

## SCHEDULE 9

Article 29

### PROTECTIVE PROVISIONS

#### PART 1

#### FOR THE PROTECTION OF OPERATORS OF ELECTRONIC COMMUNICATIONS CODE NETWORKS

1.—(1) For the protection of any operator, the following provisions have effect, unless otherwise agreed in writing between the undertaker and the operator.

(2) In this Part of this Schedule—

“the 2003 Act” means the Communications Act 2003<sup>(1)</sup>;

“conduit system” has the same meaning as in the electronic communications code and references to providing a conduit system are to be construed in accordance with paragraph 1(3A) of that code;

“electronic communications apparatus” has the same meaning as in the electronic communications code;

“the electronic communications code” has the same meaning as in section 106(1) of the 2003 Act<sup>(2)</sup>;

“electronic communications code network” means—

(a) so much of an electronic communications network or conduit system provided by an electronic communications code operator as is not excluded from the application of the electronic communications code by a direction under section 106 of the 2003 Act; and

(b) an electronic communications network which the Secretary of State is providing or proposing to provide;

“electronic communications code operator” means a person in whose case the electronic communications code is applied by a direction under section 106 of the 2003 Act; and

“operator” means the operator of an electronic communications code network.

2. The exercise of the powers of article 29 (statutory undertakers) is subject to paragraph 23 of Schedule 2 to the Telecommunications Act 1984<sup>(3)</sup> (undertaker’s works).

3.—(1) Subject to sub-paragraphs (2) to (4), if as the result of the authorised development or its construction, or of any subsidence resulting from any of those works—

(a) any damage is caused to any electronic communications apparatus belonging to an operator (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works), or other property of an operator; or

(b) there is any interruption in the supply of the service provided by an operator,

the undertaker must bear and pay the cost reasonably incurred by the operator in making good such damage or restoring the supply and make reasonable compensation to that operator for any other expenses, loss, damages, penalty or costs incurred by it, by reason, or in consequence of, any such damage or interruption.

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(1) 2003 c. 21.

(2) See section 106.

(3) 1984 c. 12.

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(2) Nothing in sub-paragraph (1) imposes any liability on the undertaker with respect to any damage or interruption to the extent that it is attributable to the act, neglect or default of an operator, its officers, servants, contractors or agents.

(3) The operator must give the undertaker reasonable notice of any such claim or demand and no settlement or compromise of the claim or demand is to be made without the consent of the undertaker which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

(4) Any difference arising between the undertaker and the operator under this Part of this Schedule must be referred to and settled by arbitration under article 40 (arbitration).

4. This Part of this Schedule does not apply to—

- (a) any apparatus in respect of which the relations between the undertaker and an operator are regulated by the provisions of Part 3 of the 1991 Act; or
- (b) any damage, or any interruption, caused by electro-magnetic interference arising from the construction or use of the authorised development.

5. Nothing in this Part of this Schedule affects the provisions of any enactment or agreement regulating the relations between the undertaker and an operator in respect of any apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.

## PART 2

### FOR THE PROTECTION OF DŴR CYMRU CYFYNGEDIG

6. For the protection of DCC referred to in this Part 2 of Schedule 9, the following provisions will, unless otherwise agreed in writing between the undertaker and DCC, have effect.

7. In this Part of this Schedule—

“acceptable insurance” means a policy of public liability/third party liability insurance effected and maintained by the undertaker and available in the market on commercially reasonable terms having regard (inter alia) to premiums required and the policy terms obtainable, with a level of insurance cover to be agreed between the undertaker and DCC, during the construction of the works pursuant to this Order with a reputable insurer and with DCC named as an insured party under the policy;

“accessories” has the same meaning as that set out in section 219 of the WIA 1991 but also includes any feature or aspect of a design that is intended to receive or facilitate the receipt of rainwater or surface water and which is part of a sustainable drainage system;

“DCC apparatus” means all apparatus or accessories vested in or belonging to DCC for the purpose of carrying on its statutory undertaking including reservoirs, water treatment works and waste water treatment works;

