

Terms and Conditions for Developer Works Agreement

*These Terms and Conditions, combined with completed
Particulars (for a Development) will form the
Developer Works Agreement for that Development.*

Table of Contents

1	Definitions	3
2	Developer Works – Timing and Sequence	6
3	Developer and Owner.....	7
4	Payments.....	7
5	Role of Consultant	8
6	Letter of Conditions and Verified Design.....	9
7	Suitably Qualified Contractor	9
8	Conduct of the Works.....	10
9	Reimbursement Works	11
10	Procedure for Practical Completion	13
11	Step-In Rights	14
12	Defects Period	15
13	Defects Security	16
14	End of Defects Period/Final Acceptance.....	16
15	Insurance.....	17
16	Landowner Consents.....	18
17	Affecting Existing Coliban Water Assets	18
18	Access to Development	19
19	Indemnity.....	19
20	Sale of Land	19
21	Termination	20
22	Dispute resolution	20
23	Signing this Agreement	20
24	Goods and Services Tax or GST (GST)	21
25	No Fettering of Coliban Water’s powers	22
26	Governing law and jurisdiction	22
27	Notices	22
28	Interpretation	22
29	Execution and counterparts	23
30	General	24

1 Definitions

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

Act means Water Act 1989 or any successor legislation.

Adopted Standards means various design and construction standards, prepared by another entity (for example the WSAA Codes or other Australian Standards), adopted from time to time by Coliban Water.

Agreement means this deed of agreement including the Particulars and Terms and Conditions.

Asset Transfer means the transfer of ownership of the Developer Works to Coliban Water.

Certification/Certify means the various forms, approvals, confirmations and other documents required to be prepared and lodged by the Consultant with Coliban Water in respect of the Developer Works.

Charges means the charges to be paid to Coliban Water in respect of the Development as set out in the Particulars and otherwise in this Agreement including:

- all fees and charges detailed in the Particulars for the Development Works Agreement;
- any other charges agreed or imposed relating to the delivery of the Works for and the connection of the Development to the Coliban Water System.

Coliban Water Standards means the various Standards, including supplements to Adopted Standards prepared or adopted by Coliban Water from time to time.

Coliban Water System means the water and sewerage systems of Coliban Water.

Commissioning means the stage at which the Developer Works are completed and connected to Coliban Water System, tested and commissioned so as to make use of the Coliban Water System.

Consultant means the Registered Consultant for this Agreement.

Contractor means the Suitably Qualified Contractor for the Development.

Decommissioned Asset means any former asset of Coliban Water disconnected, decommissioned or removed, or partially removed in association with the Development as contemplated in this Agreement.

Defects Notice means a notice to take Remedial Action issued pursuant to this Agreement or a Registered Consultant Agreement.

Defects Period means a period of 1 year (unless extended), commencing from Practical Completion until Final Acceptance.

Defects Security means any security that may be required, to be provided to Coliban Water in relation to the Defects Period.

Deferred Works Agreement means an agreement whereby Coliban Water allows particular Developer Works to be completed later than otherwise required under a Developer Works Agreement including after a Statement of Compliance.

Developer means the party so described in the Particulars.

Developer Installed Works Process means the process for obtaining Coliban Water's approval for the construction and potential transfer of, Developer Works, both generally and for the purpose of this Agreement.

Developer Works means Works constructed to serve a particular Development intended to be transferred to Coliban Water as set out in the Particulars for a particular Development.

Development means those aspects of the Development identified in the Particulars relating to water or sewerage services and includes any application material, the Verified Design, the Works, Commissioning, all associated administrative and supervisory actions and the Defects Period.

Final Acceptance means final acceptance of the Developer Works as provided in this Agreement.

Goods and Services Tax or GST means any tax imposed under any GST law and includes GST within the meaning of the *'A New Tax System (Goods and Services Tax) Act 1999* (Commonwealth) as amended.

Insurance means the insurances to be held by the Developer, Consultant and Contractor specified in this Agreement.

Land means the land so described in the Particulars.

Letter of Conditions means the initial letter from Coliban Water to the Developer and Owner, setting out conditions for the Works and requiring a design for consideration as the Verified Design.

New Customer Contribution or NCC has the meaning specified in the Price Determination.

Non-Scheduled Charge has the meaning specified in the Price Determination.

Owner means the Owner of the Land and party so described in the Particulars.

Particulars means the Particulars section of the Agreement, setting out the parties and other relevant information.

Planning Permission means any relevant planning permit or other planning permission pursuant to a municipal planning scheme and the *Planning & Environment Act 1987*.

Practical Completion means the Practical Completion of Developer Works as provided in this Agreement.

Practical Completion Notice means the written notice from Coliban Water to the Developer advising Practical Completion of the Developer Works.

Preliminary Design means a preliminary design prepared by the Registered Consultant for a proposed Development of the water, sewerage, recycled water or raw water Works intended to service that Development.

Price Determination means the Water Price Review Coliban Water Determination approved by the ESC applying from time to time.

Private Land means land which is not a public road or land owned by the Owner on or in which Works (to be transferred to Coliban Water or not) to service the Development, exist or will exist.

Private Works means works constructed to serve the Development (which are not Developer Works and are not transferred to Coliban Water) to be owned by the Owner or a future Owner of any part of the Land or an owners corporation for the Land.

Referral Authority means a statutory agency or other nominated entity that planning applications and subdivision plans are referred to pursuant to the *Planning and Environment Act 1987* and the *Subdivision Act 1988*.

