to new connections / completion of works / issue of consent. These conditions are subject to sections 136, 268, 269 and 270 of the Water Act 1989 covering conditions of subdivision, new connections and contributions for works.

"Consent to Statement of Compliance" means a notice issued by WW to the appropriate responsible authority that it consents to the issuing of a Statement of Compliance under section 21 of the *Subdivision Act 1988*.

"Construction Requirements" means any construction requirements specified by WW for the Development Works including as described in a Schedule to the Development Agreement.

"Consultant" means an Accredited Consultant engaged by the Developer to, amongst other things, prepare Design Documents for the Development Works and includes any replacement Accredited Consultant engaged by the Developer from time to time.

"Contractor" means an Accredited Contractor engaged by the Developer to, amongst other things, perform construction services for the Development Works and includes any replacement Accredited Contractor engaged by the Developer from time to time.

"Control" means a power or control that is direct or indirect or is, or can be, exercised as a result of, by means of, in breach of, or by revocation of, trusts, relevant agreements and practices, or any of them, whether or not they are enforceable.

"Corporations Act" means the *Corporations Act 2001* (Cth).

"Defect" includes any design, work or material which is not in accordance with this document or WW Standards and Specifications arising due to the act, omission or negligence of the Developer, Consultant or Contractor, including any fault, error, omission, shrinkage or other defect, but does not include ordinary fair wear and tear.

"Defects Liability Period" has the meaning given in clause 13.

"Design and Construction Forms" means the forms, notices and other information provided, in the form approved by WW from time to time, that a Consultant or Contractor is required to complete and lodge with WW to verify that Development Works have been designed and constructed in accordance with WW's requirements, and includes:

- (a) design verification forms;
- (b) pre-construction forms;
- (c) construction verification forms;
- (d) as-constructed forms; and
- (e) end of defects liability period forms.

"Design Documents" means the plans, drawings, specifications and other information, including all materials and equipment and prototypes, samples, models, processes for construction, commissioning and use of the Development Works, and other information and recommendations provided by the Consultant in relation to the Development Works.

"Design Requirements" means any design requirements specified by WW for the Development Works including as described in a Schedule to the Development Agreement.

"Developer" means a developer that has entered into a Development Agreement with WW under which the Developer must design and construct works for the supply of water, recycled water (where applicable) and sewerage assets and infrastructure to service the Development.

"Development" means the development project being undertaken by the Developer as described in a Schedule, to the Development Agreement.

"Development Works" means the works to be designed and constructed under this agreement for the supply of water, recycled water (where applicable) and sewerage assets and infrastructure to service any part of a Development and includes any works undertaken in response to a notice issued by WW during the Defects Liability Period.

"Estimated Reimbursement Amount" means the estimate of the Reimbursement Amount as established in this agreement.

"Extended Period" means the period of 12 months beginning on the day immediately following the last day of the Initial Period.

"Force Majeure Event" means an act of war (whether declared or not) or terrorism, the mobilisation of armed forces, civil commotion or riot, natural disaster, currency restriction, embargo, action or inaction by a Government Agency (other than WW), or a failure of a supplier, public utility (other than WW) or common carrier.

"Government Agency" means:

- (a) a Federal, State or local government;
- (b) a government department or agency;
- (c) a statutory corporation or authority;
- (d) any court, tribunal or other government entity with the power to provide notices or give directions to accord with the law.

"Initial Period" means 12 months from the Commencement Date.

"Insolvency Event" means, for a person, being in liquidation or provisional liquidation or under administration, having a controller (as defined in the Corporations Act) or analogous person appointed to it or any of its property, being taken under section 459F(1) of the Corporations Act to have failed to comply with a statutory demand, being unable to pay its debts or otherwise insolvent, dying, ceasing to be of full legal capacity or otherwise becoming incapable of managing its own affairs for any reason, taking any step that could result in the person becoming an insolvent under administration (as defined in section 9 of the Corporations Act), entering into a compromise or arrangement with, or assignment for the benefit of, any of its members or creditors, or any analogous event.

"Intellectual Property" means all present and future rights conferred by Law in or in relation to copyright, trademarks, designs, patents, circuit layouts, plant varieties, business and domain names, inventions and confidential information, and other results of intellectual activity in the industrial, commercial, scientific, literary or artistic fields whether or not registrable, registered or patentable. These rights include:

- (a) all rights in all applications to register these rights;
- (b) all renewals and extensions of these rights; and
- (c) all rights in the nature of these rights excluding moral rights.

"Land Development Manual" means WW's policies and procedures in the document of the same name applying from time to time, relating to land development and the supply of water and sewerage services which:

- (a) is available on WW's website; and
- (b) a copy of which is available from WW upon request; and
- (c) as may be amended by WW from time to time.

"Law" means the law in force in Victoria including, common or customary law, equity, judgment, legislation, orders, regulations, statutes, by-law, ordinances or any other legislative or regulatory measures and includes any amendment, modification or re-enactment of them.

"OHS" means occupational health and safety.

"Other Land" means land on or in which Development Works to service the Development exist or will exist and includes Private Land and Public Land.

"Owner" means the owner of the Property.

"Plumbing Requirements" means the general plumbing conditions specified by WW for the Development Works.

"Price Determination" means the Essential Services Commission's price determination for WW applicable at the Commencement Date, as amended from time to time within the period of the determination.

"Private Land" means land which is privately owned.

"Property" means the land the Development is located on.

"Public Land" means land which is either owned or managed by a public land manager and includes road reserves and crown land.

"Reimbursement Amount" means the amount of the payment by WW to the Developer for the Reimbursement Works.

"Reimbursement Amount (Initial Estimate)" means the preliminary estimate (if so included) in Schedule 3 of the Reimbursement Amount.

"Reimbursement Amount Estimate" is the estimate provided after completion of any tender process as contemplated in clause 19.

"Reimbursement Works" means that part of the Developer Works (if any) identified in a Schedule to the Development Agreement that WW will contribute to the cost of, on the terms set out in this agreement.

"Schedule" means a schedule to this agreement.

"Standard Conditions / or / Developer Agreement Standard Conditions" means these conditions.

"Variation" has the meaning given in clause 22.

"Verification" means the verification by the Consultant of the design and construction of the Development Works through the Design and Construction Forms.

"Warranty Period" has the meaning given in clause 14.

"Water Act" means the *Water Act 1989* (Vic).

"Works Warranty Bond" means the works warranty bond provided by the Developer in accordance with clause 8.

"WW Standards and Specifications" means the Design Requirements, the Construction Requirements and the Plumbing Requirements.

1.2 Rules for interpreting this document

Headings are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this document, except where the context makes it clear that a rule is not intended to apply.

- (a) A reference to:
 - (i) a legislative provision or legislation (including subordinate legislation) is to that provision or legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;
 - (ii) a recital, schedule, annexure or a description of the parties forms part of this agreement;
 - (iii) a document or agreement, or a provision of a document or agreement, is to that document, agreement or provision as amended, supplemented, replaced or novated;
 - (iv) a party to this document or to any other document or agreement includes a successor in title, permitted substitute or a permitted assign of that party;
 - (v) a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person; and
 - (vi) anything (including a right, obligation or concept) includes each part of it.
- (b) A singular word includes the plural and vice versa.
- (c) A word which suggests one gender includes the other genders.

