



## Template kiwi start-ups agreement for future equity

### User notes

This agreement is one of three different convertible instruments on our templates page that are intended to be used when recording either a *seed investment* from a third party investor or a *bridge financing* from existing shareholders:

- ▲ this kiwi start-ups agreement for future equity is intended to be used when a company is raising *seed capital* from a third party investor in the form of a convertible instrument. The terms of the kiwi start-ups agreement for future equity are *company friendly* and are based on Y-Combinator's template agreement of the same name
- ▲ the kiwi keep investment simple security is also intended to be used when a company is raising *seed capital* from a third party investor in the form of a convertible instrument. The terms of the kiwi keep investment simple security are based on the "keep-it-simple-security" created by 500 Startups and include some of the more *investor friendly* provisions typically included in convertible notes for *seed investments* in the US and as adopted for other global markets
- ▲ the convertible shareholder loan agreement is a simple *company friendly* agreement, intended to be used when an *existing shareholder* lends money to a company as a form of *bridging finance* until an expected future financing event takes place.

This agreement anticipates that the investment amount is drawn down in a lump sum on one date and is unsecured. The amount of the investment is not a loan, has no set maturity or repayment date and does not accrue interest. The investment amount remains outstanding until:

- ▲ it is automatically converted to equity on the date of the next equity financing
- ▲ it is repaid or converted (at the election of the investor) on the occurrence of a liquidity event.

The taxation of agreements of this nature has not been widely discussed or tested in New Zealand and we are currently seeking comment from leading tax advisers. In the interim we do recommend that the investor receive specialist tax advice before entering into this agreement (noting that any tax obligations will be on the account of the investor rather than the company).

Under New Zealand securities legislation, a company may not issue (or offer to issue) shares, options or other securities without providing detailed disclosure information to the new holders of those shares, options or other securities, unless the company is satisfied that an exclusion to the information disclosure requirements of the Financial Markets Conduct Act 2013 applies in relation to that offer or issue. Please see our *NZ securities law – tech company capital raising* guide under the capital raising section of the guides page of our website for an explanation of the relevant exclusions.

A company must ensure that an exclusion described in that guide applies before it offers to issue, or issues, shares.

### **using this template**

The **User Notes** and the statements in the footer below (all marked in red) are included to assist in the preparation of this document. They are for reference only – you should delete all user notes and the statements in the footer from the final form of your document.

The use of [*square brackets*] around black text means that:

- ▲ the requested details need to be inserted
- ▲ there are different options for you to consider within a clause
- ▲ the whole clause is optional and you need to consider whether to include it, based on the company's circumstances and the user notes.

Before finalising your document, check for all square brackets to ensure you have considered the relevant option and ensure that all square brackets have been deleted.

If you delete any clauses or schedules, remember to cross reference check the document.

# KIWI START-UPS AGREEMENT FOR FUTURE EQUITY

DATE

PARTIES

- [User note: Use this description if the Investor is a company.]** **[INSERT NAME OF COMPANY] LIMITED**, company number *[insert company number]* (Investor)

**[User note: Use this description if the Investor is an individual.]** **[INSERT]** (Investor)

**[User note: Use this description if the Investor is a trust.]** **[INSERT]**, **[INSERT]** and **[INSERT]** as trustees of *[insert name of trust]* (together, the Investor)
- [User note: Use this description for the company receiving the investment.]** **[INSERT NAME OF COMPANY] LIMITED**, company number *[insert company number]* (Company)

BACKGROUND

The Investor has agreed to provide to the Company an investment amount of \$*[insert]* on the terms set out in this Agreement.

SIGNED for and on behalf of **[INSERT]** )  
**NAME OF COMPANY] LIMITED** by: )

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Signature of authorised signatory

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Print full name of authorised signatory

**[User note: Use the following signature block if the Investor is a company.]**

**SIGNED** for and on behalf of **[INSERT** )  
**NAME OF COMPANY] LIMITED** by: )

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Signature of authorised signatory

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Print full name of authorised  
signatory

**[User note: Use the following signature block if the Investor is an individual.]**

**SIGNED** by **[INSERT NAME OF** )  
**INDIVIDUAL]:** )

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Signature

**[User note: Use the following signature block if the Investor is a trust. Each trustee of the trust must sign the agreement. Insert this signature block for each trustee.]**

**SIGNED** by **[INSERT NAME OF** )  
**TRUSTEE]** as trustee of the **[INSERT** )  
**NAME OF TRUST]:** )

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Signature of *[insert name of trustee]*

