

**Application for an Exemption pursuant to section 81  
of the Electricity Industry Reform Act 1998**

**Date:** 3 August 2006

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**Application:** Pursuant to Section 81 of the Electricity Industry Reform Act 1998 (EIR Act), application is hereby made to the Commerce Commission for exemption from the application of the EIR Act as described in this application.

**VERSION FOR PUBLIC DISCLOSURE**

## **Introduction**

1. Westpower Limited (**Westpower**) is an electricity lines business within the meaning of section 4 of the EIR Act. Westpower and its joint venture partner, Hari Hari Hydro Ltd (**H3**) have formed a joint venture company, Amethyst Hydro Ltd (**AHL**), to investigate the feasibility of constructing and operating a hydro generation plant on the Amethyst River at Hari Hari, South Westland in the West Coast region (**the Scheme**).

## **Confidentiality**

2. The applicant requests a confidentiality order under section 100 of the Commerce Act for:
  - (a) the Shareholders' Agreement attached as Appendix 2; and
  - (b) paragraph 38 below; and
  - (c) the Agreement for Connection of Generator Stations to the Network between Westpower and TrustPower attached as Appendix 4.
3. The reasons for seeking confidentiality are that the information is commercially sensitive and/or disclosed in confidence. Confidentiality is sought for the maximum period specified in section 100(2) of the Commerce Act. Thereafter the applicant considers that the matters identified in paragraph 2 should continue to be treated as confidential under section 9(2)(b)(ii) of the Official Information Act 1982.

## **Application of the EIR Act**

4. Westpower owns the electricity distribution network that services the West Coast of the South Island. It delivers 210GWh of electricity per annum to over 12,000 consumers. The West Coast transmission system is illustrated at Appendix 1. It operates this network through a wholly-owned subsidiary, ElectroNet Services Ltd (**ENS**).
5. AHL is not currently an electricity supply business, but this application is being submitted on the basis that if the Scheme goes ahead and becomes operational,

AHL will be an electricity supply business pursuant to section 5 of the EIR Act, because it will:

- (a) sell electricity in New Zealand (section 5(1)(a)(i));
  - (b) generate electricity in New Zealand (section 5(1)(a)(iii)); and
  - (c) own and operate generation assets (section 5(1)(b)).
6. Expected output is 6MW. The applicant notes that AHL only falls into the definition of "electricity supply business" by virtue of being 1MW over the 5MW exemption for distributed generation in section 5(2)(e) of the EIR Act.
7. It is also possible that section 5(1)(a)(ii) (relating to trading in financial hedges) may apply as discussed at paragraph 45.
8. Westpower will, via AHL, be a distributed generator if the Scheme goes ahead as the electricity generated from the Scheme will be injected directly into Westpower's network.
9. An exemption is sought to enable Westpower and its wholly-owned subsidiary, ENS, to be involved in AHL within the meaning of the EIR Act.

#### **Cross Involvements and Exemptions**

##### *Westpower*

10. Westpower is 100% owned by West Coast Electric Power Trust (**the Trust**). The income beneficiaries are all consumers connected to Westpower's distribution network.

##### *ENS*

11. ENS is a wholly-owned subsidiary of Westpower. ENS employs all staff associated with the lines business, other than the Chief Executive and Asset Manager, who are employed by Westpower. As a result, Westpower and ENS are both lines businesses within section 4 of the EIR Act. From a competition

perspective, Westpower and ENS can be regarded as a single entity and so ENS has not been analysed separately in this application. References to Westpower should be taken to include ENS unless otherwise specified.

12. In addition to services in relation to the Westpower network, ENS also currently provides design, construction and maintenance services to third parties including to hydro generators (primarily Trust Power). However, ENS is not "involved" in any electricity supply business within the meaning set out in the EIR Act.
13. Section 17 of the EIR Act prohibits Westpower (an electricity lines business) from being involved with AHL (an electricity supply business). Any cross-involvement by Westpower is also a cross-involvement by ENS.

#### *Exemptions*

14. Westpower notes that the hydro generation plant will have a maximum nameplate capacity of 6MW and will be embedded within the Westpower network. If AHL were constructing a 5MW plant, its generation activities would fall within the exemption for distributed generation in section 5(2)(e) and no cross-involvement would then arise.
15. As it stands, Westpower's interest in AHL falls within the exemption for new generation under 50MW in section 46C(1), except that Westpower will not be able to fully comply with the arms-length rules. AHL is incorporated as a separate company and so Westpower will comply with the corporate separation rule.
16. Westpower and AHL consider that it would be unrealistic and uneconomic to comply with the arms length rules, and believe that non-compliance would not have a negative effect on competition. Therefore, Westpower is applying for an exemption from the application of section 17 of the EIR Act in relation to its involvement, and that of ENS, in AHL.

#### *Cross-involvement by Directors, Employees and Shareholders*

17. As detailed in paragraph 35 below Westpower has the power to appoint four directors to the Board of AHL. Westpower's initial appointees are currently directors of Westpower and it is intended that this will continue. It is also intended that Westpower and/or ENS employees will be involved in the management and

operation of AHL. Each director or manager of Westpower who is also involved in AHL is potentially a cross-involved person pursuant to section 17 of the EIR Act. Furthermore, Westpower is 100% owned by the Trust. The applicant believes that, if Westpower is granted an exemption pursuant to section 81 of the EIR Act, the cross-involvement of such individuals and the Trust is to be disregarded pursuant to section 19(1)(h) of that Act.

18. If the Commission has a different view in relation to any individual or shareholder associated with Westpower, then Westpower requests that such individual/shareholder be granted an exemption from such cross-involvement.

### **Background to the Scheme**

19. Up until 1999 Westpower owned hydro electricity generation assets, capable of supplying 16MW of load on the Westpower network. As a result of the ownership separation rules introduced by the EIR Act in 1998, Westpower sold its interest in its generation schemes to TrustPower.
20. Westpower has recently conducted a review of its strategic direction, and as a result decided that it would be beneficial to re-enter electricity generation if an appropriate opportunity arose. There are a number of reasons for this. Westpower, together with its management team, has a valuable knowledge and skill base of, and a significant breadth of experience in, the business and operation of hydro generation and related plant and assets. Two of the current directors of Westpower were directors prior to Westpower's divestment of hydro generation assets. In addition, a number of the personnel involved in Westpower's Wahapo hydro-electric scheme (commenced in 1991) are still with Westpower, including its Asset Manager. These are essentially the same reasons as identified by the Ministry of Economic Development as to why distributors are "well placed to enter generation".<sup>1</sup>
21. In addition, demand in the South Island region is growing, and distributed generation is the most effective and secure way of meeting such demand.

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<sup>1</sup> *Investment in Electricity Generation by Lines Companies* Business & Networks Branch, Ministry of Economic Development, page 1206, paragraph 31.

### *Development of the Scheme*

22. Westpower was approached in May 2004 by a private company, H3, to become involved in what was then intended to be a very small (400kW) generation project. H3 is jointly owned by Robert Smith and Martin Doyle, both of Nelson. Mr Smith has ecological qualifications and Mr Doyle is a hydrologist.
23. Westpower entered into preliminary discussions with H3. It soon became evident that a larger scheme was possible and as a result, Westpower and H3 formed a joint venture company (AHL). Westpower continued feasibility studies in conjunction with H3 and based on the conclusions drawn in its feasibility report, Westpower has determined that the proposed Scheme is financially and technically feasible and environmentally sound. The intention is now to recommend to the AHL Board that the company be capitalised and that final feasibility and detailed design commence. The AHL Board intends to make a final decision as to whether to proceed on 3 August 2006.

### *Details of the Scheme*

24. The proposed Scheme was initially planned to have a nameplate capacity of 5MW. Following the pre-feasibility process, the potential to increase this to 6MW has materialised. A number of external factors including the availability of an EIR Act exemption, resource consent and water right issues will need to be considered before confirmation that the additional 1MW is able to be secured.
25. The cost of the Scheme is estimated to be \$20 million. Given the costs associated with building a hydro generation scheme, the economics of the Scheme are considerably more attractive at 6MW capacity than at 5MW.
26. Exploration drilling has been completed and results have been analysed to provide information for tunnel design. Construction could commence by mid-2007, depending on the progress of the necessary consents. Construction of the Scheme will take approximately 24 months (including an establishment period for procurement of equipment and construction of the downstream portal structure).
27. It is proposed that the output from the Scheme will be connected to Westpower's existing 33kv network and injected directly into Westpower's sub-transmission network. The Amethyst River is located 60km south of Hokitika which is the

nearest grid exit point on the national grid. For this reason AHL has determined that it is not feasible to connect the output from the Scheme into the national grid.

28. AHL will engage Westpower to manage the design phase and build part of, and provide all necessary electrical resources for, the Scheme. Following commencement of commercial operation of the Scheme, ENS will be contracted, by way of a Service Level Agreement, to provide any operating and maintenance services.

#### *Consents*

29. AHL has resource consents (with full and unencumbered title) relating to land use and the taking and discharging of water. The consents that have been obtained are listed in the Fifth Schedule to the Shareholders Agreement (attached as Appendix 2). These consents were originally obtained by H3 and transferred to AHL as part of Westpower and H3's joint venture agreement. Department of Conservation concessions are held for exploratory drilling (which is now completed).
30. Additional consents need to be obtained in relation to drainage and discharge from the tunnel and road, and the earthworks required for the construction of the Scheme.
31. A DOC concession (for construction and operation of the Scheme) and a grant of easement in relation to some privately held land also need to be obtained. Work is progressing on these with the intention of filing for the DOC concession in August 2006. Negotiations for the easement are underway.

#### *Operation of the Scheme*

32. AHL will contract Westpower to manage the design and building of the Scheme. Following commissioning, it is intended that AHL will contract Westpower to operate and maintain the Scheme. These services will be provided under a Service Level Agreement on an arms' length basis. Further details are set out in the Sixth Schedule to the Shareholders' Agreement. AHL will not employ any staff of its own.

33. It is intended that Westpower's Chief Executive and Asset Manager will be involved in the management of AHL, probably via an arms' length service level agreement (either directly between Westpower and AHL or via ENS). Their involvement will focus on management of contracts for the design and building of the Scheme and the future maintenance of the Scheme.
34. Hydro generation will be the sole form of generation capacity. Electricity will be purchased by AHL under a standard retail contract for operational uses.

*Structure and Operation of AHL*

35. AHL is an incorporated company having its registered office at 146 Tainui Street, Greymouth. AHL currently has five directors of which four are appointed by Westpower and one is appointed by H3. In addition, H3's alternate appointee attends all Board meetings as an observer. A chairperson is appointed by a majority of the directors.
36. AHL has a total of 100 ordinary shares currently on issue of which Westpower holds 80 shares and H3 holds the remaining 20 shares. Each share carries the same rights and privileges and will be subject to the same restrictions.
37. AHL will (subject to certain conditions) issue new shares at such time that additional capital is required to fund the construction phase of the Scheme. These will be issued in proportion to Westpower and H3's shareholding.
38. [ ]
39. Three directors appointed by Westpower and one director appointed by AHL must be present for a quorum. Significant transactions<sup>2</sup> involving AHL require an affirmative vote of a director appointed by each shareholder. These requirements are intended to ensure that, despite having a relatively small interest in the company, it is able to retain some control over its direction.
40. Copies of the Shareholders' Agreement relating to AHL and its Constitution are attached as Appendices 2 and 3.

