

# Shareholders' Agreement

Hamilton City Council (HCC)

Waikato District Council (WDC)

IAWAI – Flowing Waters Limited (Company)



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## **IAWAI – FLOWING WATERS LIMITED SHAREHOLDERS' AGREEMENT**

*Date:*

### **PARTIES**

**Hamilton City Council** (*HCC*)

**Waikato District Council** (*WDC*)

**IAWAI – Flowing Waters Limited**, a company proposed to be incorporated (the *Company*)

### **BACKGROUND**

- A HCC of Hamilton City and WDC of Waikato District are each Local Authorities pursuant to the LGA.
- B HCC and WDC have agreed to establish the Company to operate as a joint Water Organisation under the LG(WS)A for the purpose of providing Water Services to the Service Areas of Hamilton City and Waikato District.
- C HCC and WDC have each agreed to transfer their rights and obligations in respect of the Water Services Infrastructure to the Company in consideration for subscribing for Shares in the Company.
- D The Shareholders acknowledge that additional Local Authorities may accede to this document in the manner described in clause 20 of this Agreement as additional shareholders in the Company.

**NOW IT IS AGREED** by the parties as follows:

#### **1 DEFINITIONS AND CONSTRUCTION**

##### **1.1 Defined terms**

In this Agreement, unless the context otherwise requires, the following expressions have the following meanings:

*Asset Transfer Agreement* means the asset transfer agreement referred to in clause 11 of this Agreement;

*Asset Transfer Principles* refers to the principles set out in the Record of Agreement for determining:

- (a) the value of the Water Services Infrastructure, as set out in paragraphs 37 to 41 of the Record of Agreement (inclusive);
- (b) consideration payable for the transfer of the Water Services Infrastructure and related assets, as set out in paragraphs 50 to 52 (inclusive) of the Record of Agreement; and



- (c) the treatment of future vested assets under Development Agreements entered into prior to the transfer of the Water Infrastructure Assets, as set out in paragraph 46 of the Record of Agreement;

*Board* means the board of directors of the Company acting pursuant to and in accordance with the Companies Act and the Constitution;

*Business Day* means a day on which registered banks are open for normal banking business in Hamilton;

*Companies Act* means the Companies Act 1993;

*Constitution* means the constitution of the Company, as amended from time to time;

*Council-Controlled Organisation* or *CCO* has the meaning set out in the LGA;

*Deed of Accession* means a deed to the effect, and substantially in the form, of the deed annexed to this Agreement as Annexure A;

*Establishment Date* means 1 July 2025 or such later date as may be agreed in writing between the Shareholders;

*Establishment Period* means the period from the Establishment Date until the day immediately preceding the Operational Date;

*Event of Default* means the failure of a Shareholder to remedy a default specified in clause 19 within the time limit specified in that clause;

*Exit Process* means the process set out in the Third Schedule;

*Financial Year* means a year ending on 30 June;

*IAWAI – Flowing Waters Forum* shall be the forum appointed by the Shareholders as set out in clause 6 of this Agreement;

*LGA* means the Local Government Act 2002;

*LGFA* means the New Zealand Local Government Funding Agency;

*LG(WS)A* means the Local Government (Water Services) Act 2024;

*Local Authority* has the meaning given to that term in the LGA;

*Local Government Reorganisation Proposal* means a reorganisation investigation by the Local Government Commission under Schedule 3 of the LGA and includes any reorganisation plan proposed by the Commission as an outcome of such investigation;

*Major Transaction* has the meaning given to that term in the Companies Act;



*Material Contracts* mean each of the arrangements referred to in clause 14.1 to be agreed between the Company and each Shareholder during the Establishment Period and such other arrangements that the parties agree in writing shall be Material Contracts;

*Operational Date* means 1 July 2026, or such other date agreed in writing by the Shareholders;

*Operational Period* means the date from the Operational Date until such time as this Agreement is terminated in accordance with its terms;

*Record of Agreement* means the HCC & WDC Joint Waters CCO – Design Concept 2024 Record of Agreement entered into between HCC and WDC, annexed to this Agreement as Annexure B;

*Service Area* has the meaning given to it in the LG(WS)A and, in the context of this Agreement, shall be the Service Areas within Hamilton City and Waikato District;

*Shareholders* means HCC and WDC and includes any other Local Authority becoming a Shareholder under this Agreement by executing a Deed of Accession;

*Statement of Expectations* has the meaning given to it in the LG(WS)A and, in the context of this Agreement, means the Statement of Expectation annexed to this Agreement as Annexure C, as amended or replaced from time to time;

*Stormwater Network* has the meaning set out in the LG(WS)A;

*Stormwater Services* has the meaning set out in the LG(WS)A and, in the context of this Agreement, means services in relation to:

- (a) the Stormwater Network of Hamilton City owned by HCC; and
- (b) the Stormwater Network of Waikato District owned by WDC,

and includes all related and incidental services and delegation of responsibilities agreed between the Company and each Shareholder in the management service agreements referred to in clauses 11 and 14.1(c);

*subsidiary* has the meaning given to that term in section 5 of the Companies Act;

*Terms of Reference* means the terms of reference of the IAWAI – Flowing Waters Forum set out in the Second Schedule of this Agreement as amended from time to time;

*Transfer Agreement* has the meaning set out in the LG(WS)A;

*Transfer of Water Debt Principles* refers to the principles set out in the Record of Agreement for determining the transfer of existing shareholder waters-related debt, development contributions and reserves, as set out in paragraphs 42 to 44 of the Record of Agreement (inclusive), provided that:



- (a) references to "on formation" in each paragraph shall be read as amended to "on the Operational Date"; and
- (b) the treatment of deficit reserves in paragraph 43 shall be read as amended to state that shareholder loan balances between the Shareholders and the Company will be created to recognise any deficit reserves;

*Water Organisation* has the meaning set out in the LG(WS)A;

*Water Services* has the meaning set out in the LG(WS)A, and, in the context of this Agreement, mean the water services provided by the Company throughout the Service Areas of Hamilton City and Waikato District;

*Water Services Annual Budget* means the water services annual budget prepared and adopted by the Board in accordance with the Constitution and the LG(WS)A;

*Water Services Bylaws* has the meaning set out in the LG(WS)A and includes those water services bylaws referred to in clause 12 (as amended, revoked or replaced from time to time);

*Water Services Infrastructure* means the collective infrastructure comprised of the Water Supply Network and Wastewater Network located within the Service Area of a Shareholder (including, for the purposes of clause 20, of an additional Shareholder as the context may require);

*Water Services Strategy* means the water services strategy prepared and adopted by the Board in accordance with the Constitution and the LG(WS)A;

*Water Supply Network* has the meaning set out in the LG(WS)A;

*Water Supply Service* has the meaning set out in the LG(WS)A;

*Wastewater Network* has the meaning set out in the LG(WS)A; and

*Wastewater Services* has the meaning set out in the LG(WS)A.

## 1.2 **Construction**

In the construction of this Agreement, unless the context requires otherwise:

- (a) *Clauses and Schedules*: references to clauses and schedules are to clauses and schedules of this Agreement and, unless otherwise stated, a reference in a schedule to a clause is a reference to a clause in that schedule;
- (b) *Currency*: references to monetary amounts are to New Zealand currency;
- (c) *Defined terms*: words or phrases (other than proper names) appearing in this Agreement with capitalised initial letters are defined terms and shall bear the meanings given to them in this Agreement;



- (d) *Documents and agreements*: a reference to any document or agreement, including this Agreement, includes a reference to that document or agreement as amended, novated or replaced from time to time;
- (e) *Headings*: headings appear as a matter of convenience and shall not affect the construction of this Agreement;
- (f) *Related terms*: where a word or expression is defined in this Agreement, other parts of speech and grammatical forms of that word or expression have corresponding meanings;
- (g) *Schedules*: schedules are part of the operative part of this Agreement;
- (h) *Singular, plural and gender*: the singular includes the plural and vice versa, and words importing one gender include the other genders;
- (i) *Statutes and regulations*: a reference to a bill, an enactment or any regulations is a reference to that bill as enacted or that enactment or those regulations as amended, or to any enactment or regulations substituted for that enactment or those regulations;
- (j) *Time*: references to time are to New Zealand time;
- (k) *Writing*: references to "written" or "in writing" include all modes of presenting or reproducing words, figures and symbols in a tangible and permanently visible form.

