

# STANDARD CONDITIONS Development Agreement



**WESTERNPORT**  
WATER™

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# 1. Standard Conditions

## Definitions

In this Agreement the terms and words have the following meaning unless otherwise indicated expressly or by context:

<b>Acceptance Form</b>	The acceptance form set out as Appendix 1 to the Letter of Offer, as completed and signed by the Owner (or by the Developer on behalf of the Owner).
<b>Acceptance of Works Certificate</b>	Acceptance of Works Certificate means a letter issued by Westernport Water once it is satisfied that the Development Works have been satisfactorily completed as outlined in the Development Agreement. This signifies the beginning of operation of new assets by Westernport Water.
<b>Accredited Consultant</b>	The consulting engineer stated in the Acceptance Form (or such other consulting engineer as approved by Westernport Water from time to time) who must be accredited by Westernport Water to undertake the design and undertake the supervision of the construction of the Works and various other actions or functions specified in this Agreement.
<b>Accredited Contractor</b>	A contracting entity which must be accredited by Westernport Water to undertake the Works and various other relevant actions or functions specified in this Agreement.
<b>Act</b>	<i>Water Act 1989.</i>
<b>Addendums</b>	Additions to the various design and construction standards, including various Westernport Water Standards, prepared and adopted by Westernport Water from time to time and available on its website.
<b>Agreement</b>	The agreement entered into by Westernport Water and the Owner/Developer for the carrying out of the Works which is described as the 'Development Agreement' in the Letter of Offer and which is deemed to include the Acceptance Form, the Letter of Offer, this Development Agreement and the Land Development Manual.
<b>As Constructed Information</b>	Documents which the Owner/Developer must procure that the Consultant prepares, verifies and submits (electronic and/or hard copy) to Westernport Water as per Appendix 6 of the Land Development Manual.
<b>Audit</b>	A systematic and independent examination to determine whether quality activities and related results comply with planned arrangements and whether these arrangements are implemented effectively and are suitable to achieve objectives.
<b>Asset Transfer</b>	The transfer of ownership of the relevant part or all of the Works to Westernport Water as provided in this Agreement.
<b>Build Over Approval</b>	Consent to build over or within easements or assets of Westernport Water in accordance with Section 148 of the Act.
<b>Certificate of Completion</b>	Certificate of Completion is the certificate issued when Westernport Water is satisfied that the Development Works, all Westernport Water services and conditions stipulated in Development Agreement and any defect notified to the Owner/Developer, are complete.

Charges	Any fee, cost, invoice, levy or charge to be paid by the Owner to Westernport Water in respect of the Development.
Claim	Includes any claim, action, demand or proceeding (including by way of contribution or indemnity) against Westernport Water.
Competent Contractor	A prudent, qualified, competent and professional contractor experienced in performing work of a similar size, nature and complexity to the Works.
Conference	Has the meaning assigned to that term in Clause 23.
Consent to Statement of Compliance	The notice issued by Westernport Water to a Responsible Authority that it consents to the issuing of Statement of Compliance (SOC) under Section 21 of the <i>Subdivision Act 1988</i> with respect to a Development incorporating a Subdivision.
Consultant	The Accredited Consultant for this Agreement.
Construction Contract	The contract between the Contractor and the Owner or the Developer (as the context requires).
Contractor	The Accredited Contractor for this Agreement.
Customer Charter	The customer charter prepared by Westernport Water pursuant to the requirements of the Essential Services Commission.
Defects Liability Period	The period specified in the Particulars (as extended pursuant to Clause 17) within the Standard Conditions after Westernport Water issues Statement of Compliance Certificate (SOC).
Design	The detailed engineering design of the Works which the Owner/Developer must procure is prepared by the Consultant to the satisfaction of Westernport Water.
Design Package	Design certification documents required by Westernport Water which the Owner/Developer must procure that the Consultant submits to Westernport Water prior to the commencement of the Works, including, but not limited to: a) Design certification list; b) Plan of Subdivision (if any); c) Design plans; d) Estimated costs of construction of Works; and Creation of third party easement documentation (if applicable).
Developer	The person, if any, so described in the Particulars and deemed to include any party other than the Owner who is responsible for or involved in the Development including via funding, a joint venture with the Owner or in any other way which, in the opinion of Westernport Water, fits the description of the Developer.
Development	The development of the Land identified in the Particulars and includes the Works.
Development Agreement	These Westernport Water Standard Conditions.
Dispute	Has the meaning assigned to that term in Clause 23.
ESC	The Essential Services Commission. A body established under the <i>Essential Services Commission Act 2001</i> .
Existing Westernport Water Assets	Has the meaning assigned to that term in Clause 22.

Government Agency	<p>Includes:</p> <ul style="list-style-type: none"> <li>a) Referred Authorities;</li> <li>b) government or government department or other body; or</li> <li>c) a governmental, semi-governmental or judicial person; or</li> <li>d) a person (whether autonomous or not) who is charged with the administration or enforcement of any Regulation.</li> </ul>
GST	The goods and services tax within the meaning of the <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth).
Insolvency Event	<ul style="list-style-type: none"> <li>a) In respect of a party that is a corporation: <ul style="list-style-type: none"> <li>i. a receiver, receiver and manager, trustee, other controller as defined in section 9 of the <i>Corporations Act 2001</i> (Cth), or similar official, is appointed over any of the assets or undertaking of the party;</li> <li>ii. the party suspends payment of its debts generally; the party is or becomes unable to pay its debts when they are due, or is or becomes unable to pay its debts, or is presumed to be insolvent within the meaning of the <i>Corporations Act 2001</i> (Cth);</li> <li>iii. the party enters into or resolves to enter into any arrangement, composition or compromise with, or assignment for the benefit of, its creditors or any class of them;</li> <li>iv. the party ceases to carry on business or threatens to cease to carry on business;</li> <li>v. a resolution is passed, or any steps are taken to appoint, or to pass a resolution to appoint, an administrator; or</li> <li>vi. an application or order is made for the winding up or dissolution of the party, or a resolution is passed or any steps are taken to pass a resolution for the winding up or dissolution of the party, otherwise than for the purpose of an amalgamation or reconstruction that has the prior written consent of the other party;</li> </ul> </li> <li>b) In respect of a party who is an individual, the party becomes bankrupt or enters into any arrangement or composition with his or her creditors or proposes to do so.</li> </ul>
Land	The land described in the Particulars.
Latent Condition	<p>Site Conditions which are discovered on the Site and the presence of which</p> <ul style="list-style-type: none"> <li>a) as a matter of fact, were not within the knowledge of the Owner, the Contractor, the Consultant or the Developer prior to the date of the Acceptance Form; and</li> <li>b) could not have been anticipated by a Competent Contractor at the date on which it executed the Construction Contract if such contractor had: <ul style="list-style-type: none"> <li>i. examined all information made available in writing by the Owner, the Developer, the Consultant and Westernport Water to the Contractor for the purpose of tendering and prior to execution of the Construction Contract;</li> <li>ii. examined all information relevant to the risks, contingencies and other circumstances having an effect on the tender and obtainable by the making of reasonable enquiries;</li> <li>iii. inspected the Site and its surroundings,</li> </ul> </li> </ul> <p>but does not include the effects of inclement weather or the availability and condition of access to the Works.</p>