## Commission's Primary Questions

41. The Commission has stated that it will consider three primary questions when considering an application for exemption. The applicant has addressed each of these questions in the following paragraphs.

***Question 1: Would the Commission, by granting an exemption in respect of a business or involvement or interest, create incentives or opportunities to inhibit competition in the electricity industry?***

42. Westpower submits that the Scheme will not result in any inhibition of competition in any market in the electricity industry. Before analysing the specific incentives and opportunities facing the parties, it is worth considering the size of the Scheme in the context of the overall electricity market.
43. The capacity of the proposed hydro plant is estimated to be approximately 6MW. This output represents about 0.075% of the national electricity generation market.<sup>3</sup> The Ministry of Economic Development has noted that the relative size of cross-involvements needs to be considered when assessing competition risks:

*"Any amount of cross-involvement provides an incentive to lessen competition, but a firm's opportunity to lessen competition is limited by the extent of cross-involvement relative to the size of the relevant market (e.g. cross involvement in a 10MW generation plant is unlikely to provide much opportunity to lessen competition materially in a 10,000MW market)."*

44. This reflects Westpower's situation where the proposed Scheme is only 6MW. The negligible impact of small generation schemes in the context of the electricity market as a whole was acknowledged by the Commerce Commission in Decision No. 332 in relation to Alpine Energy's investment in the Opuha Dam.<sup>4</sup>
45. The Opuha situation is closely analogous to this application as in that case the Commission was considering an increase in the capacity of the dam from 5MW (permitted) to 7.5MW (for which an exemption was required and granted) and so

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<sup>2</sup> Including, but not limited to, major transactions under the Companies Act. See the Second Schedule to the Shareholders' Agreement.

<sup>3</sup> New Zealand's total generation per annum is approximately 40Twh. See the New Zealand Energy Statistics (December 2004 quarter), published 8 March 2005, available on the Statistics New Zealand website: [www.stats.govt.nz](http://www.stats.govt.nz), under Economy/Products and Services/Information Releases.

<sup>4</sup> Decision No. 332, paragraph 48.

the competition assessment centred on the 2.5MW increase. Westpower believes that in relation to the Scheme the impact of any exemption should also be assessed in terms of the 1MW difference as, although there is no plant operating as in Opuha, a 5MW plant would be permitted without an exemption.

#### *Market Impact*

46. AHL will only be active in the generation market. It will not have any impact on the distribution market and, as it will not be retailing to end consumers, its only impact on the retail market will be indirectly as a consequence of expanded competition in the generation market. However, for the purposes of analysis and to be consistent with the Commission's approach, the applicant has analysed the national electricity generation market, the national and regional electricity retail markets and the local electricity distribution market in which Westpower operates.

#### *The National Electricity Generation Market*

47. Although the Scheme will involve distributed generation Westpower considers that it is still appropriate to consider its impact in terms of the national generation market because from a demand perspective, this distributed generation is an alternative to purchasing generation which is injected directly into the national grid.
48. There is nothing in the Scheme which is likely to inhibit competition in the generation market. Additional competition in the national generation and wholesale markets will be created by AHL's investment.
49. Westpower notes that it intends to deal with AHL in the same manner as it deals with other generators currently connected to its network, including applying the same formula for avoided cost of transmission. It intends to enter into an Agreement for Connection to the Westpower network that is in substantially the same form as its existing agreement with TrustPower, which is attached as Appendix 4.

*National and Regional Electricity Retail Markets*

50. The applicant has taken into account the Commission's comments in Decision No. 575 that the impact of an exemption for a cross-involved lines business may arise only or primarily in respect of the region covered by that business' network. Therefore in order to address any potential concerns the Commission might have the applicant has addressed potential regional impacts of the Scheme on the South Westland region.
51. AHL will enter into a contract to sell its generation output to an electricity retailer, preferably with a mixture of fixed price and fixed quantity, and fixed price and variable quantity components, in order to reduce the risk of price volatility. The process for this has not yet been finalised. Entry into such a contract will remove any threat of incentives or opportunities being created to inhibit competition in the regional electricity market. Effectively AHL will be price-neutral as to the price at which the electricity it generates is sold to consumers. It is unlikely that such a contract will constitute AHL selling a financial hedge, but as the final form of contract has not been determined it is possible that AHL would fall into section 5(1)(a)(ii) of the EIR Act. Westpower submits that even if it did so this would have no competitive impact.
52. The Commission has previously raised concerns over cross-involvement by lines companies affecting retail competition. However, these concerns arise in the context of the lines company retailing to consumers on its own network. This was highlighted in Decision No. 575 where the Commission referred to the possibility of a lines company discriminating against other retailers in terms of access charges or terms, and cross-subsidising its retail business from lines.<sup>5</sup>
53. Westpower is not in this position as it will not be involved in the retail market. Therefore, the primary competitive concerns arising from cross-involvement by lines companies do not arise here.

*The Impact of Distributed Generation on Retail Competition*

54. The hydro generation plant will be connected to Westpower's own distribution network. The plant will be 60km from the nearest grid exit point and so

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<sup>5</sup> Decision No. 575, paragraph 53.

connecting the generation from the hydro scheme directly into the national grid is not viable either practicably or economically. Any proposition to build a direct connection to the nearest grid exit point would not only be in direct conflict with the intention to improve security of supply without investment in transmission, but also render the Scheme uneconomic.

55. In Decision No. 541 the Commission expressed concern about lines companies whose generation connected to their own network, stating that:

*"competition concerns are more likely to arise in a situation where control over an electricity distribution network would create an advantage, vis-à-vis other electricity retailers, in supplying electricity across that network".<sup>6</sup>*

56. However, the applicant submits that connecting to one's own lines is not *in itself* a competitive concern. It is only when connection to the lines company's network is coupled with retailing by that lines company that the opportunity is combined with the incentive to distort competition in favour of one's own retail business.

57. There is no reason why the fact of connection in itself should result in anti-competitive behaviour. Theoretically any lines company *could* charge retailers differently or impose discriminatory access terms (although the applicant would argue the regulatory environment has limited the scope for this), regardless of whether that company owns generation connected to the network. However, if the lines company is not involved in retail activity there is no incentive for discriminatory behaviour. Embedded generation does not by itself create an incentive for anti-competitive behaviour.

58. The applicant notes that the situation in Decision No. 541 was effectively the reverse of the Westpower/AHL situation: Vector was cross-involved in retailing but not on its own lines, whereas AHL will utilise Westpower's own lines but with no involvement in retailing. Westpower considers that the competition impact of these converse situations is similar (i.e. minimal) because in neither case is the critical combination of retailing to customers on the business' own lines present. In this situation, as in Vector's situation, there are no "*competing retailers*" to whom AHL might restrict access to its electricity network because AHL is not in competition with other retailers.

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<sup>6</sup> Paragraph 65.

*Local Electricity Distribution Markets*

59. As the Commission noted in Decision No. 575, local distribution networks are regional, national monopolies.<sup>7</sup> Therefore, granting an exemption cannot affect either existing or future competition in that market. Westpower has therefore not analysed the distribution market any further but would be happy to answer any questions the Commission may have in this regard.

***Question 2: Would the Commission, by granting an exemption in respect of a business or involvement or interest, create incentives or opportunities to cross-subsidise generation activities from electricity lines businesses?***

60. The Commission has previously identified a risk of cross-subsidisation where a lines business is engaged in generation. However, in Decision No. 575 the Commission acknowledged that the ability to cross-subsidise (to the extent it exists) is a consequence of cross-ownership rather than non-compliance with the arms' length rules, noting that (in respect of section 46A of the EIR Act):

*"If a lines company invested in generation and complied with the arms' length provisions, no exemption would be required, but the risk of cross-subsidisation ... would still exist ...".<sup>8</sup>*

61. Accordingly, the applicant understands that the Commission does not consider that an exemption would create or materially increase the incentive or opportunity to cross-subsidise the generation activity where the cross-involvement falls within s46A of the EIR Act (assuming compliance with the arms length rules). This logic applies equally to this situation where any risk of cross-subsidisation arises from the legislative exemption in section 46C of the EIR Act, (as it does here) rather than from the exemption from the arms-length rules sought from the Commission.
62. Furthermore, in Westpower's situation the impact of the exemption from the arms-length rules is unlikely to materially change the potential cross-subsidisation impact because the legislation allows a 5MW generation scheme without such compliance. Presumably any risk of cross-subsidisation would arise from the permitted cross-involvement, not from the 1MW difference which is the trigger for this application.

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<sup>7</sup> Paragraph 47.

<sup>8</sup> Decision No. 575, paragraph 67.

63. Westpower also considers that the joint venture with H3 weakens its incentive to cross-subsidise generation, as any such cross-subsidisation would effectively amount to a financial transfer from it to H3.
64. Westpower notes that even in Decision No. 575 rejecting Eastland's application for exemption, the Commission considered that the risk of cross-subsidisation of generation was not materially increased by an exemption. Westpower believes that the risk here is at least as low as in that situation.

#### *The Regulatory Environment*

65. The applicant submits that in considering whether its cross-involvement could give rise to cross-subsidisation or the inhibition of competition, it is necessary to consider the regulatory regime to which electricity lines businesses are now subject. The applicant submits that the introduction and application of regulatory measures, post-dating the EIR Act substantially reduces the opportunities for lines companies to cross-subsidise or inhibit competition compared with the position at the time that ownership separation was introduced. These measures render reliance on the arms length rules less important.
66. The most significant aspect of the regulatory regime in restricting lines' businesses opportunities for cross-subsidisation is Part 4A of the Commerce Act, and in particular the development of thresholds for the investigation of lines businesses which may ultimately result in the imposition of price control. The thresholds act as a disincentive to cross-subsidisation because if cross-subsidisation from lines to generation were to occur it would make it even more difficult to meet the thresholds. Furthermore, the greater transparency of lines businesses' accounts due to threshold compliance and the information disclosure regime would make any cross-subsidisation relatively easy to identify were it to occur.
67. The establishment and breadth of the functions of the Electricity Commission provides another check on lines businesses' abilities to act in an undesirable or inefficient manner. The Electricity Commission is specifically charged with making recommendations for regulations for electricity governance in order to meet specific objectives, including the minimising of barriers to competition and

downward pressure on costs.<sup>9</sup> This provides a specific means of addressing situations that could potentially lessen competition.

**Question 3: Would the Commission permit, by granting an exemption in respect of a business or involvement or interest, a relationship between an electricity lines business and an electricity supply business which is not at arms length?**

68. If the relationship between Westpower and AHL were at arms length, Westpower would fall within the exemption in section 46C for new generation. The key driver for the exemption application is that Westpower and AHL consider that compliance with the arms length rules is unrealistic for the reasons detailed at paragraphs 72 - 74 below, and would put Westpower's involvement in the Scheme at risk.

69. The Commission has acknowledged that compliance with the arms length rules is not always strictly necessary, as:

*"in most circumstances where an exemption is required from the ownership separation rules a relationship will be created that will ultimately not be at arms' length."<sup>10</sup>*

70. In Decision No. 541, the Commission set out its approach to such cases is to:

*"assess[es] the practical effect of the non-arms length relationship in order to decide whether that relationship is likely to lead to a result that would be contrary to the purposes of the EIR Act."*

71. The applicant considers that the application of the stated approach to its cross-involvement will demonstrate that in this case compliance with the arms length rules is not strictly necessary. The purpose of the EIR Act will not be compromised by an exemption from the arms length rules, on the basis that the cross-involvement of Westpower in AHL does not provide any incentives or opportunities for cross-subsidisation or inhibition of competition.