### 1.3 **Local Government (Water Services) Bill (LG(WS)A)**

This Agreement has been prepared in compliance with the requirements of the Local Government (Water Services) Bill that was introduced to the House of Representatives on 10 December 2024. If, as a result of any amendments to the draft Bill, any clauses of this Agreement require revision or amendment and/or new clauses are required, the parties agree to use all reasonable endeavours to update and amend this Agreement and the Constitution so that each document is compliant with the Bill once it becomes law.

## 2 **TERM OF AGREEMENT**

### 2.1 **Commencement**

This Agreement will commence and its provisions take effect on the later of:

- (a) the date it is entered into between the parties; and
- (b) the Establishment Date.

### 2.2 **Termination**

This Agreement shall continue in full force and effect until:

- (a) upon (and in accordance with) any agreement in writing between all of the Shareholders;



(b) upon completion of any repurchase of Shares by the Company in accordance with the terms of this Agreement resulting in there being only one holder of Shares; or

(c) an order is made, or a resolution is passed, to wind up the Company.

### 2.3 **Existing rights**

Termination of this Agreement is without prejudice to and shall not effect any rights or remedies of any party arising from any happening or event which occurs prior to termination, or any provisions of this Agreement which are intended to survive termination.

### 2.4 **Surviving provisions**

Upon termination of this Agreement, the provisions of clause 1, clause 2.3, this clause 2.4 and clauses 23, 26, 27 and 28 of this Agreement will remain in full force and effect.

## 3 **FORMATION OF THE COMPANY**

### 3.1 **Incorporation**

On or before the Establishment Date, the Shareholders will arrange for the incorporation of the Company as a limited liability company under the Companies Act. The name of the Company will be IAWAI – Flowing Waters Forum Limited or such other name as the Shareholders may agree upon. The Company's constitution will be in the form set out in the First Schedule.

### 3.2 **Water Organisation**

The parties acknowledge that the Company is:

- (a) a Water Organisation for the purpose of the LG(WS)A; and
- (b) a Council-Controlled Organisation for the purpose of the LGA,

and the Shareholders will each use their best endeavours to ensure that they comply with their, and the Company complies with its, obligations under all applicable legislation, including the LGA, the LG(WS)A, the Local Government (Water Services) Preliminary Arrangements) Act 2024, and the Companies Act.

### 3.3 **Initial Capital structure**

The Company shall have an initial share capital of \$100.00 comprising 100 ordinary shares issued at \$1.00 each. The share capital of the Company shall be subscribed for at the issue price and divided into two groups as follows:

- (a) HCC shall subscribe for 50 shares; and
- (b) WDC shall subscribe for 50 shares.



### 3.4 **Capital structure after the transfer of Water Infrastructure Assets**

Subject to approval of the Shareholders as a Reserved Matter pursuant to clause 5.1, the share capital of the Company will be adjusted to reflect the issuing of shares to the Shareholders as part of the consideration payable in respect of the transfer of Water Infrastructure Assets and related resources under each Asset Transfer Agreement. The issue price, class of shares and number of shares to be issued to each Shareholder will be determined in accordance with the Asset Transfer Principles (or as otherwise agreed between the Shareholders and the Company) and will be as set out in the Asset Transfer Agreements.

## 4 **OBJECTIVES AND VALUES OF THE COMPANY**

### 4.1 **Purpose**

It is the intention of the Shareholders that the Company is to operate as a Water Organisation and the business of the Company shall be to provide the Water Services in accordance with terms and conditions of this Agreement, the Constitution and the LG(WS)A (**Business**).

### 4.2 **Initial establishment activities**

The Shareholders will work together with and assist the Board as it undertakes all such actions as are necessary during the Establishment Period to ensure that the Company is ready to provide the Water Services from the Operational Date, including any actions set out in paragraph 13 of the Statement of Expectations.

### 4.3 **Main operating objectives and values**

The main operating objectives and values of the Company are as set out in the Constitution.

### 4.4 **Commitments to iwi and hapū**

The Shareholders have each made commitments to iwi and hapū arising from Treaty of Waitangi settlements and shall work together with the Company to maintain effective relationships with iwi and hapū in a way that supports such commitments.

### 4.5 **Conduct of the Shareholders**

A Shareholder must not conduct its affairs in a manner which is inconsistent with the purpose of this Agreement or any of the objectives and values of the Company set out in the Constitution.

## 5 **SHAREHOLDERS' OBLIGATIONS**

### 5.1 **Reserved Matters**

The Shareholders will use best endeavours to make all decisions which require Shareholder approval by consensus. Without limitation, decisions on the following matters shall require the unanimous agreement of the Shareholders:

- (a) the issue of any shares, options or convertible securities in the capital of the Company and any increase, reduction, consolidation, subdivision or cancellation of, or variation of the rights attaching to any class of shares, options or convertible securities in, the capital of the Company;



- (b) any alteration or revocation to the Constitution;
- (c) the establishment of, or acquisition of any interest in, any company, partnership, trust or other undertaking, or the entry into of any merger, joint venture, business combination or scheme of arrangement;
- (d) the proposed surrender of a designation or of an allocation of water within a consented water take or of a consent to take water;
- (e) any increase in the level of Shareholder financial support under clause 13.2;
- (f) the acquisition or construction of any asset or assets (whether by a single transaction or series of related transactions) for a price or value exceeding 25% of the value of plant, property and equipment as stated in the Company's most recent audited financial statements; or
- (g) the disposal of any asset or assets (whether by a single transaction or series of related transactions) for a price or value exceeding 10% of the value of plant, property and equipment as stated in the Company's most recent audited financial statements; or
- (h) entering into, amending or waiving any agreement, commitment or understanding, excluding those transactions provided for in (f) and (g) above, with an aggregate per annum value exceeding 10% of annual operating revenue.
- (i) the setting of any target debt levels and any debt limits for the Company (**debt limit**) above 90% of the debt ceiling covenants as set by the LGFA;
- (j) the Company incurring, or agreeing to incur, any indebtedness which would cause the Company to exceed the debt limit, other than to respond to a civil defence emergency or natural disaster in which case the Company may exceed the debt limit up to the debt ceiling covenants as set by the LGFA without the unanimous agreement of Shareholders;
- (k) the approval of the rates of interest and other terms and conditions of money borrowed or raised by the Company from a Shareholder other than in accordance with the prevailing rates of interest and terms and conditions granted by the LGFA (which should only be in exceptional circumstances);
- (l) the grant of any security or encumbrance over any Water Services Infrastructure;
- (m) the admission of another Local Authority as an additional Shareholder under this Agreement;
- (n) the exit of a Shareholder;
- (o) the putting of the Company into liquidation;



- (p) the approval of a Major Transaction;
  - (q) the change of the name of the Company;
  - (r) any change to the Dividend Policy of the Company,
- (the **Reserved Matters**).

## 5.2 **Procedures for shareholders' meetings**

The procedures for shareholders' meetings and the quorum for a meeting of the shareholders of the Company will be as set out in the Constitution.