- (d) If a word is defined, another part of speech has a corresponding meaning.
- (e) If an example is given of anything (including a right, obligation or concept) such as by saying it includes something else, the example does not limit the scope of that thing.
- (f) The expression **"this agreement"** and **"this document"** means and includes:
 - (i) the Signing Pages;
 - (ii) all Schedules completed with the Signing Pages;
 - (iii) these Development Agreement Standard Conditions;
 - (iv) any written variation to this agreement signed by all parties to the agreement.
- (g) The word **"agreement"** includes an undertaking or other binding arrangement or understanding, whether or not in writing.
- (h) The words **"body corporate"**, **"wholly-owned subsidiary"**, **"entity"**, **"subsidiary"** and **"related body corporate"** have the same meanings as in the Corporations Act.
- (i) This agreement is a deed and is executed by the parties on that basis.

1.3 Non-Business Days

If the day on or by which a person must do something under this document is not a Business Day:

- (a) if the act involves a payment that is due on demand, the person must do it on or by the next Business Day; and
- (b) in any other case, the person must do it on or by the previous Business Day.

1.4 Reference to Developer and Owner

If the Developer is the Owner of the land it signs this agreement in both those capacities. If the Developer is not the Owner of the land:

- (a) the Owner must also execute this agreement;
- (b) the Developer and any separate Owner are jointly and severally liable in respect of all obligations specified in this agreement for the Developer;
- (c) without limiting clause 1.5, the Owner appoints the Developer, and the Developer accepts appointment, as the legal agent of the Owner in all dealings with WW in respect of this agreement and the Development.

1.5 Reference to Consultant

Where in this agreement there is any reference to the Consultant:

- (a) the term is a reference to each Consultant engaged to perform the services of a Consultant in respect of the Development; and
- (b) the Developer acknowledges and agrees WW may deal with the Consultant as the agent and representative of the Developer in respect of all aspects of the Development Works.

1.6 Reference to Contractor

Where in this document there is any reference to the Contractor, the term is a reference to each Contractor engaged to perform construction services for the Development Works.

1.7 Multiple Parties

If a party to this agreement is made up of more than one person, or a term is used in this document to refer to more than one party, then unless otherwise specified in this document:

- (a) an obligation of those persons is joint and several;
- (b) a right of those persons is held by each of them severally; and
- (c) any other reference to that party or term is a reference to each of those persons separately, so that (for example) a representation, warranty or undertaking is given by each of them separately.

1.7 Application of these Standard Conditions

These Standard Conditions apply to each and every Development Works Agreement entered into by Western Water and each Developer and Owner.

2. OPERATION OF DOCUMENT

2.1 Commencement

The rights and obligations of the parties under this agreement begin on the Commencement Date.

2.2 Termination or Extension

- (a) If the Developer fails to complete the Development Works within the Initial Period, WW may, in its sole discretion:
 - (i) require the Developer to complete the Development Works in a time specified, otherwise under the terms of this agreement;
 - (ii) terminate this agreement;
 - (iii) subject to payment by the Developer of any further or revised fees, charges, or contributions assessed by WW in accordance with the Price Determination, agree to extend the operation of this document for the Extended Period on the same terms as are contained in this document; or
 - (iv) terminate this agreement and, subject to clause 2.2(c), step in to complete so much of the Development Works as are required to provide water (including recycled water) and sewerage services to customers other than the Developer.
- (b) If WW terminates this agreement under clause 2, and the Developer wishes to proceed with the Development Works, the Developer must:
 - (i) obtain the consent of WW;
 - (ii) if required, enter into a further development agreement with WW; and
 - (iii) pay to WW any further or revised fees, charges and contributions assessed by WW in accordance with the Price Determination and the Water Act.
- (c) Where WW exercises its rights under clause 2.2(a)(iv) above, the costs incurred by WW in completing works, less any amounts that WW has agreed to reimburse to the Developer, will be a debt due and payable by the Developer to WW.
- (d) Termination of this agreement is without prejudice to any rights or liabilities of the parties accruing to the date of termination.

3. AMENDMENT AND ASSIGNMENT

3.1 Amendment

This agreement can only be amended or replaced by another document signed by the parties.

3.2 Assignment

- (a) The Developer must not assign, novate, transfer, dispose of, declare a trust over or otherwise create an interest in its rights under this agreement without the prior written consent of WW.
- (b) The Developer acknowledges that WW has entered into this agreement in reliance on the expertise and capability of the Developer and may withhold its consent under clause 3.2(a) in its absolute discretion.
- (c) In response to a request to assign, transfer or novate this agreement WW may, in its discretion, require:
 - (i) the existing Developer and any new developer to sign an appropriate agreement to give effect to same; or
 - (ii) require a new developer agreement with the new Developer.

4. OVERALL RESPONSIBILITY FOR DEVELOPMENT WORKS

The Developer must carry out and complete the Development Works in accordance with this agreement.

5. WARRANTIES

5.1 Developer's Warranties

The Developer must ensure, and warrants to WW, that:

- (a) the Developer will carry out and complete the Development Works and will have the primary responsibility for all obligations arising under or in connection with the design and construction of the Development Works in accordance with this agreement;
- (b) in connection with the completion of the Development Works, it will engage only Accredited Consultants and Accredited Contractors and will only continue to engage Consultants and Contractors while they maintain their Accreditation, unless otherwise agreed in writing by WW;
- (c) the Consultant and the Contractor will be accredited in the appropriate categories of services or works for the Development Works and at all times will exercise due skill, care and diligence in carrying out services for the Development Works;
- (d) the Developer will procure that the Consultant and Contractor engaged by it are familiar with all current Laws affecting the Development Works, or which may affect the Development Works;
- (e) the Developer will procure that the Consultant and Contractor engaged by it examines and carefully checks any WW Standards and Specifications and that such WW Standards and Specifications:
 - (i) are consistent with and do, or will, conform with and meet all Laws; and
 - (ii) do not contain any material discrepancies, ambiguities or inconsistencies;

- (f) the Developer will procure that the Consultant and Contractor engaged by it will carry out their respective obligations relating to the Development Works in accordance with this agreement;
- (g) the Developer will procure that the Consultant and Contractor, before commencing the Development Works and thereafter whenever reasonably required by WW, give to WW evidence, satisfactory to WW, that the insurances required to be effected respectively by the Consultant and the Contractor have been effected and are being maintained;
- (h) the Consultant or another Accredited Consultant (who is accredited to undertake audit activity) is appointed to audit the Development Works, as required by WW, to confirm that the Contractor is constructing the Development Works in accordance with the Design Documents and the WW Standards and Specifications;
- (i) all materials for the Development Works:
 - (i) will be provided at the Developer's cost; and
 - (ii) must be either materials specified in the Approved Products List or if they are not so specified, have been approved in writing by WW.
- (j) all relevant landowner permissions have been obtained by the Developer for land impacted by the Development Works.

5.2 Warranties Unaffected

The Developer acknowledges that the warranties in clause 5.1 will remain unaffected notwithstanding:

- (a) any:
 - (i) receipt or review of;
 - (ii) comment on; or
 - (iii) acceptance of, the Design Documents, by WW;
- (b) the provision of any information and data concerning the Development by or on behalf of WW; or
- (c) the granting by WW of Accreditation to the Consultant or the Contractor.