“clearance area” means the area of land—

- (a) within 3 metres either side of the centre line of any public sewer or public water main that is less than 300mm in diameter;
- (b) within 6 metres either side of a public sewer or public water main where the public sewer or public water main is between 300mm and 600mm in diameter; or
- (c) within 9 metres either side of the centre line of a rising main;

“DCC” means Dŵr Cymru Cyfyngedig, a limited company registered in Wales under Company No. 2366777 and having its registered office at Pentwyn Road, Nelson, Treharris, Mid Glamorgan CF46 6LY or its properly authorised agents or sub-contractors;

“draft specification” means a detailed plan, cross-section and description of the works to be prepared by the undertaker (including, without limitation, a method statement and risk assessment setting out the intention in respect of the works, construction methods and programmes, position of the affected DCC apparatus and intended works and a statement that to the best of the undertaker’s knowledge, and having used all reasonable care and skill to plan the works, the works will not cause damage to the DCC apparatus);

“functions” has the same meaning as in section 219 of the WIA 1991 and includes powers and duties;

“in” in a context referring to DCC apparatus in land includes a reference to DCC apparatus under, over or upon land;

“sustainable drainage system” means any structure designed to receive rainwater and other surface water which structure is to include any feature or aspect of design that is intended to receive or facilitate the receipt of rainwater except a public sewer or a natural watercourse;

“WIA 1991” means the Water Industry Act 1991(4) as amended; and

“works” means any works forming part of the authorised development in, on, over or under any land purchased, held, or used under this Order that are near to, or will or may in any way affect any DCC apparatus together with all ancillary actions relating hereto.

**8.—(1)** Regardless of any provision in this Order or anything shown on the land plans or contained in the book of reference, the undertaker must not acquire any DCC apparatus or its accessories or override or extinguish any easement or other interest of DCC or acquire any land or other interest of DCC identified in the book of reference or create any new rights over the same otherwise than by agreement with DCC in accordance with the provisions of this Schedule.

(2) Sub-paragraph (1) does not apply to the powers conferred on the undertaker by this Order to interfere temporarily with DCC’s rights to access DCC apparatus or accessories but subject always to each sub-paragraph of paragraphs 12 and 13 of this Part and to the undertaker giving DCC 28 days’ notice of such interference.

### **Precedence of the WIA 1991**

**9.—(1)** Regardless of any provision of this Order and this Schedule the undertaker must comply fully with all provisions of the WIA 1991 in relation to any use of, any connection with or any actions or omissions which in any way affect the DCC apparatus and nothing in this Order releases the undertaker from the requirement to comply with the provisions of the WIA 1991 in relation to any use of, any connection with or any actions or omissions which in any way affect the DCC apparatus, including without limitation—

- (a) sections 41 to 44 of the WIA 1991 in respect of water main requisitions;
- (b) section 45 of the WIA 1991 in respect of any connections to a water main;
- (c) sections 98 to 101 of the WIA 1991 in respect of sewer requisitions;
- (d) section 102 of the WIA 1991 in respect of the adoption of sewers and disposal works;
- (e) section 104 of the WIA 1991 in respect of the adoption of any sewers, drains or sewage disposal works as part of the development;
- (f) sections 106 to 109 of the WIA 1991 in respect of any connections to public sewers;
- (g) section 111 of the WIA 1991 in respect of the restrictions on use of public sewers;
- (h) sections 158 and 159 of the WIA 1991 in respect of statutory rights of access to DCC apparatus;

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(4) 1991 c. 56.

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- (i) section 174 of the WIA 1991 in respect of offences of interference with works etc;
- (j) section 178 of the WIA 1991 in respect of obstruction of sewerage works etc; and
- (k) section 185 of the WIA 1991 in respect of the removal, diversion or alteration of DCC apparatus.

(2) The arbitration provisions at article 40 or specified in this Schedule do not apply where DCC uses a warrant of entry in accordance with the provisions of the WIA 1991.

