

# Annexure A

## Development Agreement Standard Conditions



### DAFI - Development Agreement Formal Instrument

#### Annexures

-  **A - Development Agreement Standard Conditions**
-  **B - Design and Construction Standards**
-  **C - Work Health Safety and Environmental and Heritage Standards**
-  **D - Role of Superintendent**
-  **E - Approved Unconditional Undertaking**

## Table of Contents

1. Interpretation.....	2
2. Operation of Document.....	8
3. Amendment and Assignment.....	10
4. The Developer.....	10
5. The Bond and Security.....	14
6. Insurance.....	16
7. Confidentiality.....	18
8. Intellectual Property.....	18
9. Goods and Services Tax.....	19
10. Construction of the Development Works.....	19
11. Variations.....	23
12. Defects Liability.....	24
13. Certification of the Development Works.....	26
14. Ownership of the Development Works.....	26
15. Indemnity by Developer.....	27
16. Notices.....	27
17. Dispute Resolution.....	28
18. Termination.....	29
19. Force Majeure.....	29
20. Ethical Conduct.....	30

# OPERATIVE PROVISIONS

## 1. Interpretation

### 1.1. Definitions

The following definitions apply in this document.

**“Additional Infrastructure”** means the works described in Schedule 2 and Schedule 3 of the Formal Instrument which SA Water requires the Developer to provide and which are in excess of what would otherwise be required for the provision of reticulation services to allotments on the Land;

**“Annexure A”** means the document described as “Annexure A - Development Agreement Standard Conditions” published by SA Water on its website located at [www.sawater.com.au](http://www.sawater.com.au) on the date on which the Developer executes the Formal Instrument;

**“Annexure B”** means the document described as “Annexure B - Development Agreement Design and Construction Standards” published by SA Water on its website located at [www.sawater.com.au](http://www.sawater.com.au) on the date on which the Developer executes the Formal Instrument;

**“Annexure C”** means the document described as “Annexure C - Development Agreement Work Health Safety And Environmental And Heritage Standards” published by SA Water on its website located at [www.sawater.com.au](http://www.sawater.com.au) on the date on which the Developer executes the Formal Instrument;

**“Annexure D”** means the document described as “Annexure D - Development Agreement Role of Superintendent” published by SA Water on its website located at [www.sawater.com.au](http://www.sawater.com.au) on the date on which the Developer executes the Formal Instrument;

**“Annexure E”** means the document described as “Annexure E - Development Agreement Approved Unconditional Undertaking” published by SA Water on its website located at [www.sawater.com.au](http://www.sawater.com.au) on the date on which SA Water executes the Formal Instrument;

**“ANTS GST Act”** means the A New Tax System (Goods and Services Tax) Act 1999 (Cth);

**“Approved Contractor”** means a person who is approved by SA Water as complying with SA Water’s Contractor Management System and is included in the Accredited Contractor List published by SA Water on its website located at [www.sawater.com.au](http://www.sawater.com.au) on the date on which the Developer signs the Formal Instrument;

**“Approved Designer”** means a consultant engineer approved by SA Water who is included in the Consultant Accreditation Rating List published by SA Water on its website located at [www.sawater.com.au](http://www.sawater.com.au) on the date on which the Developer signs the Formal Instrument;

**“Approved Products List”** means any of the following lists of products approved by SA Water for use in connection with its water and sewerage undertaking published by SA Water on its website located at [www.sawater.com.au](http://www.sawater.com.au) on the date on which the Developer signs the Formal Instrument:

TS0503 - Authorised Products for Water Systems;

TS0500 - Authorised Products for Maintenance of Water & Sewer Systems;

TS0502 – Authorised Products for Gravity and Pressure Sewer Systems;

TS0504 - Authorised Products for Packaged Sewer Pumping Stations;

TS0506 - Authorised Products for Vacuum Sewer Systems;

S0507 - Authorised Products for Pressure Sewer Systems;

**“Approved Status”** means the status of being included as an Approved Designer on SA Water’s Consultant Accreditation Rating List or an Approved Contractor on SA Water’s Authorised Contractor List published by SA Water in its website located at [www.sawater.com.au](http://www.sawater.com.au) on the date which the Developer signs the formal instrument;

**“Bond”** means the deposit of cash or the lodgement of an unconditional undertaking approved by SA Water in accordance with clause 5.1 of this document in the amount stated in Item 8 of Schedule 1 of the Formal Instrument;

**“Business Day”** means any day that is not a Saturday, Sunday or public holiday in South Australia;

**“Certificate of Practical Completion”** means the certificate issued by SA Water to the Developer in accordance with clause 13.1 of this document certifying that the Development Works or a Separable Part of the Development Works has reached Practical Completion;

**“Change in Control”** means in relation to a body corporate or entity (the body) where:

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

however no Change in Control occurs if:

- (c) the entity that ceases to Control the body under paragraph (i) was, immediately before, a wholly-owned subsidiary of a body corporate that Controls the body; or
- (d) the entity that comes into Control of the body under paragraph (ii) is, immediately afterwards, a wholly owned subsidiary of a body corporate that previously Controlled and continues to Control the body;

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

**“Commencement Date”** means the date stated in Item 3 of Schedule 1 of the Formal Instrument;

**“Contractor Management System”** means the electronic on-line system used by SA Water to demonstrate that its contractors have in place workplace management systems that are compliant with the Work Health Safety Act 2012 (SA) and operate to reduce the overall risk of workplace injury;

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

**“Corporations Act”** means Corporations Act 2001 (Cth);

**“CPI”** means the Consumer Price Index (All Groups) for Adelaide published from time to time by the Australian Bureau of Statistics or by the Commonwealth of Australia or by any other body authorised by the Commonwealth of Australia to do so;

**“Customary Working Hours”** means ordinary hours of work fixed by or under any statute, ordinance or subordinate legislation or by any relevant award,

determination, judgment or order of any competent court, board, commission or other industrial tribunal or by any relevant industrial agreement that is in force in the State of South Australia or, where hours of work are not so fixed, means the hours of work normally observed in the relevant trade or industry in the State of South Australia;

**“Date of Practical Completion of the Development Works”** means the date specified in the Certificate of Practical Completion as being the date on which Practical Completion of the Development Works was achieved;

**“Date of Practical Completion of a Separable Part of the Development Works”** means the date specified in the Certificate of Practical Completion of a Separable Part of the Development Works as being the date on which Practical Completion of the Separable Part was achieved;

**“Defect”** means any omission, defect, imperfection, shrinkage or any other fault in the Development Works which becomes apparent during the Defects Liability Period under proper use of the Development Works;

**“Defects Liability Period for the Works”** means the period in which the Developer is liable to rectify defects in the Development Works as described in clause 12.1 of this document;

**“Defects Rectification Notice”** means a written notice served by SA Water on the Developer which notice specifies the nature of the defect and the time within which the defect must be rectified;

**“Deliverable”** means all materials developed or supplied by the Developer in carrying out the Development Works;

**“Design Documents”** means the drawings specifications and other information, samples, models, patterns and the like created by the Developer for the construction of the Development Works;

**“Design and Construction Requirements”** means the design and construction requirements set out in the standards, codes and guidelines listed in Annexure B and the design and construction requirements for the Development Works, if any, specified by SA Water in Schedule 3 Special Conditions of the Formal Instrument;

**“Developer”** means the person described in Item 1 of Schedule 1 of the Formal Instrument;

**“Developer’s Contribution”** means the sum payable by the Developer to SA Water being the amount stated in Item 10 of Schedule 1 of the Formal Instrument together with any additional amount specified by SA Water in Schedule 3 Special Conditions of the Formal Instrument as being payable by the Developer to SA Water for the Additional Infrastructure or is required to be paid by the Developer to SA Water by the operation of clause 2.4 (a) (i) or clause 4.7 (a) (ii) of this document;