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<sup>9</sup> Section 172N, Electricity Act 1992.

<sup>10</sup> Decision No 541, para 76.

### *Impact of the Arms' Length Rules*

72. Compliance with the arms' length rules would result in considerably increased costs and thus significantly reduce the anticipated rate of return from the Scheme. The main aspect of non-compliance with the arms' length rules will be that the requirement for separate management and directors will not be met. While preventing common management theoretically removes one opportunity for inhibiting competition, it does not necessarily follow that common management will always result in anti-competitive behaviour. Westpower submits that, for the reasons outlined above, Westpower and AHL respectively have no incentives, and limited opportunity, for anti-competitive behaviour, and common management is unlikely to change this.
73. On the other hand, a compliance with the Rules including separate management would prevent AHL from utilising the valuable experience of Westpower's directors and senior management. Duplication of governance and management would be extremely inefficient given the relatively small size of the Scheme, even assuming that such duplication could be achieved. It is not easy to find and attract the necessary expertise to the South Westland region, an area many potential employees disregard due to its perceived remoteness. Offering opportunities such as involvement in the design, construction and management of a hydro scheme will assist Westpower in ensuring retention of its own staff. Westpower believes that if duplication were required by the arms' length rules it would be difficult to obtain the necessary personnel for AHL.
74. Furthermore, compliance would prevent the directors of Westpower from taking an active role in managing their investment. Compliance with the arms length rules would necessitate Westpower being a passive financial investor. This would not be attractive to the Westpower Board.
75. The applicant is aware that in the cases where exemptions have been granted for cross-involved lines companies (Alpine Energy and Unison Networks Limited) the Commission has required limited compliance with the arms length rules. While Westpower considers that the main area of non-compliance will be in relation to common management, requiring limited compliance creates uncertainty. Westpower believes that a full exemption from the arms length rules would not materially increase the risk of anti-competitive behaviour.

### *Competition Impact of Non-Compliance*

76. In its paper the Ministry of Economic Development recommended against raising the arms length rules threshold to 50MW, arguing that the costs (i.e. risks of anti-competitive behaviour) could outweigh the benefits. However, it noted that for some firms the costs of compliance were relatively higher and it is still considering recommending raising the threshold above the existing 5MW. This implicitly acknowledges that the cost/ benefit ratio of applying the Rules to smaller projects changes as the size of the Scheme increases. Westpower acknowledges it is difficult to identify in the abstract a given point (in MW) where the risks of non-compliance are likely to outweigh the costs of such (being both the disincentive to investment in the first place and then the additional cost of such investment caused by compliance), but it seems clear that the Scheme is at the low end of the spectrum and accordingly an exemption should be granted.

### *Objectives of the EIR Act*

77. The overall purpose of the EIR Act is to ensure "costs and prices ... are subject to sustained downward pressure; and the benefits of efficient electricity pricing flow through to all classes of consumer".<sup>11</sup> There is nothing in the structure or operation of the Scheme that is likely to interfere with this purpose and the applicant submits that purpose is largely addressed by the regulatory regime detailed in paragraphs 65 to 67 above. To the extent that the Scheme has any impact on prices, the increase in generation capacity of the Scheme will contribute to the aim of "downward pressure on costs and prices".

### *Security of Supply*

78. The construction of the Scheme will provide significant security and voltage support improvements to the South Westland area. The current electricity network from Hokitika to Hari Hari and further south to the glacier regions comprises a single circuit 33kV line, with multiple single transformer zone substations used to break the voltage down to 11kV for local distribution at each major town. Westpower's Asset Management Plan includes a provision for strengthening supply to these areas by increasing the voltage of the Hokitika-Hari Hari section of this line to 66kV (in the medium to long term). However, there will

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<sup>11</sup> Section 2(1) of the EIR Act.

still only be one line into the area and the installation of additional transmission circuits is not feasible.

79. While there is no immediate transmission constraint in the region, the dependence on a single transmission line renders the region vulnerable to transmission outages. At present, the other local generators (including TrustPower's 3MW Wahapo power station) connect into the same 33kV line and provide some support to the area. However, at peak times the output of these stations is no longer sufficient to supply the South Westland area in a transmission outage situation. The additional generation from the Amethyst Hydro Scheme would enable the whole area to be run isolated from the grid for extended periods of time.
80. Demand is growing rapidly in the South Westland region and additional distributed generation will assist in meeting this demand in the most efficient and secure manner.

#### *Impact of Increased Security on Prices*

81. Westpower considers that enhancing security of supply through embedded generation is relevant to the EIR Act objective of ensuring that "costs and prices are subject to downward pressure". The costs of transmission outages are significant if alternative sources of supply are inadequate. Even aside from transmission outage situations, distributed generation reduces demand for generation injected into the grid which includes on average, 20% transmission losses. In other words, each kWh produced by the Scheme would displace 1.25kWh generated elsewhere and injected at the Benmore reference point.

#### *Government Policy Objectives*

82. The Government's overall policy objective for electricity is "to ensure that electricity is produced and delivered to all classes of consumers in an efficient, fair, reliable and environmentally sustainable manner".<sup>12</sup>

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<sup>12</sup> As reflected in the Government Policy Statement ; *Further Development of New Zealand's Electricity Industry* released in December 2000 and reiterated in the recent Government Policy Statement on *Electricity Governance*, October 2004.

83. The existence of a non-arms length relationship between Westpower and AHL will not negatively affect any part of this objective. In fact Westpower submits that the establishment of the hydro generation plant will assist in this objective and will contribute towards the efficient use of a renewable resource, as well as assisting in avoiding unnecessary and expensive transmission investment. As noted above, distributed generation is efficient as it avoids transmission losses.
84. The Ministry of Economic Development recently published a discussion note on "Facilitating Investment in Generation by Lines Companies".<sup>13</sup> Its purpose is to "open up a discussion on how lines companies' investment in generation can be further facilitated (short of completely removing current ownership restrictions)". The paper notes that although the cross-ownership restrictions in the EIR Act have been relaxed recently, providing opportunities for lines companies to own some generation and sell the output of that generation, the majority of lines companies are yet to take advantage of these opportunities. Westpower believes that this is largely due to the requirement to comply with the arms' length rules. While the amendments to the EIR Act are encouraging, it is unrealistic to expect lines' companies to invest in generation (and especially distributed generation) if full compliance with the arms length rules is required as this requires lines companies to affectively make a significant passive investment and fail to capitalise on the very reasons that the MED has identified why lines companies are interested in generation: primarily experience and familiarity with the industry.
85. The Government has specifically directed the Electricity Commission to seek outcomes including "removing barriers to investment in new generation technologies, renewables and distributed generation".<sup>14</sup> The applicant appreciates that the Commerce Commission is not subject to this specific outcome, but it submits that in the context of an application for exemption this is a factor that the Commission should take into account.

*Impact of Relationship not at Arms-Length*

86. In summary, the fact that the relationship between Westpower and AHL will not be at arms length should not disqualify Westpower from obtaining an exemption, given there is little or no risk of cross-subsidisation or inhibition of competition.

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<sup>13</sup> Resources and Networks Branch, Ministry of Economic Development, March 2005.

<sup>14</sup> Paragraph 2(g), GPS on Electricity Governance.

87. The purpose of the EIR Act is not endangered, and the Scheme is consistent with Government policy objectives, and accordingly an exemption should be granted.

## **APPENDICES**

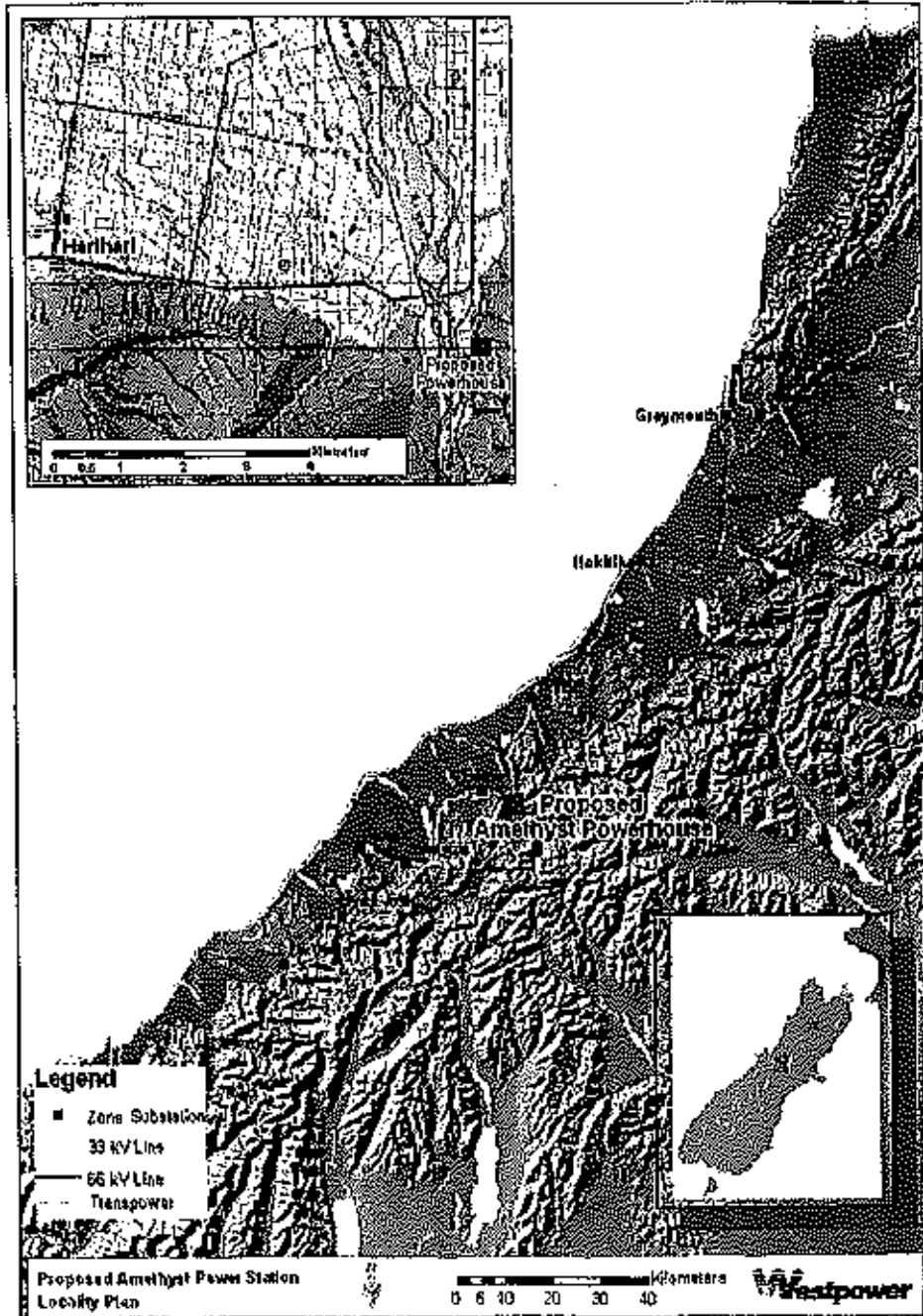
**to Application for an Exemption  
Pursuant to Section 81 of the  
Electricity Industry Reform Act 1998**

**WESTPOWER LIMITED**

**PLEASE NOTE APPENDICES 2 AND 4 ARE CONFIDENTIAL**

# APPENDIX ONE

## WEST COAST TRANSMISSION SYSTEM



## APPENDIX TWO

APPENDIX THREE

DATED

2005

CONSTITUTION

of

AMETHYST HYDRO LIMITED

I, [ ] certify that this is the Constitution of  
Amethyst Hydro Limited.