### **Protection of DCC apparatus**

**10.**—(1) Not less than 28 days before starting the execution of any works that are within the clearance area or will, or could reasonably foreseeably affect, any DCC apparatus the removal or alteration of which has not been required by the undertaker under paragraph 9(1)(k), the undertaker must submit to DCC written notice together with a draft specification.

(2) DCC must examine the draft specification submitted under sub-paragraph (1) and give its written consent or proposed amendments (each not to be unreasonably withheld or delayed) to the draft specification (including the proposed commencement date and anticipated completion date) within 28 days from the date of receipt (and in the event of amendments the process in this sub-paragraph (2) must be repeated where those amendments are not accepted). For the avoidance of doubt, DCC's proposed amendments may include such reasonable requirements for the alteration (including but not limited to the extension of DCC apparatus) or otherwise for the protection of DCC apparatus, or for securing access to it.

(3) Once approved under sub-paragraph (2), the draft specification is to be the specification and the works must be executed only in accordance with the specification and such reasonable requirements as may be made in accordance with sub paragraph (2) and DCC is entitled to watch and inspect the execution of those works.

(4) Nothing in this paragraph 10 precludes the undertaker from submitting at any time or from time to time, but in no case less than 28 days before commencing the execution of any works, a draft specification instead of the draft specification previously submitted, and having done so the provisions of this paragraph 10 apply to and in respect of the new draft specification.

(5) The undertaker is not required to comply with sub-paragraph (1) in a case of emergency provided it has complied with sub-paragraph (8) below save that the undertaker must comply with sub-paragraphs (1) and (3) above in so far as is reasonably practicable in the circumstances.

(6) DCC may opt to carry out any temporary and/or protective works specified under sub-paragraph (2) to DCC apparatus, and if DCC opts to do so it must—

- (a) agree the scope and timings of the works with the undertaker (and the undertaker must not unreasonably withhold or delay its agreement to the same);
- (b) provide an invoice together with supporting evidence of the estimated costs of the works on the basis of which it must agree with the undertaker the reasonable costs of the works to be met by the undertaker;
- (c) following agreement and payment of the costs, DCC must as soon as reasonably practicable carry out and complete the works; and
- (d) notify the undertaker immediately in writing upon completion of the temporary and/or protective works.

(7) Only those contractors that satisfy DCC's reasonable health and safety requirements are permitted to make openings into and/or connections with and/or carry out any works on or within any public sewer or drain vested in DCC unless otherwise agreed with DCC.

(8) Only DCC is permitted to make openings into and/or connections with and/or carry out any works on or within any public water main vested in DCC unless otherwise agreed with DCC.

(9) Where DCC apparatus will be affected by the works the undertaker must determine the exact location of DCC apparatus prior to any works being carried out by the undertaker and the undertaker should contact DCC where trial holes are required and such trial holes must be constructed at the undertaker's expense.

(10) Any affected DCC apparatus which is no longer required by DCC but is not removed must be transferred to the undertaker by way of a deed of transfer from DCC at the undertaker's expense and on such terms as DCC reasonably requires.

### **Suspension of works**

**11.** DCC is entitled to instruct the undertaker to suspend the works if in DCC's reasonable opinion the actions of the undertaker, or those of its contractor(s) or subcontractor(s) in carrying out the works, have caused damage to any DCC apparatus and/or are likely to cause or result in damage to any DCC apparatus and/or have caused or are likely to cause damage to the environment arising as a result of damage to DCC apparatus. In the event of such instruction being given by DCC—

- (a) the undertaker must procure that it and its contractor(s) and subcontractor(s) are to forthwith suspend or cease the works having due regard to health and safety factors and discuss and agree with DCC the remedial actions required prior to resuming the works;
- (b) the undertaker and DCC must act reasonably and without delay in discussing and agreeing any remedial actions required prior to resuming the works;
- (c) DCC must submit to the undertaker within 5 days following the suspension, a written notice specifying the reasons for suspending the works;
- (d) in the event that DCC fails to supply the written notice within 5 days of suspension DCC's instruction to suspend the works will be void and the undertaker will be entitled to recommence the works;
- (e) DCC must commence, carry out and complete any remedial works pursuant to sub-paragraph (a), as soon as reasonably practicable and DCC must give the undertaker notice immediately upon completion of such remedial works and on receipt of such notice the undertaker will be entitled to resume the works; and
- (f) DCC is entitled to reclaim all reasonable costs of all remedial works undertaken in accordance with this paragraph 11.