5.3 No Warranty by WW

- (a) Information made available to the Developer in the documents forming part of this agreement or prior to, or after the Developer submits an application to WW to undertake the Development Works, will not constitute a warranty or representation of any kind by WW, and the Developer acknowledges and agrees that such information will be checked and verified by it, the Consultant and the Contractor.
- (b) The Developer will not be entitled to claim any moneys or extension of the Initial Period on account of any alleged statement, warranty or representation with respect to the information referred to in clause 5.3(a) which may not prove correct.
- (c) No warranty, express or implied, is given by WW that the WW Standards and Specifications show all information which is or may be necessary or incidental to the Development Works.

6. DEVELOPER'S OBLIGATIONS IN RELATION TO THE DEVELOPMENT WORKS

6.1 Pre-Development Works

The Developer must ensure that:

- (a) before the Contractor proposes to commence construction of the Development Works:
 - (i) the Consultant provides and has received approval from WW of a complete set of Design Documents for the Development Works and the required Design and Construction Forms in accordance with WW's lodging requirements; and
 - (ii) the Contractor provides to WW the required Design and Construction Form in accordance with WW's lodging requirements as specified by WW in its LDM;
- (b) if at any time after the required Design and Construction Forms are provided to WW under clause 6.1(a), the Consultant and the Contractor comply with any request made by WW to provide such other information as WW reasonably requires regarding the design or construction (as applicable) of the proposed Development Works, including any information to assist WW in undertaking audits of the construction of the Development Works, within such period as specified by WW;
- (c) the Contractor gives WW at least five Business Days' written notice:
 - (i) if the Contractor does not propose to commence construction of the Development Works on the date set out either in the relevant Design and Construction Form, or any previous notice given of the date it proposes to commence construction of the Development Works; and
 - (ii) of any later date upon which the Contractor proposes to commence construction of the Development Works;
- (d) the Consultant, if the design of the Development Works changes, provides WW with a complete set of the most recent version of the Design Documents for the Development Works;
- (e) the Consultant has in place, prior to commencing the design of the Development Works and at all times during the completion of the Development Works:
 - (i) a quality management system;
 - (ii) an environmental management system, processes or procedures; and
 - (iii) an OHS management system, procedures, which meet the standards of WW; and
- (f) the Consultant complies with the system or procedures prepared under clause 6.1(e) in performing consultancy services for the Development Works.

6.2 Development Works

The Developer must:

- (a) before commencing the Development Works, satisfy all applicable requirements of the Planning and Environment Act 1987;

- (b) before commencing the Development Works, at the Developer's cost, obtain all necessary permits, consents and other authorisations required by Law for the Development Works to proceed;
- (c) without limiting clauses 6.2(a) and 6.2(b), at all times meet the requirements of all relevant Laws relating to the commencement and completion of the Development Works;
- (d) at any time upon receipt of a written request from WW, provide WW with written evidence that the requirements of clauses 6.2 have been met;
- (e) at any time where requested by WW, coordinate the location and design of the proposed Development Works with any of WW's or any other governmental agency or utility provider's existing or proposed works, operations or services;
- (f) ensure that the Contractor:
 - (i) gives WW at least five Business Days' notice in accordance with WW's lodging requirements of any occasion upon which the Contractor proposes to work on the Development Works:
 - (A) outside the hours of 7.30am to 4.00pm, Monday to Saturday; or
 - (B) on a Sunday or public holiday;
 - (ii) promptly advises WW if the Contractor vacates the site, and gives WW at least five Business Days' notice in accordance with WW's lodging requirements of the day on which the Contractor will resume the Development Works;
 - (iii) as far as practicable, ensures that any excavation made as part of the Development Works is wholly contained within an easement, or land transferred, or proposed to be granted or transferred, to WW under clause 10 and that if any part of an excavation is not within an easement or transferred land referred to in clause 10, ensures that:
 - (A) the Contractor promptly backfills such part of the excavation as is not contained within that easement or transferred land; or
 - (B) the area of any easement or transferred land referred to in clause 10 is increased to include that part of the excavation;
 - (iv) has in place, prior to the commencement of the Development Works and at all times during the completion of the Development Works:
 - (A) a quality management system;
 - (B) an environmental management system or procedures; and
 - (C) an OHS management system or procedures, which meet the minimum standards under WW's accreditation assessment process; and
 - (v) complies with the systems or procedures prepared under clause 6.2(f)(iv) in carrying out construction of the Development Works.

6.3 Completion of Development Works

- (a) Following completion of the Development Works, the Developer must ensure that:
 - (i) the Consultant that designed the Development Works provides Verification that the Development Works have been designed and completed in accordance with WW Standards and

- Specifications by providing to WW the relevant Design and Construction Form and any other information specified by WW in accordance with WW's lodging requirements;
- (ii) the Contractor that constructed and completed the Development Works provides Verification that the Development Works have been completed in accordance with WW Standards and Specifications by providing to WW the relevant Design and Construction Form and any other information specified by WW in accordance with WW's lodging requirements;
 - (iii) the Consultant and the Contractor comply with any request made by WW to provide such other information as WW reasonably requires, within such period as WW may specify;
 - (iv) the Consultant, not earlier than the end of the Defects Liability Period and not later than six months after the end of Defects Liability Period, provides to WW, in accordance with WW's lodging requirements, the required Design and Construction Form if, in the opinion of the Consultant, any Defect notified to the Consultant or the Contractor by WW or the Developer has been remedied;
 - (v) the Design and Construction Form submitted under clause 6.3(a)(iv) is accompanied by:
 - (A) evidence that an Acceptance of Works Certificate has been issued by WW with respect to the Development Works;
 - (B) evidence that any Defect of which the Consultant or the Contractor has been notified has been remedied; and
 - (C) such other documents specified by the form; and
 - (vi) the Consultant, at any time after WW is provided with the required Design and Construction Form under clause 6.3(a)(iv), complies with any request made by WW that the Consultant provide WW with such other information as WW considers desirable to assist it in determining whether everything referred to in clause 6.3(a)(v) has occurred.
- (b) The Developer acknowledges and agrees that WW will be under no obligation to issue an Acceptance of Works Certificate or a Consent to Statement of Compliance until WW receives all required Design and Construction Verification Forms, any outstanding Corrective Action Request issued by WW have been addressed to the satisfaction of WW, and any other information reasonably requested by WW is received in an acceptable format.

6.4 WW Request for information

If requested in writing by WW, the Developer must provide WW with information in relation to the progress, status and completion of the Development Works.

7. DEVELOPMENT WORKS COSTS AND CHARGES

- (a) The Developer must:
 - (i) meet the full cost of designing, constructing, project-managing, supervising, auditing, surveying and asset recording all the Development Works (except for any amounts which WW expressly agrees to reimburse the Developer; and
 - (ii) pay to WW such fees, charges and contributions relating to the Development as are calculated by WW in accordance with the

Price Determination and the Water Act including as set out in a Schedule to this Agreement,

- (b) any fees, charges or contributions are due for payment at a time specified in a Schedule to this Agreement or otherwise stated by WW.
- (c) all fees, charges, contributions or other moneys owing must be paid as a precondition to the issue of an Acceptance of Works Certificate and any Consent to a Statement of Compliance.