## TERMS OF THE AGREEMENT

**1 INTERPRETATION**

1.1 **Definitions:** In the Agreement, unless the context requires otherwise:

<b>Definition</b>	<b>Meaning</b>
<b>Agreement</b>	this agreement, including any schedule attached to it.
<b>Business Day</b>	Monday to Friday, other than any public holiday within the meaning of section 44 of the Holidays Act 2003 that occurs in <i>[insert the city where the Company is located]</i> .
<b>Conversion</b>	the conversion of the Investment Amount into Conversion Shares under clause 4.
<b>Conversion Price</b>	<p>▲ for a conversion under clause 4.1, a price per Share equal to the lower of:</p> <ul style="list-style-type: none"> <li>&gt; the Valuation Cap divided by the Fully Diluted Capitalisation immediately prior to the Equity Financing; and</li> <li>&gt; the price per Share at which Shares were issued to investors under the Equity Financing, less a discount of [20%]; and</li> </ul> <p><b><i>[User note: Alternatively, the Conversion Price on an Equity Financing could be calculated without reference to a valuation cap and/or without a discount to the price per share of the Equity Financing.]</i></b></p>
<b>Conversion Shares</b>	<p>▲ for a conversion under clause 4.3, a price per Share equal to the Valuation Cap divided by the Fully Diluted Capitalisation immediately prior to the Liquidity Event.</p> <p>▲ for a conversion under clause 4.1, the highest class of Shares issued under the Equity Financing; and</p> <p>▲ for a conversion under clause 4.3, the highest class of Share in issue immediately prior to the Liquidity Event.</p>
<b>Drawdown Date</b>	<i>[insert date]</i> or such other date as the parties agree.

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<b>Equity Financing</b>	the next issue by the Company of Shares or other Securities for capital raising purposes after the date of the Agreement.
<b>Fully Diluted Capitalisation</b>	<p>the number of Shares on issue at the relevant time, including:</p> <ul style="list-style-type: none"><li>▲ the number of Shares to be issued on the exercise of any options over or other rights to be issued Shares in existence at the relevant time (excluding any conversion of (i) the Investment Amount under the Agreement; and (ii) all other convertible loans or notes); and</li><li>▲ all Shares reserved and available for future issue under any equity incentive or similar plan of the Company, including any such plan created or increased in connection with a Equity Financing.</li></ul>
<b>Insolvency Event</b>	<p>any of the following events:</p> <ul style="list-style-type: none"><li>▲ an order is made, resolution passed or legal proceedings issued (other than a proceeding which, in the reasonable opinion of the Investor, is vexatious or frivolous), or corporate action is taken, notice given or other step taken for the dissolution of the Company;</li><li>▲ a liquidator, receiver, manager, statutory manager, inspector, trustee or other similar person is appointed in respect of the Company or some or all of its assets;</li><li>▲ any distress, attachment, or execution is levied, issued, enforced or obtained on or against all or substantially all of the Company's assets; or</li><li>▲ any security over the assets of the Company is enforced.</li></ul>
<b>Intellectual Property Rights</b>	includes copyright and all worldwide rights conferred under statute, common law or equity relating to inventions (including patents), registered and unregistered trade marks and designs, circuit layouts, data and databases, confidential information, know-how, and all other rights resulting from intellectual activity.
<b>Investment Amount</b>	[\$ <i>insert amount of the investment</i> ] or the principal amount outstanding from time to time.
<b>Liquidity Event</b>	any of the following events:

- ▲ the Company or a shareholder (or shareholders) of the Company enters into a binding agreement with a third party (or a group of associated third parties) on arms' length terms under which the third party is to acquire (other than by way of a subscription for new Shares) 50% or more of the voting Shares of the Company, and that agreement becomes unconditional;
- ▲ the Company enters into a binding agreement to dispose of assets comprising more than half the value of the Company's assets, and that agreement becomes unconditional;
- ▲ the Company resolves to amalgamate with any other company (whether or not it is the continuing company), in a transaction that is in substance the same as those described above; or
- ▲ the Company enters into a listing agreement with the New Zealand stock exchange, or other national stock exchange of similar or better standing,

provided, however, that a transaction will not constitute a Liquidity Event if its sole purpose is to change the place of the Company's incorporation, or to create a holding company that will be owned in substantially the same proportions by the persons who held the Shares immediately prior to such transaction.