Dated this

day of

2005

\_\_\_\_\_  
[ ]

## CONTENTS

INTRODUCTION	1
1. CONTENTS OF CONSTITUTION	1
2. INTERPRETATION	1
3. ISSUE OF NEW SHARES	2
4. ACQUISITION OF OWN SHARES	3
5. REDEMPTION OF SHARES	3
6. TRANSFER OF SHARES	3
7. PRE-EMPTIVE RIGHTS OF SHAREHOLDERS	4
8. TRANSMISSION OF SHARES	7
9. DISTRIBUTIONS	8
10. SHAREHOLDERS	9
11. DIRECTORS	9
12. CHIEF EXECUTIVE OFFICER	10
13. REMUNERATION AND BENEFITS	10
14. INDEMNITY AND INSURANCE OF DIRECTORS AND EMPLOYEES	11
15. CALLS ON SHARES	12
16. FORFEITURE	13
17. LIEN	14
18. DISPOSAL OF SHARES SUBJECT TO FORFEITURE OR LIEN	15
19. PROCEEDINGS OF THE BOARD OF THE COMPANY	16
20. LIQUIDATION	16
FIRST SCHEDULE	17
SECOND SCHEDULE	24

## INTRODUCTION

### 1. CONTENTS OF CONSTITUTION

#### 1.1 Content: This Constitution contains:

- (a) matters contemplated by the Act to be included in a Constitution; and
- (b) other matters which the Company wishes to include in its Constitution.

#### 1.2 Rights and Obligations: The Company, the Board, each Director and each Shareholder have:

- (a) the rights, powers, duties and obligations set out in the Act except to the extent that they are negated or modified, in accordance with the Act, by this Constitution; and
- (b) the additional rights, powers, duties and obligations set out in this Constitution.

#### 1.3 Status of shareholders' agreement: In the event of any conflict between the Constitution and the terms of any agreement between all the Shareholders in the Company, the terms of such shareholders' agreement shall prevail.

### 2. INTERPRETATION

#### 2.1 Definitions: In this Constitution, unless the context requires otherwise:

"Act" means the Companies Act 1993.

"Board" has the same meaning ascribed to it in section 127 of the Act.

"Company" means Amelyst Hydro Limited.

"Director" means any person occupying the position of Director of the Company, by whatever name called.

"Share" means a share in the Company and unless otherwise stated includes shares from each class of share (if more than one).

"Shareholder" means a shareholder of the Company.

"Treasury Stock" means Shares which have been acquired by the Company in accordance with section 67A and not cancelled.

#### 2.2 The Act: An expression not defined in this Constitution but defined in the Act shall have the same meaning in this Constitution as in the Act.

#### 2.3 Construction: In this Constitution:

- (a) references to sections are to sections of the Act and references to clauses and schedules are to clauses in, and schedules to, this Constitution and references to paragraphs are to paragraphs in the relevant schedule;
- (b) unless the context requires otherwise;

- (i) words importing the singular include the plural and vice versa, and a gender includes all other genders; and
- (ii) words importing persons include firms, corporations, unincorporated associations and authorities and firm includes partnership;
- (c) references to any legislation or provision of any legislation are deemed to be references to that legislation or provision as amended, substituted or re-enacted and unless the context requires otherwise include any statutory instruments issued under that legislation or provision;
- (d) clause headings and other headings are for ease of reference only and shall be deemed not to form part of this Constitution nor to affect the construction of this Constitution; and
- (e) powers conferred on the Company, the Board, a Director or a Shareholder may be exercised at any time and from time to time.

### 3. ISSUE OF NEW SHARES

#### 3.1 Board's powers to issue Shares

Subject to the Act and this Constitution, the Board may issue Shares at any time, to any person, and in any number it thinks fit.

#### 3.2 Pre-emptive rights on the issue of Shares

- (a) Any Shares issued or proposed to be issued by the Company that rank or would rank as to voting or distribution rights, or both equally with or prior to or behind Shares already issued by the Company must be offered as follows:
  - (i) First, to the holders of the same class of Share;
  - (ii) Second, to the holders of other classes of Share (if any); and
  - (iii) Third, to any persons who the Board is prepared to register as holders of the Shares.
- (b) The offer to holders of Shares already issued must be pro-rata according to the number of Shares held by them and remain open for acceptance for a reasonable time.
- (c) Shareholders of the same class of Share are entitled to purchase additional Shares to the extent that other Shareholders of that class do not fully accept the offer. Competing applications for additional Shares are to be allocated pro-rata according to the number of Shares held by the applicants.
- (d) Otherwise, the Board can determine the procedure for the offer, acceptance and issue of Shares and no irregularity in the process affects the validity of the allocation and issue of Shares.

**3.3 Shareholder approval for the issue of Shares**

- (a) If Shares cannot be issued by reason of any limitation or restriction in this Constitution or the Act, the Board may issue Shares if it obtains the approval for the issue in the same manner as approval is required for an alteration to this Constitution that would permit such an issue.
- (b) Subject to the terms of the approval, the Shares may be issued at any time, to any person, and in any number the Board thinks fit.

**4. ACQUISITION OF OWN SHARES**

- 4.1 **Authorisation:** The Company may purchase or otherwise acquire Shares.
- 4.2 **Treasury Stock:** The Company may hold its own Shares. The transfer by the Company of Treasury Stock shall be deemed to be an issue of new Shares and shall be subject to the Act and the Constitution accordingly.

**5. REDEMPTION OF SHARES**

- 5.1 **Authorisation:** The Company may issue Shares which are redeemable at the option of:
  - (a) the Company; or
  - (b) a Shareholder;for a consideration that is:
  - (a) specified by the Board; or
  - (b) calculated by reference to a formula specified by the Board; or
  - (c) fixed by a suitably qualified person selected by the Board who is not associated with or interested in the Company.

**6. TRANSFER OF SHARES**

- 6.1 **Entry in Register:** Shares may be transferred by entry of the name of the transferee on the Share register of the Company.
- 6.2 **Delivery of form of transfer:** For the purpose of transferring Shares, a form of transfer signed by the present holder of the Shares or by his or her personal representative, attorney or any other person who may lawfully sign on behalf of the holder shall be delivered to:
  - (a) the Company; or
  - (b) an agent of the Company who maintains the Share register under section 87(3).
- 6.3 **Form of transfer:**
  - (a) The form of transfer may be in any usual or common form or any other form approved by the Board.

- (b) The form of transfer must be signed by the transferee if registration as holder of the Shares imposes a liability to the Company on the transferee.

**6.4 Duty upon receipt:** On receipt of a formal transfer in accordance with clauses 6.2 and 6.3, the Company must forthwith enter or cause to be entered the name of the transferee on the Share register as holder of the Shares, unless:

- (a) the Board resolves within 30 working days of receipt of the transfer to refuse or delay the registration of the transfer, and the resolution sets out in full the reasons for doing so;
- (b) notice of the resolution, including those reasons, is sent to the transferor and to the transferee within 5 working days of the resolution being passed by the Board; and
- (c) the Act or this Constitution expressly permits the Board to refuse or delay registration for the reasons stated in the resolution.

**6.5 Power to refuse or delay:** The Board may refuse or delay to register a transfer of Shares if:

- (a) the Company has a lien on the Shares; or
- (b) the holder of the Shares has failed to pay to the Company an amount due in respect of those Shares, whether by way of consideration for the issue of the Shares or in respect of sums payable by the holder of the Shares in accordance with this Constitution; or
- (c) clause 6.6 applies; or
- (d) the transferor has not complied with clause 7 of this Constitution.

**6.6 Requirement of Share certificate:** Where a Share certificate has been issued, a transfer of the Shares to which it relates must not be registered by the Company unless the form of transfer required by clause 6.3 is accompanied by the Share certificate relating to the Share, or by evidence as to its loss or destruction and, if required, an indemnity in a form required by the Board.

**6.7 Cancellation upon transfer:** Where Shares to which a Share certificate relates are to be transferred, and the Share certificate is sent to the Company to enable the registration of the transfer, the Share certificate must be cancelled and no further Share certificate issued except at the request of the transferee.

## **7. PRE-EMPTIVE RIGHTS OF SHAREHOLDERS**

**7.1 General Principles:** Wherever a person (a "Proposing Transferor") wishes to transfer any Shares ("Sale Shares") to any other person, whether or not that other person is a Shareholder, the provisions of this clause 7 shall apply unless all Shareholders have otherwise agreed in writing.

**7.2 Notice:** Before transferring any Sale Shares a Proposing Transferor must give notice in writing to the Company (a "Transfer Notice") that they wish to sell the Sale Shares. A Transfer Notice:

- (a) must state the number of Sale Shares;
- (b) must state the price (the "Nominated Price") (expressed as a price per Share) at which the Proposing Transferor wishes to sell the Sale Shares;

- (c) must state the other terms and conditions applicable to the share sale, including the provision of a warranty as to title in the Shares and confirmation that the Shares will not be mortgaged or otherwise encumbered in any way on the settlement date;
- (d) may relate to less than all the Shares held by the Shareholder but must only relate to Shares of one class;
- (e) except as expressly provided in this clause 7, shall not be revocable without the consent in writing of the Shareholders; and
- (f) constitutes the Board the agent of the Proposing Transferor for the sale of the Sale Shares at the Nominated Price or the fair value fixed in accordance with this clause 7.

7.3 Offer by Board: Promptly following the receipt by the Company of a Transfer Notice (and no later than the 5<sup>th</sup> business day after the date on which a Transfer Notice is received) the Board shall offer the Sale Shares for sale to the other Shareholders in accordance with and in the order of priority set out in clause 7.7. The notice to the other Shareholders must request the Shareholder to advise the Company by the closing date of the offer:

- (a) whether the Shareholder accepts the offer at the Nominated Price; or
- (b) whether that Shareholder accepts the offer at a price equal to the fair value to be fixed in accordance with clause 7.4(b).

7.4 Acceptance (or otherwise) of Offers and Nominated Price: Where the Board gives notice to the Proposing Transferor within 60 days of the receipt by the Board of the Transfer Notice that it has found a Shareholder or Shareholders willing to purchase the Sale Shares or some of them:

- (a) at the Nominated Price, the Proposing Transferor shall, subject to clauses 7.2(a) and 7.5, be bound to sell and transfer the relevant Sale Shares to the relevant Shareholder or Shareholders at the Nominated Price within 10 days of receipt from the Board of that advice; and/or
- (b) not at the Nominated Price but at fair value, then, unless the relevant Shareholder or Shareholders and the Proposing Transferor are able to reach agreement on fair value within 10 business days, the matter shall be referred by the Board to the person nominated for the purpose by the President for the time being of the New Zealand Society of Accountants or, if for any reason the President for the time being of the New Zealand Society of Accountants does not nominate a person, the person nominated by the President for the time being of the New Zealand Law Society. The nominated person, acting as an expert and not as an arbitrator, shall determine the fair value of the Sale Shares on the basis that the sale is from a willing seller to willing buyer and the fact that the Sale Shares may confer a minority interest in the Company is to be ignored and instead all the Shares in the Company are valued as one parcel and that value multiplied by the ratio that the Sale Shares bear to the total number of Shares issued in the Company. Subject to clauses 7.2(e) and 7.5, the Proposing Transferor shall be bound to transfer the relevant Sale Shares to the relevant Shareholder or Shareholders at the fair value so fixed within 10 days of receipt of the decision of the expert as to fair value.