Letter of Offer	The letter issued by Westernport Water to the Owner or the Developer in respect of the Works.
Manual	Westernport Water's Land Development Manual (as may be updated from time to time).
New Customer Contribution	Has the meaning as specified in the Price Determination and includes a Scheduled Charge or Non-Scheduled Charge.
Non-Scheduled Charge	Has the meaning specified in the Price Determination.
Notice of Dispute	Has the meaning assigned to that term in Clause 23.
OH&S	Occupational Health and Safety.
OH&S Laws	The <i>Occupational Health and Safety Act 2004 (Vic)</i> .
OH&S Regulations	All Regulatory requirements concerning OH&S, including, without limitation: a) the <i>OH&amp;S Act 2004</i> ; b) the OH&S Regulations; c) the <i>Dangerous Goods Act 1985 (Vic)</i> and all regulations made under that Act; and d) the <i>Equipment (Public Safety) Act 1994</i> and all regulations made under that Act.
Owner	The party so described in the Particulars.
Particulars	The project specific information for this Agreement as set out in Appendix 2 to the Letter of Offer.
Permits	All applicable permits that the Owner is responsible for obtaining in order to lawfully and properly carry out the Works which will be deemed to include (without limitation): a) any work permit Westernport Water requires to permit the Works to be undertaken; b) any Planning Permission; c) all heritage permits required by any Government Agency in respect of the Works; d) all cultural permits required by any Government Agency in respect of the Works; and e) all environmental permits required by any Government Agency in respect of the Works.
Planning Permission	Any relevant planning permit or other planning permission pursuant to a municipal planning scheme and the <i>Planning and Environment Act 1987 (Vic)</i> .
Practical Acceptance of the Works	Means that stage of the Works when the conditions set out in Clause 14.1 have been satisfied and Westernport Water has issued an Acceptance of Works Certificate.
Preferred Material List	Document required listing material preferred by Westernport Water to be used in the Works.
Price Determination	The water price review Westernport Water determines as approved by the ESC from time to time.
Private Land	Land that is not a public road or land owned by the Owner, through which Westernport Water's assets will pass or be situated when the Works or the Development are completed.

Private Land Owner	The owner of Private Land.
Qualifying Cause of Delay	Any: a) breach of this Agreement by Westernport Water; or b) act or omission of Westernport Water or its consultants or agents; which the Owner/Developer can demonstrate directly causes a delay in the completion of the Works.
Referral Authority	An authority or organisation that planning applications and subdivision plans are referred to pursuant to the <i>Planning and Environment Act 1987</i> and the <i>Subdivision Act 1988</i> .
Regulation	Any law of Victoria (including common or customary law and any equity judgment), all State and Federal Acts of Parliament, orders, regulations, by-laws, ordinances or any other legislative or regulatory measure, and includes any subsequent amendment, modification or re-enactment of them.
Reimbursement Works	Any part or all of the Works, as specified in Particulars, the cost of which is subject to reimbursement by Westernport Water as provided in this Agreement.
Reimbursement Amount	The amount which Westernport Water will reimburse in respect of the Reimbursement Works, an estimate of which is included in Particulars.
Scheduled Charge	Has the meaning specified under Price Determination.
Security	The cash or bond or guarantee specified in the Particulars to be provided by the Owner/Developer to Westernport Water in accordance with this Agreement or the amount held by Westernport Water in accordance with Clause 18.2.
Site	The part of the Land on which the Works are being carried out.
Site Conditions	All physical, climatic and atmospheric conditions and characteristics of the Site whether on, in, above or below the surface of the Site.
Standards	Includes: a) the Westernport Water Standards; and b) any other code, standard or requirements adopted by Westernport Water and advised to the Owner/Developer or Consultant from time to time as applying to the Works.
Statement of Compliance	The statement issued by a Responsible Authority indicating that all conditions of a planning permit for a Subdivision have been met.
Subdivision	The division of land into two (2) or more lots (or a reserve), which can be sold or transferred separately.
Tapping	A water service pipe connecting Westernport Water's main to a property.
Testing and Commissioning of the Works	The stage at which the Works are connected to Westernport Water's system, tested, completed and commissioned in accordance with this Agreement so as to make use of Westernport Water's system.
Time for Acceptance of the Works	The time specified to achieve Practical Acceptance of the Works as specified in the Particulars.

Westernport Water Standards	<p>The design and construction standards adopted by Westernport Water from time to time which must be complied with in respect of the Works which will be deemed to include:</p> <ol style="list-style-type: none"> <li>Westernport Water Supplement to Water Supply Code of Australia, ie WSA 03-2011-3.1, Melbourne Retail Water Agencies Edition, Version 2.0;</li> <li>Addendum to Sewer Code WSA 02-1999: <ul style="list-style-type: none"> <li>Part 1 – Design</li> <li>Part 2 - Materials</li> <li>Part 3 - Standard Drawings</li> <li>Part 4 - Construction</li> </ul> </li> <li>The Sewage Pumping Station Code of Australia, WSA 04-2001;</li> <li>Drafting Specification for Drawings produced for Westernport Water;</li> <li>Wastewater Pump Station Design Requirements; and</li> <li>To the extent not set out above, all standards referred to in Section 5 of the Manual.</li> </ol>
Westernport Water Systems	The water and sewerage systems of Westernport Water.
Works	The works to be designed and constructed under this Agreement as further described in the Particulars.

## Interpretation

The following rules apply in interpreting this Agreement, except where the context makes it clear that a rule is not intended to apply:

- Headings are for convenience only and do not affect interpretation.
- A reference to 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.
- A reference to a schedule, annexure or a description of the Development Agreement or the Manual forms part of this Agreement.
- A reference to a party in this Agreement includes a successor in title, permitted substitute or a permitted assign of that party.
- A reference to 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.
- A reference to anything, including a right, obligation or concept, includes each part of it.
- A singular word includes the plural and vice versa.
- A word which suggests one (1) gender includes the other genders.
- If a word is defined, another part of speech has a corresponding meaning.
- If an example is given of anything such as by saying it includes something else, the example does not limit the scope of that thing.





## 2. Owner and Developer

- 2.1 If the Owner is not the Developer then the Owner must ensure that the Developer is provided with a copy, and is bound to comply with the requirements, of this Agreement and the Manual.
- 2.2 References in this Agreement to the 'Owner' shall collectively mean the Owner and the Developer. The Owner and the Developer shall be jointly and severally liable for all of the obligations and liabilities arising out of this Agreement in respect of the Owner.

## 3. Development Program

The Owner must (to the extent that it is within their control) prove that the Development proceeds as follows:

### Pre-construction:

- 3.1 the Owner shall engage the Consultant for the Works;
- 3.2 the Owner shall complete (or shall procure that the Consultant completes) an application for service requirements to the satisfaction of Westernport Water which shall include those items listed in paragraph 4.1 of the Manual;
- 3.3 the Owner shall submit (or shall procure that the Consultant submits) the Design Package and Design Plans to Westernport Water for approval;
- 3.4 Westernport Water shall notify the Owner whether the Design is acceptable;
- 3.5 the Owner shall submit (or shall procure that the Consultant submits) to Westernport Water the Application for Development Agreement Form;
- 3.6 to the extent that there are any Reimbursement Works, the Owner shall provide (or shall procure that the Consultant provides) details of the

estimated Reimbursement Amount for approval by Westernport Water;

- 3.7 the Owner shall execute the Acceptance Form;
- 3.8 the Owner shall engage an Accredited Contractor as the Contractor for the Works;

### Construction:

- 3.9 the Owner shall procure that construction of the Works;
- 3.10 the Owner shall procure that commissioning of the Works;
- 3.11 the Owner shall procure that obtaining and registering at Land Registry, of any easements or reserves, on Private Land (and on the Land if the Development does not include a Subdivision), to secure Westernport Water 's interest in any assets Westernport Water requires;
- 3.12 the Owner shall procure that provision of the As Constructed Information to Westernport Water;
- 3.13 in respect of any Reimbursement Works subject to this Agreement, Westernport Water shall pay the agreed Reimbursement Amount costs;
- 3.14 the Owner shall procure that the Works achieve Practical Acceptance by the time for Acceptance of the Works;
- 3.15 for Subdivisions, the Owner shall procure consent to issue of a Statement of Compliance for the Subdivision or relevant stage of Subdivision;

### Post Construction:

- 3.16 Asset Transfer;
- 3.17 Defects Liability Period; and
- 3.18 Final Acceptance.

## 4. Appointment of Consultant and Contractor

- 4.1 The Owner will engage the Consultant to design and supervise the Works. The Owner will appoint the Contractor to carry out the Works.
- 4.2 Appointment of the Consultant and the Contractor shall not relieve the Owner of any liability or obligation arising out of this Agreement and the Owner shall indemnify Westernport Water for any and all losses, costs, damages and expenses suffered or incurred by Westernport Water arising out of any act or omission of the Consultant or the Contractor.