Registered/Registration means the registration of a consultant by Coliban Water as a Registered Consultant.

Registered Consultant means a consulting engineer (company or other legal entity) Registered by Coliban Water to undertake the Verified Design and to Certify the Works, and various other actions or functions specified in this Agreement and the Registered Consultant Agreement.

Registered Consultant Agreement means the deed of agreement which a Consultant must have with Coliban Water to be Registered and to be eligible to conduct Developer Works.

Reimbursement Amount means the amount of the payment by Coliban Water to the Developer for the Reimbursement Works.

Reimbursement Amount Estimate means the estimate of the Reimbursement Amount set out in the Particulars, or as otherwise established in this Agreement.

Reimbursement Works means that part of the Developer Works (if any) identified in the Particulars that Coliban Water will contribute to on terms set out in this Agreement.

Remedial Action means the completion, repair, reinstatement or replacement of incomplete, inadequate, damaged or defective Works or works or actions in respect of any other Private Land, public land or other asset or property that is required or undertaken pursuant to a Defects Notice issued under this Agreement.

Scheduled Charge has the meaning specified in the Price Determination.

Special Conditions means any special conditions set out in the Particulars.

Standards includes the:

- Adopted Standards; and
- Coliban Water Standards.

Statement of Compliance means a statement of compliance for a plan of Subdivision or any stage thereof.

Subdivision means the division of land into two or more lots on the creation of a reserve that can be sold, transferred or created separately.

Suitably Qualified Contractor means a contractor, appointed to undertake any part of the Developer Works, where such contractor, to the satisfaction of Coliban Water (acting reasonably) is suitable, including having regard to the:

- holding of appropriate qualifications, accreditations or licences to undertake the relevant civil works;
- contractor maintaining appropriate insurances;
- contractors experience in relation to the particular Developer Works having regard to scope and complexity;
- record of the contractor including (if any) in relation Developer Works in the Coliban Water region.
- acceptable to Coliban Water to undertake Developer Works.

Superintendent means the superintendent of any contract for the construction of the Developer Works between the Developer (as principal) and the Suitably Qualified Contractor.

Terms and Conditions means these terms and conditions which apply to each Developer Works Agreement.

Verified Design means the detailed engineering design of the Developer Works prepared by the Consultant and accepted by Coliban Water.

Works means the necessary steps, actions, preparation of Verified Design, obtaining of approvals for any of the necessary water and sewerage construction works to service the Development which includes both:

- Developer Works; and
- Private Works.

WSAA Codes means the design and construction standards and specifications produced by the Water Services Association of Australia (**WSAA**).

2 Developer Works – Timing and Sequence

2.1 The Development must proceed unless otherwise permitted by Coliban Water, including the order in which it must occur, is as follows:

(a) before signing this Agreement:

- (i) engagement of a Registered Consultant;
- (ii) completion of a Preliminary Design by the Consultant and (if appropriate) acceptance of that as the Preliminary Design by Coliban Water;
- (iii) application for and provision of, the Letter of Conditions
- (iv) completion of a further design by the Consultant and (if appropriate) acceptance of that as the Verified Design by Coliban Water;
- (v) typically, engagement of a Suitably Qualified Contractor, unless deferred until later;
- (vi) the signing of this Agreement.

(b) after signing this Agreement:

- (i) notice to Coliban Water of the Suitably Qualified Contractor (if not already notified);
- (ii) notice to Coliban Water of intended commencement of the Developer Works;
- (iii) the construction of the Developer Works;
- (iv) provision to Coliban Water of the "as constructed" drawings of the Works and the Consultant's provision of the required Certification;
- (v) payment of Charges required prior to Practical Completion;
- (vi) Commissioning, Practical Completion, and (unless otherwise specified) Asset Transfer;
- (vii) Defects Period; and

(viii) End of Defects Period and Final Acceptance.

3 Developer and Owner

- 3.1 If the Developer is the Owner of the Land it signs this Agreement in both of those capacities. If the Developer is not the Owner of the Land:
- (a) the Owner must 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 Condition 5.1, the Owner appoints the Developer, and the Developer accepts appointment, as the legal agent of the Owner in all dealings with Coliban Water in respect of this Agreement and the Development.

4 Payments

- 4.1 The Developer must pay to Coliban Water:
- (a) the Charges set out in the Particulars in accordance with any specified payment requirements;
 - (b) any other cost, charge, fee or amount for necessary activities undertaken by Coliban Water associated with the Development;
 - (c) any other amount which becomes due under the terms of the Agreement;
 - (d) provided that:
 - (i) the Charges and any other monies due pursuant to this Agreement are, unless otherwise stated, GST exclusive;
 - (ii) the amount to be paid in respect of such Charges set by Coliban Water will be the amount applicable at the time of payment of such Charges, which may vary from the amounts set out in the Particulars being those applying at the date of this Agreement;
 - (e) payment must be made:
 - (i) on or before any payment date or trigger event specified in the Particulars and in any other case before Practical Completion;
 - (ii) in the case of Charges payable prior to any approval or consent from Coliban Water, then as a pre-condition to that approval or consent; and
 - (iii) in the case of any other Charges or other amounts owing, by the date specified by Coliban Water as a date at least 14 days from the date of notice for payment;
 - (f) all payments must be by bank cheque or direct transfer of clear funds.
- 4.2 Failure by the Developer to pay any Charges or other monies owing allows Coliban Water to take one or more of the following actions:
- (a) in the case of monies owing before Practical Completion, refuse its consent to any Statement of Compliance, Asset Transfer or Commissioning;

- (b) extend the Defects Period and refuse to release any Defects Security;
- (c) call upon the Defects Security to pay the relevant amounts due on the amount as a debt due and payable;
- (d) terminate this Agreement.