8. WORKS WARRANTY BOND

- (a) The Works Warranty Bond is for the purpose of ensuring that the Development Works are completed by the Developer in accordance with the requirements of this agreement, including the Warranty Period in accordance with clause 14.
- (b) The Developer must give WW a Works Warranty Bond for an amount equal to the greater of:
 - (i) \$1,000; or
 - (ii) 5% of the value of the Development Works, as determined by WW, before WW may be required to issue an Acceptance of Works Certificate.
- (c) The Works Warranty Bond must be:
 - (i) in a form specified by WW in its LDM; or
 - (ii) any other form approved by WW in its absolute discretion.
- (d) WW may have immediate recourse, without notice, to the Works Warranty Bond and may convert into money any part of or the whole of the Works Warranty Bond:
 - (i) where WW believes that WW has become entitled to exercise a right under this agreement in respect of the Works Warranty Bond;
 - (ii) for a purpose referred to in any of clauses 12.1(b), 13(e)(v) and 14.3; or
 - (iii) where the Developer is indebted to WW under this Agreement.
- (e) WW will not be liable for any loss to the Developer occasioned by recourse to the Works Warranty Bond.
- (f) The Developer agrees that it will not at any time take steps to seek an injunction against or otherwise restrain, or attempt to seek an injunction against or otherwise restrain:
 - (i) any issuer of the Works Warranty Bond contemplated in this clause 8 from paying WW pursuant to the Works Warranty Bond; or
 - (ii) WW from:
 - (A) taking any steps to obtain payment under the Works Warranty Bond; or
 - (B) using the moneys received under the Works Warranty Bond.
- (g) WW will own any interest earned on the Works Warranty Bond.
- (h) Upon the expiration of three (3) years after WW issues a Certificate of Completion, the Developer may apply to WW for a return of the balance of the Works Warranty Bond then held by WW (if any). WW must return the balance of the Works Warranty Bond held by it (if any) promptly after receipt by it of the application.

9. CONSENT OF AFFECTED LANDOWNERS

9.1 Landowner Consent

In any case where the Development Works are located on land other than the Property ("**Other Land**") the Developer must obtain the written consent of the party who either owns or controls that Other Land on the following basis:

- (a) the consent must be in writing, upon terms to the satisfaction of WW;
- (b) the consent includes agreement to allow the construction of the relevant Development Works including rights of access for WW and its employees or representatives;
- (c) the consent includes the grant of an easement for the relevant water or sewerage assets including appropriate rights of access;
- (d) in the case of Public Land, the necessary consent of the public land manager or road management authority, including if required by WW, consent to the grant of appropriate easements.

9.2 Reinstatement of Other Land by the Developer

Where Development Works is carried out on Other Land outside the boundaries of the Property, the Developer must ensure that such Other Land is reinstated to no worse condition than it was in prior to the undertaking of those Development Works.

10. EASEMENTS AND OTHER LAND

- (a) The Developer must, at the Developer's cost and as required by WW, do either or both of the following:
 - (i) grant or procure the grant of easements in favour of WW over such parts of the Property affected or occupied by the Development Works upon terms to the satisfaction of WW; or
 - (ii) vest or transfer to WW any relevant reserve or freehold land which incorporates Development Works, upon terms to the satisfaction of WW.
- (b) Any easement, reserve or land transferred as provided in clause 10(a) must be of sufficient dimensions to accommodate any excavation and any soil resulting from such excavations as may be necessary from time to time to access, repair, augment or replace the relevant works.
- (c) Unless otherwise specified by WW a minimum easement size must be 2 metres wide for sewerage and a minimum of 3 metres wide for combined sewerage and drainage easements.
- (d) The Developer is responsible for and hereby indemnifies WW in respect of, any cost, including compensation, which may be claimed or be payable in relation to the acquisition of the relevant easement, reserve or freehold land including compensation payable under the terms of the Land Acquisition and Compensation Act 1986 or the Water Act.
- (e) Without limiting its rights under this agreement, WW will not issue a Consent to Statement of Compliance until the requirements of this clause 10 have been met.
- (f) The Developer must ensure that prior to any works or building occurring on or near existing or intended Development Works, easement or reserve of WW; that this occurs in accordance with requirements specified in the Land Development Manual and Section 148 of the Water Act.

11. REPLACEMENT OF CONSULTANT OR CONTRACTOR

- (a) If at any time during the Development Works, the Consultant or the Contractor:
 - (i) has its accreditation by WW suspended or terminated;
 - (ii) resigns;
 - (iii) is terminated; or
 - (iv) is otherwise replaced by the Developer,the Developer must engage a replacement Accredited Consultant or Accredited Contractor (as applicable) and notify WW of the replacement within five Business Days of the original Accredited Consultant or Accredited Contractor (as applicable) resigning, being terminated or otherwise replaced.
- (b) The Developer must ensure that the replacement Accredited Consultant or Accredited Contractor (as applicable) signs a document upon terms to the satisfaction of WW, under which the replacement Accredited Consultant or Accredited Contractor (as applicable) assumes responsibility for the Development Works including services or works provided by the original Consultant or Contractor (as applicable).

12. COMPLETION OF WORKS

12.1 Audit

- (a) Whenever an audit undertaken by or on behalf of WW in connection with this agreement identifies a matter to which the Developer is reasonably required to attend, the Developer must:
 - (i) attend to that matter in the manner, and within the time, reasonably required by WW; and
 - (ii) on request from WW, produce evidence satisfactory to WW that the matter has been attended to.
- (b) If WW, in its sole discretion, determines that an intensive audit is required of the, design or construction of the Development Works, the Developer must pay the relevant intensive audit fee calculated by WW within 10 Business Days after receiving an invoice for that fee.

12.2 Acceptance of Works Certificate

- (a) When:
 - (i) the Consultant and the Contractor have provided to WW the properly completed and acceptable (to WW) Design and Construction Forms;
 - (ii) WW is satisfied that the Development Works have been completed in accordance with the requirements of this agreement;
 - (iii) The Consultant has provided a digital plan of sub-division (to WW's satisfaction);
 - (iv) The consultant has provided as constructed plans (if applicable) to WW's satisfaction; and
 - (v) the Developer has lodged with WW an appropriate Works Warranty Bond,WW will issue to the Developer an Acceptance of Works Certificate.
- (b) The Defects Liability Period for the Development Works commences on the date upon which WW issues an Acceptance of Works Certificate.
- (c) On and from the date upon which WW issues an Acceptance of Works Certificate all right, title and interest in the Development Works vests

in WW, by virtue of this clause, without any further instrument of transfer or assignment.

12.3 Consent to Statement of Compliance

WW will issue a Consent to Statement of Compliance when it is satisfied that the following requirements as are relevant to the Development Works have been met:

- (a) the Consultant and the Contractor have provided to WW all properly completed and acceptable (to WW) Design and Construction Forms;
- (b) an Acceptance of Works Certificate has been issued by WW with respect to the Development Works;
- (c) all water mains, recycled water mains and sewers outside the Property, have been constructed and completed;
- (d) if the assets referred to in clause 12.3 (b) and 12.3(c) have not been constructed and completed, the Developer has made appropriate alternative temporary arrangements, approved by WW;
- (e) the requirements of any planning permit or other planning permission relating to the development have been met or otherwise secured to the satisfaction of WW;
- (f) a copy of the relevant certified plan of subdivision relating to the Development, showing all easements referred to in clause 10, has been given to WW;
- (g) every instrument necessary to create an easement referred to in clause 10 in favour of WW has been lodged at the Registrar of Titles;
- (h) every transfer necessary to transfer land referred to in clause 10 has been lodged at the Registrar of Titles;
- (i) all fees, charges, contributions and other moneys payable by the Developer to WW under this document have been paid; and
- (j) any other document or information required to be given to WW under this document has been so given.