**“Developer’s Superintendent”** means the person appointed by the Developer and approved by SA Water to carry out the Role of Superintendent and includes the person appointed by the Developer and approved by SA Water as the Superintendent’s Representative;

**“Development Agreement”** means the agreement regarding the Development Works entered into by the Developer and SA Water by signing the Formal Instrument and includes the schedules and annexures to the Formal Instrument;

**“Development Works”** means the works described in Schedule 2, Development Works of the Formal Instrument which are to be designed and constructed in accordance with the Development Agreement for the supply of Water, Recycled Water (if applicable), sewers and sewage related assets and

Wastewater infrastructure to service the Land and includes the Additional Infrastructure, all variations, remedial work and work done to rectify defects during the Defects Liability Period.;

**“Direction”** includes agreement, approval, authorisation, certificate, consent, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement;

**“Dispute Representative”** has the meaning attributed to it in clause 17.1 of this document;

**“Extended Period”** means the period of eighteen (18) months beginning on the day immediately following the last day of the Initial Period and ending eighteen (18) months after that day;

**“Final Certificate”** means the certificate issued by SA Water to the Developer in accordance with clause 13.3 of this document;

**“Force Majeure Event”** means any matter outside the reasonable control of a party, including:

- (a) fire, lightning strike, explosion, flood, earthquake, landslide, tsunami or other natural disaster;
- (b) ionising radiation or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel;
- (c) riot, civil commotion, malicious damage, sabotage, war (whether declared or not), Act of Terrorism or revolution; or
- (d) order of a court, tribunal or Government Agency;

but only to the extent that the event or circumstance is:

- (e) not within the reasonable control of the affected party or a related body corporate; and
- (f) not reasonably able to be avoided, remedied or abated by the affected party by the exercise of reasonable diligence or effort;

**“Formal Instrument”** means the document so described and executed by the Developer and SA Water as an agreement;

**“GST”** means the tax imposed by the ANTS GST Act;

**“Initial Period”** means the period of eighteen (18) months commencing on the Commencement Date and ending on the that date being eighteen (18) months after that date;

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

**“Intellectual Property Rights”** means all intellectual property rights, including:

- (a) patents, plant breeders' rights, copyright, rights in circuit layouts, registered designs, trademarks, know-how and any right to have Confidential Information kept confidential; and

- (b) any application or right to apply for registration of any of the rights referred to in paragraph (i) and for the avoidance of doubt excludes moral rights and performers' rights;

**“Land”** means the land specified in Item 1 of the Schedule;

**“Law”** shall mean and include all present and future legislation (both State and Federal) and all amendments to them and re-enactments of them and all regulations, by-laws and orders made pursuant to them;

**“Liability”** means in relation to a person any liability or obligation however it arises and whether it is present or future, fixed or unascertained, actual or contingent and including any liability for consequential or indirect loss, economic loss or loss of profits;

**“Ordinary working days”** means ordinary days of work fixed by or under any statute, ordinance or subordinate legislation or by any relevant award, determination, judgment or order of any competent court, board, commission or other industrial tribunal or by any relevant industrial or enterprise agreement that is in force in the State of South Australia or, where days of work are not so fixed, means the days of work normally observed in the relevant trade or industry in the State of South Australia but does not include a day that is a public holiday in the State of South Australia;

**“Payable variation”** means a variation determined by SA Water to be a payable variation in accordance with clause 11.2 of this document;

**“Practical Completion”** means that stage in the execution of the Development Works when:

- (a) the Development Works or a Separable Part of the Development Works, as the case may be, has been completed in accordance with the Development Agreement and
- (b) those tests which are required by SA Water in accordance with clause 10.11 of this document to be carried out and passed before the Development Works or the Separable Part of the Development Works, as the case may be, are handed over to SA Water have been carried out and passed, and
- (c) the Development Works or Separable Part of the Development Works has successfully completed all necessary commissioning activities and obtained all necessary certifications
- (d) all documents including As Constructed Drawings and other information required under this document which, in the opinion of SA Water, are essential for the use, operation and maintenance of the Development Works have been supplied to SA Water by the Developer, and
- (e) all requirements specified in the Design and Construction Requirements as a pre-requisite for the issue of the Certificate of Practical Completion have been met, and
- (f) all training of SA Water staff required for the ongoing operation and maintenance of the Development Works or Separable Part of the Development Works has been carried out by the Developer;
- (g) all major defects have been rectified and a timetable for completing outstanding minor defects has been agreed with SA Water;
- (h) all debts due from the Developer to SA Water have been paid, and
- (i) the Security has been lodged by the Developer with SA Water in accordance with clause 5.2 of this document;

**“Recycled Water”** means Wastewater which has been treated so as to be usable by SA Water customers;

**“Remedial work”** means work carried out by the Developer to rectify the defects specified in a Defects Rectification Notice.;

**“Role of Superintendent”** means the Developer's construction supervisory role described in Annexure D;

**“SA Water”** means South Australian Water Corporation ABN 69 336 525 019, a body corporate by virtue of South Australian Water Corporation Act 1994 (SA) and includes its successors and assigns;

**“SA Water's Contribution”** means the sum, if any, payable by SA Water to the Developer for the cost of the Additional Infrastructure in the amount specified in Schedule 3 of the Formal Instrument;

**“SA Water Safety Standards”** means the safety standards set out in Annexure C;

**“Security”** means the deposit of cash or lodgement of an unconditional undertaking approved by SA Water in accordance with clause 5.2 of this document in the amount stated in Item 9 of Schedule 1 of the Formal Instrument;

**“Separable Part of the Development Works”** means any portion of the Development Works determined to be a Separable Part by SA Water in accordance with clause 13.2 of this document;

**“Sewage:”** includes any form of waste that may appropriately be removed or dealt with by the collection, storage and treatment or conveyance through the use of a reticulated system; **“Sewer”** means any infrastructure that is, or is to be, used for:

- (a) the collection or storage of sewage;
- (b) the conveyance or reticulation of sewage; or
- (c) the treatment of sewage including any outfall pipe or other work that stores or conveys water leaving infrastructure used for the treatment of sewage;

**“Tax Invoice”** has the meaning attributed in the ANTS GST Act; and

**“Taxable Supply”** has the meaning attributed in the ANTS GST Act.

**“Wastewater”** means water collected and transported through sewers and includes water from domestic, commercial and industrial sources including food processing factories;

**“Water”** includes rainwater, stormwater, desalinated water, recycled water and water that may include any material or impurities but does not include sewage.

## 1.2. Rules for interpreting this document

The following rules apply in the interpretation of this document, except where the context makes it clear that a rule is not intended to apply.