4.3 In any case where any Charges or other monies are due to Coliban Water pursuant to this Agreement, and such monies are owed by the Developer who is also the Owner, or any separate Owner, of any part or all of the Land, that debt is a charge on the Land, including pursuant to the Act in favour of Coliban Water.

5 Role of Consultant

5.1 The Consultant is hereby appointed by the Developer (and, if applicable, any separate Owner) and the Consultant accepts appointment, as the legal agent of the Developer and any separate Owner, in all dealings with Coliban Water in respect of this Agreement and the Development.

5.2 The Developer must ensure the Consultant:

- (a) is a Registered Consultant and maintains its status as a Registered Consultant until the end of any Defects Period;
- (b) must have completed the Verified Design or adopt and endorse the Verified Design of another Registered Consultant or seek the acceptance by Coliban Water of a substituted design to be considered for approval as the Verified Design;
- (c) otherwise review, audit and inspect the construction of the Developer Works and provide Certification of the Works, to the satisfaction of Coliban Water.

5.3 The Developer acknowledges and agrees:

- (a) it may appoint one or more Consultant for any part of the Verified Design, and construction of the Developer Works, provided that every Consultant must be Registered. If any further Registered Consultant is sought to be appointed after the Agreement date, Coliban Water must be notified by the Developer in writing;
- (b) that the Registered Consultant may have its Registration suspended or terminated by Coliban Water due to a breach of the Registered Consultant Agreement or in relation to any breach of this Agreement.

5.4 If the Consultant ceases or is intended to cease, its role as the Consultant for the Development, including due to suspension or termination of Registration, then:

- (a) except where it arises due to suspension or termination of the Consultants Registration by Coliban Water, the Developer must immediately advise Coliban Water in writing of that fact;
- (b) the Developer must seek to appoint another Registered Consultant to take on the responsibility as the new Consultant for the balance of the Development;
- (c) until a new Consultant has accepted appointment, the Works must not proceed;
- (d) any new Consultant must either adopt and endorse the Verified Design of the previous Consultant or prepare for approval a new design, as otherwise required under this Agreement; and

- (e) any costs of Coliban Water associated with the appointment of a new Consultant must be met by the Developer.

6 Letter of Conditions and Verified Design

- 6.1 Prior to and as a precondition, to this Agreement the Developer and any separate Owner must have accepted the relevant Letter (or Letters) of Conditions for the Development. The requirements of the Letter of Conditions:
- (a) Form part of the terms and conditions of this Agreement, unless otherwise varied by the terms of this Agreement, by the agreement of the parties, or at the direction of Coliban Water.
 - (b) The Letter of Conditions will require the preparation of the design (to be submitted to become the Verified Design) by the Consultant in accordance with the Standards and any direction of Coliban Water.
 - (c) At any time prior to the construction of the Developer Works (or any relevant part thereof), Coliban Water may advise the Developer or Consultant of a change in the Standards in which case a modified Verified Design may be required.
 - (d) At any time prior to the commencement of construction of the Developer Works:
 - (i) Coliban Water may for good and reasonable cause direct;
 - (ii) the Developer may request, and if Coliban Water agrees;

changes to the Verified Design, in which case the changes must be submitted to Coliban Water for approval. Upon approval by Coliban Water, the Works must proceed in accordance with that new Verified Design.
 - (e) The acceptance by Coliban Water of the Verified Design, does not amount to Coliban Water endorsing ratifying or otherwise accepting liability in respect of the Verified Design or construction of the Works in accordance with the Verified Design. Liability and responsibility for the Verified Design, and construction of the Works remains with the Developer and the Consultant in accordance with this Agreement and the Consultant Registration Agreement.

7 Suitably Qualified Contractor

Suitably Qualified Contractor

- (a) Not less than 14 days prior to construction of the Developer Works commencing the Consultant must advise Coliban Water of the Contractor, Contractors, or sub-contractors appointed for the Developer Works, unless otherwise agreed with Coliban Water.
- (b) Every Contractor (and sub-contractor) involved in the construction of the Developer Works must be in the opinion of Coliban Water, a Suitably Qualified Contractor.
- (c) If as the Works continue further Contractors (including sub-contractors) have or are intended to conduct any part of the Works, Coliban Water must be notified in writing.
- (d) If at any time during the Development, prior to Practical Completion any Contractor by its actions or quality of Works, ceases to be a Suitably Qualified Contractor Coliban Water will notify the Consultant of the case. After such notice:

- (i) the Developer Works must cease; and
- (ii) the Developer must (before the Developer Works can recommence) appoint another Suitably Qualified Contractor as a new Contractor for this Development;
- (e) The Developer must, and ensure its Consultant must, on becoming aware and as soon as practicable, notify Coliban Water if the Contractor fails to undertake the Developer Works in accordance with the Verified Design or this Agreement.

8 Conduct of the Works

8.1 The Works must be carried out in accordance with:

- (a) the Letter of Conditions;
- (b) the Verified Design;
- (c) the Standards;
- (d) only products and materials approved by Coliban Water;
- (e) any written direction of Coliban Water;
- (f) the Plumbing Standards in respect of any Private Works; and

if there is any inconsistency among these requirements or other questions regarding the Works, then upon receipt of a written request Coliban Water will indicate the manner in which the Works should proceed in order to meet Coliban Water's requirements.