12.4 Certificate of Completion

WW will issue a Certificate of Completion when it is satisfied in its discretion that:

- (a) the Development Works; and
 - (b) all other services and roads to be constructed associated with the Development are complete, and:
 - (c) any Defect notified to the Developer, Consultant or Contractor under clause 13(b) has been remedied,
- to the satisfaction of WW.

13. DEFECTS LIABILITY PERIOD

- (a) The Defects Liability Period commences on the date upon which WW issues an Acceptance of Works Certificate and continues for a minimum period of six (6) months, or until a Certificate of Completion is issued in accordance with clause 12.4, whichever is the later.
- (b) At any time during the Defects Liability Period, WW may:
 - (i) notify the Developer, the relevant Contractor, or both, in writing of any Defect that WW reasonably considers to be related to the construction of the Development Works, and require the

- Developer to procure the relevant Contractor, to remedy the Defect within the period as is set out in the notice;
- (ii) notify the Developer or the relevant Consultant, or both, in writing of any Defect that WW reasonably considers to be related to the design or supervision by the Consultant of the Development Works, and require the Developer to procure the relevant Consultant, to remedy the Defect within the period as is set out in the notice; or
 - (iii) at its discretion, undertake emergency works in respect of any Defect that WW reasonably considers to be related to the construction, design or supervision of the Development Works and recover the reasonable costs incurred in remedying the Defect from one or both of the Works Warranty Bond and the Developer.
- (c) The Developer must either itself or procure the Contractor or Consultant (as the case may be) to comply with any notice given under clauses 13(b)(i) or 13(b)(ii).
 - (d) If the Developer or relevant Contractor or Consultant does not comply with a requirement within the period set out in a notice given under clauses 13(b)(i) or 13(b)(ii), WW may remedy the Defect and recover all reasonable costs incurred in remedying the Defect from one or both of the Works Warranty Bond and the Developer.
 - (e) If, at the end of six months (or any greater period prescribed by WW) after the end of the Defects Liability Period:
 - (i) the Developer has not procured the Consultant to give WW the required Design and Construction Forms;
 - (ii) WW has not issued a Certificate of Completion; or
 - (iii) in WW's reasonable opinion, any Defect notified under clause 13(b) has not been remedied,WW may, in its sole discretion and without giving further notice to another party:
 - (iv) remedy any outstanding Defect referred to in clause 13(e)(iii); and
 - (v) recover the reasonable costs incurred by WW in remedying any such Defect, from one or both of the Works Warranty Bond and the Developer.
 - (f) The Developer must pay the amount of any costs referred to in this clause 13 within 10 Business Days after receiving an invoice for those costs.

14. WORKS WARRANTY PERIOD

14.1 Subsequent Faults—Design

If at any time within three (3) years after issuing a Certificate of Completion, WW discovers any fault in the Development Works which WW reasonably considers is attributable to a deficiency in the design of the Development Works, WW may:

- (a) notify the Developer and the relevant Consultant in writing of the fault; and
- (b) require the Developer itself to remedy or to procure the Consultant to remedy, the fault within 10 Business Days after the date of the notice or any greater period specified in the notice.

14.2 Subsequent Faults—Construction

If at any time within three (3) years after issuing a Certificate of Completion, WW discovers any fault in the Development Works which WW reasonably considers is attributable to a deficiency in the construction of the Development Works, WW may:

- (a) notify the Developer and the relevant Contractor in writing of the fault; and
- (b) require the Developer itself to remedy or to procure the Contractor to remedy, the fault within 10 Business Days after the date of the notice or any greater period specified in the notice.

14.3 WW May Remedy

- (a) Subject to clause 14.3(b), if the Developer fails itself, or fails to procure the Consultant or Contractor to remedy, any fault within the period referred to in clause 14.1 or 14.2, WW may:
 - (i) remedy the fault; and
 - (ii) recover the reasonable costs incurred by WW in remedying the fault from the Developer.
- (b) WW may, at its discretion, undertake emergency works to remedy any fault that WW reasonably considers to be attributable to a deficiency in design or construction of the Development Works and recover the reasonable costs incurred by WW in remedying the fault from the Developer.

14.4 Costs

The Developer must pay the amount of any costs referred to in this clause 14, within 10 Business Days after receiving an invoice for those costs.

15. INDEMNITY

The Developer indemnifies WW and must keep WW indemnified against any liability or Claim in respect of:

- (a) any loss, destruction or damage to any real or personal property; and
- (b) any personal injury to, or the death of any person,

arising, whether directly or indirectly, from, or in the course of, or caused by, the negligent design and construction of the Development Works or any breach by the Developer of its obligations under this agreement, except to the extent that any such loss, destruction, damage, personal injury or death has been caused by the negligence of WW, its employees, agents or contractors.

16. INSURANCE

16.1 Public Liability Insurance

- (a) The Developer must ensure that before any Development Works are commenced by the Developer, the Consultant or the Contractor, the Developer is insured under a public liability policy of insurance written on an occurrence basis (insuring WW for its vicarious liability for the acts or omissions of the Developer) which covers the Developer's liability to WW or any third party for loss of or damage to property and the death of or injury to any person (other than liability which is required by law to be insured under a workers compensation policy of insurance) and is for an amount in respect of each and every occurrence not less than \$20 million. For the avoidance of doubt, the

Developer can satisfy this requirement by relying on the public liability policy of the Contractor, provided that the policy satisfies the requirements of this clause 16.

- (b) The policy of insurance referred to in clause 16.1(a) must be maintained until the expiration of five years after the Certificate of Completion is issued.

16.2 Consultant and Contractor's Insurance

Prior to the commencement of any Development Works the Developer must ensure that:

- (a) the Consultant holds a professional indemnity insurance policy, upon terms to the satisfaction of WW;
- (b) the Contractor holds a public liability policy of insurance, upon terms to the satisfaction of WW; and
- (c) the Consultant and Contractor hold insurance for employees against statutory liability for death of or injury to persons employed by the Consultant or Contractor and, where commonwealth claims are permissible outside of the relevant statutory scheme, the Consultant or Contractor holds insurance against such common law liability for an amount as is good practice for that jurisdiction.

16.3 Insurance of Employees

- (a) Before the Commencement Date, the Developer must insure against statutory liability for death of or injury to persons employed by the Developer and, where common law claims are permissible outside of the relevant statutory scheme, the Developer must also insure against common law liability for an amount as is good practice for that jurisdiction. The insurance cover must be maintained until the expiration of five years after the date of the Certificate of Completion.
- (b) Where permitted under the relevant statutory scheme, and for all common law liability policies, the insurance policy or policies must be extended to provide indemnity for WW's liability to the Developer's employees.

