TEMPLATE SHAREHOLDERS' AGREEMENT – SERVICES COMPANY – USER NOTES

This shareholders' agreement is intended for use by small to medium sized services companies.

The agreement contains:

- standard provisions dealing with the management of the company and the relationship between the shareholders (e.g. rights to appoint directors, matters requiring the approval of all appointed directors, the provision of financial information, and confidentiality provisions, etc.)
- provisions to address the special requirements of services companies with owners working in the business.

The agreement is drafted on the basis that shareholders have agreed that they must all work in the business and deliver an "expected contribution" to the company (to be detailed in Schedule 1). Shareholders who cease to meet these requirements can be required to exit the company. Shareholders may also voluntarily exit the company on notice. In each of these cases, the company is required to buy back the shares of the exiting shareholder.

Compulsory buy-back of the shares of exiting shareholders provides certainty to both continuing and departing shareholders. However, it creates commercial risk because the company/remaining shareholders may not have the cash available to fund the purchase. To help manage this risk, the template gives the remaining shareholders the option of winding up the company if they do not wish to complete a buy-back.

Users of the agreement will need to specify (in Schedule 2) the formula to be used to calculate the purchase price of a departing shareholder's shares. This is a key detail to be agreed between shareholders when completing the agreement. Each shareholder needs to consider the purchase price formula from the perspective of both continuing and departing shareholders (because they could be in either category in the future). We recommend that you involve your accountant and/or an experienced company valuer in setting the purchase price formula, as they should be able to guide you on approaches taken by comparable companies in valuing the shares of departing shareholders.

The agreement allows the company to pay a lower price for the shares of a "bad leaver", e.g. a shareholder who is required to leave the company for failing to make their expected contribution or for material breach of the agreement. We have suggested a 25% discount for bad leavers.

The agreement assumes that the company has adopted the Kindrik Partners template constitution (see the resources section of our website). Please see the user notes to that constitution for an explanation of its purpose – in summary, as well as some provisions which are helpful from a companies law and company management perspective, it includes some important

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shareholder protections e.g. pre-emptive rights on share transfers and "tag-along" and "drag-along" rights.

The agreement is not suitable for use with product or high growth companies as it is often appropriate for shareholders in those types of companies to retain their shareholding after ceasing to work in the business.

USING THIS TEMPLATE

The ***User Notes*** and the statements in the footer (all marked in red) are included to assist you to prepare 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 deleted the brackets.

If you delete any clause or schedule, remember to cross reference check the document.

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SHAREHOLDERS' AGREEMENT

DATE

PARTIES

[User note: Use the following description for each shareholder that is an individual.]

1 [***INSERT***] ([***insert abbreviated party name***])

[User note: Use the following description for each shareholder whose shares are held jointly e.g. with a spouse.]

2 [***INSERT***] ([***insert abbreviated party name***]) and [***INSERT***] ([***insert abbreviated party name***])

[User note: Use the following description for each shareholder that is a company.]

3 [***INSERT NAME OF COMPANY***] **LIMITED**, company number [*insert company number*] ([***insert abbreviated party name***]) and the company's Shareholder Employee [***INSERT THE NAME OF THE PERSON REPRESENTING THE COMPANY THAT WILL WORK IN THE BUSINESS***] ([***insert abbreviated party name***])

[User note: Use the following description for the trustees of each shareholder that is a trust.]

4 [***INSERT***] and [***INSERT***] as trustees of [***INSERT NAME OF TRUST***] ([***insert abbreviated party name***]) and the trust's Shareholder Employee [***INSERT THE NAME OF THE PERSON REPRESENTING THE TRUST THAT WILL WORK IN THE BUSINESS***] ([***insert abbreviated party name***])

[User note: Use the following description for the company.]

5 [***INSERT NAME OF THE COMPANY TO BE GOVERNED UNDER THE AGREEMENT***] **LIMITED**, company number [*insert company number*] (**Company**)

BACKGROUND

- [*Insert*], [*insert*] and [*insert*] are the shareholders of the Company.
- The parties wish to record arrangements for the governance and business of the Company on the terms of the Agreement.

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SIGNED

[User note: Use the following signature blocks for each party that is a company and for each company's named shareholder employee.]

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

Signature of authorised signatory

Print full name of authorised signatory

SIGNED by **[INSERT THE NAME OF THE PERSON REPRESENTING THE COMPANY THAT WILL WORK IN THE BUSINESS]**:)

Signature

[User note: Use the following signature block for each party that is an individual.]

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

Signature

[User note: If any shares are held by trustees on behalf of a trust, each trustee of that trust will need to sign the agreement, along with the trust's named shareholder employee. Use the following signature blocks for each party signing as trustee of a trust and for each trust's named shareholder employee.]

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

Signature of [*Insert name of trustee*]

SIGNED by **[INSERT THE NAME OF THE PERSON REPRESENTING THE TRUST THAT WILL WORK IN THE BUSINESS]**:)

Signature

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[User note: Use the following signature block for the company to be governed by the Agreement.]