8.2 The Developer is responsible for:

- (a) ensuring all necessary Planning Permissions and statutory and other permissions are obtained and the ongoing compliance with same;
- (b) procuring the carrying out of the Works;
- (c) ensuring the proper supervision of all parties associated with the carrying out of the Works;
- (d) compliance with all Occupational Health and Safety legislation and generally the safety of all parties (including employees of Coliban Water),

and agrees that Coliban Water has no supervisory capacity in relation to the Development and the carrying out of the Works.

8.3 During the construction of the Works:

- (a) Coliban Water may carry out such inspections of the Works as Coliban Water in the circumstances thinks fit, such inspections in addition to inspection and testing prior to Practical Completion;
- (b) Coliban Water may advise the Developer or Consultant if Coliban Water becomes aware of any failure to comply with the requirements of Coliban Water in relation to the Works;
- (c) if at any time the Developer, Consultant or Contractor directs any employee to carry out or contracts any part of the Works to any third party, who in the reasonable opinion of Coliban Water is either unqualified or inappropriate to carry out the supervision, or the

construction, Coliban Water may in its discretion refuse to consent to Commissioning or Practical Completion.

- 8.4 Prior to the commencement of construction of any part or all of the Works Coliban Water may give written notice to the Developer or Consultant (or both) of any required changes to:
- (a) the Standards;
 - (b) the Verified Design;
 - (c) the products or materials approved for inclusion in the Works; or
 - (d) any plumbing Standard in respect of Private Works; and
 - (e) the Developer and Consultant must comply with such notice in the conduct of the Works.
- 8.5 Practical Completion for the Developer Works must be obtained within 3 years of the signing of this Agreement by Coliban Water, failing which this Agreement is at an end, provided, however, Coliban Water may:
- (a) agree to extend the time for commencement or completion of the Works under the terms of this Agreement; or
 - (b) impose any additional conditions or requirements under this Agreement including additional payments, amended Verified Design requirements and changes to the nature of the construction of the Works;
 - (c) require a new Developer Works Agreement.

9 Reimbursement Works

- 9.1 If the Developer Works include Reimbursement Works; the following applies:
- (a) Coliban Water will pay the Developer the Reimbursement Amount for the Reimbursement Works subject to this Agreement.
 - (b) The Reimbursement Works must be described in the Particulars.
 - (c) The Developer (through the Consultant) must provide to Coliban Water:
 - (i) the Reimbursement Amount Estimate is as set out in the Particulars;
 - (ii) details (including price), copy documents, plans and other relevant components of any tender, expression of interest or fee proposal for the construction of the Reimbursement Works;
 - (iii) details of any fees to be charged by the Consultant, plus any other fees intended to form part of the Reimbursement Amount;
 - (iv) a separate list detailing the component parts of the total making up the Reimbursement Amount Estimate;
 - (v) details of clear separation of the overall cost of the Developer Works from the Reimbursement Works cost to establish no cross subsidy of the other Developer Works through the Reimbursement Amount.

- (d) Any Reimbursement Works contract must be based upon written tenders or fee proposals from Suitably Qualified Contractors which:
 - (i) if the Reimbursement Amount Estimate is greater than \$500,000, must have occurred through a Public Tender Process in accord with Victorian Government Purchasing Board as specified by Coliban Water; or
 - (ii) if the estimated Reimbursement Amount is \$500,000 or less, subject to not less than 3 (public or private) tender or fee proposals; and
 - (iii) copies of all tenders or fee proposals must be provided to Coliban Water on request; and
 - (iv) the Developer must provide a copy of the tender with the lowest rates and (including if different) the tender with the lowest price. The lowest rate or price tender will be relied upon for Coliban Water to determine the Reimbursement Amount, noting the Developer may still select the tenderer of its choice.
- (e) Any fee to be charged by a Consultant must not exceed any amount set from time to time by Coliban Water as a percentage of the construction cost component of the Reimbursement Works, with such fee or percentage including all of the design and contract administration and supervision, the role superintendent, together with any other role of the Consultant in respect of the Works.

9.2 Upon completion of the Reimbursement Works and as a precondition to payment of any Reimbursement Amount:

- (a) accurate and complete Particulars of the final cost of the Reimbursement Works, generally consistent with those considered and approved by Coliban Water under Condition 9.2, must be provided to Coliban Water 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 Particulars as required by Coliban Water;
- (b) the suggested Reimbursement Amount will be the actual cost of the Reimbursement Works and may be subject to Condition 9.3, be lower than the Reimbursement Amount Estimate;
- (c) Coliban Water 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;
- (d) Coliban Water 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 Coliban Water.

9.3 The Reimbursement Amount Estimate, upon which the relevant Reimbursement Works have occurred proceed will be the maximum amount that Coliban Water will pay unless any increase is approved by Coliban Water provided that:

- (a) any increase due to a latent defect in conducting the Reimbursement Works will only be considered provided written advice of same is given to Coliban Water within seven (7) days of its discovery;

- (b) 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:
 - (i) no increase may be applied unless such variation is advised in writing to Coliban Water within seven (7) days of the Consultant or Developer becoming aware of same;
 - (ii) Coliban Water may, in its discretion request full Particulars of any such variation request and may take a different view to the Superintendent or principal under the relevant contract;
 - (iii) 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;
- (c) any increase requested will not be approved unless Particulars of the relevant increase, to the satisfaction of Coliban Water 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.