## 5. Design Information and Permissions

- 5.1 The Owner must ensure that the design and workmanship of the Works is carried out in accordance with:
  - 5.1.1 the Design;
  - 5.1.2 the Standards;
  - 5.1.3 any written direction of Westernport Water; and
  - 5.1.4 all relevant Regulations.
- 5.2 To the extent that there is any inconsistency or discrepancy amongst the documents specified in Clause 5.1, then the inconsistency or discrepancy will be notified to Westernport Water and resolved in accordance with the highest standards or as otherwise directed in writing by Westernport Water.
- 5.3 Prior to submission of the Design, the Owner shall ensure that the Designs have been certified by the Consultant or an accredited third party. The Owner shall submit the Design to Westernport Water for approval in accordance with the requirements set out in this Agreement.

- 5.4 Westernport Water may review the Design and advise the Owner in writing within a reasonable time whether it:

- 5.4.1 has approved the Design;

- 5.4.2 requires amendments to any part of the Design (in which case it shall detail the amendments it requires); or

- 5.4.3 rejects the Design.

- 5.5 Where Westernport Water has requested amendments to the Design under Clause 5.4.2 or rejected the Design under 5.4.3, the Owner shall resubmit revised Design to Westernport Water within 15 days of Westernport Water's notification of its decision and the process set out in Clauses 5.3 and 5.4 and this Clause 5.5 shall be repeated until such time as the Design is approved by Westernport Water. Nothing under Clauses 5.3 or 5.4 or this 5.5 shall amount to a Qualifying Cause of Delay and the Owner shall not be entitled to make any claim arising out of Clause 5.3 or this Clause 5.5.

- 5.6 After the Design has been approved, the Owner shall supply a copy of the approved Design and Westernport Water shall endorse the Design with the words "Issued for Construction".

- 5.7 The Owner shall supply Westernport Water with a copy (in pdf format and approved digital format AutoCAD version, or DXF format) of the approved Design for their records.

- 5.8 The Owner shall ensure that all necessary Planning Permissions, Permits, statutory and other permissions in respect of the Works, have or will be obtained prior to commencement of the Works and copies of the same have been provided to Westernport Water. Westernport Water is not liable to the Owner (and the Owner releases Westernport Water from any such liability) for any delay or failure to provide a suitable Planning Permission arising out of Westernport Water's review and decision (including the imposition of conditions) arising out of any Planning Permission.

- 5.9 The submission to, receipt and consideration of, or approval of an application, or endorsement of the Design, or inspection of any stage of the Works by Westernport Water does not amount

to Westernport Water approving, consenting to, ratifying or otherwise accepting liability in respect of the Design or permission or construction of the Works.

## 6. OH&S

- 6.1 The Owner is responsible for all OH&S at the Development. The Owner shall, and shall ensure that the Consultant, the Contractor and any other party engaged by it or another third party in connection with the Works, comply with the OH&S Laws and any other legal requirements with respect to OH&S, including all relevant compliance codes approved under Section 149 of the *OH&S Act 2004*. The Owner will ensure that any party engaged by it in connection with the Works holds the relevant OH&S expertise.
- 6.2 Prior to commencement of the Works and at any time during the Works, the Owner shall provide Westernport Water with such information in respect of its OH&S plan as Westernport Water requests.
- 6.3 The parties acknowledge and agree that Westernport Water has no supervisory capacity or powers in relation to the OH&S of the Development and the carrying out of the Works.
- 6.4 To the extent permitted by law, the Owner shall indemnify, keep indemnified and hold harmless, Westernport Water from and against any claim, proceedings, liability, damages, penalties, losses, expenses or costs (including, without limitation, all legal costs on a full indemnity basis) against or incurred by Westernport Water arising out of or in any way connected to any breach by the Owner or any person engaged by the Owner, or the Developer of its or their obligations under the OH&S Laws.

## 7. Site Management Plan

Prior to commencement of the Works the Owner shall provide Westernport Water with a Site Management Plan. The Owner will ensure that the Site Management Plan is kept current throughout the

Works in particular a revised copy of the same shall be reissued prior to the Testing and Commissioning of the Works. The Owner shall notify Westernport Water of any material deviations required to the original Site Management Plan during the course of the Works.

## 8. Time for Commencement and Completion of the Works

- 8.1 The Owner shall not commence the Works until such time as it has satisfied all pre-conditions to commencement of the Works under this Agreement and the Manual.
- 8.2 Subject to Clause 8.1, construction of the Works will commence within the period specified in the Particulars. The Works shall be completed by the Time for Acceptance of Works, or such other period approved by Westernport Water, in writing under the terms of this Agreement.
- 8.3 For the purpose of this Agreement, completion of construction means the last to occur of the time at which Westernport Water issues an Acceptance of Works Certificate and (if relevant) a Consent to Statement of Compliance.
- 8.4 If the construction of the Works is either not commenced or not completed within the time required by this Agreement, Westernport Water may (at its absolute and unfettered discretion):
  - 8.4.1 end this Agreement;
  - 8.4.2 extend the time for either commencement or completion of the Works;
  - 8.4.3 require the parties enter into a New Development Agreement and oblige the Owner to pay Westernport Water any additional administration fees; or
  - 8.4.4 impose any reasonable additional requirements, including additional payments, amended Design requirements

and changes to the nature of the construction of the Works.

8.5 Prior to Acceptance of Works, the Owner will be entitled to an extension of time to complete the Works provided that the Owner:

8.5.1 is delayed in reaching Acceptance of Works due to a Qualifying Cause of Delay; and

8.5.2 gives Westernport Water, promptly but in any event within 14 days of when the Owner should reasonably have become aware of the occurrence of the Qualifying Cause of Delay, a written request for an extension of time evidencing the facts of and the cause of the delay to the completion of the Works.

8.6 Westernport Water shall within 21 days of receipt of the Owner's claim for an extension of time grant a reasonable extension of time and give written notice of the extension to the Owner. If Westernport Water does not grant the full extension of time claim, Westernport Water shall notify the Owner of its decision setting out the rationale and extension of time accepted by Westernport Water within the 21 day period.

8.7 The Owner shall take all reasonable steps to prevent any delay and to overcome or minimise the occurrence of such delay including for a Qualifying Cause of Delay by providing program updates, early notice and prompts to Westernport Water.

## 9. Carrying Out of the Works

9.1 The Owner shall ensure that the Works are carried out in accordance with the Accepted Designs and the Standards.

9.2 The Owner shall ensure that Works are carried out by the Contractor in a good and workmanlike manner and that the Contractor proceeds diligently in the carrying out of the Works.

9.3 During construction of the Works, Westernport Water may (at its absolute and unfettered discretion):

9.3.1 carry out such inspections of the Works as, in the circumstances, Westernport Water deems fit;

9.3.2 Audit the Works; and

9.3.3 advise the Owner if Westernport Water becomes aware of any failure to comply with the requirements of Westernport Water, including any Audit requirements, in relation to the Works. This advice shall include but not be limited to issuing any "Corrective Action Request" in accordance with the terms of the Manual.

9.4 The Owner shall take all reasonable precautions to minimise any disturbance, noise, nuisance and inconvenience to others including but not limited to any Private Land Owners, Westernport Water and Government Agencies and the Owner shall take all reasonable precautions to prevent any trespass onto the adjoining land in connection with the carrying out of the Works.

9.5 If Westernport Water notifies the Owner that it wishes to vary the Design or Standards specified then the Owner shall notify the Consultant and Contractor of the requested variation. The Owner shall procure that the Consultant and the Contractor shall provide the Owner with a revised price and program for implementing such variation. The Owner will share this information promptly with Westernport Water. If the variation alters the Reimbursement Amount the Owner will not instruct the variation until such time as it has had written confirmation from Westernport Water to do so in accordance with Clause 16.2.