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

Signature of authorised signatory

Print full name of authorised signatory

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TERMS OF THE AGREEMENT

1 INTERPRETATION

1.1 **Definitions:** In the Agreement, the following words have the following meanings:

TERM	MEANING
Act	the Companies Act 1993.
Agreement	this agreement, including the Schedules.
Board	the Directors acting as a board of directors.
Business	[*insert description of the Company's business, e.g. providing web development and related services for government and commercial clients]*, and any other activity set out in the Business Plan.
Business Day	Monday to Friday, other than any public holiday within the meaning of section 44 of the Holidays Act 2003 that occurs in [*insert the city where the Company is located*].
Business Plan	the budget and business plan for the Company approved by the Board in accordance with clause 7. **[User note: If the company has a business plan at the date of the agreement add:]**[*The initial Business Plan is attached as Schedule 4.*]
Constitution	the constitution of the Company.
Director	a director of the Company.
Exit Date	for a Shareholder: • if clause 8.1a applies, the date on which the Shareholder Employee of that Shareholder ceases to work for the Company; • if clause 8.1bi or 8.1bii applies, the date on which notice is given by the Company under either clause stating that it intends to purchase the Shareholder's Shares under that clause[*; or* • *if clause 4.6b applies, the date on which notice is given by the Company under that clause or, if that notice is disputed by the Shareholder, the date of an expert determination in favour of the Company under clause 4.8.*]

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TERM	MEANING
	[*User note: Delete the last bullet if clauses 4.5 to 4.10 (failure to contribute) are not included.*]
Expected Contribution	the contribution that each Shareholder, via its Shareholder Employee, is expected to make to the Business of the Company, as set out in Schedule 1.
Intellectual Property Rights	includes copyright and all rights conferred under statute, common law or equity relating to inventions (including patents), registered or unregistered trade marks and designs, circuit layouts, data and databases, confidential information, know-how, and all other rights resulting from intellectual activity. **Intellectual Property** has a consistent meaning.
Major Dispute	a dispute between Shareholders and/or Shareholder Appointed Directors which threatens permanent harm to the Company as a going concern.
Securities	any Share and any security that may be converted into Shares or that gives the holder of the security the right to have Shares issued to it (including options and warrants).
Shareholder	a shareholder of the Company.
Shareholder Appointed Directors	the directors appointed under clauses 5.1b and 5.1c.
Shareholder Employee	the person stated as being that Shareholder's shareholder employee in Schedule 1 or in the deed of accession provided by the Shareholder in accordance with clause 7.2 (as applicable).
Shares	shares in the Company carrying Voting Rights.
Special Board Resolution	a Board resolution approved by a majority vote of the Board, including at least [*two-thirds*] of the Shareholder Appointed Directors.
Voting Rights	rights to vote at a meeting of shareholders of the Company (other than rights to vote only on the appointment of an administrator, on a resolution for the winding up of the Company, or on similar financial distress events).

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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 limit;

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 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.

1 TERM

1.1 **Term:** The Agreement starts on the date that it is signed by all parties and continues in force until terminated under clause 1.2.

1.2 **Termination:** The Agreement must terminate when:

a parties holding Shares carrying at least 75% of the Voting Rights agree in writing that it is terminated, in which case it must terminate on the agreed date;

b a single Shareholder holds Shares carrying 100% of the Voting Rights; or

c an order is made, or a resolution is passed, to appoint a liquidator to the Company.

1.3 **Exiting Shareholder:** A party ceases to be bound by, and to be a party to, the Agreement if it ceases to hold any Security (except that clauses 12, 13 and 16.2 will continue to apply to that party).

[User note: Clause 1.4 below sets out the process for amending the terms of the agreement. A shareholder majority of 75% is consistent with the process for amending a

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company's constitution (under the Companies Act 1993) and provides for some flexibility if the company's circumstances change over time.]

1.4 **Amendments:** The Agreement may be amended by agreement in writing of parties holding Shares carrying at least 75% of the Voting Rights.

2 CONDUCT

2.1 **Good faith:** Each Shareholder agrees to work with the Company and the other Shareholders in good faith in order to maximise the financial success of the Business.

2.2 **Implement the Agreement:** The Shareholders must exercise all Voting Rights and other powers of control available to them in relation to the Company, in their capacity as Shareholders and through their appointed Directors, to give effect to the Agreement (as far as they are able by the exercise of those rights and powers).

2.3 **Compliance of Shareholder Employees:** Each Shareholder must ensure that its Shareholder Employee complies with the terms of the Agreement.

3 SHAREHOLDINGS

3.1 **Basic requirement:** Subject to clause 3.2, only persons who are (either directly or via a Shareholder Employee) party to an employment agreement or contract for services with the Company may be Shareholders.

3.2 **Exceptions:** The requirement in clause 3.1 may be waived by Special Board Resolution. The resolution may be subject to conditions.

3.3 **No encumbrance:** A Shareholder must not create any mortgage, security interest, charge or other encumbrance over any Securities without the prior approval of a Special Board Resolution.

[User note: Insert clauses 3.4 and 3.5 below if you want the company to have the option of managing the allocation of income between shareholders by authorising dividends other than in proportion to shareholdings. We recommend you get tax advice if contemplating payment of differential dividends.]

3.4 [***Classes of Shares:*** ***[User note: Expand or reduce the number of shareholders, and associated classes of shares listed in this clause 3.4 so that each shareholder listed as a party to the agreement is allocated a separate class of shares.]****With effect from the date of the Agreement:*

a *[insert name of Shareholder] will have Class A Shares in the Company;*

b *[insert name of Shareholder] will have Class B Shares in the Company; and*

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c *[insert name of Shareholder] will have Class C Shares in the Company.*

3.5 ***Rights:*** *The classes of Shares rank equally in all respects except that, subject to clause 4.3, the Board may authorise dividends:*

a *in respect of one class of Shares but not another; or*

b *that are of a greater value per Share in respect of one class of Shares than the other.*]

4 CONTRIBUTION TO THE BUSINESS AND REMUNERATION

4.1 **Overview:** The Shareholders intend that:

a each of them will contribute to the growth, development and financial success of the Business; and

b distributions to Shareholders and remuneration of Shareholder Employees will be structured to incentivise and reward each Shareholder's contribution to those objectives.