10 Procedure for Practical Completion

10.1 After the Consultant has advised of completion of the Developer Works, including the provision of appropriate certification, Coliban Water may:

- (a) carry out such testing and inspection of the Works as Coliban Water thinks fit to validate Certification and any other information provided;
- (b) indicate which matters require Remedial Action before Coliban Water is prepared to issue Practical Completion; and
- (c) in relation to any such Remedial Action Coliban Water may require this to be carried out by any one or more of:
 - (i) the Developer;
 - (ii) Coliban Water; or
 - (iii) a third party nominated by Coliban Water, and

all costs of such Remedial Action shall be borne by the Developer and if undertaken by or on behalf of Coliban Water, are payable by the Developer, on demand to Coliban Water.

10.2 Practical Completion will not be provided until Coliban Water has received:

- (a) payment of any Charges or other monies owing to Coliban Water;
- (b) Certification of the proper completion of the Works, in accord with the Agreement and to the satisfaction of Coliban Water;
- (c) if specified in the Particulars, any Defects Security;
- (d) proof that any reserves or easements required on the Land or on Private Land have or will be transferred to or registered in favour of, Coliban Water or any relevant third party; and

- (e) if the Development involves Reimbursement Works, Practical Completion will not occur until the Reimbursement Amount is approved and agreed for payment, by Coliban Water.

10.3 Upon Practical Completion Coliban Water will:

- (a) notify the Consultant of Practical Completion; and
- (b) upon the request of the Developer or its Consultant, in the case of a Development incorporating a Subdivision and provided there are no outstanding issues under any Planning Permission or any notice of Remedial Action provide its consent to the issue of a Statement of Compliance for that Subdivision or the relevant stage of such subdivision.

10.4 The Asset Transfer to Coliban Water of the Developer Works including all rights, title and interest in such Developer Works will occur:

- (a) unless otherwise specified by Coliban Water, upon the issue of Practical Completion by Coliban Water for the completed Developer Works; or
- (b) at such other time, or upon such other occurrence, specified by Coliban Water;

provided that in any case where the issue of a Statement of Compliance occurs more than 4 months after Practical Completion the Developer (or its Consultant) must:

- (c) notify Coliban Water of this fact; and
- (d) undertake any additional tests, cleaning or works on or to the Works, that are directed to be undertaken by Coliban Water.

11 Step-In Rights

11.1 Coliban Water's right to step intake over

- (a) If Coliban Water:
 - (i) becomes entitled to terminate the Agreement; or
 - (ii) has served a notice under Condition 8 as to a failure in relation to the conduct of the Works in accordance with this Agreement, which has not been responded to, or not responded to, to the satisfaction of Coliban Water;
 - (iii) given notice of required Remedial Action, under Condition 10 which has not been responded to, or not responded to, to the satisfaction of, Coliban Water;

then Coliban Water may, serve written notice on the Developer of the intention of Coliban Water to take over all or part of the Works unless the Developer rectifies the events that entitle Coliban Water to terminate this Agreement or serve the notice under Condition 8. The notice served under this condition must:

- (i) specify what actions Coliban Water requires the Developer, Consultant or Contractors to undertake;
 - (ii) specify a time or date (of not less than 10 days from the notice) by which the actions must occur.
- (b) If the Developer fails to respond to a notice under this condition then Coliban Water may step in and take over all or part of the Works to conduct such works as Coliban Water deems necessary, including full completion of any Works or any balance of the Works.

11.2 Consequence of taking over

If Coliban Water takes over all or part of the Works then:

- (a) the Developer must cooperate and ensure any Consultant or Contractor of the Developer cooperates, to allow access to Coliban Water to the Land, any Verified Designs, and all materials and products owned by the Developer or Owner, associated with the Works to allow Coliban Water to continue to conduct the Works;
- (b) the Developer is required to complete any part of the Works in accordance with this Agreement, that are not taken over by Coliban Water;
- (c) the Developer must resume the Works taken over by Coliban Water in accordance with this Agreement if Coliban Water serves a notice on the Developer requiring it to do so.

12 Defects Period

12.1 The Defects Period (unless extended) applies for 12 months from the date of Practical Completion.

12.2 Where:

- (a) Remedial Action is required during the Defects Period; or
- (b) Coliban Water considers, for good cause, that there are likely to be further defects in or caused by, the Developer Works;

the Defects Period may be extended by Coliban Water, for a further period or periods specified by Coliban Water.

12.3 During the Defects Period the Developer must, at its cost, undertake any necessary Remedial Action in respect of the Developer Works or Private Works or to other property damaged due to the Development or the Developer Works, including in response to a Defects Notice.

12.4 During the Defects Period Coliban Water may, where it considers Remedial Action is required, serve a Defects Notice on the Developer requiring the Developer to initiate Remedial Action:

- (a) in the manner; and
- (b) within the time;

specified in the Defects Notice. The Developer must comply with the Defects Notice.

12.5 If Coliban Water considers Remedial Action is required it may:

- (a) Immediately, in the case of an emergency (in the opinion of Coliban Water);
- (b) If the defect is minor;
- (c) after the failure of the Developer or Consultant (or both) to undertake adequately (in the opinion of Coliban Water) or within the time specified, the required Remedial Action;

undertake the relevant Remedial Action and recover any cost of so doing from any one or more of:

- (d) the Defects Security;
- (e) the Developer;

either before or after Coliban Water undertakes the works.