- a) a reference to a document (including this document) or to an agreement, or a provision of a document or agreement, is a reference to the document, agreement or provision as amended, supplemented replaced or novated;
- b) a reference to any legislation or to any provision of any legislation includes:
  - (i) all legislation, regulations, proclamations, ordinances, by-laws and instruments issued under that legislation or provision; and



- (ii) any modification, consolidation, amendment, re-enactment or substitution of that legislation or provision;
- c) a word importing:
  - (i) the singular includes the plural;
  - (ii) the plural includes the singular; and
  - (iii) a gender includes every other gender;
- d) words denoting individuals include corporations, unincorporated associations, partnerships, trusts and joint ventures;
- e) a reference to a party includes that party's administrators, successors and permitted assigns;
- f) if any act pursuant to this document would otherwise be required to be done on a day which is not a Business Day then that act may be done on the next Business Day;
- g) where a word or phrase is given a defined meaning, any other part of speech or grammatical form in respect of that word or phrase has a corresponding meaning;
- h) a reference to two or more persons is a reference to those persons jointly and severally;
- i) a reference to a clause is a reference to a clause of this document;
- j) a reference to a schedule is a reference to a schedule of the Formal Instrument;
- k) a reference to a clause number is a reference to all of its sub-clauses;
- l) a reference to dollars is to Australian dollars;
- m) where general words are associated with specific words which define a class, the general words are not limited by reference to that class;
- n) the clause headings are for convenient reference only and they do not determine the meaning of a clause;
- o) the word "or" is not exclusive; and
- p) where there is any conflict between a provision of this document and a provision of a Schedule, the provision in the Schedule shall prevail.

### **1.3. Multiple parties**

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

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

## **2. Operation of Document**

### **2.1. Commencement of Development Agreement**

The rights and obligations of the parties conferred or imposed by the

development Agreement begin on the date on which the last of the parties to do so, executes the Formal Instrument.

## **2.2. SA Water consent**

Subject to clauses 2.3 and 2.4 of this document SA Water consents to the Developer carrying out the Development Works on the Land in accordance with the Development Agreement.

## **2.3. Review by SA Water**

If the Developer fails to commence the Development Works within six (6) months of the Commencement Date SA Water may, acting reasonably, review the operation of the Development Agreement and in the course of any such review may amend, supplement or replace all or any of the following:

- a) the location and the description of the Development Works;
- b) the location and the description of the Additional Infrastructure;
- c) the Design and Construction Requirements
- d) the amount of the Bond;
- e) the amount of the Security;
- f) the amount of SA Water's Contribution;
- g) the amount of the Developer's Contribution;
- h) the Date for Practical Completion of the Development Works; and
- i) the Date for Practical Completion of the Additional Infrastructure,

and in addition the costs incurred by SA Water in carrying out the review will be a debt due and payable by the Developer to SA Water.

For the purposes of this clause the Development Works commence when the Developer has engaged the Approved Contractor and the Approved Designer, appointed a person to carry out the Role of Superintendent in accordance with the Development Agreement and construction of the Development Works in accordance with the Development Agreement has commenced on the Land. If any of these requirements for commencement have not occurred the Development Works have not commenced.

## **2.4. Termination or extension**

- a) If the Developer fails to complete the Development Works within the Initial Period, SA Water may, in its sole discretion:
  - (i) subject to payment by the Developer of any further or revised fees, charges, or contributions assessed by SA Water, agree to extend the operation of the Development Agreement for the Extended Period on the same terms as are contained in this document;
  - (ii) terminate the Development Agreement; or
  - (iii) terminate the Development Agreement and step in to complete so much of the Development works as is required to provide water (including recycled water) and sewerage services to customers other than the Developer.
- b) If SA Water agrees to extend the operation of the Development Agreement in accordance with clause 2.4 (a) (i) the further revised fees,

charges and contributions payable shall be the Developers Contribution updated to reflect:

- (i) any changes as have been published by SA Water in accordance with section 36 on the Water Industry Act 2012 and are in effect at the date the extension is agreed, and
  - (ii) any changes in the cost of constructing the Additional Works;
- c) If SA Water terminates the Development Agreement under clause 2.4(a)(ii) or (iii), and the Developer subsequently wishes to proceed with the Development Works, the Developer must:
- (i) obtain the consent of SA Water;
  - (ii) enter into a further development agreement with SA Water; and
  - (iii) pay to SA Water any further or revised fees, charges and contributions assessed by SA Water.
- d) Where SA Water exercises its rights under clause 2.4 (a)(iii) above, the reasonable costs incurred by SA Water in completing works, less the amount of SA Water's Contribution and any other amounts that SA Water has agreed to reimburse to the Developer, will be a debt due and payable by the Developer to SA Water.
- e) Termination of this Agreement is without prejudice to any rights or liabilities of the parties accruing to the date of termination.

### **3. Amendment and Assignment**

#### **3.1. Amendment**

This document can only be amended or replaced by:

- a) an inconsistent provision included in Schedule 3 Special Conditions of the Formal Instrument and then only to the extent of the inconsistency; or
- b) another document signed by the parties that expressly states that it is amending the Development Agreement Standard Conditions set out in this document.

#### **3.2. Assignment**

- a) The Developer may not assign, transfer, dispose of, declare a trust over or otherwise create an interest in its rights and obligations set out in this document without the prior written consent of SA Water.
- b) The Developer acknowledges that SA Water has entered into the Development Agreement in reliance on the expertise and capability of the Developer and may withhold its consent under clause 3.2(a) in its absolute discretion.

### **4. The Developer**

#### **4.1. Overall responsibility for Development Works**

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

## 4.2. Work Health and Safety

The Developer acknowledges that in carrying out and completing the Development Works the Developer is acting as a person conducting a business or undertaking for the purposes of the Work Health and Safety Act 2012 (SA) and, without limiting the operation of clause 4.6(d) of this document, agrees to comply with, and to ensure that the Approved Designer, Approved Contractor and Superintendent comply with, the provisions of the Work Health and Safety Act 2012 (SA) and any other applicable legislation including the legislation listed under the heading "Work Health and Safety" in Annexure C.

## 4.3. Developer's warranties

The Developer warrants to SA Water, that:

- a) the Developer will carry out and complete the Development Works and will have the primary responsibility for all obligations arising out of or in connection with the design and construction of the Development Works in accordance with the Development Agreement and will ensure that the Approved Designer and the Approved Contractor respectively design and construct the Development Works in accordance with the Development Agreement;
- b) in connection with the completion of the Development Works, it will only engage an Approved Designer and an Approved Contractor;
- c) that the Approved Designer and the Approved Contractor:
  - (i) at all times will be suitably qualified and experienced, and will exercise due skill, care and diligence in the carrying out and completion of the Development Works;
  - (ii) effect and maintain the insurances, and observe the general requirements regarding insurance, set out respectively in clause 6 of this document; and
  - (iii) will carry out their respective obligations relating to the Development Works in accordance with the Development Agreement;
- d) the Developer will ensure that the Approved Designer and Approved Contractor engaged by it are familiar with all current Laws affecting the Development Works, or which may affect the Development Works, and that there is nothing in the Design and Construction Requirements which is inconsistent with, or at variance with, any current Laws;
- e) the Developer will ensure that the Approved Designer and Approved Contractor engaged by it examine and carefully check any Design and Construction Requirements and that such Design and Construction Requirements:
  - (i) are consistent with and do, or will, conform with and meet all Laws; and
  - (ii) do not contain any material discrepancies, ambiguities or inconsistencies;
- f) the Approved Designer or the Developers Superintendent (who is accredited to undertake audit activity) is appointed to undertake a reasonable program of audits of the construction of the Development Works by the Approved Contractor. Without limitation, these audits must cover the management of work health and safety as well as the environmental and quality performance of the Approved Contractor; and

- g) all materials for the Development Works:
  - (i) will be provided at the Developer's cost; and
  - (ii) are either materials specified in the Approved Products List or if they are not so specified, have been approved by SA Water.

#### **4.4. Warranties unaffected**

The Developer acknowledges that the warranties in clause 4.3 will remain unaffected notwithstanding:

- a) any:
  - (i) receipt or review of;
  - (ii) comment on; or
  - (iii) acceptance of,the Design Documents by SA Water;
- b) the provision of any information and data or the giving of a Direction concerning the Development Works by or on behalf of SA Water; or
- c) the granting by SA Water of Approved Status to the Approved Designer or the Approved Contractor.