**7.5 Right of Revocation:** Notwithstanding any other provisions of this clause, the Proposing Transferor shall not be required to, but may:

(a) sell all or any number of the Sale Shares for less than the Nominated Price; or

(b) sell some only of the Sale Shares;

and accordingly where:

(c) Shareholders wish to purchase less than all the Sale Shares; and/or

(d) the fair value as fixed in accordance with clause 7.4(b) is less than the Nominated Price,

the Proposing Transferor may revoke the Sale Notice with respect to all (but not less than all) of the Sale Shares within five days of receiving a notice from the Board under clause 7.4 which would otherwise require the Proposing Transferor to transfer Sale Shares.

**7.6 Not Sufficient Shareholder Purchasers:** If the Board has not within 60 days of the receipt by the Company of the Transfer Notice advised the Proposing Transferor that it has found Shareholders willing to buy all the Sale Shares, whether at the Nominated Price or the fair value (or a combination thereof), the Proposing Transferor shall be at liberty at any time within six months after that date to transfer any of the Sale Shares to any person on a bona fide sale at a price not being less than the Nominated Price provided that the Board may require to be satisfied in such manner as it considers reasonable that such Sale Shares are being transferred pursuant to a bona fide sale (or not less than the Nominated Price and, if not so satisfied, may refuse to register the relevant instrument of transfer.

**7.7 Preferential order as to right to purchase:** All Sale Shares shall be offered by the Board to the Shareholders in the order of priority set out below. Any offer of the Sale Shares shall be made by written notice giving the offeree 7 days within which such offer may be accepted and if not accepted within that 7 day period the offer shall be deemed to have lapsed. The order of priority for such offers shall be as follows (provided that where the Sale Shares comprise all of the Shares of a particular class, steps (a) and (b) shall be deemed to have been taken with none of the Shares having been sold):

(a) to the holder or holders of the same class of Shares as the Sale Shares pro rata between them according to existing Shareholdings;

(b) if any holder of the same class of Shares as the Sale Shares declines to purchase that holder's proportion of the Sale Shares, then to the other holders of that class of Share pro-rata according to existing Shareholdings;

(c) if any Sale Shares remain unsold after being offered in accordance with (a) or (b) above, then any such unsold Sale Shares shall be offered to the holders of any other class of Share pro-rata according to existing Shareholdings;

(d) if any holder of a class of Shares other than the class of the Sale Shares declines to purchase that party's proportion of the Sale Shares offered in accordance with (c) above, then to the other holders of that class of Shares pro-rata according to existing Shareholdings; and

(e) If any Sale Shares remain unsold after being offered in accordance with (d) above, then any such unsold Sale Shares shall be offered to all Shareholders. Any Shareholder that wishes to accept Shares that are offered in accordance with this subclause (e) must accept all of the Shares so offered. If more than one Shareholder accepts all of the Shares offered in accordance with this subclause (e), then the Shares will be divided pro rata amongst those Shareholders according to existing total Shareholdings.

7.8 **Default of Transferor:** If a Proposing Transferor, after having become bound to transfer any Sale Shares to another Shareholder, defaults in transferring those Sale Shares, the Board may authorise any Director to execute on behalf of and as attorney for the Proposing Transferor any necessary transfers, and may receive the purchase money for those Sale Shares. The Board shall hold the purchase money on trust for the Proposing Transferor and shall cause the name of the purchaser to be entered in the Share register as the holder of the Sale Shares. The receipt of the Company for the purchase money shall be a good discharge to the purchaser who shall not be bound to see to the application of it. After the name of the purchaser has been entered into the Share register pursuant to this clause the validity of the proceedings shall not be questioned by any person.

7.9 **Personal Representative to Sell:** Notwithstanding any other provision in this clause 7, the Directors may give written notice to any person becoming entitled to Shares as a consequence of the death, bankruptcy, dissolution or winding up of any Shareholder deeming that person or Shareholder to have given a transfer notice pursuant to clause 7.2 and clauses 7.2 to 7.8 shall apply.

## 8. TRANSMISSION OF SHARES

8.1 **Death of Shareholder:** If a Shareholder dies, the survivor (if the deceased was a joint Shareholder) or the personal representative of the Shareholder, shall be the only persons recognised by the Company as having any title to or interest in the Shares of the deceased Shareholder, but nothing in this clause shall release the estate of a deceased joint Shareholder from any liability in respect of any Share or constitute a release of any lien which the Company may have in respect of any Share.

8.2 **Rights:** Any person becoming entitled to a Share in consequence of the death or bankruptcy of a Shareholder, upon such evidence being produced as may be properly required by the Board:

(a) is entitled to exercise all rights (including without limitation the rights to receive distributions, to receive notices of and attend meetings and to vote in person or by representative), and is subject to all limitations, attached to the Shares held by that Shareholder; and

(b) is entitled either to be registered as holder of those Shares or to make such transfer of the Shares as the Shareholder could have made, but such registration shall not operate as a release of any rights (including any lien) to which the Company was entitled prior to registration of the personal representative.

8.3 **Joint Entitlement:** Where two or more persons are jointly entitled to any Share in consequence of the death of the registered holder they shall, for the purposes of this Constitution, be deemed to be joint holders of the Shares.

8.4 **Registration:** The Board shall have the same right to refuse to register the person entitled to any Share by reason of the death or bankruptcy of any Shareholder (or that Shareholder's nominee) as if that Shareholder were the transferee named in an ordinary transfer presented for registration.

## 9. DISTRIBUTIONS

9.1 **Distributions to be paid according to paid up capital:** All distributions (which for the purpose of this Constitution include dividends) shall, subject to any special rights attached to Shares, be paid according to the amounts paid or credited as paid on the Shares in respect of which the distribution is paid, but no amount paid or credited as paid on a Share in advance of calls shall be treated for the purpose of this clause as paid on the Shares. All distributions shall be apportioned and paid proportionately to the amounts paid or credited as paid on the Shares during any portion or portions of the period in respect of which the distribution is paid; but if any Share is issued on terms providing that it shall rank for distribution as from a particular date that Share shall rank for that distribution accordingly.

9.2 **Manner of payment:** A distribution payable in cash may be paid by cheque sent by post:

- (a) to the registered address of the Shareholder or person entitled thereto;
- (b) in the case of joint holders to any one of the joint holders at his or her registered address; or
- (c) to such persons and to such address as the Shareholder or person entitled or such joint holders as the case may be, may direct;

and the Company shall not be responsible for any loss arising from such mode of transmission.

9.3 **No interest:** No distribution shall bear interest against the Company.

9.4 **Deductions from distribution:** The Directors may deduct from any distribution to any Shareholder all such sums of money as may be due from him or her to the Company on account of any or all of the following:

- (a) calls, instalments or otherwise or any debt, liability or engagement; and
- (b) such amounts as the Company may be called upon to pay under any legislative enactment in respect of the Shares of a deceased or other Shareholder.

9.5 **Person to whom distribution payable:** A distribution shall be made to the person who is the registered holder of the Share in respect of which the distribution is authorised at the time of the authorisation of the distribution (or at the time when the distribution is authorised to be made).

9.6 **Distribution to joint holders:** If several persons are registered as joint holders of any Shares, and such persons are entitled to receive distributions in respect of the Shares, any one of them may give effectual receipts for any distribution in respect of the Share.

9.7 **Right not transferred:** A transfer of any Share shall not pass the right to any distribution authorised thereon before the registration of the transfer.

- 9.8 Dividend by way of distribution of assets:** Without limiting section 52, the Directors may distribute in kind among the Shareholders by way of dividend any of the assets of the Company, and in particular any Shares or securities of other companies to which the Company is entitled.
- 9.9 Unclaimed distributions:** All distributions unclaimed for 1 year after having been authorised may be invested or otherwise made use of by the Directors for the benefit of the Company until claimed. All distributions unclaimed for 5 years after having been authorised may be forfeited by the Directors for the benefit of the Company. The Directors may at any time after such forfeiture annul such forfeiture and make the distribution so forfeited to any person producing evidence that such person is entitled to the distribution and shall do so unless in the opinion of the Directors such distribution would embarrass the Company.

## **10. SHAREHOLDERS**

### **10.1 Meetings of Shareholders:** The proceedings of:

- (a) a meeting of Shareholders; and
  - (b) a meeting of Shareholders who are an interest group under the Act,
- are governed by the provisions set out in the First Schedule to this Constitution.

## **11. DIRECTORS**

### **11.1 Number of Directors:** The minimum number of Directors shall be four and the maximum number of directors shall be ten.

### **11.2 Appointment and removal by Shareholders:**

- (a) The Shareholders shall appoint Directors of the Company by ordinary resolution.
- (b) Any Director may be removed from office by ordinary resolution passed at a meeting of Shareholders called for the purpose of or for purposes that include the removal of the Director.
- (c) Section 155 of the Act shall not apply to the appointment of Directors of the Company.

### **11.3 Appointment by Board:**

The Board may appoint any person to be a Director to fill a casual vacancy.

### **11.4 Alternate Directors:**

- (a) A Director may in writing appoint any person to be an alternate Director to represent such Director, and may remove any alternate Director so appointed from office.
- (b) An alternate Director so appointed shall not, except by virtue of an agreement with the Director whom he or she represents entitling him or her to part of the remuneration which would otherwise be payable to such Director, be entitled to receive any remuneration from the Company, nor be required to hold any qualification, but shall otherwise be subject to the provisions of this Constitution with regard to Directors. An alternate Director shall (subject to

giving to the Company an address within New Zealand at which notices may be served upon him or her) be entitled to receive notices of all meetings of the Directors, and in the absence of the Director whom he or she represents, to attend and vote at all meetings of the Directors and to perform all the functions of such Director as a Director.

(c) An alternate Director shall cease to be an alternate Director if the Director whom he or she represents:

- (i) gives notice to the Company terminating such appointment; or
- (ii) ceases for any reason to be a Director,

or if the Shareholders who appointed that Director give the Company notice terminating the appointment of the alternate Director.

(d) An alternate Director shall be entitled at meetings of the Directors to one vote for every Director whom he or she represents in addition to his or her own vote as Director if he or she is a Director in his or her own right.

**11.5 Directors may not act below minimum number:** If the number of Directors falls below the minimum the Board shall not act except for the purposes of requesting the Shareholders to appoint additional Directors to bring the number up to that minimum.

**11.6 Power to manage Company:** Subject to the Act, the Directors of the Company have full power and authority to manage the Company in accordance with section 128 of the Act.