## 6 **SHAREHOLDER DECISIONS DURING THE ESTABLISHMENT PERIOD**

### 6.1 **Shareholder obligations during the Establishment Period**

Each Shareholder agrees that, during the Establishment Period:

- (a) each Shareholder will operate and conduct the supply of Water, Wastewater and/or Stormwater Services and use and maintain the Water Infrastructure Assets and Water Networks in the ordinary course of business;
- (b) each Shareholder will obtain the Board's agreement (not to be unreasonably withheld or delayed) prior to undertaking any of the following decisions or commitments:
  - (i) entry into any private development agreement for the provision of water supply or wastewater related infrastructure or services that has a capital or whole of life cost of \$10,000,000 or more, unless already provided in the relevant Shareholder's Annual Plan or Long-Term Plan;
  - (ii) changes to cost or terms of the water and wastewater supply agreement between WDC and Watercare relating to the north of WDC (other than to the extent necessary to novate such agreement to the Company);
  - (iii) changes to the contract for service between WDC and Watercare (other than to the extent necessary to novate such contract from WDC to the Company);
  - (iv) changes to the contracts for service between HCC and CoLab relating to Sampling and Analysis, Smart Water, Trade Waste and the Business Management of these services;
  - (v) entry into and any new or changed cross boundary agreement relating to the provision of water and/or wastewater services to areas of Waipā District;
  - (vi) entry into or changes to any development agreements, Regional Deal commitments, Housing Infrastructure Fund loans, Infrastructure Funding and Financing Agreements, or Infrastructure Acceleration Fund



agreements that relate to or impacts on water supply services or infrastructure and/or wastewater services or infrastructure;

- (vii) changes to conditions of consent for water takes or discharge, or the reallocation of consented water takes or discharges, that would impact on the capacity of the water and wastewater networks to deal with growth and operate effectively;
- (viii) the sale or purchase of waters related assets and land that would significantly affect the nature and value of the assets that are intended to be transferred to the Company under the Asset Transfer Agreements;
- (ix) changes to terms and conditions of employment of staff that are intended to be transferred to the Company, including terms relating to the transfer of staff, that would affect the cost structure or employment liabilities of the Company; and
- (x) any other commitment or contract that would materially affect the value and nature of the assets, liabilities, responsibilities and cost structure of the Company as intended by the Record of Agreement.

## 6.2 **Disagreement during the Establishment Period**

Where there is a disagreement between a Shareholder and the Company in relation to any of the matters set out in clause 6.1 (including as to any terms or conditions which the Board's agreement is given subject to), the dispute resolution process set out in clause 26 will not apply, and Company and the Shareholders shall endeavour in good faith to resolve any such disagreement by negotiation between the Chief Executives of the Shareholders and the Chief Executive of the Company (or the Executive Chair of the Company in the period prior to the appointment of a Chief Executive).

## 7 **IAWAI – FLOWING WATERS FORUM**

### 7.1 **Establishment and Terms of Reference**

The Shareholders will establish and maintain a IAWAI – Flowing Waters Forum in accordance with the Terms of Reference, the terms of the Constitution and the terms of this Agreement. The purpose of the IAWAI – Flowing Waters Forum is to provide governance oversight to the Company and to provide a forum for joint shareholding decisions.

### 7.2 **Appointment of IAWAI – Flowing Waters Forum members**

Unless otherwise determined by special resolution of the Shareholders, the composition and membership of the IAWAI – Flowing Waters Forum will be as specified in the Terms of Reference.

### 7.3 **Delegations to IAWAI – Flowing Waters Forum members**

Each Shareholder agrees to delegate to their appointed member of the IAWAI – Flowing Waters Forum all of the powers, and responsibilities necessary to participate



in and carry out the powers and responsibilities of the IAWAI – Flowing Waters Forum set out in the Terms of Reference.

#### 7.4 **Attendance at meetings**

Each Shareholder will procure that its members attend each meeting of the IAWAI – Flowing Waters Forum in person. If any member fails to attend any three consecutive meetings of the IAWAI – Flowing Waters Forum, the appointing Shareholder must remove that member and appoint a new member in replacement.

### 8 **BOARD**

#### 8.1 **Board role**

The business and affairs of the Company must be managed by, or under the direction and supervision of, the Board.

#### 8.2 **Initial Establishment Board**

- (a) During the Establishment Period, the Board shall comprise a maximum of three Directors, unless otherwise approved by a special resolution of the Shareholders.
- (b) With effect from the Establishment Date, the persons set out in the table below will be the Directors of the Company, and the Shareholders and the Board (as applicable) will be deemed to have taken all steps necessary to appoint those persons as Directors:

Director	Initial Term
Kevin Lavery	Two years
Tim Manukau	Two years
Dave Chambers	One year

- (c) Each Director set out in the table above will be appointed for the corresponding initial term. Following expiry of each initial term, the Director shall be eligible for re-appointment by the IAWAI – Flowing Waters Forum in accordance with the Constitution and the Terms of Reference.
- (d) During the Establishment Period, the quorum for a meeting of the Board shall be three Directors and all decisions shall be made by unanimous agreement of all three Directors.

#### 8.3 **Board composition and appointments during Operational Period**

- (a) During the Operational Period, the Board shall comprise between five and seven Directors.
- (b) Other than the initial Directors appointed in accordance with clause 7.2, Directors will be appointed and removed by the IAWAI – Flowing Waters Forum in accordance with the Terms of Reference and the Constitution.



#### 8.4 **Chairperson**

- (a) The first chairperson of the Board will be Kevin Lavery, who will hold office as chairperson for an initial period of two years commencing on the Establishment Date. After that period, the chairperson shall be appointed by the IAWAI – Flowing Waters Forum.
- (b) Kevin Lavery will also act in the capacity of Executive Chair until such time that a Chief Executive Officer of the Company is appointed and commences his or her employment with the Company.

#### 8.5 **Procedures for Board meetings**

Subject to clause 8.2(d), the procedures for Board meetings and the quorum for a meeting of the Board of the Company will be as set out in the Constitution.

### 9 **STATEMENT OF EXPECTATIONS**

#### 9.1 **Statement of Expectations**

- (a) The first Statement of Expectations shall be as set out in Annexure C.
- (b) The IAWAI – Flowing Waters Forum will review the Statement of Expectations annually, such review to be undertaken prior to the commencement of each Shareholder's process for preparation and review of its Annual Plan or Long-Term Plan (as those terms are defined in the LGA) and the Company's preparation and review of the Water Services Strategy and Water Services Annual Budget.
- (c) The IAWAI – Flowing Waters Forum may review and amend or replace the Statement of Expectations more frequently than the annual review referred to in clause 9.1(b), but the Statement of Expectations cannot be changed within six months of the adoption of the last Statement of Expectations.
- (d) Any reviewed, amended or replaced Statement of Expectations must be prepared in a manner consistent with the requirements of the LG(WS)A for a Water Service Provider, and provided to the Board.
- (e) When undertaking a review, or proposing to amend or replace the Statement of Expectations, the IAWAI – Flowing Waters Forum must consult with the Board before adopting a final Statement of Expectations.
- (f) The Board will ensure that the Business is conducted in accordance with the Statement of Expectations.

#### 9.2 **Publication**

Each Shareholder must publish a copy of the Statement of Expectations, together with all half-yearly and annual water services reports, on their public website within the timeframes set out in the LG(WS)A.



## 10 **DIVIDEND POLICY**

### 10.1 **Payment of dividends**

Unless otherwise agreed by the Shareholders as a Reserved Matter, the Company will not pay dividends to the Shareholders. Any operating surpluses of the Company must instead be applied towards maintaining, developing and investing in the Water Services Infrastructure. For the avoidance of doubt, nothing in this clause will prevent the Company from making repayments on any Shareholder loans or buying back the shares of an Exiting Shareholder in accordance with the Third Schedule.

## 11 **TRANSFER/ACQUISITION OF ASSETS**

### 11.1 **Sale and purchase**

To enable the Company to provide the Water Services, each Shareholder commits to transfer their respective Water Services Infrastructure and all related resources (including all such employees, rights, contracts, agreements, consents, permits, designations, land, access, licences, water allocations, customer data and financial information as are necessary to provide the Water Services) to the Company on the terms and conditions set out in an Asset Transfer Agreement to be agreed in accordance with clause 11.2.

### 11.2 **Negotiation and execution of Asset Transfer Agreement**

Each Shareholder and the Company shall use best endeavours to negotiate and execute the Asset Transfer Agreement during the Establishment Period, with the intention that the Water Services Infrastructure will be transferred to the Company with effect from the Operational Date. Unless otherwise agreed between the Shareholders and the Company, the Asset Transfer Agreement shall reflect the Asset Transfer Principles.