- 12.6 The Developer agrees that any of its obligations in respect of Remedial Action or a Defects Notice in the Defects Period are in addition to and in no way reduced by the other rights of Coliban Water against the Consultant in respect of a particular Development.
- 12.7 Prior to the issue of Practical Completion Coliban Water may require an audit of the Developer Works at the Owner's expense. If the audit identifies any defect or other non-conformance in the Developer Works or finds any other aspect of this Agreement is not satisfied, Coliban Water may serve a Defects Notice requiring Remedial Action otherwise in accordance with the Agreement.
- 12.8 During the Defects Period the Developer agrees the Consultant continues to be appointed to act as agent on behalf of the Developer and be actively involved in responding to any notices of, and providing information to, Coliban Water including in facilitating any Remedial Action.

13 Defects Security

- 13.1 When specified in the Particulars, the Developer must provide to Coliban Water the Defects Security which:
- (a) is an amount of either:
 - (i) 5 percent;
 - (ii) or such other percentage advised by Coliban Water;of the actual cost of the Developer Works once such amount is accepted by Coliban Water;
 - (b) is required as a precondition to Practical Completion;
 - (c) must be a Bank Guarantee, cash payment or other security acceptable to Coliban Water;
 - (d) must not include any termination date or right of recall or revocation;
 - (e) must be provided with clear identification that it is provided as a Defects Security to secure compliance with this Agreement, including the Defects Period;
 - (f) may be called upon by Coliban Water at any time to meet the cost of Remedial Action or any other default of the Agreement (including the non-payment of Charges or other monies owing);
 - (g) if required by Coliban Water, the Developer must reinstate the Defects Security to its original amount or any modified amount specified by Coliban Water, and any failure to do so means that amount specified becomes a debt due and payable to Coliban Water;
 - (h) may be called on by Coliban Water before, during or after Coliban Water has expended any monies or undertaken any actions or works arising from any necessary Remedial Action or other breach;
 - (i) will be returned to the Developer at the end of the Defects Period provided there are no defects in the Developer Works or breaches of this Agreement, outstanding.

14 End of Defects Period/Final Acceptance

- 14.1 At the expiration of the Defects Period, Coliban Water will, provided there are no outstanding breaches of the Agreement (including any payments due) and no outstanding Defects Notice from Coliban Water to carry out Remedial Action advise the Developer, or Consultant.

15 Insurance

- 15.1 The Developer must require the Consultant to take out and maintain a professional indemnity insurance policy. The insurance must:
- (a) be taken out and maintained by the Consultant in respect of any Developer Works the Consultant undertakes in accordance with the relevant Registered Consultant Agreement;
 - (b) be held in respect of the Verified Design of Developer Works and the role of the Consultant in respect of Certifying the proper completion of Developer Works including, where applicable, any role of Superintendent or other supervisory role under any contract for construction of Developer Works.
- 15.2 The Developer must ensure that, for the duration of the Development a public liability policy is held by either the Developer or the Contractor, or both, in respect of the Land, the Development and the Works. The policy must:
- (a) be provided to Coliban Water (that is, a certificate of currency and if requested a copy of the policy) prior to and as a pre-condition to the commencement of Works;
 - (b) cover the respective rights, interests and liabilities to third parties of the parties from time to time whenever engaged in the Works;
 - (c) cover the parties' and Coliban Water's respective liability to each other for loss or damage to property and the death of or injury to any person; be endorsed to cover any construction plant not covered under a comprehensive or third-party motor vehicle insurance policy;
 - (d) provide insurance cover for an amount in respect of any one occurrence of not less than \$5 million or other amount specified by Coliban Water; and
 - (e) be with an insurer and otherwise in terms both approved in writing by Coliban Water (which approval shall not be unreasonably withheld).
- 15.3 The Developer must in respect of any of its employees maintain an employers' liability and workers' compensation insurance policy which covers any damage, loss or liability suffered or incurred by any person engaged by or associated with the Developer in respect of the Development arising:
- (a) by virtue of any statute relating to workers' or accident compensation or employers' liability; or
 - (b) at common law.
- 15.4 The Developer must:
- (a) promptly (upon becoming aware) notify Coliban Water if:
 - (i) an event occurs which may give rise to a claim under or prejudice, the Insurance; or
 - (ii) the Insurance is cancelled; or
 - (b) not do anything or allow anything to be done, which may prejudice any Insurance held.
- 15.5 The Developer must satisfy itself that the Consultant and the Contractor both hold worker's compensation and employer's liability insurances and must advise Coliban Water in any case

where the Developer becomes aware that the Contractor's or Consultant's insurances are either cancelled or the subject of a claim in respect of an event.

16 Landowner Consents

- 16.1 In any case where the Works are located on property outside of the Land, the Developer is responsible for obtaining any and all necessary consents in respect of those Works and cost associated with same, including:
- (a) prior to the commencement of works outside the Land, in any case where the Works are located within a road reserve or other public land, the necessary consent of that public land manager or road management authority, including if required by Coliban Water, Registered Aboriginal Party, the creation of any reserve or easement;
 - (b) the consent by written agreement of the owner and occupier of any Private Land, to the conduct the Developer Works;
 - (c) as a precondition to Practical Completion and consent to Statement of Compliance in the case of any Private Land, any necessary reserve or easement required by Coliban Water in relation to securing Developer Works into the future, with such reserve or easement to be created or vested in favour of Coliban Water or such other person or land specified by Coliban Water.