16.4 Evidence of Insurance

- (a) The Developer must ensure that, on or before the Commencement Date, WW receives:
 - (i) a copy of a certificate of currency for each insurance policy that the Developer is required to effect under this clause 16;
 - (ii) a copy of the Developer's WorkSafe certificate of currency (if applicable); and
 - (iii) if requested a copy of necessary insurances to be held by the Consultant and Contractor.
- (b) The Developer must notify WW of any change to details set out in the certificates of currency previously provided to WW within two Business Days of the change.
- (c) Whenever otherwise requested in writing by WW, the Developer must provide satisfactory evidence (in the form of copies of certificates of currency) of the Developer's insurance policies.
- (d) Insurance must not limit liabilities or obligations at general law, under other provisions of this agreement or any consultancy or construction agreement or contract.

16.5 Terms of Insurance and Obligations not to Prejudice Insurance

- (a) The Developer must ensure that:
 - (i) the policy of insurance the subject of clause 16.1:
 - (A) provides that failure by the Developer (or any other insured) to observe and fulfil the terms of the policy will not prejudice the insurance with regard to WW; and
 - (B) provides that the insurer must give not less than 20 Business Days' notice of cancellation to the Developer;
 - (C) is on terms approved in writing by WW (which approval must not be unreasonably withheld);
 - (D) is with an insurer with a financial security rating of "A-" or better with Standard and Poors or the equivalent rating with another recognised ratings agency; and
 - (E) includes cross liability and full severability and the agreement of the insurer not to impute any pre-contractual non-disclosures from one insured to another for the purposes of determining rights to coverage.
- (b) The Developer must not do any act or permit or suffer any circumstances by which a policy of insurance the subject of this clause 16 may at any time become void, voidable or cancellable or which would entitle an insurer to reduce its liability (including to nil) for a claim under the policy and the Developer must at all times at its own expense comply with the conditions of such policies so as to prevent their invalidation, cancellation or prejudice. The Developer indemnifies WW against any loss WW may suffer arising out of the default of the Developer under this clause 16.5(b).

16.6 Notices from Insurer of Claims

The Developer must notify WW in writing:

- (a) within two Business Days whenever the insurer gives the Developer a notice of cancellation or any other notice in respect of a policy; and
- (b) of any Claims or circumstance which could give rise to Claims against the insurances required by this clause 16 within five Business Days after it becomes aware of the Claims or circumstances and provide such further information to WW in relation to the Claim as WW may reasonably require. This clause 16.6(b) does not require the notification of Claims or circumstances which could give rise to Claims unrelated to the Development Works or the exercise of rights by the Developer under this agreement.

17. CONFIDENTIALITY

17.1 Confidentiality Obligation

Each party must keep confidential and must not allow, make or cause any public announcement or other disclosure of or in relation to any information relating to the conduct and assessment of, and decision making in relation to, any tender conducted by the Developer for works relating to the Development Works that are required to be undertaken by WW and that the Developer has agreed to undertake on behalf of WW.

17.2 Exceptions

A party's obligation under clause 17.1 not to make any disclosure does not apply to disclosures to the extent they are:

- (a) required by law;

- (b) required by the listing rules of Australian Stock Exchange Limited;
- (c) required to enable the party to perform its obligations or making or defending any Claim under this document; or
- (d) required to be disclosed under this document, provided that before any such disclosure, the disclosing party notifies the other party in writing of the information it proposes to disclose and gives details of the reasons for such disclosure.

18. INTELLECTUAL PROPERTY

18.1 Intellectual Property in Deliverables

- (a) All Intellectual Property in the Deliverables will be owned absolutely by the party creating the Deliverable and vest in that party immediately on creation by that party.
- (b) To the extent that WW may at any time acquire any right, title or interest in any Intellectual Property in the Deliverables, WW, by this document, assigns to the relevant party all such right, title and interest.

18.2 Licence

- (a) To the extent that any Intellectual Property in the Deliverables is owned by the Developer, the Developer grants WW a non-exclusive, perpetual, non-transferable, royalty free and worldwide licence of the Intellectual Property in those Deliverables for whatever purpose required by WW.
- (b) To the extent that any Intellectual Property in the Deliverables is owned by the Consultant or the Contractor, the Developer must procure the Consultant or Contractor, as the case may be, to grant WW a non-exclusive, perpetual, non-transferable, royalty free and worldwide licence of the Intellectual Property in those Deliverables for whatever purpose required by WW.

18.3 No Infringement

The Developer warrants to the best of its knowledge and belief after making all reasonable enquiries that WW's use of the Deliverables will not infringe any Intellectual Property rights of any person nor give rise to any liability to make royalty or other payments to any person.

19. REIMBURSEMENT WORKS

19.1 Reimbursement Works

If the Developer Works include Reimbursement Works:

- (a) the provisions of this clause 19 apply; and
- (b) provisions of any Reimbursement Procedure, adopted by WW from time to time apply, as if that policy formed part of this agreement.

19.2 Completion of Reimbursement Option

Where Reimbursement Works are proposed, the relevant Schedule to this Agreement must be completed including a description of the Reimbursement Works.

19.3 Conduct and Responsibility for Reimbursement Works – Design, Tender and Completion

The design, contract preparation, tender and construction of the Reimbursement Works must occur as follows:

- (a) the design may include a concept phase, functional design phase and a final design phase where WW will provide input but otherwise the authorisation of the design by WW is treated on the same basis as other Development Works;
- (b) the Developer must procure the preparation by a Consultant of a tender for the Reimbursement Works, including as follows:
 - (i) the tender documents and schedules must include the proposed construction contract;
 - (ii) the tender documents may be based on the Consultant's or Developer's, or WW's format, however, must otherwise be to the reasonable satisfaction of WW;
 - (iii) for Reimbursement Works estimated to be under a particular amount (set from time to time by WW) the Developer must source not less than 3 quotations;
 - (iv) for Reimbursement Works estimated to be above a particular amount (set from time to time by WW) these works must be subject to a public tender upon terms and open to tenderers for a period, to the satisfaction of WW;
 - (v) WW may require that any tender process is conducted through the WW Tender link process or like facility or upon other arrangements specified by WW;
 - (vi) the Consultant will conduct an initial assessment of any tenders (including quotations) and provide a detailed breakdown and comparison of all quantities, costs and variations, all to be provided to WW;
 - (vii) WW may, as it thinks fit, choose to participate in any tendering interview process;
 - (viii) all tender interview processes must be carefully administered by the Consultant and reports in relation to same provided to WW;
 - (ix) the Consultant, with input from the Developer will recommend a preferred tenderer who must be an Accredited Contractor including the reasons supporting the recommendation for approval by WW.
- (c) provision of a statutory declaration (in a form required by WW) by one or more of the Developer, Consultant or Contractor, as relevant to the circumstances, that any tender process in respect of the Reimbursement Works was conducted in accord with appropriate probity requirements and without any known conflict of interest, collusion or inappropriate benefit or advantage to any person or entity.