#### **4.5. No warranty by SA Water**

- a) Information made available to the Developer in the documents forming part of the Development Agreement or prior to, or after the Development Works application, will not constitute a warranty or representation of any kind by SA Water, and the Developer acknowledges and agrees that such information will be checked and verified by it, the Approved Designer and the Approved Contractor.
- b) The Developer will not be entitled to any moneys or extension of the Initial Period on account of any alleged statement, warranty or representation with respect to the information referred to in clause 4.4(a) which may not prove correct.
- c) No warranty, express or implied, is given by SA Water that the Design and Construction Requirements show all information which is or may be necessary or incidental to the Development Works.
- d) SA Water gives no guarantee or warranty, express or implied, as to the performance, commercial practices or financial status of any person listed as having Approved Status. SA Water does not endorse any of the workmanship of, or the services offered by, the persons so listed.
- e) SA Water gives no guarantee or warranty, express or implied, as to the fitness for purpose or performance of any product included in the Approved Products List.

#### **4.6. Obligations in relation to the Development Works**

The Developer must:

- a) before commencing the Development Works, satisfy all applicable requirements of the Development Act 1993 (SA);
- b) before commencing the Development Works, at the Developer's cost, obtain all necessary permits, consents and other authorisations required

- by Law for the Development Works to proceed;
- c) not commence the Development Works until the Developer has provided to SA Water a copy of the Formal Instrument duly executed by or on behalf of the Developer and the Developer has paid to SA Water the amount specified in Item 10 of Schedule 1 of the Formal Instrument;
  - d) without limiting clauses 4.6(a) and 4.6(b) at all times meet the requirements of all relevant Law relating to the commencement and completion of the Development Works including the legislation listed under the heading "Environment and Heritage Protection" in Annexure C;
  - e) at any time upon receipt of a written request from SA Water, provide SA Water with written evidence that the requirements of paragraphs (a) to (c) have been met; and
  - f) at any time where requested by SA Water, coordinate the location and design of the proposed Development Works with any of SA Water or any other authority's existing or proposed works, operations or services.

#### **4.7. Development Works costs**

- a) The Developer must:
  - (i) meet the full cost of designing, constructing, project-managing, supervising, auditing, surveying and asset recording all of the Development Works (except for any amounts which SA Water expressly agrees to pay the Developer, as set out in Schedule 3 of the Formal Instrument); and
  - (ii) pay to SA Water the Developer's Contribution together with such other fees, charges and contributions relating to the Development Works as are published by SA Water in accordance with section 36 of the Water Industry Act 2012 and are in effect at the date the Developer commences the Development Works.
- b) The fees, charges and contributions referred to in clause 4.7(a) (ii) must be paid by the Developer to SA Water within sixty (60) Days after the Developer has been invoiced by SA Water for them.
- c) SA Water's liability to make payment to the Developer for the costs of the Development Works is limited to the sum of the following:
  - (i) the amount of one dollar (\$1.00) payable in accordance with clause 1.2(a) of the Formal Instrument;
  - (ii) the amount, if any, stated in Schedule 3 of the Formal Instrument as being payable by SA Water; and
  - (iii) the value of a payable variation, if any, agreed or determined in accordance with clause 11.2 of this document.

#### **4.8. SA Water right to enter Land**

- a) The Developer agrees to allow SA Water its employees and authorised agents to have access to the Land in order to inspect the Development Works at any time during their construction.
- b) SA Water must ensure that its employees and authorised agents comply with the Developer's workplace health and safety procedures that apply to the Land while they are on the Land to inspect the Development Works during their construction.

#### 4.9. Taking up residence on the Land

The Developer must ensure that no person takes up temporary or permanent residence on any part of the Land prior to a Certificate of Practical Completion for the Development Works being issued by SA Water in accordance with clause 13.1 of this document.

### 5. The Bond and Security

#### 5.1. Bond

- a) If the Developer wishes to settle or complete the sale of allotments on the Land at a time when the Development Works have not reached Practical Completion, the Developer by notice in writing may request SA Water to allow clearance of the allotments on the Land.
- b) Within ten (10) Business Days of making a request in accordance with clause 5.1(a) of this document the Developer must:
  - (i) provide the Bond to SA Water for the purpose of ensuring that the Development Works are completed by the Developer in accordance with the requirements of the Development Agreement;
  - (ii) instruct the Developer's surveyor to lodge with the Development Assessment Commission the final plan of land division for the allotments on the Land; and
  - (iii) notify SA Water in writing that it has carried out the actions required by paragraphs (i) and (ii) of this clause.
- c) The Bond may be provided by the Developer in the form of cash or an approved unconditional undertaking in the form of a bank guarantee or insurance bond issued by an approved financial institution or insurance company.
- d) SA Water shall have the absolute discretion to approve or to disapprove of the form of an unconditional undertaking and the financial institution or insurance company issuing it.
- e) The form of unconditional undertaking set out in Annexure E is approved by SA Water.
- f) Within five (5) Business Days after receiving the Bond from the Developer and being satisfied that the Developer has complied with clause 5.1(b) (ii) of this document SA Water will advise the Development Assessment Commission that SA Water's conditions in relation to the final plan of land division lodged by the Developer in relation to the Land have been met.
- g) By notice in writing to SA Water given at any time after a substantial proportion of the Development Works has been completed and prior to the Development Works reaching Practical Completion the Developer may make up to three (3) requests for SA Water to reduce the amount of the Bond as work on the Development Works progresses. SA Water will consider any such request and assess the value of the Development Works that have been completed up to the date of the request. In its absolute discretion SA Water may reduce the amount of the Bond having regard to the reduced value of the Development Works that are yet to be completed.
- h) Within five (5) Business Days of receiving from the Developer the written request to reduce the Bond SA Water will:

- (i) if it has decided that there has been a substantial reduction in the value of the Development Works that are yet to be completed, notify the Developer in writing of its decision and repay or release the balance of the Bond to the Developer; or
  - (ii) if it has decided that there has not been a substantial reduction in the value of the Development Works that are yet to be completed, notify the Developer in writing that it will not make any reduction in the Bond.
- i) At Practical Completion of the Development Works SA Water will retain as the Security an amount of the Bond equal to the Security and within five (5) Business Days after SA Water has issued a Certificate of Practical Completion for the Development Works SA Water will notify the Developer in writing of its intention to retain this amount as Security and repay or release to the Developer the balance of the Bond remaining after any deduction made by SA Water in accordance with clause 5.3 of this document.
  - j) Nothing in this clause 5.1 operates to limit the Developer's obligations set out in clause 4.9 of this document.

## 5.2. The Security

- a) The Security is for the purpose of ensuring that any defects in the Development Works are rectified by the Developer during the Defects Liability Period in accordance with the requirements of the Development Agreement.
- b) The Security may be provided by the Developer in the form of cash or an approved unconditional undertaking in the form of a bank guarantee or insurance bond issued by an approved financial institution or insurance company.
- c) SA Water shall have the absolute discretion to approve or to disapprove of the form of an unconditional undertaking and the financial institution or insurance company issuing it.
- d) The form of unconditional undertaking set out in Annexure F is approved by SA Water.
- e) The Developer must provide the Security to SA Water when the Development Works, or a Separable Part of the Development Works, have been brought to a stage ready for Practical Completion.
- f) As between the Developer and SA Water, Practical Completion of the Development Works shall not take place unless and until the Security has been provided by the Developer to SA Water.
- g) Notwithstanding any other provision of the Development Agreement, SA Water is not obliged to release and repay the Bond to the Developer unless and until the Security has been provided by the Developer to SA Water.
- h) The Security, or the balance of the Security remaining after any deduction made by SA Water in accordance with clause 5.3 of this document, must be released to the Developer within five (5) Business Days after the issue of a Final Certificate for the Development Works.