4.2 **Remuneration:** The remuneration payable to Shareholder Employees for services provided to the Company shall be determined by the Board in accordance with Schedule 1. The Board may, by Special Board Resolution, vary the remuneration arrangements set out in Schedule 1. The Board must apply this clause 4.2 in good faith in accordance with the intention stated in clause 4.1.

4.3 **Dividend policy:** The Board must adopt (and may amend at any time) a dividend policy which reflects (in addition to any other matters reasonably considered by the Board):

a the intention stated in clause 4.1; and

b the working capital and operational requirements of the Company, any Business Plan, and the requirements of the Act.

[User note: The obligation in clause 4.4 below is limited to the use of reasonable endeavours. This is to ensure that a shareholder is not exposed to a potential breach of

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contract claim if it employs reasonable endeavours but still fails to make its Expected Contribution.

The parties may choose to include clauses 4.5 to 4.10 (failure to contribute) as a mechanism of dealing with a shareholder that, despite its reasonable endeavours, continues to underperform.

Any absolute obligations relating to a shareholder's employment or services (hours of work etc.) should be set out in the relevant employment/contract for services agreement.]

4.4 **Requirement to contribute:**

a Each Shareholder, via its Shareholder Employee, must use reasonable endeavours to make its Expected Contribution.

b The Expected Contribution of a Shareholder may, if approved by Special Board Resolution, be varied by agreement in writing between the Shareholder and the Company.

[User note: Clauses 4.5 to 4.10 provide a mechanism for dealing with an underperforming shareholder, ultimately leading to the exit of the shareholder from the company if the situation is not resolved. However, forced exit is a blunt instrument, so consider whether this is appropriate for your company before including these clauses.]

4.5 [***Failure to contribute:*** *f the Board considers that a Shareholder, via its Shareholder Employee, has failed to make the Expected Contribution in one or more material respects, the Company may give notice to the Shareholder providing details of the shortfall in contribution. The Shareholder may respond within five Business Days of receipt of the notice under this clause 4.5 either accepting the matters stated in that notice and proposing remedial action that the Shareholder will take to remedy those matters, or setting out the reasons why the Shareholder disagrees with the matters stated in that notice.*

4.6 ***Board decision:***

a *If the Board is satisfied with the remedial action proposed by the Shareholder in response to a notice given under clause 4.5 or is satisfied based on the reasons given by the Shareholder that there was not a shortfall in contribution, the Company must withdraw the notice given under clause 4.5.*

b *If:*

i *the Shareholder fails to respond within five Business Days of receipt of the notice given under clause 4.5; or*

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ii *the Board is not satisfied with the remedial action proposed or, having considered the reasons given by the Shareholder, continues to consider that the Shareholder has failed to make the Expected Contribution in one or more material respects,*

the Company may, within 20 Business Days of the date of the Shareholder's response given under clause 4.7 (or the date set out in clause 4.6bi if the Shareholder fails to respond), give the Shareholder a further notice stating that it has failed to make the Expected Contribution and that the Company or its nominee(s) intends to purchase the Shareholder's Shares under clause 8.

4.7 ***Shareholder may dispute:*** *If the Shareholder receives a notice from the Company given under clause 4.6, it may, by giving notice to the Company within 10 Business Days of the date of that notice, dispute the Board's decision and require the matter to be referred to expert determination under clauses 4.8 and 4.9. If the Shareholder does not give notice to the Company within 10 Business Days of receipt of that notice (or gives notice that the Shareholder does not require the matter to be referred for expert determination) then the Company or its nominee(s) must purchase the Shareholder's Shares in accordance with clause 8.*

4.8 ***Expert determination:*** *If a notice is given by the Shareholder in accordance with clause 4.7 disputing the Board's decision and requiring the matter to be referred to expert determination, the question of whether or not the Shareholder, via its Shareholder Employee, failed to make the Expected Contribution in one or more material respects must be decided by expert determination in accordance with Schedule 3.*

4.9 ***Effect of decision:*** *If the expert's decision is that the Shareholder, via its Shareholder Employee, failed to make the Expected Contribution in one or more material respects, the Company or its nominee(s) must purchase the Shareholder's Shares in accordance with clause 8 as if the Shareholder was given notice under clause 4.6b on the date of the expert's determination being given. If the expert finds that the Shareholder, via its Shareholder Employee, did make the Expected Contribution, the Company's notice given under clause 4.6b shall be of no effect and the Company must not give another notice under clause 4.6b in respect of the same matter.*

4.10 ***Sole remedy:*** *The process set out in clauses 4.5 to 4.10 is the Company's (and the other Shareholders') sole remedy against a Shareholder for failure to make the Expected Contribution, unless that Shareholder is also in breach of its obligation to use reasonable endeavours under clause 4.4a.*]

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5 BOARD OF DIRECTORS

[User note: Clause 5.1 below provides a mechanism for appointing directors who are shareholders holding a specified percentage of the shares in the company. The remaining board seats may only be appointed by majority vote of the shareholders with the approval of a Special Board Resolution.]