9.6 If the Owner wishes to vary the Design or Standards or receives a request from the Consultant or Contractor to vary the Design or the Standard, the Owner shall make a written request to Westernport Water specifying the details of the variation proposed and provide revised Design Plans and any other information as required by Westernport Water. Westernport Water shall (at the cost of the Owner) review the proposed variation and notify the Owner of

its decision which shall be final. In the event that no response is received by the Owner from Westernport Water within 14 days of submission of the proposed variation, the variation will be deemed to have been rejected by Westernport Water.

9.7 If the Works are not completed strictly in accordance with:

9.7.1 the Design (and authorised variations thereto); and

9.7.2 the Standards; and

9.7.3 any other requirements specified in this Agreement,

then Westernport Water may require all or any part of the Works to be removed and to be replaced with Works in accordance with the requirements of this Clause 9.7. Such further works shall be at the sole cost of the Owner.

9.8 Any connections to Westernport Water's system shall be undertaken by an Accredited Contractor at the Owner's cost with all the required safety equipment such as confined space entry.

9.9 The Testing and Commissioning of the Works is not to be undertaken unless the Owner has:

9.9.1 given written notice to all customers;

9.9.2 complied with all requirements of the Manual in relation to connection including lodging the requisite forms within the stipulated timeframes; and

9.9.3 ensured that the Testing and Commissioning of the Works is directly supervised by Westernport Water.

9.10 Prior to commencement of the Testing and Commissioning of the Work, the Owner shall give Westernport Water not less than five (5) days' notice of its intention to carry out the Testing and Commissioning of the Works.

9.11 It is a condition precedent to the Owner's right to carry out the Testing and Commissioning of the Works that the Owner procures that the Contractor has made full preparation for the Testing and Commissioning of the Works.

The preparation shall include liaison with Westernport Water's Engineering and Construction team and documentation of a comprehensive works program and work method statements. The Owner shall ensure that it has afforded Westernport Water the right to inspect the site of the Testing and Commissioning of the Works and that it has provided Westernport Water with such information as it may reasonably require for the Testing and Commissioning of the Works.

9.12 The Owner shall not proceed with the Testing and Commissioning of the Works unless it has received prior written confirmation from Westernport Water that it is satisfied that the Works are ready to proceed to such testing and commissioning.

9.13 Westernport Water shall have no liability to the Owner, and the Owner shall not be entitled to make any claim in respect of any delay to the Works or the Testing and Commissioning of the Works arising out of any delay by Westernport Water in approving the Testing and Commissioning of the Works.

9.14 Where the Works interface with an existing Westernport Water asset, the Owner shall procure that the Works and the Testing and Commissioning of the Works are carried out in such a manner as to minimise the effect on the continuity of operation or availability of any existing services provided by Westernport Water. The Owner shall indemnify Westernport Water in respect of any losses, costs, charges or expenses suffered or incurred by Westernport Water arising out of the Owner or the Contractor's failure to minimise the affect or exercise the appropriate standard of care when carrying out the Testing and Commissioning of the Works.

9.15 Where the Testing and Commissioning of the Works necessitates an effect on the continuity of operation or availability of existing services, the Owner shall submit full details of the proposed approach and timing of the Testing and Commissioning of the Works to mitigate the impact on the normal operation of the plant in accordance with the requirements of the Manual.



9.16 Notwithstanding any other provision of this Agreement, the Owner shall not commence the Testing and Commissioning of the Works unless it has provided a written notice to Westernport Water confirming that it has ensured that all necessary equipment, tools and materials required to complete the particular task are available at the site of the Works.

9.17 All costs incurred in the Testing and Commissioning of the Works, including but not limited to preparation of work method statements and the supply and construction of temporary facilities shall be borne by the Owner.

9.18 Westernport Water will manage the shutdowns and provision of temporary services, at the Owner's cost, during any connection to existing water, recycled water and sewerage system. The cost of temporary services will be reimbursed prior to the Works.

9.19 The Owner is responsible for the immediate excavation, safety and security of the site and the integrity of adjoining structures until Acceptance of Works.

9.20 The Owner will indemnify and keep indemnified and hold harmless Westernport Water in respect of any claim by a third party relating to any injury to (or death of) any person and any damage to any property arising out of the carrying out of the Works.

9.21 If at any time during the course of the Works the Owner sub-contracts any part of the Design or the Works to any third party who, in the reasonable opinion of Westernport Water, is either unqualified or inappropriate to carry out the Design, supervision or the construction of the Works, Westernport Water may, in its absolute discretion, refuse to do any or all of the following:

9.21.1 connect the Works to Westernport Water's system;

9.21.2 issue an Acceptance of Works Certificate;

9.21.3 consent to the Asset Transfer; or

9.21.4 where relevant, issue the Consent to Statement of Compliance.

## 10. Payment

10.1 The parties acknowledge that the Charges detailed in the Particulars are estimates only and are subject to final calculation and adjustment in accordance with this Clause 10.

10.2 Payments by the Owner to Westernport Water must be made:

10.2.1 in the case of Charges that can be calculated prior to Westernport Water providing its consent to issue a Statement of Compliance, issuing Acceptance of Works or the Asset Transfer, then prior to, and as a pre condition to, those consents;

10.2.2 in the case of any other Charges, within thirty (30) days of receipt by the Owner of a request or invoice for payment; and

10.2.2 all payments must be made by cash, bank cheque or credit card.

10.3 The Owner acknowledges and agrees that Westernport Water may withhold any consent or approval pending receipt of any outstanding payment to it under this Agreement.

10.4 Immediately prior to any payment falling due under this Agreement, Westernport Water will make a final calculation in relation to the relevant Charges, which shall be subject to the following:

10.4.1 any amount payable shall be the amount calculated at the time of the actual payment, and the parties acknowledge and agree that the Charges of Westernport Water may vary from time-to-time;

10.4.2 if any amount already paid by the Owner to Westernport Water proves to be greater than the amount attributable to the Works, then the excess amount shall be credited to other fees or reimbursed in full, as applicable, and at Westernport Water's discretion; and

10.4.3 if any amount already paid by the Owner to Westernport Water proves to be less

than the amount required to be paid because the cost of the Works was greater than anticipated or fees have increased, then the Owner must pay that additional amount.

10.5 Failure by the Owner to pay any amount owing to Westernport Water by the date specified for payment of that amount, shall entitle Westernport Water (at its absolute discretion) to do any one (1) or more of the following:

10.5.1 in the case of amounts owing before Acceptance of Works, to refuse its consent to issue a Statement of Compliance or the Testing and Commissioning of the Works or the issue of Acceptance of Works;

10.5.2 in the case of amounts owing after Acceptance of Works, to extend the Defects Liability Period and refuse to release the Security;

10.5.3 to call upon the Security; and

10.5.4 to sue on the amounts as debts due and payable.

## 11. Access to Development Information

11.1 The Owner must provide Westernport Water with, or make arrangements, through third parties if necessary, to provide Westernport Water complete access at all reasonable times to:

11.1.1 any information, plans or materials relating to the Development; and

11.1.2 any information, plans or materials relating to the Land (including Private Land and other land that is not owned by the Owner) upon which the Works exist or will exist,

and, upon execution of the Acceptance Form, the Owner irrevocably provides unconditional consent to Westernport Water having access to

all information relating to the Development as it relates to or impacts upon, the Works.

## 12. Consultant and Contractor

12.1 The Owner must engage the Consultant to carry out the Design and to supervise the construction of the Works. The Consultant must be an Accredited Consultant.