**12.—(1)** In the event that either the undertaker or DCC (for the purpose of this paragraph 12 "the party" or together "the parties") wishes to take any action which would impact on the ability of the undertaker to carry out the development or DCC to carry out its statutory functions, the parties must use reasonable endeavours to cooperate with one another in order to align work streams so to minimise or avoid disruption to the other party's works. In respect of the references to 'work' and 'works' in this sub-paragraph (1), to the extent that this refers to 'work' or 'works' to be undertaken by DCC, the definition of works in paragraph 7 of this Part does not apply.

(2) Subject to paragraph 13, differences or disputes arising between the undertaker and DCC under this Schedule must, unless otherwise agreed in writing between the undertaker and DCC, be determined by arbitration in accordance with article 40 (arbitration) of the Order.

### **Emergency Works**

**13.—(1)** The undertaker is permitted to carry out emergency works provided that it first notifies DCC of the proposed emergency works. For the avoidance of doubt, in the event that DCC suffers any loss, cost or damage as a result of the emergency action taken by the undertaker without prior notification in accordance with this sub-paragraph the indemnity in paragraph 15 is to apply.

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(2) DCC must at all times be permitted to carry out any emergency works in relation to its DCC apparatus within the Order Limits in accordance with Part II Schedule 6 WIA 1991.

(3) Emergency works required in order for DCC to fulfil its statutory functions under sub-paragraph (2) are to take precedence over works to be carried out by the undertaker and, in such circumstances, the undertaker must reschedule its works accordingly.

(4) In respect of the references to ‘work’ and ‘works’ in this paragraph 13, to the extent that this is ‘work’ or ‘works’ to be undertaken by DCC, the definition of works in paragraph 7 of this Part does not apply.

### **Insurance**

14. The undertaker must not commence any works under paragraph 10(1) to this Part unless and until the undertaker has procured acceptable insurance.

### **Damage to DCC apparatus**

15.—(1) Subject to sub-paragraphs (3) to (6), the undertaker is to indemnify and hold harmless DCC against all claims demands costs damages expenses penalties and losses which DCC sustains or becomes liable for in consequence of works under sub-paragraph 10(1) and emergency works under sub-paragraph 13(1) (but only in where such emergency works are carried out by the undertaker without prior notification to DCC in accordance with sub-paragraph 13(1)) to this Part in respect of—

- (a) any breach of this Part relating to the performance of the works caused by the actions or default of the undertaker, its contractors, subcontractors, licencees, agents and invitees relating to the performance of the works;
- (b) damage to the environment caused by the undertaker during any works including but not limited to pollution and/or contamination; and
- (c) any breach of any stipulation or otherwise of any deeds of grant (or any renewal of any of the deeds of grant made on substantially the same terms provided that DCC has supplied the undertaker with a copy of the new document) arising from the works.

(2) Subject to sub-paragraphs (3) to (6), the undertaker is to bear and pay the costs reasonably incurred by DCC in making good damage to DCC apparatus or restoring an interruption in the supply provided by DCC as a direct consequence of the undertaker’s performance of the works under this Part.

(3) Nothing in sub-paragraph (1) imposes any liability on the undertaker with respect to any damage or interruption to the extent that it is attributable to the act, neglect or default of DCC, its officers, servants, contractors or agents.

(4) DCC must use its reasonable endeavours to mitigate in whole or in part and to minimise any costs, expenses, loss, demands, and penalties to which the indemnity under this paragraph 15 applies. If requested to do so by the undertaker, DCC is to provide an explanation of how the claim has been minimised and mitigated. The undertaker is only liable under this paragraph 15 for claims reasonably incurred by DCC.