**Purpose**

**[User note: Consider the Purpose carefully. The Company is required to use the Investment Amount only for this stated purpose (unless the Investor agrees otherwise).]**

*[meeting the Company's working capital requirements while seeking to complete a Qualifying Equity Financing].*

**Shareholders' Agreement**

a shareholders' agreement between the Company and all of the shareholders of the Company.

**Shares**

shares in the Company.

**Valuation Cap**

**[User note: The valuation cap is critical to the economics of the note. The amount of the valuation cap divided by the number of shares on issue in the Company at the relevant time is the price per share at which the Investment Amount will convert to Conversion Shares on**

*the occurrence of a Liquidity Event (if the Investor elects to convert). On the occurrence of an Equity Financing the price per share determined by the valuation cap is the highest price at which the Investment Amount will automatically convert to Conversion Shares (whereas the Investment Amount will automatically convert at a lower price per share if the Equity Financing is undertaken at a valuation that is lower than the valuation cap, after applying the discount set out in the definition of Conversion Price).]*

#[insert valuation cap].

## 1.2 Interpretation:

- a A reference to:
  - i a **clause** or a **schedule** is to a clause in or a schedule to the Agreement;
  - ii a **person** includes a body corporate, an association of persons (whether corporate or not), a trust, governmental or other regulatory body, authority or entity, in each case whether or not having a separate legal personality;
  - iii **including** and similar words do not imply any limitation;
  - iv a **statute** includes references to that statute as amended or replaced from time to time;
  - v a **party** is a reference to a party to the Agreement, and includes that party's permitted successors and permitted assigns; and
  - vi **\$** or **dollars** are to New Zealand currency.
- b The **headings** in the Agreement are for convenience only and have no legal effect.
- c The **singular** includes the plural and vice versa.

## 2 CONDITIONS

The Agreement is conditional on:

*[User note: See our template "resolutions to approve a convertible instrument" for a directors' resolution approving the execution of the agreement and the issue of shares under it.]*

- a the Company delivering to the Investor:



- i resolutions of the directors and (if necessary) shareholders of the Company authorising the execution of the Agreement and the issue of the Conversion Shares on conversion of the Investment Amount in accordance with the Agreement; and
- ii to the extent necessary, signed waivers from the existing shareholders of the Company of any rights of pre-emption relating to the execution of the Agreement and any issue of Conversion Shares, arising under the Companies Act 1993, the constitution of the Company, or otherwise; and

**[User note: See our “NZ securities law – tech company capital raising” guide for an explanation of the relevant exclusions. A company must ensure that one of the exclusions described in that guide applies before it takes the Investment Amount.]**

- b the Company being satisfied that an exclusion to the information disclosure requirements of the Financial Markets Conduct Act 2013 applies in relation to the execution of the Agreement by the Investor.

### **3 THE INVESTMENT AMOUNT AND TERMS OF THE AGREEMENT**

- 3.1 **Investment Amount:** The Investor must make the Investment Amount available to the Company in one drawing only on the terms set out in the Agreement.
- 3.2 **Drawdown:** The Investor must pay the full amount of the Investment Amount to the Company on the Drawdown Date in cleared funds into the nominated account of the Company.
- 3.3 **Purpose:** The Company must use all amounts drawn down only for the Purpose or for any other purpose approved by the Investor.

### **4 CONVERSION AND REPAYMENT OF INVESTMENT AMOUNT**

- 4.1 **Equity Financing:** On the date of an Equity Financing, the Investment Amount is to automatically convert into Conversion Shares by applying that amount to subscribe for Conversion Shares at the Conversion Price.
- 4.2 **Conversion documentation:** The Investor must execute any agreements, resolutions and/or other documents (including any subscription agreement or shareholders’ agreement) that are required to be executed by the Investor in order to complete an Equity Financing and/or record the Conversion contemplated by clause 4.1, provided that the terms of issue of the Conversion Shares are in accordance with clause 4.6.
- 4.3 **Liquidity Event:** If a Liquidity Event occurs, the Investor may elect to convert the Investment Amount into Conversion Shares on the date of the Liquidity Event by applying that amount to subscribe for Conversion Shares at the Conversion Price. If the Investor does not elect to convert the Investment Amount to Conversion Shares, the Company must repay to the Investor the Investment Amount within 20 Business Days of the date of the Liquidity Event.