5.1 **Board size and composition:** ***[User note: We suggest that the maximum number of directors be set at less than double the number of shareholder appointed directors (so that the appointed directors as a group are able to control the board in priority to any group of directors appointed by shareholder vote). For example, if there are three shareholder appointed directors, we suggest a total board size of five.]***

a The maximum number of Directors is [*insert number*].

b At the date of the Agreement, the Board comprises:

i [*insert name*] (appointed by [*insert name of appointing shareholder*]);

ii [*insert name*] (appointed by [*insert name of appointing shareholder*]); and

iii [*insert name*] (appointed by [*insert name of appointing shareholder*]).

c Each Shareholder has, while it holds at least [*30*]% of the Company's Shares, the right to appoint its Shareholder Employee as a Director by written notice to the Board.

d A Shareholder may appoint a person other than its Shareholder Employee as a Director with the consent of the Board.

e If a Shareholder wishes to exercise its right to appoint a Director under clause 5.1c but the maximum number of Directors permitted under clause 5.1a has been reached, the Shareholders must cause a Director who is not a Shareholder Appointed Director (**Additional Director**) to resign. If there is more than one Additional Director and the Shareholders cannot agree on which of them must resign, the Additional Director to resign must be determined by drawing of lots.

f A Shareholder who appointed a Director under clause 5.1b, 5.1c or 5.1d may remove that Director at any time by written notice to the Board.

g The Board must appoint one of the Directors to act as chairman of the Board on the following basis:

i he or she will hold office for 12 months;

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ii each chairman will, at the expiry of his or her term, be eligible for re-appointment and will be deemed to have been removed from that office unless he or she has been re-appointed before the end of that term; and

iii at meetings of the Board, the chairman will vote in his or her capacity as a Director only and will not have a separate casting vote.

h Each Director may appoint an alternate Director to act on his or her behalf in his or her absence from New Zealand or while incapacitated by illness or accident.

5.2 **Quorum:** A quorum for a meeting of the Board will be a majority of Directors including sufficient Shareholder Appointed Directors to pass a Special Board Resolution. If a quorum is not present within 30 minutes of the time scheduled for the start of the meeting, the meeting must be postponed for three Business Days and notice of the postponement must be given to all Directors. The quorum for a postponed meeting shall be the Directors in attendance at the meeting.

5.3 **Board meetings:** The Board must meet monthly or as otherwise agreed by the Board. Board meetings may take place in person or by audio or audio and visual communication as permitted by the Constitution. Except where stated otherwise in the Agreement, decisions of the Board will be by majority vote.

[User note: Clause 5.4 below requires the company to indemnify, and take out liability insurance for, the directors. A company may only indemnify and take out this insurance if it is expressly authorised to do so in its constitution. Check that the company's constitution contains that authorisation before including this obligation in your shareholders' agreement. Our template constitution (see the resources section of our website) authorises the company to take out this insurance and give these indemnities.]

5.4 **Insurance:** The Company must:

a take out, and maintain at all times, directors' and officers' liability insurance cover for those risks which can be lawfully covered, to an appropriate level approved by the Board; and

b enter into appropriate deeds of indemnity with each Director on terms consistent with the Act.

6 BUSINESS PLAN, ETC.

6.1 **Business Plan:** Where a Business Plan has been adopted, the Company must operate, and the Business must be conducted, materially in accordance with that plan, unless otherwise approved by Special Board Resolution.

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6.2 **Adoption of annual Business Plan:** At least 40 Business Days before the end of each financial year, the Company must (unless otherwise approved by the Board) prepare a budget and business plan for the following financial year which must be approved by Special Board Resolution before it takes effect. If a new budget and business plan is not approved, the last approved Business Plan (if any) will continue in force.

6.3 **Regular reporting:** The Company must provide the following reports to the Directors within 10 Business Days of the end of each month:

a monthly balance sheet, profit and loss statements and cashflow statements, including performance against budget and a rolling 12 month forward cashflow forecast;

b a management report including details of performance against the Business Plan; and

c other information reasonably requested by the Board.

6.4 **Financial statements:** The Company must, within 60 Business Days of the end of each financial year, provide to Shareholders financial statements for that year prepared in accordance with accounting principles, standards and practices generally accepted in New Zealand.

7 PROTECTIVE PROVISIONS

[User note: Clause 7.1 below sets out specific matters that must be approved by Special Board Resolution. The provisions set out here are reasonably permissive. You may wish to include additional restrictions.]

7.1 **Matters requiring Special Board Resolution:** The following actions may only be taken by the Company or Shareholders if approved by Special Board Resolution:

a the issue of Securities, or the entry into any agreement requiring the issue of Securities, other than an issue offered pro rata to all Shareholders;

b the appointment or removal of a CEO or managing director of the Company. A CEO or managing director must:

i unless all Shareholders agree otherwise, be one of the Shareholders; and

ii must as a condition of appointment agree to step down from the role without any right to compensation if his or her removal is approved under this clause 7.1b;

c the lending of any money, the provision of any guarantee, indemnity or other contingent commitment or the grant of any security over the business or assets of the Company, other than in the ordinary course of the Company's business;

d any transaction with a related party of the Company or any Director or Shareholder;

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e the adoption of the Business Plan and any significant amendment to or departure from the Business Plan (including any expenditure not provided for in the budget included in the Business Plan in excess of $[*insert amount*]);

f any material change to accounting policies, or the appointment or revocation of appointment of an auditor;

g any material change to any dividend policy of the Company; or

h any material change in the nature of the Business.