## 12 **DELEGATIONS OF FUNCTIONS OR POWERS**

### 12.1 **Delegation of Responsibilities for Water Services Bylaws**

(a) To enable the Company to provide the Water Services, exercise effective control over the Water Infrastructure Assets, and meet statutory obligations as a Water Organisation, each Shareholder commits to delegate their functions or powers that relate to the administration and enforcement of the following water services bylaws to the Company:

- (i) Waikato District Council Water Supply Bylaw 2023;
- (ii) Waikato District Council Trade Waste and Wastewater Bylaw 2023
- (iii) Hamilton City Council Water Supply Bylaw 2013 (Amended 2024); and
- (iv) Hamilton City Council Trade Waste and Wastewater Bylaw 2016 (Amended 2023),

(the **Delegated Bylaws**).



- (b) To the extent permitted by law, the delegation of responsibility and decision-making with respect to the Delegated Bylaws is intended to include the transfer of existing consents, access agreements, connection agreements, trade waste consents, trade waste agreements, water supply agreements, individual customer agreements, water allocations, water conservation and demand plans. The delegation is also intended to include decision-making under the bylaws, including decisions relating to connections, consents, approval notices, appointing authorised officers, and fixing charges.
- (c) The delegation of responsibility to the Company with respect to the Delegated Bylaws will be set out in an instrument of delegation. Each Shareholder and the Company shall use best endeavours to negotiate and agree the terms of each instrument of delegation, with the intention that all of the relevant instruments of delegation will be effective from the Operational Date.
- (d) It is the intention of the Shareholders to delegate responsibility for the administration and enforcement of any further updates to the Delegated Bylaws and/or any successor bylaws that might replace them.

## 12.2 Stormwater Responsibilities

- (a) To enable the Company to provide integrated Water Services and Stormwater Services, each Shareholder commits to transfer their respective employees and related equipment involved in the provision of Stormwater Services to the Company on the terms and conditions set out in an Asset Transfer Agreement to be agreed in accordance with clause 11.2.
- (b) Each Shareholder commits to delegate relevant administration and enforcement powers and functions under the following Water Services Bylaws as part of the management service agreements for the provision of Stormwater Services to be agreed in accordance with clause 14:
  - (i) Waikato District Council Stormwater Bylaw 2021; and
  - (ii) Hamilton City Council Stormwater Bylaw 2021.

## 13 FUNDING

### 13.1 Initial Funding

The initial funding of the Company will be provided by the Shareholders as follows:

- (a) **Establishment Loans:** HCC will provide initial funding to the Company to provide working capital and fund activities during the Establishment Period by way of a Shareholder Loan (**HCC Establishment Loan**) in accordance with the following principles:
  - (i) The amount of the HCC Establishment Loan shall be equal to the budget agreed by the Shareholders for the Establishment Period prior to the Establishment Date.



- (ii) HCC shall either, in whole or in part, procure an amount equal to the HCC Establishment Loan from the LGFA (**LGFA Establishment Loan**) and/or make an attribution from HCC's overall portfolio of existing debt and financing arrangements (**Pre-Existing Loans**) prior to the Establishment Date in order to provide the HCC Establishment Loan.
  - (iii) The HCC Establishment Loan will be provided to the Company on a "back-to-back" basis and at the same interest rate(s) and on the same terms and conditions as the LGFA Establishment Loan and/or Pre-Existing Loans, such that the debt repayment and refinancing provisions require the Company to service the HCC Establishment Loan in a manner that is consistent with, and on no less favourable terms, than the terms of the LGFA Establishment Debt and/or the underlying Pre-Existing Loans to the extent attributed to the HCC Establishment Loan. On maturity of each portion of the HCC Establishment Loan, subject to the satisfaction of solvency requirements, the Company will repay the HCC Establishment Loan in full.
  - (iv) HCC and the Company will use best endeavours to enter into the financing instruments documenting the HCC Establishment Loan promptly following entry into this Agreement.
  - (v) The Company must not take or omit to take any action for the purpose, or which has or may have the effect, of causing HCC to be in breach of the terms and conditions of the LGFA Establishment Loan and/or the underlying Pre-Existing Loans.
- (b) **Transitional Loans:** Each of the Shareholders shall provide transitional funding to the Company in connection with the current debt incurred by Shareholders attributable to the Water Infrastructure Assets and any relevant reserves relating to the Water Infrastructure Assets by way of Shareholder Loans (**Transitional Loans**) in accordance with the following principles
- (i) The principal amount of the Transitional Loans and the debt repayment and refinancing terms and conditions of the Transitional Loans will be calculated and provided to the Company in a manner that is consistent with the Transfer of Water Debt Principles.
  - (ii) Each Shareholder and the Company will use best endeavours to enter into financing instruments during the Establishment Period to agree the terms of the Transitional Loans effective from the Operational Date and consistent with the Transfer of Water Debt Principles.

### 13.2 Further funding

As a matter of general policy, as and when the Company requires further funds (including as each Transitional Loan matures and is repaid in full), the Shareholders agree to provide such support as is necessary to enable the Company to incur indebtedness up to the debt limit that has been approved by the Shareholders as a Reserved Matter under clause 5.1(i) by accessing LGFA funding or funding from approved counterparties (which may include providing uncalled equity funding,



security, indemnities, guarantees or other credit support), provided that neither Shareholder shall be required to provide any support which is not pro-rata to their then-current shareholding in the Company at the time of providing such support.

## 14 MATERIAL CONTRACTS

### 14.1 Material Contracts with Shareholders

During the Establishment Period, the Company intends to enter into the following Material Contracts with each of the Shareholders:

- (a) an Asset Transfer Agreement for the transfer of the Water Services Infrastructure and related resources from each Shareholder as vendors to the Company as purchaser as further detailed in clause 11;
- (b) a shared services agreement for the provision of shared services by each Shareholder as supplier to the Company as purchaser in order to support the Company's operations on and from the Establishment Date, such services to be provided:
  - (i) at cost; and
  - (ii) with no transfer of risk from the Company to each Shareholder;
- (c) management service agreements for the provision of Stormwater Services by the Company as supplier to each Shareholder as purchaser, such services to be provided:
  - (i) on an evergreen basis with automatic rollover unless terminated in accordance with its terms;
  - (ii) at cost;
  - (iii) on the basis that there is no transfer of risk from each Shareholder to the Company; and
  - (iv) on the basis that no Shareholder will be offered lower pricing for like-for-like Stormwater Services than any other Local Authority;
- (d) agreements for the assignment, novation or subcontract (as the case may be) of each Shareholder's rights and obligations in respect of agreements with third party developers and central government funding agreements to the extent such agreements relate to the Water Services and are necessary for the Company to carry on the Business and provide the Water Services; and
- (e) any other material commitment or agreement of the Shareholders that would materially affect the value and nature of the assets, liabilities and responsibilities of the Company as intended by this Agreement.



#### 14.2 **Negotiation and execution of Material Contracts**

The initial Chair appointed in accordance with clause 8.4(a) and the Chief Executive Officer (once appointed) shall be the Company's representatives for negotiating and concluding the Material Contracts. The Company and the Shareholders will use best endeavours to negotiate and execute the Material Contracts during the Establishment Period, with the intention that each of the Material Contracts will take effect on and from the Operational Date (or such other date agreed in writing between the parties in respect of any Material Contract).

#### 14.3 **Transfer agreements**

To the extent that any of the Material Contracts are Transfer Agreements:

- (a) the parties shall ensure that the terms and conditions of the Material Contract comply with obligations required under the LG(WSA), including incorporating all mandatory content set out in Schedule 2 of the LG(WSA);
- (b) Each Shareholder acknowledges that it:
  - (i) continues to be responsible, as the water service provider under the LG(WSA) for ensuring the provision of the water services to which the contract or arrangement relates; and
  - (ii) must ensure that the Company performs and exercises all statutory functions, duties, and powers associated with providing the water services to which the contract or arrangement relates.

### 15 **CONFLICTS OF INTEREST**

#### 15.1 **Conflicts of interest arising**

The parties acknowledge that actual, perceived or potential conflicts of interest may arise from time to time between:

- (a) the interests of the Shareholders as between each other; and
- (b) the interests of a Shareholder and the Company,

(**Conflicts**), including as may arise in the context of a dispute under any Material Contract or any other agreement entered into between the Company and a Shareholder from time to time (**Related Party Agreements**).