12.2 The Owner must ensure that the terms of the Consultant's engagement obliges the Consultant to:

12.2.1 carry out the Design, or if the Consultant has not carried out the Design, the Consultant has unequivocally adopted and endorsed the Design of a prior Accredited Consultant for the purpose of this Agreement;

12.2.2 be, and continue to be, a suitably-qualified and experienced designer;

12.2.3 exercise the due skill, care and diligence in performing its services and carrying out the Design as would be expected for a Consultant performing services and design for a project of a similar size, scale and nature;

12.2.4 perform its services and the Design in accordance with the Standards so that the Works are fit for their stated purpose;

12.2.5 ensure the Works are carried out with materials on the Preferred Material List, or otherwise approved by Westernport Water, and that where at any time the Design or the form of, or materials used in, the construction of the Works, due to any reason, changes, or is required to change, it will notify the Owner and any third party including Westernport Water (in writing) immediately upon becoming aware of such change;

12.2.6 comply with the requirements of Westernport Water and Private Land Owners and the terms of any third party agreements provided to it (including this

- Agreement) in respect of the Development;
- 12.2.7 inspect the Works as required to verify that the Works are being constructed in accordance with the Design and all other requirements contemplated by this Agreement;
- 12.2.8 provide an irrevocable, perpetual and royalty free licence (with the right to sub-licence) to the Owner and any third party, including Westernport Water, to use any Design Plans, the Design Package and any other drawings, specifications or other information prepared by the Consultant for any purpose in connection with the Works including, the subsequent maintenance, servicing or alteration to the Works;
- 12.2.9 ensure that the Design Package and any other drawings, specifications or other information prepared by the Consultant are free from any Moral Rights or claim under Part IX of the *Copyright Act 1968* (Cth), or any other restriction;
- 12.2.10 indemnify the Owner and any third party, including Westernport Water, in respect of any loss, costs, charges or expenses incurred by the Owner or any third party, including Westernport Water, arising out of its breach of the obligations referred to in Clause 12.2.9 or 12.2.10;
- 12.2.11 acknowledge that Westernport Water has relied on and continues to rely on the professional skills of the Consultant;
- 12.2.12 not assign, subcontract, transfer the terms of its engagement without the express written consent of the Owner;
- 12.2.13 keep confidential and not disclose any information provided to the Consultant in connection with the Works even after completion of the Works or if earlier, termination of the Consultant's engagement;
- 12.2.14 provide to the Owner and Westernport Water documents as required certifying the Works have been or will be carried out in a proper and professional manner, in accordance with:
- 12.2.14.1 the Design;
- 12.2.14.2 the Standards;
- 12.2.14.3 the As Constructed Information;
- 12.2.14.4 all design and construction specifications; and
- 12.2.14.5 any reasonable requests of Westernport Water; and
- 12.2.15 indemnify, keep indemnified and hold harmless any third parties, including Westernport Water, in respect of:
- 12.2.15.1 any cost to a third party, including Westernport Water, in repairing any Design defect in the Works or damage caused by the Design of the Works;
- 12.2.15.2 any claim by a third party, including Westernport Water, relating to any damage to person or property, arising from any defect in the Design of the Works or breach of any third party agreements (including this Agreement) by the Consultant, provided in the case of established negligence on the part of any third party, including Westernport Water, any liability of the Consultant shall be reduced proportionally to the extent of the effect of that negligence; and
- 12.2.16 act independently and impartially in the certification of the proper and workmanlike completion of the Works.
- 12.3 The Owner shall ensure that under the terms of the Consultant's engagement it has a right to approve the key persons appointed by the Consultant to undertake any aspect of the Works. The Owner will provide details of the key persons to Westernport Water. If Westernport Water is not satisfied for any reason with the key persons of the Consultant, including qualifications or experience,

Westernport Water will communicate this to the Owner and the Owner shall request the removal or alteration of the key persons. If the Owner fails to comply with this Clause 12.3, Westernport Water may:

- 12.3.1 refuse to provide its next relevant consent to allow the Works to progress; and
- 12.3.2 request that the Owner imposes reasonable additional requirements in respect of checking any aspect of the Works undertaken by or under the supervision of that key person.

12.4 The Owner shall not terminate or suspend the Consultant or the Consultant's key person's engagement without Westernport Water's consent.

12.5 Subject Clause 12.4, if the Consultant ceases to be the Consultant for the Works, the Owner must appoint another Accredited Consultant to take on the responsibility as Consultant for the balance of the Development and Works including the Defects Liability Period. The Owner must ensure that the subsequent Consultant enters into terms of agreement in accordance with this Clause 12. The Owner agrees that the Works will not proceed unless or until a new Consultant is appointed and that new Consultant has executed terms of engagement in accordance with this Clause 12.

**Contractor:**

12.6 The Owner warrants that:

- 12.6.1 it will only appoint an Accredited Contractor to undertake the Works;
- 12.6.2 the Works will not commence until the Owner notifies Westernport Water (in the required form) of the Contractor's appointment;
- 12.6.3 in any case where the Contractor ceases to be the Contractor for the Works, it will advise Westernport Water in writing and until another Accredited Contractor is contracted for the balance of the Works, the Works must not proceed unless or until a new Contractor is appointed and that new Contractor has executed terms

of engagement in accordance with this Clause 12.

12.7 The Owner must ensure that the terms of the Construction Contract oblige the Contractor to:

- 12.7.1 carry out the Works in a good and workmanlike manner and to proceed diligently in the carrying out of the Works;
- 12.7.2 be, and continue to be, a suitably-qualified and experienced contractor with the requisite experience for projects of this size, scale and nature;
- 12.7.3 perform the Works in accordance with the Standards;
- 12.7.4 procure that the Works are fit for their stated purpose;
- 12.7.5 ensure the Works are carried out with materials on the Preferred Material List or approved by Westernport Water;
- 12.7.6 comply with the requirements of any Planning Permissions, Permits, statutory and other permissions in respect of the Works and the requirements of Westernport Water and any third party agreements provided to it including this Agreement;
- 12.7.7 provide a copy of the trench notification, obtained for the Works from the Department of Labour, to the Owner and Westernport Water;
- 12.7.8 allow any third parties including but not limited to Westernport Water and their Contractors access to the Site for the purpose of inspection and for any concurrent works required to be carried out to facilitate Testing and Commissioning of the Works;
- 12.7.9 carry out the Works in accordance with the *OH&S Act 2004*; and OH&S Laws;
- 12.7.10 construct the Works in accordance with the Design and all other requirements contemplated by this Agreement;

- 12.7.11 not assign, subcontract, or transfer the Construction Contract without the express written consent of the Owner;
  - 12.7.12 keep confidential and not disclose any information provided to the Consultant in connection with the Works even after completion of the Works or if earlier, termination of the Construction Contract; and
  - 12.7.13 acknowledge that it is a pre-condition to Practical Acceptance of the Works that the Contractor has provided the required number of copies of the As Constructed Information to the Owner.
- 12.8 The Owner will provide a list of the Contractor's proposed sub-contractors to Westernport Water at least seven (7) days before the relevant part of the Works to be undertaken by that sub-contractor commences. If, prior to a sub-contractor's commencement of the relevant part of the Works, Westernport Water notifies the Owner that it does not consent to the use of that sub-contractor on the Works then the Owner shall communicate this to the Contractor and an alternate sub-contractor shall be engaged.
- 13.1.4 the policy is with an insurer and otherwise in terms both approved in writing by Westernport Water (which approval shall not be unreasonably withheld); and
  - 13.1.5 the policy is maintained for a period of six (6) years after Practical Acceptance of the Works either as an on-going policy or as run off insurance for the Development or Consultant, or both.
- 13.2 The Owner must ensure that, for the duration of the Development, including the Defects Liability Period, a public liability policy is held by either the Owner or the Contractor, or both, in respect of the Land, the Development and the Works. The policy must:
- 13.2.1 be provided to Westernport Water (that is, a Certificate of Currency and a copy of the policy) prior to and as a pre-condition to the commencement of Works;
  - 13.2.2 note the interests of Westernport Water;
  - 13.2.3 cover the respective rights, interests and liabilities to third parties of the parties from time to time whenever engaged in the Works;
  - 13.2.4 cover the parties' and Westernport Water's respective liability to each other for loss or damage to property and the death of or injury to any person;
  - 13.2.5 be endorsed to cover the use of any construction plant not covered under a comprehensive or third party motor vehicle insurance policy;
  - 13.2.6 provide insurance cover for an amount in respect of any one (1) occurrence of not less than the sum in the Particulars; and
  - 13.2.7 be with an insurer and otherwise in terms both approved in writing by Westernport Water (which approval shall not be unreasonably withheld).