[User note: Clause 7.2 below sets out the process for admitting a new Shareholder to the Company.]

7.2 **New Shareholder:** The Company and the Shareholders may not issue new Shares or transfer existing Shares to a new Shareholder, unless:

a the Share issue or transfer is approved by Special Board Resolution;

b the proposed new Shareholder and Shareholder Employee enter into a deed of accession to the Agreement on terms that are acceptable to the Board; and

c the Shareholder (either directly or via its Shareholder Employee) enters into an employment agreement or contract for services with the Company on terms that are acceptable to the Board.

7.3 **Interpretation:** From the date of issue or transfer of Shares to a new Shareholder in accordance with clause 7.2, the Agreement must be read as if that new Shareholder and its Shareholder Employee are parties to it, having all the rights and obligations of a party under the Agreement.

7.4 **No pre-emptive rights**: The Shareholders waive any pre-emptive rights that they may have in respect of any issue or transfer of Shares made in accordance with clause 7.2, whether arising under the Constitution, the Act or otherwise. To avoid doubt, any *tag-along* and/or *drag-along* rights set out in the Constitution are unaffected.

[User note: Delete clause 7.5 (subsidiaries) below if clause 7.1 (matters requiring special approval) has been deleted.]

7.5 [***Subsidiaries:*** *Clause 7.1 will apply to each subsidiary (as defined in the Act) of the Company as if references to that Company were references to that subsidiary, and the parties must take all actions to ensure that the subsidiaries of the Company comply with this requirement.*]

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8 DEPARTURE FROM THE COMPANY

[User note: This clause 8 sets out the circumstances in which a shareholder must sell its shares back to the company and exit the business. The parties should consult their accountant or company valuer to discuss the appropriate means of calculating the purchase price for those shares (to be set out in schedule 2).]

8.1 **Departing Shareholder:** Subject to clause 8.2, the Company must purchase all of the Shares held by a Shareholder (**Departing Shareholder**) in accordance with this clause 8 if:

a the Shareholder Employee of that Shareholder ceases to work for the Company for any reason (including by reason of death or incapacitation)***[User note: If clause 9 (key person insurance) is included in the agreement add:]***[*, except that this clause 8.1a will not apply if the Shares are to be purchased by the other Shareholders in accordance with clause 9*];

b the Company gives the Shareholder written notice stating that the Company or its nominee(s) intends to purchase the Shareholders' Shares under this clause 8.1b where:

i the Shareholder or its Shareholder Employee is, or has in the preceding 60 Business Days been, in material breach of the Agreement and the Shareholder or Shareholder Employee has not remedied that breach within 10 Business Days of being required to do so by the Board; or

ii an order is made, resolution passed, an application is made by the Shareholder or a similar action is taken for the bankruptcy, liquidation, dissolution or winding up of the Shareholder[*; or*

[User note: Include clause 8.1c only if clauses 4.5 to 4.10 (failure to contribute) are included in the agreement.]

c *the Company is required to do so under clause 4.7 or 4.9.*]

8.2 **Alternative to Share purchase:** The Company may, by Special Board Resolution made within 60 Business Days of the Exit Date of a Shareholder, elect not to purchase the Shares of a Departing Shareholder in which case the Company must be wound up in accordance with clause 11.

8.3 **Purchase Price:** Subject to clause 8.4, the purchase price payable by the Company (or its nominee(s)) for the Shares of a Departing Shareholder (**Purchase Price**) must be determined in accordance with Schedule 2.

8.4 **Bad leaver:** If:

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a clause 8.1a applies and the Shareholder Employee, without the Board's agreement, provided less than [*6 months*] written notice to the Company before voluntarily ceasing to work for the Company;

b clause 8.1a applies and the employment agreement or contract for services of the Shareholder Employee was terminated as a result of the death or incapacitation of the Shareholder or for serious misconduct (including fraud, dishonesty or gross negligence); or

c clause 8.1bi or 8.1bii***[User note: If clauses 4.5 to 4.10 (failure to contribute) are included in the agreement add:]***[*or 8.1c*] applies,

the Purchase Price will be [*75%*] of the amount determined in accordance with Schedule 2.

8.5 **Settlement date:** The settlement date of any Share purchase under clause 8 will be the date that is 12 months from the Exit Date or an earlier date notified to the Departing Shareholder in writing by the Company or its nominee(s) at least 10 Business Days in advance (**Settlement Date**). On the Settlement Date:

a the Departing Shareholder must deliver to the Company or its nominee(s) registrable transfers of all Shares held by the Departing Shareholder executed by the Departing Shareholder in favour of the Company or its nominee(s); and

b contemporaneously with the receipt of those transfers, the Company or its nominee(s) must pay to the Departing Shareholder the Purchase Price.

8.6 **Failure to transfer:** Subject to the Company complying with its obligation under clause 8.5b, if the Departing Shareholder fails to comply with its obligation under clause 8.5a on or before the Settlement Date, by operation of this clause 8.6 the Departing Shareholder automatically appoints the Company as its attorney with the power to complete, execute and submit to the Board the transfers referred to in clause 8.5a on the Departing Shareholder's behalf, and the Board may register those share transfers immediately upon payment of the Purchase Price.