#### 15.2 **General policy on conflicts of interest**

As a general policy, the Shareholders must:

- (a) manage any actual, perceived or potential conflicts of interest in a transparent and collaborative manner, including through early notification of such Conflict to the other parties to this Agreement; and
- (b) not, and ensure that its appointed members to the Shareholders Forum do not, use their rights, powers and responsibilities under this Agreement to take or omit to take any action which causes or contributes to a dispute arising



under any Related Party Agreement, or which frustrates, prevents, delays or otherwise hinders any dispute resolution under a Related Party Agreement.

### 15.3 **Conflicts of interest protocol**

If either party so requests, the Shareholders (either themselves or by delegation to the Shareholders Forum) will use best endeavours to agree a conflicts of interest protocol with the intention that such protocol would be binding on the Shareholders.

## 16 **REPRESENTATIONS AND WARRANTIES**

### 16.1 **Full authority**

Each Shareholder represents and warrants to the other Shareholder and to the Company that it has been duly authorised to enter into and perform this Agreement, and has the necessary power to bind itself in the manner contemplated by this Agreement.

## 17 **SHAREHOLDERS' UNDERTAKING**

### 17.1 **Undertaking to perform this Agreement and the Material Contracts**

Each Shareholder undertakes to:

- (a) duly perform and observe all the terms and conditions to be performed or observed by a Shareholder under this Agreement and any contracts referred to clause 14.1 to which it is a party;
- (b) procure that its members of the IAWAI – Flowing Waters Forum will use their best endeavours to ensure that the IAWAI – Flowing Waters Forum performs and carries on its duties and obligations so as to give full effect to this Agreement.

## 18 **TRANSFER OF SHARES / SHAREHOLDER EXIT PROCESS**

### 18.1 **Shareholder intentions**

Each Shareholder will keep the other Shareholders informed of their intentions in respect of their ownership of the Company from time to time.

### 18.2 **Intention to exit**

Without limiting clause 18.1, each Shareholder must give the other Shareholders a confidential notification where that party is considering exiting the Company as soon as practicable after the receipt of any internal approvals necessary to commence initial steps towards undertaking any such exit and, in any event, before issuing a Notice of Intention.

### 18.3 **No transfer except in accordance with Exit Process**

Subject to the exception in clause 1.2 of the Third Schedule, no Shareholder may sell, transfer, assign or otherwise dispose of or deal with (whether by operation of law or otherwise), or take any step to accept an offer to purchase, transfer, assign or otherwise dispose of or deal with that Shareholder's Shares except in accordance with the Exit Process as set out in the Third Schedule.



## 19 DEFAULT

### 19.1 Events of Default

- (a) If a Shareholder fails to observe or perform any of that Shareholder's material obligations under this Agreement and such default is not remedied within 20 Business Days of that Shareholder receiving written notice from the other Shareholder requiring that the default be remedied (**Event of Default**), then, for so long as that Event of Default continues and without prejudice to any other rights that the parties may have, that Shareholder, and any members appointed by it to the IAWAI – Flowing Waters Forum, will not be entitled to vote or give its approval in relation to any matter under this Agreement (including, for the avoidance of doubt, the right to vote on any Reserved Matter) and the defaulting Shareholders' Shares will not be counted for the purpose of determining a quorum for any Shareholders' meeting.
- (b) If an Event of Default has occurred, then that Shareholder will use all reasonable endeavours to remedy that Event of Default as soon as is reasonably practicable.
- (c) If the Event of Default relates to a Shareholder (**Defaulting Shareholder**), for reasons other than default of the Company:
- (i) failing to comply with its obligation to complete the transfer of the Defaulting Shareholder's Water Infrastructure Assets to the Company under the Asset Transfer Agreement; and
  - (ii) failing to remedy such Event of Default in accordance with the timeframes set out in 19.1(a) (time being of the essence) or such other period agreed by the parties,

then, without prejudice to any other rights or remedies available to the non-Defaulting Shareholder and the Company under this Agreement and/or the Asset Transfer Agreement, the parties agree that, as a general principle, the Defaulting Shareholder will reimburse the Company for all costs associated with the HCC Establishment Loan, including all principal and interest payments then due and owing or that may become due and owing. The parties agree to use best endeavours to give effect to the intention of this clause.

## 20 INTRODUCTION OF ADDITIONAL SHAREHOLDERS

### 20.1 Introduction of additional Shareholders

Subject to the agreement of the Shareholders pursuant to clause 5.1 and clause 20.2, another Local Authority may request to join the Company by:

- (a) transferring its Water Services Infrastructure and all related resources (including all such employees, rights, licences, customer data and financial information as are necessary to provide the Water Services within the relevant Service Area) to the Company; and



- (b) acceding to this Agreement as an additional Shareholder.

## 20.2 **Proposal for additional Shareholder**

The following terms shall apply to a proposal for the introduction of an additional Shareholder:

- (a) Any proposal to introduce an additional Shareholder shall be considered by the Board and the Board must make a recommendation to accept or reject the proposal to the IAWAI – Flowing Waters Forum.
- (b) The IAWAI – Flowing Waters Forum, on receipt of such a recommendation from the Board, must consider the proposal and make a final recommendation to the Shareholders. The final decision on the proposal would be made by the Shareholders as a Reserved Matter pursuant to clause 5.1.
- (c) An additional Shareholder may only be introduced by increasing the capital of the Company and issuing new shares to the additional Shareholder in accordance with this clause 20.
- (d) The amount and value of new shares to be issued to the additional Shareholder must be determined by reference to the fair value of the net water services infrastructure being contributed to the Company, relative to the fair value of the existing assets of the Company, using the Asset Transfer Principles (with references to HCC and WDC in those principles deemed to refer to the additional Shareholder).
- (e) The terms for the sale and transfer of the additional Shareholder's water services infrastructure must not be more favourable to the additional Shareholder than those agreed by the existing Shareholders.
- (f) The admission of the additional Shareholder must not:
  - (i) be detrimental to the existing Shareholders or their communities;
  - (ii) worsen the Company's financial position; or
  - (iii) result in the Company failing to meet its obligation to be financially sustainable.
- (g) Each party will bear their own costs of the additional Shareholder joining, provided that the Company must use reasonable endeavours to ensure that a proposed additional Shareholder that withdraws from the process prior to admission covers the costs incurred by the Company of considering the proposal.

## 20.3 **Transfer of assets and issue of shares**

If a proposal is approved by the Shareholders under 20.2(a), the existing Shareholders shall procure the Company to use all reasonable endeavours to negotiate and enter into all such transactions documents as are necessary to effect the transfer of the Water Services Infrastructure and related resources (including all



employees, rights, licences, customer data and financial information necessary to provide the Water Services within the additional Shareholder's Service Area) and issue the new shares to the additional Shareholder. For the avoidance of doubt, if entry into the transaction documents is a Major Transaction or otherwise constitutes a Reserved Matter under clause 5.1, the transaction documents must be conditional on the Company obtaining all necessary approvals from the Shareholders.

#### 20.4 **Deed of Accession**

The additional Shareholder shall execute a Deed of Accession by which it agrees to observe and be bound by this Agreement as if it had executed this Agreement as a Shareholder named in this Agreement.

#### 20.5 **Shareholders' loans to Company**

The additional Shareholder shall pay to the Company such sums as are necessary to ensure that the additional Shareholder contributes a pro-rata share with the existing Shareholders (according to the shareholding of that Shareholder) to the amount of any loans from the existing Shareholders to the Company.

#### 20.6 **Amendment to this Agreement**

When an additional Shareholder is admitted to the Company, the Shareholders must seek to agree the requisite amendments to this Agreement or the Constitution to provide for:

- (a) iwi engagement and participation to appropriately incorporate iwi and any relevant Te Tiriti o Waitangi settlement from the enlarged service area;
- (b) any changes in the composition and decision making of the IAWAI – Flowing Waters Forum;
- (c) any changes in the Board composition and the process of appointing Directors to the Board; and
- (d) any other clauses necessary to reflect the fact that there are more than two Shareholders.