## **12. CHIEF EXECUTIVE OFFICER**

**12.1 Without limiting sections 128 or 130:**

(a) The Board may appoint one or more of its body (or any other person) to be the Chief Executive Officer of the Company either for a fixed term or otherwise and may fix the Chief Executive Officer's remuneration. The Board may remove any Chief Executive Officer and appoint another in his or her place. Any Chief Executive Officer if removed by the Board shall have no right or claim to continue in office and his or her only remedy against the Company (if any) shall be damages. Where the Chief Executive Officer is a Director, the Chief Executive Officer shall not be entitled to participate in remuneration fixed by the Company for ordinary Directors for as long as he or she holds that office.

(b) The Board may delegate to the Chief Executive Officer such of the powers exercisable under this Constitution as it thinks fit (except such powers to which special provisions inconsistent with delegation are contained in this Constitution) and with such limitations and restrictions as to time and mode of exercise or otherwise as it may think expedient and may at any time withdraw revoke or vary the powers so conferred.

## **13. REMUNERATION AND BENEFITS**

**13.1 Authorisations:** The Company shall be entitled to:

(a) pay remuneration or provide other benefits to a Director for his or her services as a Director or in any other capacity; and

(b) enter into a contract to do any of things set out in clause 13.1(a),

In accordance with section 161 of the Act.

**13.2 Expenses and special remuneration:**

(a) The Directors shall be entitled to be paid reasonable travelling and hotel and other expenses incurred when engaged on the business or affairs of the Company.

(b) If any Director is called upon to perform any extra or special services for the Company or its business the Board may award such Director special remuneration out of the funds of the Company and such remuneration shall be in addition to the ordinary remuneration referred to in this clause.

**14. INDEMNITY AND INSURANCE OF DIRECTORS AND EMPLOYEES**

**14.1 Indemnities for costs:** The Company may indemnify each Director for any costs incurred by him or her in any proceeding:

(a) that relates to liability for any act or omission in his or her capacity as a Director or employee; and

(b) in which judgement is given in his or her favour, or in which he or she is acquitted, or which is discontinued.

**14.2 Indemnities for liability:** The Company may also indemnify each Director in respect of:

(a) liability to any person other than the Company or a related company for any act or omission in his or her capacity as a Director or employee; or

(b) costs incurred by that Director or employee in defending or settling any claim or proceeding relating to any such liability,

not being criminal liability or liability in respect of a breach of the duty specified in section 131.

**14.3 Further Indemnities for costs:** The Company may indemnify an employee of the Company or a Director or employee of a related company for any costs incurred by him or her in any proceeding:

(a) that relates to liability for any act or omission in his or her capacity as a Director or employee; and

(b) in which judgement is given in his or her favour, or on which he or she is acquitted, or which is discontinued.

**14.4 Further Indemnities for liability:** The Company may also indemnify an employee of the Company or a Director or employee of a related company in respect of:

(a) liability to any person other than the Company or a related company for any act or omission in his or her capacity as a Director or employee; or

- (b) costs incurred by that Director or employee in defending or settling any claim or proceeding relating in any such liability,

not being criminal liability or liability in respect of a breach, in the case of a Director, of the duty specified in section 131 or, in the case of an employee, of any fiduciary duty owed to the Company or related company.

14.5 Insurance: The Company may, with the prior approval of the Board, effect insurance for a Director or employee of the Company or a related company in respect of:

- (a) liability, not being criminal liability, for any act or omission in his or her capacity as a Director or employee; or
- (b) costs incurred by that Director or employee in defending or settling any claim or proceeding relating to any such liability; or
- (c) costs incurred by that Director or employee in defending any criminal proceedings that have been brought against the Director or employee in relation to any act or omission in his or her capacity as a director or employee and in which he or she is acquitted.

14.6 Definitions: In this clause:

"Director" includes a former Director;

"effect insurance" includes pay, whether directly or indirectly, the costs of the insurance;

"employee" includes a former employee;

"indemnify" includes relieve or excuse from liability, whether before or after the liability arises; and

"indemnity" has a corresponding meaning.

## 15. CALLS ON SHARES

15.1 Power to call: Subject to clause 15.2, the Board or any person authorised by the Board may make such calls as they think fit upon the Shareholders in respect of moneys unpaid on the Shares held by them respectively and not paid in accordance with the terms of the issue of the Shares. Each Shareholder shall subject to receiving at least 21 days written notice specifying the time and place of payment pay the amount of every call so made on him or her to the Company or person (if any) appointed for the purpose at the times and places appointed by the Board. A call may be made payable by instalments and may be revoked or postponed as the Board may determine.

15.2 Prior holders not liable for calls: Where a Share renders its holder liable for calls, or otherwise imposes a liability on its holder, that liability attaches to the holder of the Share for the time being, and not to a prior holder of the Share, whether or not the liability became enforceable before the Share was registered in the name of the current holder.

15.3 Call made: A call shall be deemed to have been made at the time when the resolution of the Board authorising the call was passed.

15.4 Joint holders: Joint holders of a Share shall be jointly and severally liable to pay all calls in respect of that Share.

- 15.5 **Interest:** If a sum called in respect of a Share is not paid before or on the day appointed for payment the person from whom the sum is due shall pay interest on the sum from the day appointed for payment to the time of actual payment at such rate as the Board may determine. The Board may, however, waive payment of that interest wholly or in part.
- 15.6 **When payable:** Any sum which by the terms of issue of a Share becomes payable on issue or at any fixed date shall, for the purposes of this Constitution, be deemed to be a call duly made and payable on the date on which by the terms of issue the sum becomes payable.
- 15.7 **Proof of liability:** The amount of any unpaid call or instalment may be recovered as a debt due from the Shareholder to the Company by proceedings commenced at any time after the call became payable. In any such proceedings it shall be sufficient to prove that:
- (a) the name of the Shareholder sued is entered in the Share Register as the holder or one of the holders of the Shares in respect of which such debt accrued;
  - (b) the resolution making the call is duly recorded in the minute book of the Company; and
  - (c) notice of such call was duly given to the Shareholder,
- and it shall not be necessary to prove any other matter and the proof of the matters referred to in this clause shall be conclusive evidence of the debt.
- 15.8 **Different amounts:** The Board may on the issue of Shares differentiate between the Shareholders as to the amount of calls to be paid and the times of payment.
- 15.9 **Receipt of uncalled money:** The Board may if they think fit receive from any Shareholder willing to advance all or any part of the money uncalled and unpaid on any Shares held by that Shareholder. Upon receipt of such advance the Board may:
- (a) pay interest at such rate as may be agreed upon between the Board and the Shareholder from the date of the advance until the date for payment; and
  - (b) repay the advance upon giving to the Shareholder 3 months' written notice,
- but no Shareholder shall be entitled as of right to any interest.

## 16. FORFEITURE

- 16.1 **Failure to pay:** If a Shareholder fails to pay any call or instalment of a call on the day appointed for payment, the Board may serve notice on the Shareholder requiring payment of the unpaid call or instalment together with any interest which may have accrued and any expenses that may have been incurred by the Company by reason of such non-payment.
- 16.2 **Notice:** The notice shall name a further day (not earlier than the expiration of 14 days from the date of service of the notice) on or before which the payment required by the notice is to be made. The notice shall state that in the event of non-payment by the time appointed the Shares in respect of which the call was made will be liable to be forfeited. The notice shall also state the place at which payment is to be made.

**16.3 Non-compliance:** If the requirements of any such notice are not complied with, any Share in respect of which the notice has been given may, before the payment required by the notice has been made, be forfeited by a resolution of the Board to that effect. Such forfeiture shall include all distributions authorised in respect of the forfeited Shares and not actually paid or made before the forfeiture.

**16.4 Entry of forfeiture:** When any Share is so forfeited:

- (a) notice of the resolution shall be given to the Shareholder in whose name it stood immediately prior to the forfeiture;
- (b) an entry of the forfeiture, with the date thereof, shall forthwith be made in the Share Register;
- (c) the Share certificate of any such Shares shall be immediately cancelled by the Company and the Shareholder in whose name such cancelled Share stood immediately prior to such cancellation shall return such Share certificate to the Company within 14 days of receiving notice of such resolution; and
- (d) as soon as it is sold or disposed of, an entry of the date and manner of the sale or disposition, shall be made in the Share Register.

**16.5 Forfeited Share:** A forfeited Share shall be deemed to be the property of the Company and may be sold or otherwise disposed of on such terms and in such manner as the Board thinks fit subject to compliance with clause 3 which shall apply as if the forfeited Shares were new Shares (provided that the forfeited Shares shall not be offered under clause 3 to the Shareholder who forfeited those Shares). The Board may, at any time before a sale or disposition, annul the forfeiture on such terms as the Board thinks fit.

**16.6 Ceasing to be Shareholder:** A person whose Shares have been forfeited shall cease to be a Shareholder in respect of the forfeited Shares, but shall remain liable to pay to the Company all money which at the date of forfeiture was payable by the Shareholder to the Company in respect of the Shares. The Shareholder's liability shall cease if and when the Company receives payment in full of all such money in respect of the Shares.

**16.7 Fixed time payments:** The provisions of this Constitution as to forfeiture shall apply in the case of non-payment of any sum which by the terms of issue of a Share becomes payable at a fixed time as if the same had been payable by virtue of a call duly made and notified.

## **17. LIEN**

**17.1 Lien on Shares:** The Company shall have a first lien upon each Share registered in the name of each Shareholder (whether solely or jointly) and upon the proceeds of sale of such Share for:

- (a) unpaid calls or other amounts, and any interest payable on such amounts, relating to the Share; and
- (b) such amounts as the Company may be called upon to pay under any legislation in respect of the Share.

17.2 **Waiver:** The registration of a transfer of Shares in which the Company has any lien shall, unless notice to the contrary shall first be given to the transferee, operate as a waiver of such lien.

17.3 **Distributions:** The lien shall extend to all distributions from time to time authorised in respect of the Shares.

17.4 **Sale of Shares:** A Director, on behalf of the Company, may sell any Shares on which the Company has a lien if:

- (a) a sum in respect of which the lien exists is presently payable; and
- (b) 14 days written notice demanding payment of such sum has been given to the Shareholder or to the person entitled by reason of the Shareholder's death or bankruptcy.

#### 18. DISPOSAL OF SHARES SUBJECT TO FORFEITURE OR LIEN

18.1 **Execution:** To give effect to any sale or disposition pursuant to clauses 16 or 17 a Director, on behalf of the Company, may execute a transfer of the Shares to the purchaser.

18.2 **Discharge from calls:** Upon registration of the transfer to the purchaser of Shares sold or disposed of by the Company pursuant to clauses 16 or 17 (the "Transferee") the Transferee shall hold such Shares free from all calls due prior to such purchase.

18.3 **Purchase money:** The Transferee shall not be bound to see to the application of the purchase money nor shall the Transferee's title to the Shares be affected by any irregularity or invalidity in the sale procedure.

18.4 **Former Shareholder's remedy:** The remedy of the former Shareholder and of any person claiming under or through the former Shareholder shall be against the Company exclusively and in damages only.

18.5 **Proceeds:** The net proceeds of the sale of any forfeited Share or of Shares sold for the purpose of enforcing the lien shall be applied:

- (a) first, in payment of all costs and expenses of such sale or any attempted sale;
- (b) secondly, in or towards satisfaction of any unpaid calls, interest, expenses or other amounts in respect of which any lien exists; and
- (c) thirdly, in payment to the previous holder of the Share or to the executors, administrators or assigns of the previous holder.