8.7 **Transfer:** Shares sold by a Departing Shareholder must be transferred:

a free of all mortgages, security interests, charges, liens and other encumbrances or any other adverse interests; and

b together with all rights, title and interest attaching to the Shares immediately prior to the Share sale.

8.8 **Resignation from the Board:** A Departing Shareholder must (if applicable) resign as a Director, or must remove any Shareholder Appointed Director appointed by that Shareholder, as soon as practicable following the Exit Date.

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8.9 **Voting Rights:** From the Exit Date, Shares held by the Departing Shareholder have no Voting Rights.

8.10 **Personal guarantees:** The Company and the Shareholders must use their best endeavours to procure the unconditional release of any personal guarantees provided by the Departing Shareholder in respect of the Company from the Settlement Date. The Company indemnifies the Departing Shareholder against all liabilities, claims, proceedings and costs arising from the Settlement Date in connection with any personal guarantee to which this clause 8.10 applies.

8.11 **Agreement of entitled persons:** This clause 8.11 is an agreement of the Shareholders as entitled persons to any Share purchase made by the Company under the Agreement for the purposes of section 107(1)(c) of the Act. The Shareholders waive any pre-emptive, "tag-along" and/or "drag-along" rights, that they may have in respect of any transfer of Shares undertaken in accordance with this clause 8, whether arising under the Constitution, the Act or otherwise.

9 KEY PERSON INSURANCE

[User note: This clause 9 requires the company to take out key person insurance for each of the shareholder employees (for the benefit of each shareholder). This enables the remaining shareholders to purchase the shares of a shareholder who dies or is incapacitated, using the proceeds of the key person insurance. Under these clauses, the purchase price for the shares is capped at the amount of the insurance proceeds. It is therefore very important that the board reviews the key person insurance policies on a regular basis. It should also be noted that as a company grows it can be hard to justify maintaining policies at a level of coverage that reflects the actual value of each shareholders' interest in the company.

If you wish to include provisions of this nature in your shareholders' agreement, we recommend you first discuss your requirements with a suitably experienced risk adviser and your accountant, including the amount, availability and cost of cover, and the accounting and tax treatment of premiums and insurance proceeds.]

9.1 [***Key Person Insurance:*** *The Company must use commercially reasonable endeavours to take out and maintain at all times key person insurance for the Shareholder Employees (**Key Person Insurance**). So far as is commercially reasonable, the Key Person Insurance must be consistent with the following principles:*

a *a separate policy must be taken out in respect of each insured Shareholder Employee;*

b *each policy must be for the benefit of (and in the name of) all of the other Shareholders, pro rata to their respective shareholdings in the Company;*

c *subject to clause 9.1d, the amount of cover taken out in respect of each Shareholder Employee shall be as approved by the Board; and*

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d *the amount of cover taken out in respect of each of the Shareholder Employees must be pro rata to each of their associated Shareholders' shareholding in the Company, except that the Board may adjust the amount of cover to reflect any difference in the cost of insuring any Shareholder Employee (including any difference in the amount of premiums or contributions payable).*

9.2 ***Company to fund insurance:*** *The Shareholders authorise the Company to pay, and the Company must pay, the premiums and other contributions to the Key Person Insurance as they fall due.*

9.3 ***Death or incapacitation:*** *If a Shareholder Employee dies or becomes incapacitated and that event triggers a payment to Shareholders under the Key Person Insurance (**Insurance Payment**):*

a *the Shares held by the Shareholder associated with the deceased or incapacitated Shareholder Employee (**Transferring Shares**) must be sold by that Shareholder, the survivor(s) (if the deceased Shareholder Employee was a joint Shareholder), or the personal representative(s) of the Shareholder Employee (as applicable), and purchased by the other Shareholders in proportion to the amount of the Insurance Payment received by each of those Shareholders; and*

b *the total purchase price payable for the Transferring Shares will be equal to the total amount of the Insurance Payment.*

9.4 ***Settlement:*** *The date of settlement of any sale and purchase of the Transferring Shares under this clause 9 will be the date that is 10 Business Days from the date of the Insurance Payment (**Settlement Date**). On the Settlement Date:*

a *the holder of the Transferring Shares must deliver to the purchasing Shareholders executed registrable transfers of the Transferring Shares in favour of each of the purchasing Shareholders in proportion to the amount of the Insurance Payment received by each of those Shareholders; and*

b *contemporaneously with the receipt of those transfers, each purchasing Shareholder must pay to the holder of the Transferring Shares the amount of the Insurance Payment received by that Shareholder.*

9.5 ***Failure to transfer:*** *If the holder of the Transferring Shares fails to comply with its obligation under clause 9.4a on or before the Settlement Date, by operation of this clause 9.5, the holder of the Transferring Shares automatically appoints the Company as its attorney with the power to complete, execute and submit to the Board the transfers referred to in that clause on the holder of the Transferring Shares' behalf, and the Board may register those share transfers immediately upon compliance by the purchasing Shareholders with their obligations under clause 9.4b.*

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9.6 ***Transfer:*** *The Transferring Shares must be transferred:*

a *free of all mortgages, security interests, charges, liens and other encumbrances or adverse interests whatsoever; and*

b *together with all rights, title and interest attaching to the Transferring Shares immediately prior to the sale of the Transferring Shares.*

9.7 ***No pre-emptive rights****: The Shareholders waive any pre-emptive,* tag-along *and/or* drag-along *rights, that they may have in respect of any transfer of Shares undertaken in accordance with this clause 9, whether arising under the Constitution, the Act or otherwise.*]

10 MAJOR DISPUTE

10.1 **Notice of dispute:** If a Shareholder considers a Major Dispute has arisen, it must give notice to the other Shareholders (**Major Dispute Notice**) summarising the matters in dispute and the effect the Shareholder considers this has on the Company.