- 4.4 **Insolvency Event:** If an Insolvency Event occurs, the Company must immediately repay to the Investor the Investment Amount.
- 4.5 **Insufficient funds on a Liquidity Event or Insolvency Event:** If there are insufficient funds to pay the Investor and any other person that has entered into an agreement with the Company on terms that are substantially the same as the Agreement (except for the Investment Amount and the Drawdown Date) (**Participating Investors**) any amount payable under clause 4.3 or 4.4, then the Company's available funds must be distributed amongst the Participating Investors in proportion to their Investment Amounts. If any part of an Investment Amount remains unpaid following that distribution, the remaining Investment Amount is to automatically convert into Conversion Shares by applying that amount to subscribe for Conversion Shares at the relevant Conversion Price.
- 4.6 **Terms of issue of Conversion Shares:** Conversion Shares issued as a consequence of a Conversion will rank for dividends from the date they are issued and will otherwise rank equally in all respects with the other Shares of the same class then in issue, except that in the case of a Conversion in accordance with clause 4.1, any price based anti-dilution rights, dividend rights, or liquidation preferences may be amended (at the discretion of the Company) so as to reflect the Conversion Price.
- 4.7 **Notice of Equity Financing, Liquidity Event or Insolvency Event:** The Company must provide the Investor with written notice of:
- a the terms of an Equity Financing at least 5 Business Days prior to the closing of the Equity Financing;
  - b a Liquidity Event at least 10 Business Days prior to the occurrence of the Liquidity Event; and
  - c an Insolvency Event promptly following the occurrence of the Insolvency Event.
- 4.8 **Governing documents following a Liquidity Event:** Any Conversion Shares issued in accordance with clause 4.3 are to be issued subject to the terms of any constitution of the Company and any Shareholders' Agreement in-force as at the date of issue of the Conversion Shares. Immediately following the issue of any Conversion Shares, the Investor must execute a deed of accession to any Shareholders' Agreement, agreeing to be bound by its terms.
- 4.9 **Fractional entitlements:** The number of Conversion Shares to be issued to the Investor must be rounded up to the nearest whole number if there is a fractional entitlement.
- 4.10 **Adjustment:** If there is any bonus issue, consolidation or subdivision of any Shares or any reduction or cancellation of share capital (or any similar reorganisation of the capital of the Company), the Conversion Price must be adjusted by the Company, if necessary, to ensure that the economic effect of the Conversion remains the same.

## 5 COMPANY'S UNDERTAKINGS

While the Investment Amount is outstanding, the Company must not, unless approved in writing by the Investor:

- a make any material change to the business carried on by it at the date of the Agreement;  
or
- b pay any dividend or make any other distributions in respect of its Shares.

## 6 WARRANTIES

6.1 **Mutual warranties:** Each party represents and warrants to the other that the following is true as at the date of the Agreement:

- a if it is a company, it is duly incorporated and validly existing under the laws of New Zealand;
- b it has the power, and, if it is a company, has taken all necessary action (including the passing of all resolutions and obtaining any necessary consents) to enter into, execute and deliver, and exercise its rights, and perform its obligations, under the Agreement; and
- c it has validly executed and delivered the Agreement and its obligations under the Agreement are legal, valid and binding and the Agreement is enforceable against it in accordance with its terms.

6.2 **Company warranties:** The Company warrants to the Investor that the following is true as at the date of the Agreement:

- a as far as the Company is aware, the Company owns or is legally entitled to use all Intellectual Property Rights used in the conduct of its business;
- b as far as the Company is aware, the business of the Company does not infringe any Intellectual Property Rights of any other person and, as far as the Company is aware, no claims relating to Intellectual Property Rights used by the Company are pending or threatened by any third party;
- c the Company is not a party to any legal proceedings, arbitration, or statutory or governmental inquiry of any kind, nor is the Company aware of any such legal proceedings, arbitration or inquiry, pending or threatened against the Company; and
- d as far as the Company is aware, there is not any existing cause of action, or facts or circumstances that could be used for commencing legal proceedings, either civil or criminal, against the Company that could prevent or materially alter or delay any of the transactions contemplated by the Agreement.

- 6.3 **Exclusions from warranty claims:** No facts or circumstances will give rise to a claim by the Investor against the Company under clause 6.2 to the extent that those facts or circumstances:
- a were fairly disclosed in writing to the Investor by or on behalf of the Company prior to the date of the Agreement;
  - b were available on a public register, file or record maintained by the New Zealand Companies Office, the Intellectual Property Office of New Zealand or the Personal Property Securities Register as at the date of the Agreement; or
  - c arose because of an action taken by the Company with the Investor's prior written consent.
- 6.4 **Timing:** The Company will have no obligation to the Investor in respect of any claim under clause 6.2 unless written notice of that claim is given to the Company within 12 months of the date of the Agreement.
- 6.5 **Aggregate maximum liability:** The Company's aggregate liability to the Investor in respect of a breach of any of the warranties set out in clause 6.2 will be limited to the Investment Amount.