## 5.3. Recourse to the Bond and Security

- a) Without limiting SA Water's rights under any other provision of the Development Agreement, any debt or debts due from the Developer to



SA Water whether by operation of the Development Agreement or otherwise, may be deducted by SA Water from the Bond and the Security, or either of them, and retained by SA Water.

- b) If the Security does not consist of money SA Water may convert the Security into money in order to exercise its rights in clause 5.3 (a) of this document. SA Water is not obliged to give the Developer prior notice of its intention to convert the Security into money and is not liable to the Developer for any loss or expense that the Developer may suffer or incur as a result of the conversion.
- c) SA Water shall be entitled to recover from the Developer any debt or debts due from the Developer to SA Water that have not been satisfied out of the Bond and the Security, or either of them.
- d) Nothing in this clause operates to limit or prevent SA Water's rights to recover damages from the Developer for breaches of the Development Agreement or any other remedy available to it.

## **6. Insurance**

### **6.1. Public liability insurance**

- a) Before the Developer commences any of the Development Works, the Developer must:
  - (i) arrange effect and maintain a public liability policy of insurance which must be in the joint names of SA Water and the Developer and which must cover the Developer's liabilities to SA Water and third parties; and
  - (ii) ensure that each contractor involved in carrying out the Development Works including the Approved Contractor and all subcontractors employed from time to time by any such contractor in relation to the Development Works effects and maintains a public liability policy of insurance for their respective rights and interests and covering their respective liabilities to third parties (including SA Water),

for loss of or damage to property death of or injury to any person (other than liability for entitlements provided to workers by the Return to Work Act 2014 (SA) or which is otherwise required by law to be insured under a workers compensation policy of insurance) and in each case is for an amount in respect of any one occurrence not less than \$20 million.

- b) The Developer must ensure that the policy of insurance that the Developer and each contractor and subcontractor involved in carrying out the Development Works is obliged to effect and maintain by operation of paragraph (a) of this clause 6.1 is maintained until the Final Certificate is issued in accordance with clause 13.3 of this document.
- c) The Developer must not, and must ensure that the Approved Contractor does not, do any act or permit or suffer any circumstances by which the policy of insurance taken out under this clause 6.1 may at any time become void or voidable and the Developer must at all times at its own expense comply with the conditions of such policy so as to prevent its invalidation. The Developer hereby indemnifies SA Water against any losses, damages, costs or expenses arising out of its default under this paragraph.
- d) The Developer must produce to SA Water and must ensure that each contractor and subcontractor involved in carrying out the Development Works produces to SA Water, a certificate of currency of the policy of insurance that each is obliged to effect and maintain by operation of

paragraph (a) of this clause 6.1, before commencing any work forming part of the Development Works.

## **6.2. Professional indemnity insurance**

- a) The Developer must ensure that before the Approved Designer commences any work in connection with the design of the Development Works, the Approved Designer has arranged professional indemnity insurance with a limit of indemnity not less than \$5 million which covers liability arising from a breach of professional duty, whether owed in contract or otherwise caused by any negligent act or omission of the Approved Designer, its employees, subcontractors, contractors or agents.
- b) The Policy of insurance referred to in clause 6.2 (a) must be maintained until the expiration of three (3) years after the Certificate of Practical Completion is issued.
- c) The Developer must ensure that the Approved Designer does not do any act or permit or suffer any circumstances by which the policy of insurance taken out under this clause 6.2 may at any time become void or voidable and the Approved Designer must at all times at its own expense comply with the conditions of such policy so as to prevent its invalidation or prejudice rights of the insured under such policy. The Developer hereby indemnifies SA Water against any losses, damages, costs or expenses directly attributable to the Approved Designer's default under this paragraph.

## **6.3. Terms of insurance**

- a) The Developer must ensure that the policies of insurance required under this clause 6 provide that the insurer waives all rights, remedies or relief to which it might become entitled by way of subrogation against SA Water.
- b) The effecting and keeping in force of any insurance will not in any way limit the obligations or responsibilities of the Developer under this document or at Law.

## **6.4. Insurance of employees**

- a) The Developer must ensure that the Approved Designer and Approved Contractor and their respective subcontractors each are a registered or self-insured employer in accordance with section 128 and 129 respectively of the Return to Work Act 2014 (SA) or hold workers' compensation insurance as may otherwise be required by Law until the expiration of 2 years after the date of the Certificate of Completion.
- b) The Developer indemnifies SA Water against any loss it may suffer as a consequence of any failure of the Approved Designer, the Approved Contractor or any of their respective subcontractors to become a registered or self-insured employer in accordance with section 128 and 129 respectively of the Return to Work Act 2014 (SA) or obtain workers' compensation insurance in accordance with this clause 6.4.

## **7. Confidentiality**

### **7.1. Confidentiality obligation**

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

### **7.2. Exceptions**

The Developer's obligation under clause 7.1 not to make any disclosure does not apply to disclosures to the extent they are:

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

## **8. Intellectual Property**

### **8.1. Intellectual Property in Deliverables**

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

### **8.2. License**

The Developer grants SA Water a non-exclusive, perpetual, non-transferable, royalty free and worldwide license under the Intellectual Property in the Deliverables for whatever purpose required by SA Water and must ensure that each of the Approved Designer and the Approved Contractor grants to SA Water a license of their respective Intellectual Property in the Deliverables in similar terms.

### **8.3. No infringement**

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

## 9. Goods and Services Tax

### 9.1. GST Price Adjustment

If the Developer is obliged to pay a Goods and Services Tax (GST) in respect of a taxable supply or taxable importation under this Agreement then the price for the goods &/or services supplied under this Agreement must be adjusted so that;

- a) the Developer's net revenue under this Development Agreement, taking into account the Developer's liability for GST, any input tax credits, and benefits from tax reform should not, by reason only of the imposition of GST, be less than it otherwise would be; and
- b) any increase in payments due from SA Water as a result of the imposition of GST should be reduced to the extent that the Developer is able to benefit from input cost reductions as a result of tax reforms associated with the introduction of GST.

### 9.2. Tax Invoice

If the Developer is liable to pay GST in respect of any taxable supply or taxable importation to SA Water under this document, the Developer must deliver to SA Water's Representative a tax invoice in respect of a payment under this document at the time when payment is made as a condition of such payment.

## 10. Construction of the Development Works

### 10.1. Developer Supervision of the Works

- a) The Developer must ensure that a person competent to do so and acceptable to SA Water is appointed to carry out the Role of Superintendent and personally supervises the Development Works to ensure that they are constructed in accordance with the Development Agreement. This person may be appointed by the Developer.
- b) If the Developer's Superintendent is to change during the construction of the Development Works, the Developer must notify SA Water in writing of the proposed change before appointing a new person as the Developer's Superintendent and to provide SA Water with sufficient information to enable SA Water to determine whether the person to be appointed Developer's Superintendent is a fit and proper and competent person to perform the Role of Superintendent. SA Water may withhold its consent for the person to be appointed Developer's Superintendent in its absolute discretion.
- c) Any matter within the knowledge of the Developer's Superintendent will be deemed to be within the knowledge of the Developer.
- d) Any notice given to the Developer's Superintendent will be deemed to be notice given to the Developer.
- e) If the Developer or the Developer's Superintendent is absent from the Land, SA Water may take any action which, acting reasonably, it considers necessary to prevent loss of or damage to the whole or any part of the Development Works or to any property or to prevent personal injury to any person on the Land. The cost of any such action taken by SA Water is, at the discretion of SA Water, a debt due from the Developer to SA Water.
- f) Any action taken by SA Water under this clause does not relieve the Developer of any of its liabilities or obligations under the Development Agreement.