10.2 **Good faith negotiations:** If a Major Dispute Notice is given, the parties must use their best endeavours to resolve the matters in dispute by good faith negotiations.

10.3 **Mediation:** If good faith negotiations do not resolve the matters in dispute within 10 Business Days of a Major Dispute Notice being given, any Shareholder may by notice to the other Shareholders require the dispute to be referred to mediation, in which case:

a the mediation will be subject to the New Zealand Resolution Institute's standard mediation agreement or rules (as the case may be);

b the mediation will be conducted in [*insert city where the Company is located*], New Zealand by an independent mediator and at a fee agreed to by each party. Unless agreed otherwise, the mediator's costs will be divided between the Shareholders involved in the dispute pro rata to their respective shareholdings; and

c if the parties cannot agree on the mediator and/or the mediator's fee within five Business Days of the referral of the dispute to mediation, any party may ask the chairperson of the Resolution Institute or his or her delegate to select the mediator and/or determine the mediator's fee, in which case the decision of the chairperson or delegate shall be binding on the parties.

10.4 **Obligations continue:** Despite the existence of a dispute and the operation of this clause 10, each party must, to the extent possible, continue to perform its obligations under the Agreement.

10.5 **Urgent relief:** This clause 10 does not affect any party's right to seek urgent interlocutory and/or injunctive relief from any New Zealand court of competent jurisdiction.

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10.6 **Wind up Company:** If the matters in dispute are not resolved within 60 Business Days of the start of mediation (or any longer period agreed in writing by all Shareholders), any Shareholder may by notice in writing to the other Shareholders require the Company to be wound up, in which case clause 11 will apply.

11 WINDING UP

11.1 **Sign documents:** If a notice is given under clause 10.6 requiring the Company to be wound up, or a resolution has been passed under clause 8.2 to wind up the Company, then all Shareholders must sign or procure the signing of all necessary documents or resolutions and take all necessary steps to have the Company wound up without delay.

11.2 **Liquidator:** Unless otherwise resolved by the Shareholders, the liquidator of the Company must be a partner(s) of the Company's accountants or, if they are unwilling or unable to act, a person(s) nominated by those accountants.

11.3 **Shareholder tenders:** A Shareholder may bid or submit tenders to the liquidator for all or any part of the business and assets of the Company. Despite any Shareholder tenders, the liquidator may sell all or any part of the business or assets of the Company in any way he or she thinks most advantageous for the realisation of the Company's business and assets.

12 NON-COMPETITION

[User note: This clause 12 restricts Shareholders and their Shareholder Employees from competing with the Company until expiry of the periods stated in clause 12.2. This clause needs careful thought as to whether the restraint (including the duration of the restraint and geographic region) is reasonable – from the perspective of both the Company and a departing Shareholder. If the restraint is unreasonable, it may not be enforceable under New Zealand law. As a general rule, the longer the restraint and the broader the geographic region, the more difficult it will be to enforce. Also, bear in mind that each Shareholder and its Shareholder Employee signing the agreement will be subject to this clause if they depart the Company – so Shareholders have a significant personal interest in making sure the restraint is reasonable.]

12.1 **General:** During the periods specified in clause 12.2, a Shareholder and (if applicable) its associated Shareholder Employee must not, anywhere in [*Auckland/Wellington/the North Island, etc.*]:

a carry on, engage in or be concerned with any business in competition with the Company, whether on its own account or as a shareholder, director, consultant, employee or contractor of any other business;

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b directly or indirectly perform any work for any person that has been a customer of the Company in the previous 12 months, or solicit the business of any such customer for the benefit of any person other than the Company; or

c solicit any of the employees or contractors of the Company to terminate their employment or contract with the Company otherwise than as a result of recruitment advertising which is not targeted at any particular employee or contractor.

12.2 **Restraint periods**: The restraints:

a in clause 12.1a apply to each Shareholder and (if applicable) its associated Shareholder Employee from the date the Shareholder becomes a party to the Agreement until the date 6 months after the Exit Date of that Shareholder; and

b in clauses 12.1b and 12.1c apply to each Shareholder and (if applicable) its associated Shareholder Employee from the date the Shareholder becomes a party to the Agreement until the date 12 months after the Exit Date of that Shareholder.

12.3 **Restraints reasonable:** Each Shareholder acknowledges that the restraints in this clause 12 are fair and reasonable with regard to subject matter, area and duration, and are reasonably required by the Company and the other Shareholders as consideration for their entry into this Agreement.

13 INTELLECTUAL PROPERTY

All Intellectual Property created by a Shareholder in the course of working for the Company or otherwise in connection with the Business shall be owned by the Company from the date of its creation. Each Shareholder must, if requested by the Company, execute any documents required to vest the ownership of any of that Intellectual Property in the Company.

14 INDEPENDENT TRUSTEE

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.

15 NOTICES AND RECEIPT OF DOCUMENTS ELECTRONICALLY

15.1 **Notices:** Subject to clause 15.2, 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

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address or email address set out in Schedule 1 (or at such other address as notified by the party changing its address).