## 13. Insurance

- 13.1 The Owner must ensure that the Consultant takes out and maintains a professional indemnity insurance policy. The Owner must ensure that:
- 13.1.1 the policy is for the amount stated in the Particulars;
  - 13.1.2 a Certificate of Currency is provided to Westernport Water promptly on engaging the Consultant and as a pre-condition to commencement of the Works;
  - 13.1.3 the policy provides cover in respect of the Consultant's Design of the Works and the role of the Consultant in respect of supervising the Works including any role of superintendent under the contract for construction of the Works;



# 14. Procedure for Practical Acceptance of Works

14.1 Despite any provision of this Agreement to the contrary, Practical Acceptance of the Works will not be achieved unless and until the following pre-conditions have been satisfied:

- 14.1.1 the Owner has paid Westernport Water all outstanding Charges;
- 14.1.2 provision to Westernport Water of the As Constructed Design Certification (ACDC) Information in electronic form and otherwise as required by Westernport Water and As Constructed Design Certification (ACDC) Package is accepted by Westernport Water;
- 14.1.3 Westernport Water have been advised in writing of the successful completion of the Testing and Commissioning of the Works;
- 14.1.4 Westernport Water have been advised in writing of any part or parts of the Works that have not been constructed in accordance with the Design;
- 14.1.5 where Reimbursement Works are involved, Westernport Water has agreed the sum which constitutes the Reimbursement Amount;
- 14.1.6 delivery to Westernport Water of the Security required pursuant to Clause 18;
- 14.1.7 any obligations set out in the Manual in respect of Practical Acceptance of the Works have been complied with; and
- 14.1.8 any reserves or easements required on the Land or on any Private Land are transferred to, or registered in favour of, Westernport Water.

14.2 After the As Constructed Information is provided, Westernport Water may require

verification that all of the equipment used for testing was fit for purpose, within calibration limits and that the testing was carried out while the calibration was current. If Westernport Water is not satisfied that the equipment used for testing was satisfactory, Westernport Water may indicate which matters require attention or alteration before Westernport Water issues an Acceptance of Works Certificate. In relation to any additional testing that is identified, Westernport Water may require this to be carried out by any one (1) or more of:

14.2.1 the Consultant or the Owner;

14.2.2 Westernport Water; or

14.2.3 a third party nominated by Westernport Water, and

all costs of such testing shall be borne by the Owner and are payable on demand to Westernport Water.

14.3 After the As Constructed Information is provided, Westernport Water may carry out such testing and inspection of the Works as Westernport Water thinks fit to validate the information provided in the As Constructed Information and indicate which matters require attention or alteration before Westernport Water issues an Acceptance of Works Certificate. In relation to any such testing, Westernport Water may require this to be carried out by any one (1) or more of:

14.3.1 Westernport Water; or

14.3.2 a third party nominated by Westernport Water, and

all costs of such testing shall be borne by the Owner.

14.4 After Practical Acceptance of the Works occurs Westernport Water will:

14.4.1 advise of its consent to Testing and Commissioning of the Works; and

14.4.2 in the case of a Development incorporating a Subdivision, provide its consent to issue a Statement of Compliance for that Subdivision or the relevant stage thereof.

## 15. Asset Transfer

The Asset Transfer to Westernport Water of the relevant Works (or part thereof) as specified in the Particulars, including all rights, title and interest in those Works will occur:

- 15.1 in the case of a Subdivision, upon the issue of a Statement of Compliance for that Subdivision (or its relevant stage) for the Works within or servicing that stage of a Subdivision;
- 15.2 in the case of a Development not incorporating a Subdivision, upon the issue of an Acceptance of Works Certificate by Westernport Water; or
- 15.3 at such other time or upon such other occurrence specified by Westernport Water,  
  
provided that in any case where the issue of a Statement of Compliance occurs more than four (4) months after Practical Acceptance of the Works the Owner must:
- 15.4 notify Westernport Water of this fact at least 14 days before Statement of Compliance is issued; and
- 15.5 undertake any additional tests, cleaning or works that are directed to be undertaken by Westernport Water.

## 16. Reimbursement

- 16.1 In any case where, in respect of the Works, this Agreement makes allowance for a reimbursement of part or all of the cost of the Works by Westernport Water the following applies:
  - 16.1.1 the Reimbursement Works which are the subject of the reimbursement and particulars in relation to same (including the estimated Reimbursement Amount) are set out in the Particulars;
  - 16.1.2 the Reimbursement Amount which is finally calculated and paid may be more or less than the estimated Reimbursement Amount in the Particulars based on the actual cost of the Reimbursement Works;

- 16.1.3 if the estimated Reimbursement Amount exceeds \$150,000.00 (or any other amount specified by Westernport Water) the Owner acknowledges that the Contractor must be appointed through a public tender process or in accordance with requirements specified by Westernport Water; and
- 16.1.4 the Owner must provide to Westernport Water:
  - (a) details (including price) and relevant components of any tender, expression of interest or fee proposal for the construction of the portion of the Works which are the subject of reimbursement;
  - (b) details of any fees to be charged by the Consultant, together with or including any other Consultant or Contractor fees not otherwise provided;
  - (c) a separate list detailing the component parts of the total cost of the Works, identifying the estimated reimbursement; and  
  
after the consideration of same, Westernport Water will advise whether it accepts the estimated Reimbursement Amount and whether the Owner may proceed with the particular Works.

- 16.2 The estimated Reimbursement Amount, upon which Westernport Water has advised the relevant Works may proceed, will be the maximum amount that Westernport Water will pay, unless any increase is first approved by Westernport Water (at its absolute discretion), provided that:
  - 16.2.1 any increase due to a Latent Condition in respect of the particular Works will only be considered if written advice of same is given to Westernport Water within seven (7) days of its discovery;
  - 16.2.2 the Owner acknowledges that any variation to the Works approved by the Owner will not necessarily result in an

approval of any increase in the Reimbursement Amount;

approved by Westernport Water in accordance with Clause 16.

16.2.3 any increase requested in relation to Consultant's costs, or costs other than the actual construction of the Works, must be established by the Owner to be properly attributable to the particular aspect of the Works to which a Reimbursement Amount applies; and

16.2.4 any requested increase will not be considered unless complete and accurate information about the reason for the relevant increase is provided to Westernport Water, to its satisfaction, together with proof that the relevant increase was not due to the negligence, deficient work quality or some matter otherwise within the reasonable control of the Owner, Consultant, or Contractor in respect of the particular Works.

16.3 Upon completion of the Works, and as a pre-condition to payment of any Reimbursement Amount:

16.3.1 the Owner must have provided Westernport Water with accurate and complete details of the final cost of the particular Works, including the Reimbursement Amount, consistent with those considered and approved by Westernport Water under Clause 16.1.1. including, but not limited to, all invoices relating to plant, equipment, materials, Consultant's costs, Contractor's costs and any sub-contractor's costs, as required by Westernport Water;

16.3.2 Westernport Water may, in its discretion, and at its cost, appoint an independent quantity surveyor or similarly-qualified professional to review the requested reimbursement and will withhold any part of any Reimbursement Amount based on the outcome of such an independent assessment; and

16.3.3 the Owner must issue to Westernport Water a valid tax invoice, inclusive of GST, as claim for payment of the Final Reimbursement Amount for the amount

## 17. Defects

17.1 The Defects Liability Period, unless otherwise extended as provided in this clause, shall be for the period stated in the Particulars. The Defects Liability Period shall commence on the date of the Acceptance of Works Certificate, provided:

17.1.1 where repairs are required during the Defects Liability Period; or

17.1.2 Westernport Water considers, in its reasonable opinion, that it is likely that further defects exist and that repairs to and/or replacement of the Works or part of the Works will be required,

the Defects Liability Period will be extended for a period specified by Westernport Water from time to time.

17.2 During the Defects Liability Period the Owner must upon notice from Westernport Water and at the Owner's cost, undertake any repair or replacement of the Works or make good any damage to any person, equipment, fixtures or property caused by any defect in, or failure of, the Works.