19.4 Reimbursement Amount Estimate

- (a) The Reimbursement Amount Estimate provided after the tender process will be based on the amount of the successful tender for the construction of the Reimbursement Works.
- (b) Upon completion of the Reimbursement Works and as a precondition to payment of any Reimbursement Amount
 - (i) accurate and complete details of the final cost of the Reimbursement Works, to the satisfaction of WW, must be provided to WW including as appropriate, any and all invoices in respect of plant, equipment, materials, the Consultant costs, the Contractor costs and any other costs and like details as required by WW;
 - (ii) the Reimbursement Amount will be the actual cost of the Reimbursement Works and may be lower or, subject to Clause 19.4(c), higher, than the Estimated Reimbursement Amount;

- (iii) WW may in its discretion and at the cost of the Developer appoint an independent quantity surveyor or the like entity to review the requested reimbursement and may withhold payment of any part of the Reimbursement Amount based on the outcome of such independent assessment;
 - (iv) WW must receive (from the Developer or other relevant party) a valid Tax Invoice or invoices, inclusive of GST, as a precondition to any claim for payment of the approved Reimbursement Amount including any modified amount agreed or directed by WW.
- (c) The Reimbursement Amount Estimate, upon which WW has advised the relevant Reimbursement Works may proceed will be the maximum amount that WW will pay unless any increase is approved by WW provided that:
- (i) any increase due to a latent defect in conducting the Reimbursement Works will only be considered provided written advice of same is given to WW within seven (7) days of its discovery;
 - (ii) any approved variation of a contract for the construction of the Reimbursement Works will not necessarily result in an approval of any increase in, the Reimbursement Amount provided further:
 - (A) no increase may be applied unless such variation is advised in writing to WW within seven (7) days of the Consultant or Developer becoming aware of same; and
 - (B) WW may, in its discretion request full details of any such variation request and may take a different view to the superintendent or principal under the relevant contract;
 - (C) any increase requested in relation to Consultant's costs or costs other than the actual construction of the Reimbursement Works must be established by the Consultant and the Developer to be properly attributable to the particular Reimbursement Works only;
 - (iii) any increase requested will not be approved unless details of the relevant increase, to the satisfaction of WW are provided concerning the accuracy of the relevant request and proof that the relevant increase was properly related to the Reimbursement Works or not due to the negligence, deficient work quality or otherwise beyond the reasonable control of the Developer, Consultant, Contractor or Superintendent or principal in respect of the Reimbursement Works.

19.5 Claim for Payment of Reimbursement Amount

- (a) The Developer is required to submit to WW a tax compliant invoice, inclusive of GST, as claim for payment of the final Reimbursement Amount.
- (b) WW will only finalise the payment of the Reimbursement Amount following receipt of the Developer's compliant claim for reimbursement.

20. GOODS AND SERVICES TAX

20.1 Definitions and Interpretation

Terms defined in *A New Tax System (Goods & Services Tax) Act 1999* (Cth) have the same meaning in this agreement unless the context otherwise requires.

20.2 GST Pass On

- (a) Unless otherwise stated, the amounts shown in this agreement are exclusive of GST.
- (b) If GST is payable on any supply made under or in connection with this agreement:
 - (i) the consideration otherwise provided for that supply is increased by the amount of that GST; and
 - (ii) the recipient must make payment of the increase as and when the consideration otherwise provided for, or relevant part of it, must be paid or provided or if the consideration has already been paid or provided, within five Business Days of receiving a written demand from the supplier.

20.3 Tax Invoices / Adjustment Notes

The right of the supplier to recover any amount in respect of GST under this agreement on a supply is subject to the issuing of the relevant tax invoice or adjustment note to the recipient, except where the recipient is required to issue the tax invoice or adjustment note.

20.4 Reimbursements

Costs actually or estimated to be incurred or revenue actually or estimated to be lost by a party that is required to be reimbursed or indemnified by another party, or used as the basis for calculation of consideration for a supply, under this agreement must exclude any amount in respect of GST included in a cost to the extent to which an entitlement arises or would arise to claim an input tax credit and any amount in respect of GST included in the revenue lost.

21. NOTICES

Any notice to be given by any party under this agreement may be given by delivering it, posting it by prepaid post, by email or by any other means agreed between the parties from time to time, to the address or email address, as the case may be, set out for that party in Schedule 1, as subsequently updated by written notice for that party to all other parties.

22. VARIATIONS

22.1 Directing Variations

- (a) The Developer must not, and must ensure that the Consultant or the Contractor do not, vary the Development Works except as directed by or consented to, in writing, by WW.
- (b) WW may, acting reasonably, give the Developer written notice of a proposed Variation to the Development Works and the Developer must comply with any such direction.
- (c) The Developer will be entitled to:
 - (i) any reasonable cost, loss, expense or damage; and/or
 - (ii) a reasonable extension of the Initial Period,by reason of the Variation as agreed by WW acting reasonably.

22.2 Variations for Convenience of Developer

- (a) If the Developer wishes to request WW to allow a Variation, it must lodge a request in writing with WW.

- (b) If the Developer requests WW to allow a Variation for the convenience of the Developer, WW may do so in its discretion. Any consent must be written and may be conditional.
- (c) Unless a consent provides otherwise, the Developer will not be entitled to:
 - (i) any cost, loss, expense or damage; or
 - (ii) extension of the Initial Period, by reason of the consented Variation.
- (d) WW may determine to consent or refuse to consent to a Variation requested by the Developer in WW's absolute discretion.

23. DISPUTES

23.1 Application

- (a) Any dispute in relation to this agreement or the Development Works (other than a payment under Part 13, Division 6 of the Water Act) must be determined in accordance with the procedure in this clause 23.
- (b) A dispute relating to a payment under Part 13, Division 6 of the Water Act will be dealt with in accordance with the process set out in the Water Act.

23.2 Mediation

- (a) If any dispute arises, a party to the dispute (the **"Referring Party"**) may by giving notice to the other party or parties to the dispute (the **"Mediation Notice"**) refer the dispute to mediation for resolution.
- (b) The Mediation Notice must:
 - (i) be in writing;
 - (ii) state that it is given pursuant to this clause 23.2;
 - (iii) include or be accompanied by reasonable particulars of the dispute including:
 - (A) a brief description of the circumstances in which the dispute arose;
 - (B) references to any:
 - (aa) provisions of this agreement;
 - (bb) acts or omissions of any person, relevant to the dispute; and
 - (C) where applicable, the amount in dispute (whether monetary or any other commodity) and if not precisely known, the best estimate available.
- (c) If a Mediation Notice is given, the parties must attempt to resolve the dispute by engaging in mediation in accordance with, and subject to, the Institute of Arbitrators & Mediators Australia Mediation and Conciliation Rules and endeavour to settle the dispute by mediation within 20 Business Days of the Referring Party giving the Mediation Notice or such further period as the parties may agree in writing (**"Mediation Period"**).
- (d) The mediation will take place in Melbourne and be administered by the Institute of Arbitrators & Mediators Australia.
- (e) The parties must enter into an agreement with the appointed mediator on such terms as the parties and the mediator may agree (**"Mediation Agreement"**), or failing agreement, on terms reasonably requested

by the mediator, provided those terms do not conflict with this clause 23.2.

- (f) The parties must not withhold agreement to any reasonable fees and disbursements the mediator requests to be set out in the Mediation Agreement.

23.3 Condition Precedent to Litigation

Subject to clause 23.5, a party must not commence legal proceedings in respect of a dispute unless:

- (a) a Mediation Notice has been given; and
- (b) the Mediation Period has expired.

23.4 Continuance of Performance

Despite the existence of a dispute, the parties must continue to perform their respective obligations under this agreement.

23.5 Summary or Urgent Relief

Nothing in this clause 23 will prevent a party from instituting proceedings to seek urgent injunctive, interlocutory or declaratory relief in respect of a dispute.

23.6 Survive Termination

This clause 23 survives the expiry or termination of this agreement.