### 21 **CHANGES TO SERVICE AREA**

#### 21.1 **Local Government Reorganisation - Consultation**

Each Shareholder commits that it will not initiate or respond to a Local Government Reorganisation Proposal that would have the effect of changing the Company's Service Area without first consulting with the Company and considering the Company's view of the impact of such a change on:

- (a) the assets, capacity, and financial viability of the Company;
- (b) the ability of the Company to meet expectations of the Shareholders;
- (c) the cost, nature, quality, of any assets, liabilities, consents, water allocations, obligations, and designations, that would be transferred to the Company under the proposal;



- (d) the opportunities and potential benefits associated with the proposal.

#### 21.2 **Local Government Reorganisation - Consideration**

- (a) The parties agree that when considering any Local Government Reorganisation Proposal, they will apply the same process and principles as apply to the introduction of an additional shareholder (clause 20, amended as necessary for the context) for a proposal that would have the effect of increasing the Company's Service Area.
- (b) The parties agree that when considering any Local Government Reorganisation Proposal they will apply the same process and principles as apply to the exit of a Shareholder (clause 18 and the Third Schedule, amended as necessary for the context) for a proposal that would have the effect of decreasing the Company's Service Area.
- (c) The parties agree that a boundary adjustment between them would not change the Company's Service Area.

### 22 **ASSIGNMENT**

#### 22.1 **No assignment without consent**

A party must not assign or transfer any of its rights or obligations under this Agreement without the prior written consent of each of the other parties.

### 23 **CONFIDENTIALITY**

#### 23.1 **Confidentiality**

Subject to clauses 30.2, 30.3 and 30.4, each party must treat the terms of this Agreement and all information made available by or on behalf of any other party in connection with this Agreement as strictly confidential.

#### 23.2 **Exceptions**

The obligation of confidentiality under clause 23.1 does not apply to:

- (a) information that is generally available to the public at the date of this Agreement or subsequently becomes so available other than by reason of breach of any obligation of confidentiality;
- (b) any disclosure or publication of information that is necessary to comply with any law, including the LGA, the LG(WS)A and the Local Government Official Information and Meetings Act 1987, or the order of any Governmental Agency; and
- (c) any disclosure of information to a Local Authority proposing to join the Company as an additional Shareholder in accordance with clause 20.

In the event any such announcement or disclosure is required by law or the order of any Governmental Agency, the parties agree to consult with each other regarding the contents of any such announcement or disclosure prior to the making thereof.



### 23.3 **Announcements**

The parties will not (except in accordance with clause 23.2) make any public announcement regarding the terms of this Agreement except in a form and manner and at such time as the parties shall agree upon.

## 24 **FURTHER ASSURANCES**

### 24.1 **To implement this Agreement and the Material Contracts**

Subject to this Agreement, and the requirements of the LGA, the LG(WS)A and any other applicable law, each Shareholder must pass all resolutions of the Shareholders, and must take all action and execute all documents and the members of the IAWAI – Flowing Waters Forum appointed by the Shareholder pass all the resolutions of the Company and take all such action and execute all documents, as shall be necessary to implement this Agreement, the Material Contracts and the transactions contemplated by such agreements.

### 24.2 **To discharge Company's duties and obligations**

Subject to this Agreement, and the requirements of the LGA, the LG(WS)A and any other applicable law, each Shareholder must vote its shares in the Company, or cause all members of the IAWAI – Flowing Waters Forum appointed by the Shareholder to vote so as to cause the Company, to assume and discharge each of the Company's duties and obligations contained in this Agreement and the Material Contracts.

## 25 **GOVERNING DOCUMENT**

### 25.1 **This Agreement to prevail over other agreements between Shareholders**

In the case of any conflict or inconsistency between, on the one hand, the terms and provisions of any other agreement or contract or document between the Shareholders relating to, or affecting, the business or affairs of the Company (including the Record of Agreement) and, on the other hand, the terms and provisions of this Agreement, the terms and provisions of this Agreement as may be applicable will prevail.

### 25.2 **This Agreement to prevail over Constitution**

- (a) In the event of any conflict or inconsistency between the terms and provisions of this Agreement and the Constitution, the terms and provisions of this Agreement will prevail.
- (b) The Shareholders will resolve the conflict or inconsistency by procuring amendments to the Constitution to make it consistent with this Agreement.

## 26 **RESOLUTION OF DISPUTES**

### 26.1 **Negotiations**

If a dispute arises between any of the parties concerning the construction of this Agreement, or their rights and obligations under it, then unless other provisions of this Agreement govern the manner in which that dispute is to be resolved, the parties in dispute must enter into negotiations in good faith to try to resolve the dispute. A party in dispute may initiate the negotiations by giving written notice to



the other. The party who initiates the resolution procedures must name its representative in the negotiations when giving written notice to the other party. The other party must then promptly name its representative in the negotiations. Each representative must have authority to settle the dispute. Within 30 Business Days of the parties having advised each other of their representatives, the representatives must enter into negotiations to try to resolve the dispute.

## 26.2 **Mediation**

If the dispute is not resolved within 30 Business Days of the representatives entering into negotiations to try to resolve the dispute in accordance with clause 26.1, or within a longer period agreed in writing between the representatives (the **Negotiation Period**), or if the parties have not met during the Negotiation Period, any party to that dispute may, within 30 Business Days after the last date of the Negotiation Period, submit the dispute to mediation. Any party to the dispute may commence the mediation by giving a written notice to the other parties to the dispute stating the subject matter and details of the dispute and that party's desire to have the dispute referred to mediation (the **Mediation Notice**).

## 26.3 **Arbitration**

If the dispute is not resolved within the following 30 Business Days of the parties attending mediation in accordance with clause 26.2, or within a longer period agreed on in writing by the representatives, the parties must submit the dispute to arbitration in accordance with the Arbitration Act 1996. Either party may commence the arbitration by giving a written notice to the other stating the subject matter and details of the dispute and that party's desire to have the dispute referred to arbitration. The arbitration shall be conducted by one arbitrator, if the parties can agree upon one or, failing agreement, by two arbitrators, one to be appointed by each party. If the preference is to have two arbitrators, those arbitrators must appoint a third arbitrator before they begin to consider the dispute.

## 27 **NOTICES**

### 27.1 **Modes of delivery**

Any notice or communication which a Shareholder gives to any other Shareholders or to the Company concerning anything relating to this Agreement or to the Company must be in writing. Notices to a Shareholder or to the Company are to be delivered by hand to the designated address of that Shareholder or the Company or sent by post with postage prepaid or by email to that Shareholder or the Company at that address.

### 27.2 **Effective delivery by hand**

A notice or other communication delivered by hand will be deemed to have been received at the time of delivery. However, if the delivery is not made on a Business Day or is made after 5.00 p.m. on a Business Day, then the notice or other communication will be deemed to have been delivered on the next Business Day.

### 27.3 **Effective delivery by post**

A notice or other communication delivered by pre-paid post will be deemed to have been received on the 2<sup>nd</sup> Business Day after posting.



#### 27.4 **Effective delivery by email**

A notice or other communication sent by email will be deemed to have been received on the day of transmission. However, if the date of transmission is not a Business Day or the transmission is sent after 5.00 p.m. on a Business Day then the notice or other communication will be deemed to have been given on the next Business Day after the date of transmission.

#### 27.5 **Designated addresses**

- (a) A designated address for the purpose of this Agreement is that specifically designated in this clause or such other address specifically designated by a Shareholder or the Company by notice given to the other Shareholders. The addresses designated pursuant to this clause are:

##### **Hamilton City Council**

Hamilton City Council, Private Bag 3010, Hamilton 3204

Email: [info@hcc.govt.nz](mailto:info@hcc.govt.nz)

Attention: Lance Vervoort

##### **Waikato District Council**

Waikato District Council, Private Bag 544, Ngāruawāhia 3742

Email: [info@waidc.govt.nz](mailto:info@waidc.govt.nz)

Attention: Craig Hobbs

- (b) The Company's designated address will be the head office in New Zealand for the time being of the Company as determined by the Board.