17.3 If, during the Defects Liability Period, Westernport Water is required to carry out any necessary replacement, repair or rectification to the Works, or repair any damage to any other property arising out of any defect in the Works, then Westernport Water may:

17.3.1 in the case of an emergency (in the opinion of Westernport Water), act immediately to undertake that relevant repair or replacement, at the Owner's cost; or

17.3.2 if not an emergency, advise the Owner of the necessary repair or replacement (as applicable) and allow the Owner to undertake the relevant repair or replacement within the period of time specified by Westernport Water, and if the Owner fails to undertake such repair or replacement within the relevant period

of time, Westernport Water may undertake such repair or replacement, at the Owner's cost; and

17.3.3 in any case, call upon the Security to meet the cost or likely cost to Westernport Water either before or after Westernport Water undertakes the relevant Works or actions or incurs any relevant expense. The cost of any Works or action undertaken by Westernport Water above the value of the Security will be advised to the Owner and will be a debt due and payable immediately by the Owner to Westernport Water.

17.4 At the end of the Defects Liability Period, Westernport Water may Audit the Works at Westernport Water's expense in accordance with the terms of the Manual. If the Audit identifies any defect or other non-conformance in the Works, or finds that any other aspect of this Agreement is not satisfied, Westernport Water may serve a notice on the Owner in respect of same identifying the "Corrective Action Request" set out in the Manual. The Owner must pay the costs of the Audit and rectify the defects or breaches identified in the notice without delay. If the defects or breaches are not remedied to Westernport Water's satisfaction within a reasonable time, Westernport Water may carry out the necessary rectification works or remedial action and before or after carrying out any such work, call upon the Security to meet the cost, or the likely cost, of doing so.

17.5 At the end of the Defects Liability Period, the Owner must lodge with Westernport Water an End of Defects Liability Verification form signed by the nominated representatives of the Consultant and the Contractor. Provided no defects are identified, Westernport Water will, subject to the Owner having complied with its obligations under this Agreement, issue a Final Acceptance Certificate.

17.6 The Owner agrees to indemnify, keep indemnified and hold harmless Westernport Water from the date of the Asset Transfer in respect of:

17.6.1 any costs suffered or incurred by Westernport Water in repairing any

defect in the Works or damage to the Works arising from such defect;

17.6.2 any claim against Westernport Water relating to any damage to person or property arising from any defect in the design or construction of the Works.

The Owner's obligation to indemnify Westernport Water under this clause will reduce on a proportional basis to the extent that any liability is caused by any negligent act or omission of Westernport Water.

## 18. Security

18.1 The Owner must provide to Westernport Water a Security which must be in the form specified in the Particulars. Where the Security is in the form of a bank guarantee or bond, the form of guarantee/bond must be pre-approved by Westernport Water and must not include an expiry date.

18.2 The Security must be provided to Westernport Water prior to (and as a pre-condition of) Practical Acceptance of the Works being achieved and

18.2.1 where the Works incorporate a reimbursement arrangement and the estimated Reimbursement Amount exceeds 5% of the estimated value of the total Works, Westernport Water may at its discretion agree to the Security to be provided upon the issue of the Acceptance of Works Certificate by way of Westernport Water retaining an amount for Security from the Reimbursement Amount which would otherwise be payable to the Owner;

18.2.2 where the Works incorporate a reimbursement arrangement and Westernport Water will be reimbursing 100% of the total cost of the Works, Westernport Water will withhold payment of 5% of the Reimbursement Amount by way of Security until the end of the Defects Liability Period;

18.2.3 for works where Westernport Water will be reimbursing less than 100% of the total

cost of the Works, Westernport Water will reimburse 100% of the Reimbursement Amount and require payment of 5% Security based on the actual construction cost of the Works with the submission of the As Constructed Information (as per reticulation works listed above).

**18.3 The Security may be called upon by Westernport Water:**

18.3.1 in the event of any failure by the Owner to comply with any of its obligations arising out of this Agreement;

18.3.2 in the event of any other default (including the non-payment of the Charges); and

18.3.3 as otherwise contemplated in this Agreement, and

if at any time, including during the Defects Liability Period, Westernport Water has exercised its right to claim some part or all of the Security under this Clause, the Owner must reinstate the Security to its original amount (or any modified amount specified by Westernport Water) and, if the Owner fails to do so, Westernport Water may terminate this Agreement.

18.4 Subject to this Agreement, at the end of the Defects Liability Period, and after the issue of a Final Acceptance Certificate, Westernport Water shall return the Security to the Owner, less any amount that Westernport Water has already called upon or is entitled to retain pursuant to this Agreement.

## 19. Private Land Owner Consents

19.1 In any case where the Works are located on Private Land or any other land that is not owned by the Owner, the Owner must:

19.1.1 in any case where the Works are located within a road reserve or other public land,

as a pre-condition to commencement of the Works:

- (a) obtain all necessary consents from any Government Agency, public land manager or road management authority, including, where necessary, Westernport Water; and
- (b) obtain any necessary reserve or easement required by Westernport Water in relation to securing the Works.

19.1.2 in the case of any Private Land, as a pre-condition to commencement of the Works:

- (a) obtain all necessary consents; and
- (b) obtain any necessary reserve or easement required by Westernport Water in relation to securing the Works:
  - (i) ensuring such reserve or easement is created and vested in Westernport Water, at the Owner's cost, in favour of Westernport Water or such other person specified by Westernport Water; and
  - (ii) paying all costs of both Westernport Water and the relevant Private Land Owner in respect to the creation of the easement or reserve, including legal costs, valuation fees, Land Title Office fees, mortgagee fees and any compensation payable; and
  - (iii) providing any Certificate Of Title for any reserve created or proof of registration of any easement, prior to Practical Acceptance of the Works; and
  - (iv) ensure that Private Land is reinstated to the same condition as it was prior to the undertaking, or installation of, the Works.



19.2 If any assets are not constructed within either existing easements or reserves, or easements or reserves created or procured by the Owner, the Owner will bear the costs of Westernport Water in acquiring the required interest in the land, or the entirety of the relevant land, to protect the asset.

These expenses include Westernport Water's and the Private Land Owner's legal costs, valuation fees, Land Title Office fees, mortgagee fees and any compensation payable to a Private Land Owner or any other party with an interest in the relevant Private Land or public land. The Owner agrees to indemnify, keep indemnified and hold harmless Westernport Water in respect of any action, claim, costs, legal costs (on a full indemnity basis), compensation, interest and any other amount payable by Westernport Water to a Private Land Owner or any other person having an interest in the relevant land, with respect to an acquisition of that land by Westernport Water.

## 20. Change in Owner

20.1 If the Owner sells part of the Land, prior to the issue of Statement of Compliance for that Subdivision, where the sale is of individual lots from a Plan of Subdivision, the Owner will not be required to disclose this Agreement, however, the Owner's obligations to Westernport Water, including those relating to the Defects Liability Period and indemnities given shall remain unaffected; and

20.2 where the sale is other than the sale of individual lots, the Owner shall disclose this Agreement (and provide a copy of the Development Agreement and the Manual) to any potential purchaser of the Land,

provided that this Agreement and rights arising from it shall not transfer to any new Owner of the Land but Westernport Water shall not be unreasonably refused to enter into a New Agreement similar to this Agreement with that new owner.

## 21. Audit

The Owner acknowledges that in accordance with the Manual and in addition to any site attendances that may be carried out by the officers or agents of Westernport Water in relation to the Works, Westernport Water may, at any time, instigate a detailed Audit of the Works and all its components. Unless otherwise provided or pursuant to Clause 17.4, such Audit shall be at the cost of Westernport Water.

## 22. Existing Westernport Water Assets

22.1 The Owner acknowledges that there may be existing Westernport Water Assets in the vicinity of the Development.

22.2 The Owner shall ensure that there is no damage to existing Westernport Water Assets.

22.3 The Owner agrees to indemnify, keep indemnified and hold harmless Westernport Water in respect of:

22.3.1 any costs, losses and expenses suffered or incurred by Westernport Water in repairing any damage to the existing Westernport Water Assets which is caused in any way by the construction of the Works;

22.3.2 any claim brought against Westernport Water relating to any damage to person or property arising from any damage to existing Westernport Water Assets caused by the construction of the Works.