18.6 **Evidence:** A certificate by a Director and countersigned by an authorised person that the power of sale has arisen and is exercisable by the Company under this Constitution, or that a Share in the Company has been duly forfeited on the date stated, shall be conclusive evidence of the facts stated in that certificate.

18.7 **Further powers:** For giving effect to any such sale after forfeiture or for enforcing the lien the Board may authorise some person to transfer the Shares sold to the purchaser. If the certificate for the Shares is not delivered up to the Company the Board may issue a new certificate distinguishing it as they think fit from the certificate not delivered up.

**19. PROCEEDINGS OF THE BOARD OF THE COMPANY**

19.1 The provisions of the Third Schedule to the Act shall not apply to proceedings of the Board. The Second Schedule to the Constitution shall govern proceedings of the Board.

**20. LIQUIDATION**

20.1 **Surplus Assets:** Subject to the terms of Issue of any Shares, if on the liquidation of the Company the surplus assets shall be:

- (a) more than sufficient to repay the whole of the paid up capital, the excess shall be distributed among the Shareholders; or
- (b) insufficient to repay the whole of the paid up capital, such surplus assets shall be distributed so that as nearly as may be the losses shall be borne by the Shareholders,

in proportion to the capital paid or which ought to have been paid at the commencement of the liquidation on the Shares held by them respectively, other than amounts paid in advance of calls.

20.2 **Distribution in specie:** With the approval of the Shareholders by ordinary resolution, the liquidator of the Company may divide amongst the Shareholders in kind the whole or any part of the assets of the Company (whether or not they are of the same kind) and for that purpose the liquidator may:

- (a) attribute such values to assets as the liquidator considers appropriate; and
- (b) determine how the division will be carried out as between the Shareholders or different classes of Shareholders.

20.3 **Vesting in trust:** With the approval of the Shareholders by ordinary resolution, the liquidator of the Company may vest the whole or any part of any surplus assets of the Company in trustees upon trust for the benefit of the Shareholders but no Shareholder is compelled to accept any Shares or other securities on which there are any liabilities. The liquidator may determine the terms of the trust.

## FIRST SCHEDULE

### Procedures at Meetings of Shareholders

#### 1. MEETINGS OF SHAREHOLDERS

1.1 This Schedule governs the proceedings of meetings of Shareholders.

#### 2. CONSTRUCTION

2.1 Unless stated otherwise, references to clauses are references to clauses in this Schedule.

2.2 A reference in this Schedule to a Shareholder present at a meeting or entitled to vote at a meeting includes a reference to a proxy of a Shareholder, a representative of a corporate Shareholder, an attorney of a Shareholder, and any person who may lawfully act on behalf of a Shareholder.

#### 3. NOTICE

3.1 Written notice must be given to Shareholders, Directors and auditors

Written notice of the time and place of a meeting of Shareholders must be sent to every Shareholder entitled to receive notice of the meeting and to every Director and any auditor of the Company not less than ten working days before the meeting. Such written notice must be sent to the most recent physical address, email address and facsimile number which the above persons have provided to the Company, provided that if an address, email address or facsimile number is not provided, such notice shall be sent to the last address, email address and facsimile numbers known to the Company. In addition, if a Shareholder and/or Director have, for the purposes of this clause, notified the Company of a phone number for an answerphone enabled phone, notice must also be given to that Shareholder and/or Director by leaving a message containing all the details that are required by this constitution to be contained in a written notice of meeting of Shareholders on such phone at least ten working days before the meeting.

3.2 Service of notices outside New Zealand

If a Shareholder has no registered address within New Zealand and has not supplied to the Company an address within New Zealand for the giving of notices, but has supplied an address outside New Zealand, then notices must be posted to that Shareholder at such address and shall be deemed to have been received by that Shareholder 48 hours after the time of posting.

3.3 Notice must state nature of business

The notice must state:

- (a) the nature of the business to be transacted at the meeting in such detail that will enable a Shareholder to form a reasoned judgement in relation to it; and
- (b) the text of any special resolution to be submitted to the meeting.

3.4 Irregularities in notice may be waived

Any irregularity in a notice of a meeting is waived if all the Shareholders entitled to attend and vote at the meeting attend the meeting without protest as to the irregularity or if all such Shareholders agree to the waiver.

### 3.5 Notice of adjournment

If a meeting is adjourned notice of the adjourned meeting must be given in the same way as notice was given for the meeting from which the adjournment took place.

## 4. MEETING AND QUORUM

### 4.1 Methods of holding meetings

A meeting of Shareholders may be held either:

- (a) By a number of Shareholders, who constitute a quorum, being assembled together at the place, date and time appointed for the meeting; or
- (b) By means of an audio, or audio and visual, communication by which all Shareholders participating and constituting a quorum can simultaneously hear each other throughout the meeting.

The Company is not required to hold meetings of Shareholders in the manner specified in clause 4.1(b). A meeting will be held in that manner only if the notice of meeting so specifies or the Board otherwise decides that the Company should do so.

### 4.2 Business to be transacted only if a quorum is present

Business may be transacted at a meeting of Shareholders only if a quorum is present at the time when the meeting proceeds to business.

### 4.3 Quorum for a Shareholders' meeting

A quorum for a meeting of Shareholders is present if two or more Shareholders or their proxies are present at the meeting and the Shareholders who are present between them are able to exercise more than 90 percent of the votes to be cast on the business to be transacted by the meeting.

### 4.4 Meeting to be adjourned if no quorum

If a quorum is not present within 30 minutes after the time appointed for a meeting:

- (a) in the case of a meeting called under section 121(b) of the Act, the meeting is dissolved;
- (b) in the case of any other meeting,

the meeting will be adjourned to the same day in the following week at the same time and place, or to such other day, time, and place as the Directors may appoint. Notice of any such adjournment must be given in accordance with clause 3.6 of this First Schedule. If at the adjourned meeting a quorum is not present within 30 minutes after the time appointed for the meeting, the Shareholders present will constitute a quorum.

## **5. CHAIRPERSON**

### **5.1 Chairperson of Board to be chairperson of meeting**

The chairperson of the Board, if present at a meeting of Shareholders, will chair the meeting.

### **5.2 Directors may elect chairperson if chairperson of Board not available**

If no chairperson of the Board has been elected or, if at any meeting of Shareholders the chairperson of the Board is not present within 15 minutes of the time appointed for the commencement of the meeting or is unwilling to act, the Directors present may elect one of their number to be chairperson of the meeting.

### **5.3 As a last resort Shareholders may elect chairperson**

If at any meeting of Shareholders, no Director is willing to act as chairperson or if no Director is present within 15 minutes of the time appointed for the commencement of the meeting, the Shareholders present may elect one of their number to be chairperson of the meeting.

### **5.4 Chairperson's power to adjourn meeting**

The chairperson of a meeting at which a quorum is present:

- (a) May adjourn the meeting with the consent of the Shareholders entitled to attend and vote at that meeting; and
- (b) Must adjourn the meeting if directed by the meeting to do so.

The only business that may be transacted at any adjourned meeting is the business left unfinished at the meeting from which the adjournment took place.

## **6. VOTING**

### **6.1 Voting by show of hands or voice vote at meeting**

In the case of a meeting of Shareholders held under clause 4.1(a) of this Schedule, unless a poll is demanded, voting at the meeting will be by a show of hands or by voice vote, as the chairperson may determine.

### **6.2 Voting by voice if audio-conference meeting**

In the case of a meeting of Shareholders held under clause 4.1(b) of this Schedule, unless a poll is demanded, voting at the meeting will be by the Shareholders signifying individually their assent or dissent by voice or by such other manner as the chairperson may decide.

### **6.3 Votes of joint holders**

Where two or more persons are registered as the holders of a Share, the vote of the person named first in the Share Register and voting on a matter must be accepted to the exclusion of the votes of the other joint holders.

#### **6.4 Shareholder loses voting rights if calls unpaid**

A Shareholder is not entitled to vote at any meeting of Shareholders other than a meeting of an interest group, unless all sums due to the Company by that Shareholder in respect of any Share registered in that Shareholder's name have been paid.

#### **6.5 Chairperson not to have casting vote**

In the case of an equality of votes the chairperson shall not have a casting vote.

#### **6.6 Chairperson's declaration of result**

- (a) Unless a poll is demanded, a declaration by the chairperson of the meeting that a resolution on a show of hands or voice vote is carried by the requisite majority or lost, shall be conclusive evidence of that fact.
- (b) The result of a poll declared by the chairperson of the meeting shall be deemed to be the resolution of the meeting at which the poll was demanded.

### **7. Polls**

#### **7.1 Poll may be demanded by chairperson or Shareholder**

At a meeting of Shareholders, a poll may be demanded, either before or after a vote by show of hands or voice vote, by:

- (a) At least five Shareholders having the right to vote at the meeting; or
- (b) A Shareholder or Shareholders having the right to exercise at least 10 percent of the total votes to be cast on the business to be transacted at the meeting; or
- (c) A Shareholder or Shareholders holding Shares that confer a right to vote at the meeting and on which the total amount paid up is at least 10 percent of the total amount paid up on all the Shares that confer that right.

#### **7.2 Time at which polls to be taken**

A poll demanded on the election of a chairperson of a meeting or on a question of adjournment must be taken immediately. A poll demanded on any other question is to be taken at such time as the chairperson of the meeting directs. The meeting may proceed to deal with any other business other than that upon which a poll has been demanded pending the taking of the poll.

#### **7.3 Counting votes cast in a poll**

If a poll is taken, votes must be counted according to the votes attached to the Shares of each Shareholder present and voting.

#### **7.4 Result of a poll to be treated as resolution of the meeting**

The result of a poll declared by the chairperson of the meeting will be treated as the resolution of the meeting at which the poll was demanded on the issue for which the poll was taken.

#### **7.5 Proxy allowed to demand a poll**

The instrument appointing a proxy to vote at a meeting confers authority to demand, or join in demanding a poll, and a demand by a person as proxy for a Shareholder has the same effect as a demand by the Shareholder.

## **8. PROXIES**

### **8.1 Proxy form must be sent with notice**

A proxy form must be sent with each notice of Shareholders.

### **8.2 Proxies permitted**

A Shareholder may exercise the right to vote by being present in person or represented by proxy.

### **8.3 Proxy to be treated as Shareholder**

A proxy for a Shareholder is entitled to attend and be heard at a meeting of Shareholders as if the proxy were the Shareholder.

### **8.4 Appointment of proxy must be in writing and specify restrictions**

A proxy must be appointed by a notice in writing that is signed by the Shareholder, and the notice must state whether the appointment is for a particular meeting or a specified term not exceeding 12 months. A proxy need not be a Shareholder of the Company.

### **8.5 Notice of proxy to be produced at least 48 hours before meeting**

No proxy is effective in relation to a meeting unless a copy of the notice of appointment is sent to the registered office, or such other place within New Zealand as is specified for that purpose in the notice convening the meeting, at least 48 hours before the time for holding the meeting or adjourned meeting at which the person named in the notice proposes to vote or such less period as the Board may determine. If the written notice appointing a proxy is signed under power of attorney, a copy of the power of attorney (unless already deposited with the Company) and a signed certificate of non-revocation of the power of attorney must accompany the notice.

### **8.6 Form of notice of proxy**

A notice appointing a proxy shall be in such form as the Board may direct.