### 28 **MISCELLANEOUS CLAUSES**

#### 28.1 **Amendment**

No amendment to this Agreement shall be effective unless it is in writing and signed by all the parties. For the purposes of this clause, an amendment to the Constitution, whether pursuant to clause 25.2(b) or otherwise, shall not be regarded as an amendment to this Agreement.

#### 28.2 **Waiver**

No party will be deemed to have waived any right under this Agreement unless such waiver is in writing and signed by such party. Any such waiver by a party of a breach of any provision of this Agreement will not constitute a waiver of any subsequent or continuing breach of such provision or of the breach of any other provision of this Agreement by that party.

#### 28.3 **No partnership**

Nothing in this Agreement or in the relationship between the Shareholders or in the relationship between, on the one hand, the Shareholders and, on the other hand,



the Company is to be construed as in any sense creating a partnership between any two or more of the parties to this Agreement or as giving to any party any of the rights, or subjecting any party to any of the liabilities, of a partner.

**28.4 No charge or lien over shares**

No Shareholder may mortgage, charge or otherwise encumber its shares in the Company, or create or suffer or permit a lien over such shares, without the prior written consent of the other Shareholders.

**28.5 Governing law / jurisdiction**

This Agreement shall be governed by and construed in accordance with New Zealand law. Subject to clause 26.3, the parties submit to the non-exclusive jurisdiction of the courts of New Zealand for the purpose of hearing and determining any disputes or proceedings arising out of or in connection with this Agreement.

**28.6 Counterparts**

This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute the same instrument.



**EXECUTION**

Executed as an agreement.

**Hamilton City Council** by:

\_\_\_\_\_  
\_\_\_\_\_

in the presence of:

\_\_\_\_\_

Name:

Occupation:

Address:

**Waikato District Council** by:

\_\_\_\_\_  
\_\_\_\_\_

in the presence of:

\_\_\_\_\_

Name:

Occupation:

Address:

**IAWAI – Flowing Waters Limited** by:

\_\_\_\_\_  
Director

\_\_\_\_\_  
Director



**FIRST SCHEDULE: FORM OF CONSTITUTION OF THE COMPANY**

**SECOND SCHEDULE: IAWAI – FLOWING WATERS FORUM TERMS OF REFERENCE****1 BACKGROUND**

- 1.1 The Shareholders agree that the IAWAI – Flowing Waters Forum will be constituted in accordance with the Terms of Reference.
- 1.2 The Terms of Reference are intended to be binding on the IAWAI – Flowing Waters Forum.

**2 PURPOSE**

- 2.1 The purpose of the IAWAI – Flowing Waters Forum is:

- (a) to provide a forum for joint shareholding decisions; and
- (b) to provide governance oversight over the Company.

in accordance with the Constitution, the Shareholders' Agreement and the LG(WS)A.

- 2.2 The IAWAI – Flowing Waters Forum shall ensure its decisions support the ongoing operation and success of the Company and do not undermine the Company's financial position or viability.

**3 MEMBERS AND VOTING**

- 3.1 The IAWAI – Flowing Waters Forum will consist of:

- (a) three representatives appointed by each Shareholder; and
- (b) three representatives appointed by Waikato-Tainui,

each representative referred to as a *Member* and, together, the *Members*.

- 3.2 Each Shareholder holds one vote on the IAWAI – Flowing Waters Forum, which shall be exercised as follows:

- (a) each Shareholder shall elect one of its appointed Members as the Lead Representative;
- (b) subject to clause 3.3, only the Lead Representatives shall be authorised to exercise a vote on any matter for which the IAWAI – Flowing Waters Forum has been delegated decision making in accordance with these Terms of Reference; and
- (c) in the absence of the Lead Representative, one of the other Members appointed by the Shareholder will be authorised to exercise that Lead Representative's vote.

- 3.3 Notwithstanding clause 3.2, each Member, including the representatives appointed by Waikato-Tainui, shall have one vote in respect of:

- (a) the appointment (including re-appointment) or removal of a Director; and



- (b) the appointment or removal of the chairperson of the Board;
- (c) the appointment or removal of the chairperson of the IAWAI – Flowing Waters Forum.

3.4 Each Shareholder may, at its sole discretion but subject to this clause 3, determine any matters relating to the appointment of their representatives and how their interests are represented on the IAWAI – Flowing Waters Forum.

#### 4 **CHAIR**

- 4.1 The chair of the IAWAI – Flowing Waters Forum shall be the Member elected to such role by the unanimous agreement of the Members from time to time.
- 4.2 The chair of the IAWAI – Flowing Waters Forum does not hold a casting vote.

#### 5 **QUORUM**

- 5.1 The quorum necessary for the transaction of business at a meeting of the IAWAI – Flowing Waters Forum is:
  - (a) one representative of each Shareholder; and
  - (b) one representative of Waikato-Tainui.

No business may be transacted at a meeting of the IAWAI – Flowing Waters Forum unless a quorum is present.

#### 6 **MEETINGS**

- 6.1 Unless otherwise provided in the Shareholders' Agreement and these Terms of Reference, the following terms govern the proceedings at meetings of the IAWAI – Flowing Waters Forum:
  - (a) **Chairperson:** If the chair of the IAWAI – Flowing Waters Forum is not present within 15 minutes of the time appointed for the commencement of the meeting, the Members present may choose one of their number to be chair of the meeting.
  - (b) **Notice of meetings:**
    - 1 Written notice of the time and place of a meeting of the IAWAI – Flowing Waters Forum must be sent to every Member entitled to receive notice of the meeting not less than 10 working days before the meeting.
    - 2 The notice must state the nature of the business to be transacted at the meeting in sufficient detail, with any relevant supporting documents, to enable a Member to form a reasoned judgment in relation to it.



- 3 An irregularity in a notice of a meeting is waived if all the Members entitled to attend and vote at the meeting attend the meeting without protest as to the irregularity, or if all such Members agree to the waiver.
- (c) **Method of holding meetings:** A meeting of the IAWAI – Flowing Waters Forum may be held by a quorum of the Members:
- (i) being assembled together at the time and place appointed for the meeting; or
  - (ii) participating in the meeting by means of audio, audio and visual, or electronic communication; or
  - (iii) by a combination of both.
- (d) **Minutes:** The chair of the Shareholders Forum must ensure that minutes are kept of all proceedings at meetings of the Shareholders Forum. Minutes which have been signed correct by the chair of the meeting are prima facie evidence of the proceedings.
- (e) **No postal votes:** A Member may not exercise the right to vote at a meeting by casting a postal vote.
- (f) Except as provided in this clause 6 in these Terms of Reference, a meeting of the IAWAI – Flowing Waters Forum may regulate its own procedure.

## 7 DECISION-MAKING

- 7.1 The Members will strive to make all decisions by consensus.
- 7.2 In the event that a consensus on a particular matter before the IAWAI – Flowing Waters Forum is not able to be reached, the matter will be put to a vote in accordance with clause 3.
- 7.3 In the situation where there is an equality of votes cast on a matter, the matter subject to the vote is defeated and the status quo is preserved.
- 7.4 Other than for those matters for which the IAWAI – Flowing Waters Forum has effective decision-making capacity through these Terms of Reference, each Shareholder retains its powers to make its own decisions on matters referred to it by the IAWAI – Flowing Waters Forum and any Reserved Matters under the Shareholders' Agreement.

## 8 IAWAI – FLOWING WATERS FORUM POWERS AND RESPONSIBILITIES

- 8.1 Unless otherwise agreed by the Shareholders, each Shareholder will delegate to its appointed Member, all responsibilities and powers in relation to voting on behalf of the appointing Shareholder on the following matters:
- (a) the agreement of when a meeting of Shareholders, or written resolutions instead of holding a meeting of Shareholders, is required;



- (b) subject to clause 8.3, the appointment and removal of Directors; and
- (c) the appointment and removal of the chairperson of the Board.