The obligation to indemnify Westernport Water's Assets under this Clause will reduce on a proportional basis to the extent that any liability is caused by any negligent act or omission of Westernport Water.

22.4 The Owner must ensure that Westernport Water's employees and agents have access to existing Westernport Water Assets at all times.

22.5 The Owner must ensure that a Build Over Approval is obtained in respect to Works in existing Westernport Water easements, or within one (1) metre of Westernport Water assets. The conditions of any Build Over Approval shall be in addition to the terms of this Agreement.

"without prejudice" negotiations for the purpose of applicable rules of evidence;

23.4.4 if the Dispute is settled, all of the parties must sign the terms of agreement and those terms will be binding on the parties; and

23.4.5 if the Dispute is not resolved within 14 days of the date of service of the Notice of Dispute, or any other period agreed to by the parties in writing, the parties will be entitled to enforce their rights under this Agreement and may commence proceedings in any appropriate court or tribunal.

23.5 Notwithstanding the existence of a Dispute, the parties must continue to perform their respective obligations under this Agreement. The parties agree that if the Owner disputes any charge or other amount owing to Westernport Water, the Owner must pay the disputed amount, until such time as the matter is resolved.

## 23. Dispute Resolution

23.1 If a Dispute arises between the parties relating to or arising out of this Agreement, a party may not commence proceedings in any court or tribunal relating to the Dispute unless it has complied with this Clause, except where the party seeks urgent interlocutory relief.

23.2 If a Dispute arises, a party may serve on the other party a notice stating that a Dispute has arisen and identify the subject of the Dispute ("Notice of Dispute").

23.3 Within seven (7) days after the date of service of the Notice of Dispute, the parties must convene at least one (1) Conference to seek to resolve the Dispute or agree on a method of doing so.

23.4 The parties must attempt in good faith to resolve the Dispute expeditiously and agree that:

23.4.1 at each Conference, each party will be represented by a person having authority to agree to any resolution of the Dispute;

23.4.2 the matters discussed at each Conference are confidential and:

- (a) statements made by the parties and their representatives; and
- (b) discussions between the participants to the Conference;

before, after or during each Conference, cannot be used in any legal proceedings;

23.4.3 all communications and negotiations between the parties arising out of and in connection with this clause will, to the fullest extent possible, be treated as

## 24. GST

24.1 Unless otherwise stated, the amounts shown in this Agreement are exclusive of GST.

24.2 If GST is payable on any supply made in connection with this Agreement:

24.2.1 the consideration otherwise provided for that supply is increased by the amount of that GST; and

24.2.2 the recipient must make payment of the increase as and with the consideration otherwise provided for that supply is increased by the amount of that GST; and

24.2.3 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 seven (7) days of receiving a written demand from the supplier.

## 25. Termination

- 25.1 Westernport Water may terminate this Agreement with immediate effect by serving written notice on the Owner, if the Owner:
- 25.1.1 commits a material breach of any term of this Agreement;
  - 25.1.2 acts in a fraudulent manner;
  - 25.1.3 changes control of the Owner without the prior consent of Westernport Water;
  - 25.1.4 engages or continues to engage the Consultant or the Contractor if they do not have, or they cease to maintain, their accreditation with Westernport Water, without the written approval of Westernport Water (which may be given or withheld at Westernport Water's absolute discretion);
  - 25.1.5 is the subject of an Insolvency Event;
  - 25.1.6 fails to complete the Development by the Time for Acceptance of the Works, or
  - 25.1.7 fails to take out or maintain or ensure that there is taken out or maintained by the Contractor and the Consultant respectively the required public liability and professional indemnity insurances.
- 25.2 Upon termination:
- 25.2.1 the Owner must cease carrying out the Works;
  - 25.2.2 to the extent permitted by law, the Owner is not entitled in contract, tort or otherwise to any payment or compensation for losses incurred as a result of the termination;
  - 25.2.3 the costs incurred by Westernport Water in repairing, completing or otherwise rectifying the Works or damage caused to any property due to defective Works or other breach of this Agreement will be a debt due and immediately payable by the Owner to Westernport Water; and

25.2.4 any indemnity, release or guarantee provided to Westernport Water by any other party to this Agreement will survive the termination of this Agreement.

25.3 termination, however caused, is without prejudice to any rights or liabilities of Westernport Water accruing to the date of termination;

25.4 This Clause 25 survives termination of this Agreement.

## 26. Notices

26.1 A notice required or permitted to be given by one (1) party to another under this Agreement must be in writing, addressed to the party to receive it and be:

26.1.1 handed to the party's representative of that party;

26.1.2 delivered to that party's address;

26.1.3 sent by pre-paid mail to that party's address;

26.1.4 transmitted by facsimile to that party's facsimile number, or

26.1.5 in addition to one (1) of the other methods set out in this clause, sent via email to the party's email address.

26.2 A notice given to a party in accordance with Clause 26.1 must be treated as having been duly given and received:

26.2.1 if handed to the party's representative of that party, immediately;

26.2.2 if delivered to a party's address, on the day of delivery;

26.2.3 if sent by pre-paid mail by using express post, on the third business day after posting;

26.2.4 if sent by any pre-paid mail other than express post, on the sixth business day after posting;

26.2.5 if transmitted by facsimile to a party's facsimile number, and a correct and complete transmission report is received, on the day of transmission; or

26.2.6 if transmitted by email to a party's email address, at the time for receipt of the notice.

26.3 For the purposes of this Clause 26, the address, facsimile number or email address of a party is the address, facsimile number or email address stated in the Particulars, unless notice of another address, facsimile number or email address has been given to the other party.

## 27. General

27.1 This Agreement applies to the Development and the Works, whether any of the Works are undertaken before on or after the commencement of this Agreement.

27.2 This Agreement (including the Manual and the Development Agreement) contain the entire agreement between the parties regarding the Development. Any previous understanding, agreement, representation or warranty relating to the Development is replaced by this Agreement and has no further effect.

27.3 Any waiver or agreement on the part of Westernport Water in not enforcing any term of this Agreement shall not be deemed to be a waiver in any way of any other right or obligation of Westernport Water.

27.4 If any term of this Agreement or in its particular application is or becomes invalid or unenforceable, the remaining terms shall not be affected and each shall be valid and enforceable to the fullest extent permitted by law.

27.5 The parties agree that a construction of this Agreement that results in all provisions being enforceable is to be preferred to any other construction.

27.6 If, despite the application of Clause 27.5, a provision of this Agreement is illegal or unenforceable:

27.6.1 if the provision would not be illegal or unenforceable if a word or words were omitted, that word or those words are omitted; and

27.6.2 in any other case, the whole provision is omitted;

and the remainder of this Agreement continues in force.

27.7 Each of the parties represents and confirms that it:

27.7.1 has full legal capacity and power to:

(a) own its property and to carry on its business; and

(b) enter into this Agreement and to carry out the transactions that this Agreement contemplates; and

27.7.2 holds each authorisation necessary to:

(a) enable it to properly execute this Agreement and to carry out the transactions that this Agreement contemplates;

(b) ensure that this Agreement is legal, valid, binding and admissible in evidence; and

(c) enable it to properly carry on its business; and

27.7.3 is complying with any conditions to which any of these authorisations is subject.

27.8 This Agreement does not create a partnership between the Owner and Westernport Water.

27.9 The Owner agrees that in entering into this Agreement it has not relied upon any representation, warranty or inducement by Westernport Water.

27.10 This Agreement is governed by the law in force in Victoria. 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.

27.11 Each party must pay its own expenses incurred in negotiating and executing this Agreement.

27.12 Where under any provision of this Agreement, any notice is to be given or any payment is to be made on a day which is not a business day, the notice may be given or the payment made on the next day which is a business day.







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