(5) Neither the undertaker, nor any of its officers, employees or agents are, in any circumstances whatsoever, liable to DCC for any indirect or consequential loss.

(6) Nothing in this Part affects the provisions of any enactment or agreement regulating the relations between the undertaker and DCC in respect of any DCC apparatus laid or erected in land belonging to the undertaker on the date on which the Order is made.



## PART 3

### FOR THE PROTECTION OF THE RELEVANT PLANNING AUTHORITY

**16.**—(1) The following provisions shall apply for the protection of the consenting authority unless otherwise agreed in writing between the undertaker and the consenting authority.

(2) In this part of this Schedule—

“consenting authority” means either Denbighshire County Council or Conwy County Borough Council in respect of any work which requires consent under section 23 of the Land Drainage Act 1991(5);

“construction” includes execution, placing, altering, replacing, relaying and removal and excavation, and “construct” and “constructed” shall be construed accordingly;

“drainage work” means any watercourse and includes any land which provides or is expected to provide flood storage capacity for any watercourse and any bank, wall, embankment or other structure, or any appliance, constructed or used for land drainage, flood defence, and any ancillary works constructed as a consequence of works carried out for drainage purposes;

“emergency” means a situation which—

- (a) is unexpected, involving little or no prior warning, or aspects of which could not have reasonably been predicted in advance;
- (b) is a serious event presenting a risk of harm or damage to people, property or the environment; and
- (c) requires a need for urgent action to address the risk of harm, carry out repairs or prevent a worsening of the situation;

“plans” includes sections, drawings, specifications, calculations and method statements;

“specified work” means a work that is required to be consented under the terms of section 23 of the Land Drainage Act 1991, irrespective of any status as a statutory undertaker under those provisions; and

“watercourse” includes all rivers, streams, ditches, drains, cuts, culverts, dykes, sluices, basins, sewers and passages through which water flows except a public sewer.

**17.** Regardless of any provision in this Order or anything shown on the land plans or contained in the book of reference, the undertaker shall not acquire any interest of the consenting authority or acquire any land or other land interest of the consenting authority identified in the book of reference or create any new rights over the same otherwise than by agreement with the consenting authority in accordance with the provisions of this Schedule.

**18.**—(1) Before beginning to construct any specified work, the undertaker shall submit to the consenting authority plans of the specified work and such further particulars available to it as the consenting authority may within 28 days of the receipt of the plans reasonably require.

(2) Any such specified work shall not be constructed except in accordance with such plans as may be approved in writing by the consenting authority, or determined under sub-paragraph (1).

(3) Any approval of the consenting authority required under this paragraph—

- (a) shall not be unreasonably withheld or delayed;
- (b) shall be given within 8 weeks of the submission of the plans submitted under sub-paragraph (1) or where the consenting authority has requested further particulars for

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(5) 1991 c. 59.

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approval (such request must be made within 2 weeks of receipt of the plans submitted under sub-paragraph (1)) within 8 weeks of the submission of such plans;

- (c) shall be deemed to have been given if it is neither given nor refused within 8 weeks of the submission of the plans or receipt of further particulars if such particulars have been required by the consenting authority for approval; and
- (d) may be given subject to such reasonable modifications to the plans as the consenting authority may request and such reasonable requirements as the consenting authority may make for the protection of any drainage work or for the protection of watercourse, or for the prevention of flooding or pollution or in the discharge of its environmental duties.

**19.** The requirements which the consenting authority may make under paragraph 18 include conditions requiring the undertaker at its own expense to construct such protective works, whether temporary or permanent, before or during the construction of the specified works as are reasonably necessary to safeguard any drainage work against damage.

**20.—**(1) Subject to sub-paragraph (2), any specified work, and all protective works required by the consenting authority under paragraph 19, shall be constructed—

- (a) in accordance with the plans approved or deemed to have been approved under this Schedule; and
- (b) the consenting authority shall be entitled by its officer to watch and inspect the construction of such works.