## 10.2. SA Water's Representative

- a) SA Water, by notice in writing to the Developer, may appoint a person to act as SA Water's representative in relation to the Development Works and may change that appointment from time to time.
- b) The person notified to the Developer as SA Water's representative may exercise the powers conferred on SA Water by the Development Agreement during the period of their appointment.

## 10.3. Directions

- a) The Development Works must be executed in accordance with the Development Agreement and in accordance with any directions given by SA Water in relation to the Development Works.
- b) Any direction given to the Developer by SA Water may be given either orally or in writing. When any such direction is given orally, SA Water must, as soon as practicable after the direction is so given, confirm it in writing addressed to and served on the Developer in accordance with the Development Agreement.
- c) Any direction,
  - (i) if given to the Developer's Superintendent on the Land in respect of the execution of the Development Works on the Land, or
  - (ii) if given to the Developer's Superintendent at any other place in respect of the execution of part of the Development Works in that place,

will be deemed to be a direction served on the Developer.

## 10.4. Request for information

If requested in writing by SA Water, the Developer must provide SA Water with information in relation to the progress, status and completion of the Development Works. SA Water must not issue a request under this clause more than once per month.

## 10.5. Care of Development Works

- a) The Developer is solely responsible for the Development Works from and including the date of commencement of the Development Works up to the time title and risk passes to SA Water by the operation of clause 14.2 of this document.
- b) If loss or damage occurs to the Development Works during the period for which the Developer is responsible for the care of the Development Works the Developer shall promptly rectify the loss or damage at the Developer's cost.

## 10.6. Working Hours

- a) If the Developer wishes to work outside the customary working hours or on other than Ordinary Working Days, the Developer must give two days written notification to SA Water of the hours involved and the proposed work being performed. If SA Water deems it necessary to have a representative present for any period of time outside customary working hours then the Developer must pay all SA Water's costs properly incurred

by SA Water in arranging its representative's attendance. All such costs shall be a debt due from the Developer to SA Water and recoverable in accordance with the provisions of this document.

- b) If in the interests of safety of the Development Works or to protect life or property the Developer finds it necessary to carry out, without the prior consent of SA Water, work outside customary working hours or on other than ordinary working days, the Developer must inform SA Water in writing of the circumstances as soon as possible.

### **10.7. Prevention of Loss or Damage**

If at any time prior to SA Water issuing a Certificate of Practical Completion for the Development Works SA Water determines that any remedial, protective, repair or other like work is urgently needed to prevent loss of or damage to the Development Works or to any property or to prevent personal injury to or the death of any person, SA Water will, as soon as practicable after such determination, notify the Developer of that determination and the Developer must carry out the work immediately on receipt of that notification. If the notification is given verbally SA Water will, as soon as practicable after the notification provide the Developer with a written notification of that determination. If the Developer is unable or unwilling to do the work at once or cannot be contacted, SA Water may, by its own or other workforce, do such work as SA Water may determine to be necessary. If the work done by SA Water in accordance with this clause is work which SA Water determines to be work that the Developer was liable to do at the Developer's expense under the Development Agreement, all costs and charges properly incurred by SA Water in doing the work will be a debt due from the Developer to SA Water and recoverable in accordance with the provisions of this document.

### **10.8. Setting out the Development Works**

The Developer must set out the Development Works correctly in accordance with the Development Agreement and must provide all instruments and materials necessary for that purpose at its own expense.

### **10.9. Non complying materials or work**

- a) SA Water may, at any time before the issue of the Final Certificate, reject any material or work comprising the Development Works which is not in accordance with the Development Agreement and/or is not adequate for its intended purpose. SA Water may direct that such material or work be replaced, corrected or removed and any such rejection or direction must be made or given as soon as practicable after the discovery by SA Water of its non-compliance with the Development Agreement
- b) If SA Water directs the Developer to replace or correct any material or work; the Developer must commence the work of replacement or correction within seven (7) days after the receipt by the Developer of the direction. The Developer must provide all quality assurance documentation and updated asset information such as updated test certificates, documentation, drawings and the like associated with the replacement or correction work.
- c) If SA Water directs the Developer to remove from the Land any material that is not in accordance with the Development Agreement, the Developer must do so promptly. All such replacements, corrections and removals will be at the Developer's own cost. If the Developer fails to

comply with the directions given by SA Water under this clause, SA Water may have the work of replacement, correction or removal carried out by other persons.

- d) The Developer must complete any work required by this clause 10.9 promptly and to the satisfaction of SA Water.
- e) The cost incurred by SA Water in having the work of replacement, correction or removal carried out will be a debt due from the Developer to SA Water and recoverable in accordance with the provisions of this document. This clause shall survive termination of the Development Agreement.

#### **10.10. Unacceptable progress**

- a) If at any time during construction of the Development Works SA Water determines that:
  - (i) work is not being carried out in accordance with the Development Agreement;
  - (ii) the rate of progress or time for completion of the Development Works is unacceptable to SA Water;
  - (iii) undue inconvenience is being caused to users of a public road in the vicinity of the Works; or
  - (iv) undue inconvenience is being caused to allotments adjoining the Land or allotments not located on the Land,

then SA Water may give written notice to the Developer requiring the Developer to rectify the situation.

- b) If, 10 business days after SA Water gives written notice to the Developer under clause 10.10(a), SA Water is of the opinion that the Developer has not rectified the situation described in the notice, then SA Water, on giving written notice of such opinion to the Developer, may take over and proceed to construct the Development Works or a Separable Part of the Development Works.
- c) Any costs or charges properly incurred by SA Water in undertaking the Development Works, or a Separable Part of the Works, under clause 10.10(b) will be a debt due from the Developer to SA Water recoverable in accordance with the provisions of this document.

#### **10.11. Special testing of the Development Works**

- a) After giving the Developer reasonable notice in writing of its intention to do so, SA Water may enter the Land and carry out tests to determine whether the Development Works are being or have been constructed in accordance with the Development Agreement.
- b) If testing is carried out to verify that the Development Works comply with the Development Agreement, the costs of and incidental to the tests and the costs or charges properly incurred by SA Water in carrying out or participating in the tests will be a debt due from the Developer to SA Water recoverable in accordance with the provisions of this document.
  - (i) if the tests demonstrate that the Development Works do not comply with the Development Agreement, will be payable by the Developer and, to the extent of the costs and charges properly incurred by SA Water, will be a debt due from the Developer to SA Water recoverable

in accordance with the provisions of this document; and

- (ii) if the tests demonstrate that the Development Works do comply with the Development Agreement, will be payable by SA Water and, to the extent of the costs and charges properly incurred by the Developer, will be a debt due from SA Water to the Developer.

## **10.12. Benefit of warranties**

The Developer must ensure that SA Water will have the benefit of any warranties available from a manufacturer or supplier of materials and products used in the construction of the development Works.

## **10.13. As constructed Information**

- a) The Developer, at its cost, shall prepare and deliver to SA Water as-constructed information in accordance with the Design and Construction Requirements including details of the completed Development Works.
- b) The Developer, at its cost, shall prepare and deliver to SA Water all constructed Asset, Operating, Maintenance and Safety information in accordance with the Design and Construction Requirements.
- c) Notwithstanding any other clause in this document SA Water is not obliged to reduce the bond, if any, to the Security or to issue a Certificate of Practical Completion in relation to the Development Works or for any Separable Part of the Development Works unless and until the Developer has complied with its obligations in clause 10.13(a) of this document.