17 Affecting Existing Coliban Water Assets

- 17.1 In any case where the Works include the disconnection, removal or decommissioning of existing assets in the Coliban Water System the following will apply:
- (a) Coliban Water may either in this Agreement or separately specify the Coliban Water assets that must be either removed or decommissioned and any particular requirements in respect of the removal or decommissioning;
 - (b) the Developer accepts all risk for:
 - (i) making good any impact to the Land, property or to the Coliban Water System relating to the disconnection, removal or decommissioning;
 - (ii) the method of disconnection, removing or decommissioning the Coliban Water assets;
 - (iii) the construction of any building, other infrastructure or landscaping over or close to any decommissioned or removed former Coliban Water Assets;
 - (c) the Developer must at its cost:
 - (i) remove any easement securing a former Coliban Water asset that has been removed or decommissioned; and
 - (ii) create any new easement required by Coliban Water over any replacement asset;
 - (iii) pay Coliban Water the residual value of the decommissioned or removed asset;as specified by Coliban Water.
- 17.2 The ownership of and all liability for, any Coliban Water asset decommissioned but not removed transfers to the Developer, unless otherwise decided by Coliban Water, from the earlier of either:

- (a) the date or trigger specified by Coliban Water; or
- (b) if no date or trigger is specified, in the case of a Development:
 - (i) involving a Subdivision, upon the registration of the Plan of Subdivision; or
 - (ii) not involving a Subdivision, upon Practical Completion.

18 Access to Development

18.1 The Developer and Consultant, to the extent of their lawful authority, must provide to Coliban Water access to:

- (a) any information, plans or materials (including copies as requested); and
- (b) the Land;

relating to the Development including the provision of all necessary consents to allow Coliban Water's records to be maintained and the standard of the Works to be reviewed.

18.2 The Developer and Consultant acknowledge that in addition to normal site attendances that can be carried out by the officers or agents of Coliban Water in relation to the Works Coliban Water may instigate a detailed Audit of the Works and all its components. Such Audit shall be at the cost of the Developer.

19 Indemnity

19.1 The Developer indemnifies Coliban Water for a period of 5 years from the date of Practical Completion in respect of:

- (a) any cost of Coliban Water in repairing any defect to the Developer Works or damage to the Coliban Water System arising from such defect;
- (b) any claim against Coliban Water relating to any damage to person or property arising from any defect in the Verified Design or construction of the Works;
- (c) any claim against Coliban Water in respect of any Decommissioned Asset.

This indemnity shall be reduced on a proportional basis to the extent such liability arises due to any negligence of Coliban Water.

20 Sale of Land

20.1 Prior to the issue of Practical Completion the Developer must, in relation to any proposed sale of the Land:

- (a) where the sale is of individual lots from a Plan of Subdivision, the Developer is not required to disclose this Agreement, however, the Developer obligations to Coliban Water, including those relating to the Defects Period and Indemnities given, will remain unaffected in respect of such lots sold; or
- (b) to disclose this Agreement (and provide a copy of same) to any potential purchaser of the Land or part of the Land provided further this Agreement and rights arising from it shall not transfer to any new Developer of the Land; and

this Agreement will not, without the written agreement of Coliban Water be novated or assigned to

any subsequent purchaser of the Land or part of the Land and may, at the option of Coliban Water be terminated.

21 Termination

In any case where:

- (a) the Developer or Owner is placed under financial administration, is liquidated or becomes insolvent or in the case of an individual is bankrupt or has entered into a debt (or like) arrangement.
- (b) the Developer is in breach of this Agreement, or any warranty given by the Developer under the Agreement which, has not been rectified, or in the reasonable opinion of Coliban Water, is not capable of rectification, including within a reasonable time;
- (c) a sale of the Land without the necessary agreement of Coliban Water of the assignment or novation of this agreement has occurred as contemplated under Condition 20;

Coliban Water may give notice of the Termination of this Agreement to the Developer which shall be effective either seven (7) days after that notice, or such longer period if so specified in that notice.

22 Dispute resolution

- 22.1 Any dispute arising out of the Agreement or concerning the performance or the non-performance by party of its obligations under the Agreement must be referred, upon the giving of seven (7) days written notification by any party, to a dispute panel (**Dispute Panel**):
- (a) with each party entitled to appoint one member; and
 - (b) which shall meet within either seven (7) days as provided in the written notice or within any other period agreed by the parties.
- 22.2 Any unanimous decision of the Dispute Panel is binding on the parties, however, if the Dispute Panel either fails to reach a decision on the matter or one or more parties refuses to participate in this process, the dispute may be resolved by mediation or arbitration if the parties so agree or by recourse to the courts.
- 22.3 The provisions of this Agreement regarding dispute resolution do not prevent any party from obtaining any injunctive, declaratory or interlocutory relief from a court which may be urgently required.
- 22.4 Notwithstanding the existence of a dispute, the parties must continue to perform their respective obligations under this Agreement. The parties acknowledge that if the Developer disputes an invoice received from Coliban Water, the Developer must pay the disputed amount, until such time as the matter is resolved in accordance with this Condition.

23 Signing this Agreement

- 23.1 This Agreement is executed by the parties in the Particulars section, including on the basis:
- (a) the Agreement comes into operation when:
 - (i) the Particulars (identical to those signed by Coliban Water) are signed by the Developer and Owner, if separate from the Developer; and

- (ii) the Particulars section, once signed, is returned to Coliban Water;
- (b) where the Developer is also the Owner of the Land the Developer signs in its capacity as the Developer and as the Owner;
- (c) if the Developer or the Owner or Consultant 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 Coliban Water has notice of the Trust, then the Developer or the Owner or Consultant, as applicable:
 - (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 or the Owner 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 Coliban Water, acting reasonably, to enter into this Agreement.