15.2 **Electronic delivery:** Each Shareholder notifies the Company that it wishes to receive by email all notices, statements, reports, accounts and other documents to be sent to Shareholders.

16 GENERAL

16.1 **Conflict with Constitution:** To the extent of any inconsistency or conflict, the provisions of the Agreement will prevail over the provisions of the Constitution. In order to give effect to this clause 16.1, if any inconsistency or conflict is identified or becomes apparent, the parties must do all things and sign all documents, including where necessary making amendments to the Constitution, as may be required to remove the inconsistency or conflict.

16.2 **Confidentiality:** Each party must keep the Agreement, its terms and information it receives about the Company and its business (**Confidential Information**) confidential, and must not use or disclose that Confidential Information without the prior written consent of the other parties except to the extent that:

a disclosure is required by law;

b the relevant information is already in the public domain;

c it is reasonably required to obtain professional advice; or

d it is reasonably necessary in connection with any proposed:

i financing of that party;

ii sale of that party's interest in the Company; or

iii 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 16.2.

16.3 **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 second 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,

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

16.4 **Entire agreement:** The Agreement contains all of the terms agreed between the parties relating to the matters dealt with in the Agreement and supersedes all prior discussions and agreements covering the subject matter of the Agreement.

16.5 **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.

16.6 **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.

16.7 **No partnership:** Nothing contained in the Agreement will be deemed or construed to constitute any party to be a partner, agent or representative of any other party, or to create any trust or commercial partnership.

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

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

16.10 **Partial invalidity:** If any provision of the Agreement becomes invalid or unenforceable to any extent, the remainder of the Agreement and its application shall not be affected and shall remain enforceable to the greatest extent permitted by law.

16.11 **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.

16.12 **Governing law and jurisdiction:** The Agreement is governed by New Zealand law, and the parties submit to the non-exclusive jurisdiction of the New Zealand courts.

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SCHEDULE 1

SHAREHOLDER DETAILS AND REMUNERATION POLICY

Part A Shareholder Details

[*INSERT NAME OF SHAREHOLDER*]	
Shareholder Employee	[***User note:*** • ***For a shareholder that is a company or a trust, insert the name of the Shareholder Employee listed in the Parties section as being the Shareholder Employee of that shareholder.*** • ***For a shareholder that is an individual, insert the name of that shareholder.*** • ***For joint shareholders (e.g. spouses), insert the name of the shareholder that will work in the business.***]
Expected Contribution of Shareholder Employee	[***User note: Insert whether the Shareholder Employee is expected to contribute on a full or part time basis and as an employee, contractor or director.***] The Shareholder Employee is to work [*full time/part time*] in the Business as an [*employee/contractor/director*]. [***User note: Insert the contribution that the Shareholder Employee is expected to make to the business. Some possible examples of expected outputs are set out in the square brackets that follow.***] [*The Shareholder Employee is expected to:* • *[generate sales of at least [$insert] per [financial year];]* • *[engage at least [insert] new clients per [financial year].]*]
Notice details	**Contact name:** [*Insert*] **Address (physical address and PO Box):** [*Insert*] **Email address:** [*Insert*]

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Part B Remuneration Details (clause 4.2)

[*User note: Insert details of remuneration payable to Shareholders. This could be a statement of remuneration principles, or specific salaries/rates/bonuses to be paid to Shareholders. The more specific the details, the less discretion the Board will have in determining shareholder remuneration*].

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SCHEDULE 2

PURCHASE PRICE FOR SHARES OF DEPARTING SHAREHOLDER

[User note: As noted at clause 8, the parties should discuss the appropriate means of determining the purchase price payable by the company for the shares of any departing shareholder with a suitably qualified accountant or business valuation expert. Common methods for calculating the appropriate purchase price include:

- ***the selling shareholder's pro rata interest in the net asset value of the company;***
- ***the higher of that pro rata net asset value or a multiple of EBIT; or***
- ***the selling shareholder's pro rata interest in the fair market value of the company as determined by an independent expert. An example of a standard fair market value clause is set out below.]***

[*The Purchase Price shall be the Departing Shareholder's pro rata interest in the fair market value of the Company as at the end of the month prior to the Exit Date, determined by an expert in accordance with Schedule 3. The Purchase Price must be determined:*

A *[with/without] a discount for a minority interest;*

B *without regard to the provisions of the Agreement and the Constitution including ignoring the restrictions on the transfer of Shares contained in the Agreement or the Constitution.*]

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SCHEDULE 3

EXPERT DETERMINATION

[*User note: Include this schedule only if clauses 4.5 to 4.10 (failure to contribute) are included in the agreement or if a reference to expert determination is included in the provisions of schedule 2, otherwise delete this schedule.*]

1 [*The independent expert will be appointed by agreement of the Company and the Shareholder, or failing agreement, by the President of the New Zealand Law Society (or his or her delegate) on application by either party.*

2 *In reaching his or her decision, the expert must have regard to a single set of written submissions from the Company and from the Shareholder.*

3 *The Company and the Shareholder must each provide the expert with any assistance that the expert may request to issue his or her opinion.*

4 *The expert must not act as a mediator or arbitrator and the Arbitration Act 1996 does not apply.*

5 *Unless otherwise specified by the expert, the expert's fees must be borne equally between the Company and the Shareholder.*

6 *The expert's decision is final and binding on the parties (in the absence of manifest error).*]

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SCHEDULE 4

INITIAL BUSINESS PLAN

[*To insert if applicable, otherwise delete this Schedule*]

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