# **11. Variations**

## **11.1. Directions to vary**

- a) If, at any time during the progress of the Development Works, SA Water determines that the form, quality or quantity of the Development Works should be varied, SA Water may direct the Developer to do all or any one or more of the following:
  - (i) increase, decrease or omit any part of the Development Works;
  - (ii) change the character or quality of any material or work comprising the Development Works;
  - (iii) change the levels, lines, positions or dimensions of any part of the Development Works;
  - (iv) execute additional work including design requirements;
  - (v) vary the program or the order of the work comprising the Development Works;
  - (vi) execute any part of the work outside normal or agreed working hours.
- b) No variation to the Development Works may be made by the Developer without a direction being given by SA Water.
- c) SA Water in its absolute discretion may direct a variation at the request of the Developer.
- d) A variation to the Development Works will not operate to invalidate or vary the Development Agreement.
- e) Whenever possible, to allow for proper planning and programming of the



Development Works by the Developer, SA Water must give the Developer notice of variations before the time they are to be carried out.

- f) Variations other than payable variations will be at the Developer's expense.

## **11.2. Payment and Value of Payable Variations**

- a) Payable variations are those variations that are determined by SA Water to be required in relation to the provision of water or wastewater reticulation to land other than the Land. A variation made at the request of the Developer will not be a payable variation unless SA Water determines otherwise.
- b) SA Water will pay the Developer for payable variations. The amount of such payment will be the value of payable variations determined under this clause.
- c) The value of payable variations must be determined by agreement between the Developer and SA Water.

## **11.3. Extensions of time**

- a) The Developer will be entitled to a reasonable extension of the Initial Period by reason of a variation directed by SA Water in accordance with clause 11.1 (a) of this document to the extent determined by SA Water acting reasonably.
- b) The Developer will not be entitled to an extension of the Initial Period for a variation directed by SA Water at the request of the Developer in accordance with clause 11.1 (c) of this document unless SA Water determines otherwise.

## **12. Defects Liability**

### **12.1. Defects Liability Period**

- a) The Defects Liability Period for the Development Works or a Separable Part of the Development Works will commence on the Date of Practical Completion of the Development Works or Separable Part of the Development Works and continue for a period of 12 months from that date.
- b) Subject to clause 12.1(c) if a Certificate of Practical Completion is issued for a Separable Part of the Development Works prior to the Practical Completion of the Development Works, then the Defects Liability Period for that Separable Part of the Development Works will commence on the Date of Practical Completion for the Separable Part of the Development Works and continue for a period of 12 months from that date. The Defects Liability Period for the remaining portion of the Development Works will be as determined by clause 12.1(a).
- c) If, acting at the request of the Developer, SA Water determines that a section or portion of the Development Works is a Separable Part of the Development Works, SA Water may also determine that the Defects Liability Period for all or any of the Separable Parts of the Development Works not commence until the date upon which SA Water issues a Certificate of Practical Completion for the last Separable Part of the Development Works to reach Practical Completion and in doing so SA Water may extend the Defects Liability Period for all or any of the

Separable Parts of the Development Works for a period exceeding twelve (12) months but not exceeding twenty four (24) months.

- d) Any extension of the Defects Liability Period must be in accordance with clause 12.2.
- e) If, during the Defects Liability Period any defect in the Development Works becomes apparent under the proper use of the Development Works, or any Separable Part of the Development Works, and such defect is due to design, workmanship, or materials for which the Developer is responsible, SA Water may serve on the Developer and the Developer's Superintendent a written notice specifying the nature of the defect and the time within which the Developer must remedy the defect. The Developer must comply with the notice at the Developer's own expense. Notwithstanding the provisions of this clause, the Developer will not be responsible for the effects of fair wear and tear on the Development Works during the Defects Liability Period.

## **12.2. Defects Resolution Work**

- a) If it becomes necessary for the Developer to execute any remedial work under clause 12.1, the provisions of that clause will apply to the remedial work as if it were the Development Works and the Defects Liability Period will commence on the date on which the remedial work is completed. SA Water may, in its discretion, approve a shorter defects liability period than that provided for by clause 12.1 in respect of any remedial work.
- b) If any defects are not remedied by the Developer within the time specified in the Defects Rectification Notice or such extension of that time as SA Water may determine, SA Water may remedy the defects at the Developer's risk and expense, but without prejudice to any other rights which SA Water may have against the Developer in respect of such defects. All costs incurred by SA Water for remedying the defects will be a debt due from the Developer to SA Water and recoverable in accordance with the provisions of this document.
- c) Unless the Developer is directed otherwise in writing by SA Water, any remedial work on any operational or transferred active asset or mains constructed under the Development Agreement, including updated as constructed information, must be carried out by SA Water at the Developer's expense. All costs incurred by SA Water for remedying the defects will be a debt due from the Developer to SA Water and recoverable in accordance with the provisions of this document.
- d) If any remedial work is of such character as may affect the efficiency of the Development Works, SA Water may, within 20 business days of completion of that remedial work, notify the Developer that further tests are to be made in accordance with the Development Agreement. The costs of such further tests must be borne by the Developer.

## **12.3. Use of work by SA Water**

Subject to such restrictions on the use of the Development Works as, in the opinion of SA Water, may be necessary for the execution of remedial works by the Developer, SA Water must have the full, free and unrestricted use of the Development Works, without interference from the Developer, during the Defects Liability Period. Use of the Development Works by SA Water does not relieve the Developer from any liability or obligation contained in the Development Agreement.

## **13. Certification of the Development Works**

### **13.1. Certificate of Practical Completion**

- a) When SA Water is satisfied that the Practical Completion of the Development Works, or of a Separable Part of the Development Works, has been reached and the Security has been lodged, SA Water will issue to the Developer a Certificate of Practical Completion for the Development Works or for that Separable Part of the Development Works.
- b) The Certificate of Practical Completion must state the date of Practical Completion of the Development Works or of that Separable Part of the Development Works to which it applies and such date will operate, for the purposes of the Development Agreement, as the Date of Practical Completion of the Development Works or of that Separable Part of the Development Works.
- c) On issue of the Certificate of Practical Completion of the Development Works or a Separable Part of the Development Works the Developer must give SA Water possession and control of the Development Works or the Separable Part of the Development Works in respect of which the Certificate of Practical Completion was issued.

### **13.2. Separable Parts of the Development Works**

- a) SA Water, acting on its own initiative or at the request of the Developer, may determine that a section or portion of the Development Works is a Separable Part of the Development Works.
- b) When determining a Separable Part of the Development Works SA Water must also determine the portion of the Security (if any) that will apply to that separable portion and to the remainder of the Development Works and notify the Developer of the determination.
- c) A Certificate of Practical Completion for each separable part of the Development Works will be issued by SA Water in Accordance with clause 13.1 of this document.
- d) Provisions in the Development Agreement will apply to each Separable Part of the Development Works in the same manner as they apply to the Development Works.

### **13.3. Final Certificate**

When all work required by the Development Agreement, including that of remedying defects during the Defects Liability Period, has been finally completed to the satisfaction of SA Water and the Developer has fulfilled all its other obligations in the Development Agreement, SA Water will issue to the Developer a Final Certificate.