## 7 INDEPENDENT TRUSTEES

The liability of any independent trustee under the Agreement is not an unlimited or personal liability and instead is limited to the funds from time to time belonging to the trust on behalf of which they have entered into the Agreement, in the proper course of the administration of that trust. In this clause, an **independent trustee** is any party who has signed the Agreement in their capacity as the trustee of a trust and who is not a beneficiary of the trust nor has any right to, or interest in, any of the assets of the trust except in their capacity as trustee of that trust.

## 8 GENERAL

- 8.1 **Confidentiality:** Each party must keep the Agreement and information it receives about the Company and its business in connection with the Agreement (**Confidential Information**) confidential, and must not use or disclose that Confidential Information without the prior written consent of the Company except to the extent that:
- a disclosure is required by law;
  - b the relevant information is already in the public domain other than through the default of that party;
  - c it is reasonably required to obtain professional advice; or
  - d it is reasonably necessary in connection with any proposed:
    - ▲ financing of that party;
    - ▲ sale of that party's interest in the Company; or

- ▲ sale of all or part of the business of, or the shares in, that party,  
and the party receiving the Confidential Information has entered into confidentiality undertakings substantially the same as those set out in this clause.

8.2 **Notices:** All notices and communications given under the Agreement must be in writing and must be delivered personally, sent by post or sent by email to the address or email address set out in the Schedule (or at such other address as notified from time to time by the party changing its address).

8.3 **Time of service:** Any notice given under the Agreement will be deemed to be validly given:

- a in the case of delivery, when received;
- b in the case of posting, on the third Business Day following the date of posting; or
- c if emailed, one hour after the email is sent unless a return email is received by the sender within that one hour period stating that the addressee's email address is wrong or that the message cannot be delivered,

provided that any notice received after 5 pm on a Business Day or on any day that is not a Business Day will be deemed to have been received on the next Business Day.

8.4 **Entire agreement:** The Agreement contains all of the terms, representations and warranties made between the parties relating to the matters dealt with in the Agreement and supersedes and cancels all prior discussions and agreements covering the subject matter of the Agreement. The parties have not relied on any representation, warranty or agreement relating to the matters dealt with in the Agreement that is not expressly set out in the Agreement, and no such representation, warranty or agreement has any effect from the date of the Agreement. Without limiting the previous sentence, the parties agree to contract out of sections 9, 12A, 13 and 14(1) of the Fair Trading Act 1986.

8.5 **Further assurances:** The parties must each sign all further documents, pass all resolutions and do all further things as may be necessary or desirable to give effect to the Agreement.

8.6 **Amendment:** The Agreement may only be amended by agreement of the parties in writing.

8.7 **Waiver:** No exercise or failure to exercise or delay in exercising any right or remedy will constitute a waiver by that party of that or any other right or remedy available to it.

8.8 **No assignment:** No party may assign any of its rights or obligations under the Agreement without the prior written consent of the other party.

8.9 **Costs:** Except as otherwise provided in the Agreement, the parties will meet their own costs relating to the negotiation, preparation and implementation of the Agreement.

- 8.10 **Partial invalidity:** If any provision of the Agreement becomes invalid or unenforceable to any extent, the remainder of the Agreement and its application will not be affected and will remain enforceable to the greatest extent permitted by law.
- 8.11 **Signature:** The Agreement may be executed in two or more counterparts, each of which is deemed an original and all of which constitute the same Agreement. A party may enter into the Agreement by signing and sending (including by email) a counterpart copy to each other party.
- 8.12 **Governing law and jurisdiction:** The Agreement will be governed by New Zealand law, and the parties submit to the non-exclusive jurisdiction of the New Zealand courts.

**SCHEDULE 1****Details for notices**

<b>Company</b>	
<b>Contact Name:</b>	<i>[insert]</i>
<b>Address:</b>	<i>[insert]</i>
<b>Email address:</b>	<i>[insert]</i>

<b>Investor</b>	
<b>Contact Name:</b>	<i>[insert]</i>
<b>Address:</b>	<i>[insert]</i>
<b>Email address:</b>	<i>[insert]</i>