24. FORCE MAJEURE

24.1 Notice and Suspension of Obligations

If a party is affected, or is likely to be affected, by a Force Majeure Event:

- (a) that party must immediately give the other party prompt notice of that fact including:
 - (i) full particulars of the Force Majeure Event;
 - (ii) an estimate of its likely duration;
 - (iii) the obligations affected by it and the extent of its effect on those obligations; and
 - (iv) the steps taken and proposed to be taken to rectify it; and
- (b) the obligations under this document of the party giving the notice are suspended to the extent to which they are affected by the relevant Force Majeure Event as long as the Force Majeure Event continues.

24.2 Effort to Overcome

A party claiming a Force Majeure Event must use its best endeavours to remove, overcome or minimise the effects of that Force Majeure Event as quickly as possible.

24.3 Alternative Supply

During any period in which the Developer is not performing its obligations because of a claimed Force Majeure Event, WW may (but need not) obtain all its requirements from any other source or make alternative arrangements for the performance, whether by another person or otherwise, of any obligation which the Developer is not performing without incurring any liability to the Developer.

25. TERMINATION

25.1 Termination by WW for Cause

WW may terminate the Developer's rights under this document, with immediate effect by written notice to the Developer, if:

- (a) the Developer:
 - (i) commits a material breach of any condition in this document;
 - (ii) acts in a fraudulent manner;
 - (iii) permits a Change of Control of the Developer to occur without the prior consent of WW;
 - (iv) engages or continues to engage the Consultant or Contractor if they do not have, or they cease to maintain their, Accreditation, without the written approval of WW (which may be given or withheld in WW's absolute discretion);
 - (v) ceases to carry on business or is the subject of an Insolvency Event; or
 - (vi) subject to clause 2.2(a)(iii), fails to complete the Development Works within the Initial Period; or
- (b) a Force Majeure Event affecting the Development Works continues for more than 30 Business Days.

25.2 Effect of Termination

If the Developer's rights are terminated under clause 25.1:

- (a) the Developer must not carry out any further Development Works under this document;
- (b) termination, however caused, is without prejudice to any rights or liabilities of the parties accruing to the date of termination;
- (c) the Developer is not entitled in contract, tort or otherwise to any payment or compensation for losses incurred as a result of the termination; and
- (d) the costs incurred by WW in completing any Development Works under clause 2.2(a)(ii), will be a debt due and payable by the Developer to WW.

26. GENERAL

26.1 Inconsistency Between Development Agreement Documents

Where any inconsistency arises between the terms and conditions of this agreement and any Schedules or annexures, these terms and conditions will take precedence to the extent of any such inconsistency.

26.2 Operation of this Document

- (a) This agreement applies to the Development Works, whether any of the Development Works are undertaken before, on or after the Commencement Date.
- (b) This agreement contains the entire agreement between the parties regarding the Development Works to be undertaken for the Development. Any previous understanding, agreement, representation or warranty relating to the Development Works is replaced by this agreement and has no further effect.
- (c) Any right that a person may have under this agreement is in addition to, and does not replace or limit, any other right that the person may have.

- (d) If any provision of this agreement is unenforceable or partly unenforceable, that provision is:
 - (i) where possible, to have no effect to the extent necessary to make this agreement enforceable; unless
 - (ii) this would materially change the intended effect of this agreement, in which case that entire provision has no effect.

26.3 Parties Empowered to Enter into this Agreement

Each of the parties represents and confirms that:

- (a) it has full legal capacity and power to:
 - (i) own its property and to carry on its business; and
 - (ii) enter into this agreement and to carry out the transactions that this agreement contemplates; and
- (b) it holds each authorisation necessary to:
 - (i) enable it to properly execute this agreement and to carry out the transactions that this agreement contemplates;
 - (ii) ensure that this agreement is legal, valid, binding and admissible in evidence; and
 - (iii) enable it to properly carry on its business, and it is complying with any conditions to which any of these authorisations is subject.

26.4 No Partnership

This agreement does not create a partnership between the parties.

26.5 Disclaimer

The Developer agrees that in entering this agreement it has not relied upon any representation, warranty or inducement by WW nor is any representation, warranty or thing made or done by WW to be inferred, incorporated or implied into this agreement.

26.6 Trustee Provisions

- (a) if the Developer has entered into this agreement in the capacity of a trustee of any trust ("**Trust**") under any trust agreement, agreement of settlement or any other instrument ("**Trust Agreement**"), and whether or not WW has notice of the Trust, then the Developer:
 - (i) enters into this agreement as trustee of the Trust as well as personally; and
 - (ii) represents and warrants that:
 - (A) they have power under the Trust Agreement and, in the case of a corporation, under its constitution, to enter into and execute this agreement and to perform the obligations imposed under this agreement as trustee;
 - (B) all necessary resolutions have been passed as required by the Trust Agreement and, in the case of a corporation, by its constitution, in order to make this agreement fully binding;
 - (C) the execution of this agreement is for the benefit of the Trust;
 - (D) they are not now and will not be in default under the Trust Agreement;
 - (E) there is not now, and they will not do anything by virtue of which there will be in the future, any restriction or

- limitation on the right of the Developer to be indemnified out of the assets of the Trust; and
- (F) there is no material fact or circumstance relating to the assets, matters or affairs of the Trust that might, if disclosed, be expected to affect the decision of WW, acting reasonably, to enter into this agreement.

26.7 Attorneys

Each person who executes this agreement on behalf of a party under a power of attorney declares that he or she is not aware of any fact or circumstance that might affect his or her authority to do so under that power of attorney.

26.8 Governing Law

- (a) This agreement is governed by the Law in force in Victoria.
- (b) Each party submits to the non-exclusive jurisdiction of the courts exercising jurisdiction in Victoria, and any court that may hear appeals from any of those courts, for any proceedings in connection with this agreement, and waives any right it might have to claim that those courts are an inconvenient forum.

26.9 Liability for Expenses

Each party must pay its own expenses incurred in negotiating, executing, stamping and registering this document.

26.10 Giving Effect to this Document

Each party must do, and must ensure that its employees and agents do, anything (including execute any document) that the other party may reasonably require to give full effect to this agreement.

26.11 Waiver of Rights

A right may only be waived in writing, signed by the party giving the waiver, and:

- (a) no other conduct of a party (including a failure to exercise, or delay in exercising, the right) operates as a waiver or otherwise prevents the exercise of the right;
- (b) a waiver of a right on one or more occasions does not operate as a waiver of that right if it arises again; and
- (c) the exercise of a right does not prevent any further exercise of that right or of any other right.

26.12 Operation of Indemnities

- (a) Each indemnity in this agreement survives the expiry or termination of this agreement.
- (b) A party may recover a payment under an indemnity in this agreement before it makes the payment in respect of which the indemnity is given.

26.13 Consents

Where this agreement contemplates that WW may agree to or consent to something (however it is described), WW may:

- (a) agree or consent, or not agree or consent, in its absolute discretion; and
- (b) agree or consent subject to conditions, unless this document expressly contemplates otherwise.

26.14 Non-merger

The rights of the parties do not merge at the date of termination or completion of the Development Works.

26.15 Inconsistency with Other Documents

If this agreement is inconsistent with any other document or agreement between the parties, this agreement prevails to the extent of the inconsistency.