### **8.7 Vote by proxy valid where Company not notified before meeting of disqualified proxy**

Where:

- (a) the Shareholder has died or become incapacitated; or
- (b) the proxy, or the authority under which the proxy was executed, has been revoked; or
- (c) the Share in respect of which the notice of proxy is given has been transferred,

before a meeting at which a proxy exercises a vote in terms of a notice of proxy but the Company does not receive written notice of that death, incapacity, revocation, or transfer before the start of the meeting, the vote of the proxy is valid.

## **9. SHAREHOLDER PROPOSALS**

**9.1** A Shareholder may give written notice to the Board of a matter the Shareholder proposes to raise for discussion or resolution at the next meeting of Shareholders at which the Shareholder is entitled to vote.

### **9.2 Board to give notice of proposal at Company's expense**

If the Board receives the notice at least 20 working days before the last day on which notice of the relevant meeting of Shareholders is required to be given by the Board, the Board must, at the expense of the Company, give notice of the Shareholder proposal and the text of any proposed resolution to all Shareholders entitled to receive notice of the meeting.

### **9.3 Board to give notice of proposal at Shareholder's expense**

If the Board receives the notice at least 5 working days and not more than 20 working days before the last day on which notice of the relevant meeting of Shareholders is required to be given by the Board, the Board must, at the expense of the Shareholder, give notice of the Shareholder proposal and the text of any proposed resolution to all Shareholders entitled to receive notice of the meeting.

### **9.4 Board may give notice of proposal on short notice**

If the notice is received by the Board less than 5 working days before the last day on which notice of the relevant meeting of Shareholders is required to be given by the Board, the Board must, if practicable, and at the expense of the Shareholder, give notice of the Shareholder proposal and the text of any proposed resolution to all Shareholders entitled to receive notice of the meeting.

### **9.5 Proposing Shareholder may include statement**

If the Directors intend that Shareholders may vote on the proposal by proxy or by postal vote, they must give the proposing Shareholder the right to include in or with the notice given by the Board a statement of not more than 1000 words prepared by the proposing Shareholder in support of the proposal, together with the name and address of the proposing Shareholder.

### **9.6 Board may exclude statement in some cases**

The Board is not required to include in or with the notice given by the Board a statement prepared by a Shareholder which the Directors consent to be defamatory, frivolous or vexalious.

### **9.7 Shareholder to give security for costs for proposal with short notice**

Where the costs of giving notice of the Shareholder proposal and the text of any proposed resolution are required to be met by the proposing Shareholder, the proposing Shareholder must, on giving notice to the Board, deposit with the Company or tender to the Company a sum sufficient to meet those costs.

## **10. CORPORATE REPRESENTATIVES**

### **10.1 Corporation may act by representative**

A body corporate which is a Shareholder may appoint a representative to attend any meeting of Shareholders on its behalf in the same manner as that in which it could appoint a proxy. The

representative shall be entitled to attend and be heard at a meeting of Shareholders as if the representative were the Shareholder.

#### **11. MINUTES**

##### **11.1 Board must keep minutes of proceedings**

The Board must ensure that minutes are kept of all proceedings at a meeting of Shareholders and that a record is kept of all written resolutions of Shareholders. Minutes which have been signed correct by the chairperson of the meeting are prima facie evidence of the proceedings at the meeting unless they are shown to be inaccurate.

#### **12. WRITTEN RESOLUTIONS**

##### **12.1 Resolutions may be in counterparts**

Any resolution in lieu of a meeting passed pursuant to the Act may consist of several copies of the resolution, each signed or assented to by one or more of the Shareholders. A copy of a written resolution, which has been signed and is sent by facsimile or any similar means of communication, will satisfy the requirements of this clause.

#### **13. OTHER PROCEEDINGS**

##### **13.1 Meeting may regulate other proceedings**

Except as provided in this Schedule, a meeting of Shareholders may regulate its own procedure.

## SECOND SCHEDULE

### Proceedings at Meetings of Directors

#### 1. MEETINGS OF THE BOARD

This Schedule governs the proceedings at meetings of the Board except where otherwise agreed by all Directors for the time being in relation to a particular meeting or meetings. The Third Schedule to the Act shall not apply.

#### 2. CONSTRUCTION

Unless stated otherwise, references to clauses are references to clauses in this Schedule.

#### 3. WRITTEN RESOLUTIONS

##### 3.1 Written resolutions of the Board permitted

A resolution in writing signed or assented to by all of the Directors or their alternative Directors is as valid and effective as if it had been passed at a meeting of the Board duly convened and held.

##### 3.2 Written resolutions may be in counterparts

Any written resolution may consist of several copies of the resolution, each signed or assented to by one or more of the Directors (or their alternate Directors). A copy of a written resolution, which has been signed and is sent by facsimile or any similar means of communication, will satisfy the requirements of this clause.

#### 4. NOTICE OF MEETING

##### 4.1 Director or employee under Director's instructions to convene meetings

A Director or an employee of the Company at the request of a Director, may convene a meeting of the Board by giving notice in accordance with this Schedule.

##### 4.2 Notice to contain certain details

The notice of meeting must include the date, time and place of the meeting and the matters to be discussed in such detail to enable a reasonable Director to appreciate the general import of such matters.

##### 4.3 Period of notice required to be given to Directors in New Zealand

A meeting may be summoned in the manner set out in clause 4.1 at any time by giving at least two business days notice. Notice of a meeting must be given to every Director.

#### 4.4 Notice to be sent to Director's address

The notice of meeting must be given to each Director personally or sent to the most recent physical address, email address and facsimile number which the Director provides to the Company for that purpose, but if an address, email address or facsimile number is not provided, then to his or her last place of employment or residence, email address and facsimile number known to the Company. In addition, if a Director has, for the purposes of this clause, notified the Company of a phone number for an answerphone enabled phone, notice of meeting must also be given to that Director by leaving a message containing all the details that are required by this constitution to be contained in a written notice of meeting of Directors on such phone at least two business days prior to the meeting.

#### 4.5 Directors may waive irregularities in notice

Any irregularity in the notice of a meeting is waived if all Directors entitled to receive notice of the meeting attend the meeting without protest as to the irregularity, or if all Directors agree to the waiver.

### 5. METHODS OF HOLDING MEETINGS

#### 5.1 A meeting of the Board may be held either:

- (a) By a number of Directors who constitute a quorum, being assembled together at the place, date and time appointed for the meeting; or
- (b) By means of audio, or audio and visual, communication by which all Directors participating can simultaneously hear each other throughout the meeting.

### 6. QUORUM FOR BOARD MEETING

6.1 Unless otherwise determined by the Board, the quorum necessary for the transaction of business at a meeting of the Board is a majority of Directors. No business may be transacted at a meeting of the Board unless a quorum is present.

### 7. MEETING ADJOURNED IF NO QUORUM

7.1 If a quorum is not present within 30 minutes after the time appointed for a meeting of the Board, the meeting will be adjourned automatically until the following working day at the same time and place, and notice of the adjourned meeting shall promptly be given to all Directors in accordance with clause 4.4. If at the adjourned meeting a quorum is not present within 30 minutes after the time appointed for the meeting, the Directors present will constitute a quorum.

### 8. CHAIRPERSON

#### 8.1 Chairperson

The chairperson of the Board shall be appointed by a majority of the directors and shall hold office until the Board appoints another chairperson in his or her place or until he or she vacates office.

#### 8.2 Chairperson to chair meetings

The chairperson of the Board will chair all meetings of the Board at which he or she is present.

### **8.3 Directors may elect chairperson of meeting if chairperson of Board is not present**

If no chairperson is elected, or if at a meeting of the Board the chairperson is not present within 15 minutes after the time appointed for the commencement of the meeting, then the Directors present may elect one of their number to be the chairperson of the meeting.

## **9. VOTING**

### **9.1 Voting on resolutions**

Each Director has one vote. A resolution of the Board is passed if it is agreed to by all Directors present without dissent or if an ordinary majority of the votes cast on it are in favour of it. A Director must not vote where that voting by the Director is restricted by this Constitution. A Director present at a meeting of the Board may abstain from voting on a resolution, and any Director who abstains from voting on a resolution will not be treated as having voted in favour of it for the purposes of the Act.

### **9.2 Chairperson not to have a casting vote**

The chairperson of Directors shall not have a casting vote in the case of an equality of votes.

## **10. INTERESTED DIRECTORS**

### **10.1 Directors must disclose their interests**

As soon as a Director becomes aware of the fact that he or she is interested in a transaction or proposed transaction with the Company, that Director must cause to be entered in the interests register, and disclose to the Board:

- (a) the nature and monetary value of his or her interest (if the monetary value of the interest is able to be quantified); or
- (b) the nature and extent of his or her interest (if the monetary value of the interest cannot be quantified).

### **10.2 General disclosure in certain cases will suffice**

For the purposes of clause 10 a general notice entered in the interests register and disclosed to the Board to the effect that a Director:

- (a) is a Shareholder, Director, officer, or trustee of another named company or other person; and
- (b) is to be regarded as interested in any transaction with may, after the date of the entry or disclosure, be entered into with that other company or person,

is a sufficient disclosure of that interest in relation to such transactions.

### **10.3 Failure to disclose does not affect validity of transaction**

Any failure by a Director to comply with clause 10 does not affect the validity of a transaction entered into by the Company or the Director. However, the transaction may be avoided under clause 10.4 of this Schedule.

### **10.4 Company may avoid transaction if Director interested**

Where the Company enters into a transaction in which a Director is interested, the Company may avoid that transaction in accordance with the Act. However, if all entitled persons have agreed to or concurred in the Company entering into such transaction, then this clause 10.4 will not apply.

### **10.5 Interested Director may vote**

A Director of the Company who is interested in a transaction entered into or to be entered into by the Company may:

- (a) vote on a matter relating to the transaction;
- (b) attend a meeting of Directors at which a matter relating to the transaction arises, and be included among the Directors present at the meeting for the purpose of a quorum;
- (c) sign a document relating to the transaction on behalf of the Company; and
- (d) do anything else as a Director in relation to the transaction;

as if he or she were not interested in the transaction.

## **11. DELEGATION OF POWERS**

### **11.1 Restriction on Board's right to delegate its powers**

The Board may delegate to a committee of Directors, a Director, an employee of the Company or any other person, any one or more of its powers other than its powers under any of the sections of the Act set out in the Second Schedule of the Act.

### **11.2 Board delegates to comply with regulations**

In exercising the Board's delegated powers, any committee of Directors, Director, employee or employees of the Company or any other person must comply with any regulations that the Board may impose.

### **11.3 Committee proceedings**

The provisions of this Constitution relating to meeting and proceedings of the Board shall, so far as they are not altered by regulations made by the Board, also apply to meetings and proceedings of any committee of Directors.

**12. MINUTES**

**12.1 Board Must Keep Minutes of Proceedings**

The Board must ensure that minutes are kept of all proceedings at meetings of the Board and that a record is kept of all written resolutions of Directors. Minutes which have been signed correct by the chairperson of the meeting are evidence of the proceedings at the meeting unless they are shown to be inaccurate.

**OTHER PROCEEDINGS**

**13. BOARD MAY REGULATE OTHER PROCEEDINGS**

13.1 Except as set out in this Schedule, the Board may regulate its own procedure.

## APPENDIX FOUR