(2) The undertaker shall give to the consenting authority not less than 14 days' notice in writing of its intention to commence construction of any specified work and notice in writing of its completion not later than 7 days after the date on which it is completed.

(3) If the consenting authority shall reasonably require, the undertaker shall construct all or part of the protective works so that they are in place prior to the construction of any specific work.

(4) If any part of a specified work or any protective work required by the consenting authority is constructed otherwise than in accordance with the requirements of this Schedule, the consenting authority may by notice in writing require the undertaker at the undertaker's own expense to comply with the requirements of this part of this Schedule or (if the undertaker so elects and the consenting authority in writing consents, such consent not to be unreasonably withheld or delayed) to remove, alter or pull down the work and, where removal is required, to restore the site to its former condition to such extent and within such limits as the consenting authority reasonably requires.

(5) Subject to sub-paragraph (6), if within a reasonable period, being not less than 28 days from the date when a notice under sub-paragraph (4) is served upon the undertaker, it has failed to begin taking steps to comply with the requirements of the notice and subsequently to make reasonably expeditious progress towards their implementation, the consenting authority may execute the works specified in the notice and any expenditure incurred by it in so doing shall be recoverable from the undertaker.

(6) In the event of any dispute as to whether sub-paragraph (4) is properly applicable to any work in respect of which notice has been served under that sub-paragraph, or as to the reasonableness of any requirement of such a notice, the consenting authority shall not, except in emergency, exercise the powers conferred by sub-paragraph (5) until the dispute has been finally determined.

**21.—**(1) Subject to sub-paragraph (6) the undertaker shall, from the commencement of the construction of the specified works, maintain in good repair and condition and free from obstruction any drainage work which is situated within the limits of deviation, whether or not the drainage work is constructed under the powers conferred by this Order or is already in existence.

(2) If any such drainage work which the undertaker is liable to maintain is not maintained to the reasonable satisfaction of the consenting authority, the consenting authority may by notice in writing



require the undertaker to repair and restore the work, or any part of such work, or (if the undertaker so elects and the consenting authority in writing consents, such consent not to be unreasonably withheld or delayed), to remove the work and restore the site to its former condition, to such extent and within such limits as the consenting authority reasonably requires.

(3) If, within a reasonable period being not less than 28 days beginning with the date on which a notice in respect of any drainage work is served under sub-paragraph (2) on the undertaker, the undertaker has failed to begin taking steps to comply with the reasonable requirements of the notice and has not subsequently made reasonably expeditious progress towards their implementation, the consenting authority may do what is necessary for such compliance and may recover any expenditure reasonably incurred by it in so doing from the undertaker.

(4) If there is any failure by the undertaker to obtain consent or comply with conditions imposed by the consenting authority in accordance with these protective provisions the consenting authority may serve written notice requiring the undertaker to cease all or part of the specified works and the undertaker shall cease the specified works or part thereof until it has obtained the consent or complied with the condition unless the cessation of the specified works or part thereof would cause greater damage than compliance with the written notice.

(5) In the event of any dispute as to the reasonableness of any requirement of a notice served under sub-paragraph (2), the consenting authority shall not, except in a case of emergency, exercise the powers conferred by sub-paragraph (3) until the dispute has been finally determined.

(6) This paragraph does not apply to drainage works which are vested in the consenting authority, or which the consenting authority or another person is liable to maintain and is not proscribed by the powers of the Order from doing so.

**22.** If by reason of the construction of any specified work or of the failure of any such work the efficiency of any drainage work is impaired, or that drainage work is otherwise damaged, such impairment or damage shall be made good by the undertaker to the reasonable satisfaction of the consenting authority and if the undertaker fails to do so, the consenting authority may make good the same and recover from the undertaker the expense reasonably incurred by it in so doing.

**23.** The fact that any work or thing has been executed or done by the undertaker in accordance with a plan approved or deemed to be approved by the consenting authority, or to its satisfaction, or in accordance with any directions or award of an arbitrator, shall not relieve the undertaker from any liability under the provisions of this Part of this Schedule.