## **14. Ownership of the Development Works**

### **14.1. Development Works do not merge with Land**

The Developer acknowledges the operation of section 47 of the Water Industry Act 2012 and agrees that the Development Works do not become a fixture in relation to the Land.

## 14.2. Title and Risk

- a) The parties acknowledge and agree that in the period between the Commencement Date and the date of issuing by SA Water of a Certificate of Practical Completion for the Development Works or a Separable Part of the Development Works all right, title and interest in the Development Works remain with the Developer.
- b) On and from the date upon which SA Water issues a Certificate of Practical Completion for the Development Works or a Separable Part of the Development Works:
  - (i) all right, title and interest in the Development Works or the Separable Part of the Development Works vest in SA Water by operation of this clause without any further instrument of transfer or assignment; and
  - (ii) other than the rectification of defects by the Developer in accordance with clause 12 of this document during the Defects Liability Period, SA Water is responsible for operating, maintaining, repairing and replacing the Development Works or the Separable Part of the Development Works at its cost.

## 15. Indemnity by Developer

The Developer indemnifies SA Water and must keep SA Water indemnified against any Liability or Claim in respect of:

- a) any loss, destruction or damage to any real or personal property;
- b) any infringement of a third party's Intellectual Property Rights;
- c) any personal injury to, or the death of, any person,

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

## 16. Notices

A party may serve a notice on, or issue a direction to, the other party by delivering it by hand, posting it by prepaid post, by facsimile transmission, by electronic mail transmission or by any other means agreed between the parties from time to time, to the street address, facsimile telephone number or email address as the case may be set out for the Developer in Item 1 of Schedule 1 of the Formal Instrument and for SA Water in Item 7 of Schedule 1 of the Formal Instrument, or as subsequently updated by written notice and any such notice or direction will be deemed to have been served if:

- a) delivered by hand before 5.00 pm on a Business Day, otherwise on the next Business Day;
- b) sent by pre-paid mail, on the third Business Day after posting; or
- c) transmitted by facsimile before 5.00 pm on a Business Day and a complete transmission report is received on the day of transmission, otherwise on the next Business Day, provided that if the recipient receives by facsimile transmission a notice that is illegible, the recipient must notify the sender immediately and the sender must continue to retransmit the

notice until the recipient confirms that it has received a legible notice;  
and

- d) if transmitted by email before 5.00 pm on a Business Day and the sender receives a message-opened response, otherwise on the next Business Day, subject always to the sender receiving a message-opened response.

## **17. Dispute Resolution**

### **17.1. Dispute procedure**

Except in the case of genuine urgency requiring immediate interlocutory or interim relief or remedy, neither party may commence legal proceedings in relation to any dispute, or other matter arising out of the Development Agreement, including, without limitation, a dispute as to a determination, decision or direction made or issued by SA Water ("a disputed matter"), without first doing everything in that party's power to comply with the following procedure.

- a) The procedure under this clause is initiated by either the Developer or SA Water sending to the other party a written notice by Registered Mail, requiring the implementation of dispute resolution procedures under this clause 17.1 ("a dispute resolution notice").
- b) Within 15 Business Days of receipt of a dispute resolution notice or by agreement of the parties, each party must nominate a Dispute Representative and must reduce to writing the nature and scope of the disputed matter, and the issues raised by it, and submit the disputed matter to the Dispute Representatives.
- c) The Dispute Representatives must meet and attempt to resolve the disputed matter as soon as practicable.
- d) Each of the Dispute Representatives is hereby authorised by the relevant party sufficiently so that they may meet and endeavour to resolve the dispute without detailed reference to another person, within a period of 10 Business Days, or such longer period as the parties may agree, after reference of a disputed matter to them. In so doing they may be supported (at their election and cost) by legal, financial, technical or other experts.

In this clause 17.1, "Dispute Representative" means, each of the persons nominated by the Developer as the Developer's Dispute Representative and by SA Water as SA Water's Dispute Representative.

### **17.2. Alternative Dispute Resolution**

Nothing in this clause is intended to preclude the parties from agreeing to use any form of arbitration or alternative dispute resolution process at their mutual discretion.

### **17.3. Continuing obligation to carry out Development Works**

Unless SA water agrees otherwise the Developer must diligently proceed to complete the Development Works while a disputed matter is being resolved.

## 18. Termination

### 18.1. Termination by SA Water for cause

SA Water may terminate the Development Agreement with immediate effect by written notice to the Developer:

- a) if the Developer:
  - (i) commits a material breach of any condition in this document;
  - (ii) acts in a fraudulent manner;
  - (iii) permits a Change in Control of the developer to occur without the prior written consent of SA Water';
  - (iv) permits the Approved Designer or Approved Contractor to cease to maintain its Approved Status;
  - (v) ceases to carry on business or is the subject of an Insolvency Administration; or
  - (vi) fails to complete the Development Works within the Initial Period or, if SA Water has agreed an extension in accordance with clause 2.4 (a) (i), within the Extended Period; or
- b) a Force Majeure Event affecting the Development Works continues for more than 30 Business Days.

### 18.2. Effect of termination

If the Development Agreement is terminated in accordance with clause 18.1 of this document:

- a) SA Water's consent for the Development Works given in accordance with clause 2.2 of this document will lapse and cease to be operative with effect from the date of termination;
- b) the Developer must not carry out any further Development Works under the Development Agreement;
- c) the termination, however caused, is without prejudice to any rights or liabilities of the parties that have accrued prior to the date of termination;
- d) the Developer is not entitled in contract, tort or otherwise to any payment or compensation for losses incurred as a result of the termination; and
- e) if, after giving written notice to the Developer of its intention to do so, SA Water proceeds to complete the Development Works:
  - (i) the Developer consents to SA Water entering the Land for the purpose of completing the Development Works which consent may not be revoked; and
  - (ii) the costs incurred by SA Water in completing the Development Works will be a debt due and payable by the Developer to SA Water and recoverable in accordance with this document.

This clause shall survive termination of the Development Agreement.

## 19. Force Majeure

### 19.1. Notice and suspension of obligations

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

- a) that party must immediately give the other party prompt notice of that

fact including:

- (i) full particulars of the Force Majeure Event;
  - (ii) an estimate of its likely duration;
  - (iii) the obligations affected by it and the likely extent of its effect on those obligations;
  - (iv) the steps taken and proposed to be taken to rectify the effect of the Force Majeure Event; and
- b) the obligations in the Development Agreement of the party giving the notice are suspended to the extent to which they are affected by the relevant Force Majeure Event for as long as the Force Majeure Event continues.

### **19.2. Effort to overcome**

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

### **19.3. Alternative Supply**

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

## **20. Ethical Conduct**

In this clause "public sector employee" has the meaning given in the Public Sector Act 2009.

The Developer agrees to conduct itself in a manner that does not invite, directly or indirectly, SA Water's officers, employees or agents or any public sector employee to behave unethically, to prefer private interests over SA Water's interests or to otherwise contravene the Code of Ethics for the South Australian Public Sector published by the South Australian Government and available from [www.publicsector.sa.gov.au](http://www.publicsector.sa.gov.au) [Policy – Code of Ethics]. If the Developer fails to comply with this requirement SA Water at its discretion may terminate the Developer Agreement or refuse further payment.

If the arrangements related to this contract include the intentional promise or deliver of any goods benefits (whether to SA Water or any of its officers, employees or agents or any public sector employee) not specified in the contract and SA Water is reasonably satisfied that promise or delivery is not the result of a genuine mistake, then SA Water at its discretion may terminate the Developer Agreement, recover all moneys paid by SA Water under the Developer Agreement or refuse further payment.

Nothing in this clause derogates from the Principal's other rights under this contract.