24 Goods and Services Tax or GST (GST)

- 24.1 If a party (**supplier**) is required to pay GST in respect of a supply made under, or pursuant to, or by reason of a breach of this Agreement, the recipient of the supply must (in addition to any other payment for, or in connection with, the supply) pay to the supplier an amount equal to such GST (**GST gross-up**).
- 24.2 If a GST gross-up is payable, then the supplier will give the recipient a tax invoice for the supply.
- 24.3 Provided a tax invoice has been given, the GST gross-up must be paid by the recipient at the same time as any other payment is made for the supply.
- 24.4 Terms used in this Condition 24.1 which are defined in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* have the meaning given to them in that Act.
- 24.5 In this Condition, a reference to a payment includes any payment of money and any form of consideration other than payment of money.
- 24.6 In this deed, all references to payments and obligations to make payments, including all references to compensation (including by way of reimbursement or indemnity) are, but for the operation of this Condition, exclusive of GST.

25 No Fettering of Coliban Water's powers

This Agreement does not fetter or restrict Coliban Water's power or discretion to make or impose requirements or conditions in connection with any use or development of the Land, any Planning Permission, the approval or certification of any plans of Subdivision or consolidation relating to the Land or the issue of a Statement of Compliance in connection with any such plans.

26 Governing law and jurisdiction

This Agreement is governed by and is to be construed in accordance with the laws of Victoria. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts and tribunals of Victoria and waives any right to object to proceedings being brought in those courts or tribunals.

27 Notices

27.1 A notice or other communication required or permitted, under this Agreement, to be served on a party must be in writing and may be served:

- (a) personally on the party;
- (b) by leaving it at the party's address set out in this Agreement;
- (c) by posting it by prepaid post addressed to that person at the party's current address for service; or
- (d) by email to the party's email notified in writing to the other party.

27.2 A notice or other communication is deemed served:

- (a) if served personally or left at the party's address, upon service;
- (b) if posted within Australia to an Australian address, five (5) Business Days after posting;
- (c) if served by email, subject to the next Condition, at the time indicated on the transmission report produced by the sender's email facilities indicating that the email was sent in its entirety to the addressee's email address; and
- (d) if received after 5.00pm in the place of receipt or on a day which is not a Business Day, at 9.00am on the next Business Day.

28 Interpretation

28.1 In this Agreement, unless the contrary intention appears:

- (a) the singular includes the plural and vice versa;
- (b) a reference to a document or instrument, including this Agreement, includes a reference to that document or instrument as novated, altered or replaced from time to time;
- (c) a reference to an individual or person includes a partnership, body corporate, government authority or agency and vice versa;
- (d) a reference to a party includes that party's executors, administrators, successors, substitutes and permitted assigns;

- (e) words importing one gender include other genders;
- (f) other grammatical forms of defined words or expressions have corresponding meanings;
- (g) a covenant, undertaking, representation, warranty, indemnity or agreement made or given by:
 - (i) two or more parties; or
 - (ii) a party comprised of two or more persons,
 is made or given and binds those parties or persons jointly and severally;
- (h) a reference to a statute, code or other law includes regulations and other instruments made under it and includes consolidations, amendments, re-enactments or replacements of any of them;
- (i) a recital, schedule, annexure or description of the parties' forms part of this Agreement;
- (j) if an act must be done on a specified day that is not a Business Day, the act must be done instead on the next Business Day;
- (k) if an act required to be done under this Agreement on a specified day is done after 5.00pm on that day in the time zone in which the act is performed, it is taken to be done on the following day;
- (l) a party that is a trustee is bound both personally and in its capacity as trustee;
- (m) a reference to an authority, institution, association or body (**original entity**) that has ceased to exist or been reconstituted, renamed or replaced or whose powers or functions have been transferred to another entity, is a reference to the entity that most closely serves the purposes or objects of the original entity;
- (n) headings and the provision of a table of contents are for convenience only and do not affect the interpretation of this Agreement.

29 Execution and counterparts

- 29.1 The parties' consent to execution of this Agreement by electronic means, in paper format or a combination of both.
- 29.2 This Agreement:
- (a) may be executed and exchanged in any number of counterparts, whether in electronic or paper format or a combination of both, and all the counterparts together constitute one and the same instrument; and
 - (b) is binding on the parties on the exchange of executed counterparts.
- 29.3 If this Agreement is executed and exchanged by electronic means or witnessed by audio visual means, the relevant party, signatory and/or witness does so in accordance with:
- (a) *Electronic Transactions (Victoria) Act 2000* (Vic); or
 - (b) in relation to a corporation, the *Corporations Act 2001* (Cth).

- 29.4 If the signatures on behalf of one party are on different counterparts, this will be taken to be, and have the same effect as, signatures on the same counterpart and on a single copy of this Agreement.

30 General

- 30.1 If the Particulars include Special Conditions those Special Conditions have priority over these Conditions.
- 30.2 Where in this Agreement it refers to a notice, direction or action of Coliban Water such notice, direction or action is effective if given or made by an employee or authorised agent of Coliban Water.
- 30.3 Any waiver or agreement on the part of Coliban 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 Coliban Water.
- 30.4 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.
- 30.5 This Agreement is executed as a Deed.