8.2 Unless otherwise agreed by the Shareholders, each Shareholder delegates to the IAWAI – Flowing Waters Forum all responsibilities and powers in relation to:

- (a) preparing the Statement of Expectations, including:
  - (i) the development and communication of growth strategies, priorities and plans to the Company;
  - (ii) the development and measurement of key performance indicators for the Company on performance and customer satisfaction;
  - (iii) the annual review of and, as may be necessary from time to time, amendments to the Statement of Expectations, to, amongst other things, respond to changes in government policy, changes to district and city plans, changes in the rate and nature of population growth, any change to territorial authority boundaries, and any out of sequence or unanticipated development, such review to be undertaken prior to the commencement of each Shareholder's Annual Plan or Long-Term Plan process (as those terms are defined in the LGA) and the Company's preparation and review of its Water Services Strategy or Water Services Annual Budget;
- (b) receiving and commenting on the Water Services Strategy and the Water Services Annual Budget prepared by the Board;
- (c) undertaking monitoring of the Company and its performance;
- (d) receiving and considering the water services half-yearly and annual reports prepared by the Board;
- (e) developing and reviewing the required competencies for the Board; and
- (f) agreeing the remuneration of Directors,

in accordance with the terms of the Constitution, the Shareholders' Agreement and the LG(WS)A.

8.3 In the appointment and removal of Directors by the IAWAI – Flowing Waters Forum in accordance with these Terms of Reference, the Members must take into account:

- (a) the balance of competencies and skills required by the Company for the next period of time;
- (b) the appointment of Directors on the basis of merit, competencies and skill;
- (c) the collective competencies and skills of the Board relevant to a substantial water related infrastructure business; and



(d) the perceived and actual independence of Directors.

8.4 Unless otherwise agreed by the Shareholders, the IAWAI – Flowing Waters Forum will be responsible for making a recommendation to the Shareholders on:

- (a) any matter that is a Reserved Matter under the Shareholders' Agreement; and
- (b) any other matter reasonably raised by the Shareholders, either individually or jointly, or by the Board, to the IAWAI – Flowing Waters Forum.

## 9 **SECRETARIAT**

9.1 Unless otherwise agreed from time to time by the Shareholders, the Shareholders will rotate responsibility for providing secretariat services (including preparation of minutes to support the chair's obligations under clause 6.1(d)) to the IAWAI – Flowing Waters Forum every three years, with HCC agreeing to provide secretariat services for the initial three years commencing on the Establishment Date.

9.2 The chair of the IAWAI – Flowing Waters Forum will be responsible for managing the agenda at meetings of the IAWAI – Flowing Waters Forum.

## 10 **REMUNERATION**

10.1 Each Shareholder will be responsible for remunerating the Member appointed by it to the IAWAI – Flowing Waters Forum for any costs associated with the membership to the IAWAI – Flowing Waters Forum.

10.2 The Shareholders, jointly, will be responsible for remunerating (in proportion to their shareholding in the Company) the Members appointed by Waikato-Tainui for any costs associated with the membership to the IAWAI – Flowing Waters Forum.

## 11 **CONFIDENTIALITY**

Obligations of confidentiality applying to the Shareholders pursuant to the Shareholders' Agreement will apply to the Members.

## 12 **AMENDMENTS**

No amendment to these Terms of Reference shall be effective unless it is in writing and signed by all the Shareholders.

## 13 **DISESTABLISHMENT**

The IAWAI – Flowing Waters Forum may be disestablished by unanimous written agreement of the Shareholders or upon termination of the Shareholders' Agreement.



## THIRD SCHEDULE: SHAREHOLDER EXIT PROCESS

### 1 OPERATION OF EXIT PROCESS

#### 1.1 No transfer except in accordance with Exit Process

Subject to the exception in clause 1.2 of this Schedule, no Shareholder may sell, transfer, assign or otherwise dispose of or deal with (whether by operation of law or otherwise), or take any step to accept an offer to purchase, transfer, assign or otherwise dispose of or deal with that Shareholder's shares except in accordance with the provisions of this Schedule.

#### 1.2 Exceptions

The provisions of this Schedule do not apply to the transfer of any share by a Shareholder that is approved by unanimous agreement of the Shareholders in accordance with clause 5.1 of this Agreement.

#### 1.3 Time limits

As regards to all time limits imposed on the Shareholders under this Schedule, time is of the essence. However, such time limits may be extended if the Shareholders agree unanimously in writing to do so.

### 2 PROCEDURES FOR INITIATING THE EXIT PROCESS

#### 2.1 Notice of Intention

If a Shareholder (**Exiting Shareholder**) at any time wishes to cease providing joint Water Services pursuant to this Agreement and resume the ownership of the Water Services Infrastructure and the management and operation of Water Services located within its Service Area (**Exit**), it must first give the non-exiting Shareholder (**Remaining Shareholder**) and the Company a notice of its intention to leave (**Notice of Intention**).

#### 2.2 Notice of Intention Binding

After giving a Notice of Intention, the Exiting Shareholder may not withdraw from the Exit Process, except by first obtaining the written consent of the Remaining Shareholder (and such consent may be given or withheld in that party's discretion).

#### 2.3 Company to develop and convey Exit Plan

(a) Within 12 months following the date of the Notice of Intention, the Remaining Shareholder and the Company must:

(i) develop a draft exit plan which addresses the matters described in clause 2.3(b) (**Exit Plan**); and

(ii) provide the draft Exit Plan to the Exiting Shareholder for its approval.

(b) The Exiting Shareholder must provide the Remaining Shareholder and the Company all necessary assistance required in preparing the Exit Plan.

(c) The draft Exit Plan must address in detail the processes and procedures that the parties will comply with so as to ensure that the Exiting Shareholder has,



upon conclusion of the Exit Process, all resources (including all employees, rights, licences, IT systems, customer data and financial information) and Water Services Infrastructure necessary to enable the Exiting Shareholder to provide the Water Services within its Service Area (**Transferring Assets**). Without limiting the foregoing, the Exit Plan must address the following principles:

- (i) **Fairness:** the arrangements should be fair to both the Exiting Shareholder and the Remaining Shareholder.
- (ii) **Treatment of assets:** the Exiting Shareholder would need to purchase from the Company all the Transferring Assets in its Service Area, together with an appropriate amount of working capital and an assignment or novation of any funding arrangements relating to the Transferring Assets, documented on the terms of an asset transfer agreement. Assuming that the Company's assets are revalued annually, the Exiting Shareholder would need to purchase the Transferring Assets at the value at which they are held in the Company's accounts. If the Company does not value assets annually, then the Transferring Assets to be purchased would be valued in accordance with the Asset Transfer Principles.
- (iii) **Net surplus reserves:** Net surplus reserves would be separated and transferred to the Exiting Shareholder applying the same principles as were used in the establishment process (refer to Treatment of Existing Council Debt, Development Contributions and Reserves set out in sections 42 to 44 of the Record of Agreement).
- (iv) **Joint assets:** There may be some assets that serve customers outside the Exiting Shareholder's Service Area, or customers within the Exiting Shareholder's Service Area may be serviced by assets that remain within the Company. The Company, the Remaining Shareholder and the Exiting Shareholder would need to agree appropriate arrangements for these assets and any connections and/or service agreements that may be necessary as part of the Exit Plan.
- (v) **Consideration:** As consideration for the transfer of the Transferring Assets, the Exiting Shareholder would transfer its shares to the Company, accept the Transferring Assets as payment for its Shareholder Loans and pay the balance in cash.
- (vi) **Other liabilities:** The Exiting Shareholder would bear the cost of any stranded assets or other liabilities (such as an oversized head office or operating systems or redundancy costs for staff who do not wish to accept positions with the Exiting Shareholder) for a period of 12 months from the date of completion of the Exit.
- (vii) **Transaction costs:** The Exiting Shareholder would bear the Company's reasonable legal and other transaction-related costs.



#### 2.4 **Response to draft Exit Plan**

- (a) The Exiting Shareholder must notify the Company in writing within three months of receipt of the Exit Plan that the Exiting Shareholder either:
  - (i) substantially accepts the Exit Plan; or
  - (ii) substantially rejects the Exit Plan but wishes to negotiate the consideration; or
  - (iii) rejects the Exit Plan.
- (b) If the Exiting Shareholder accepts the Exit Plan, the parties must implement the Exit Plan in accordance with clause 3.1 of this Schedule.
- (c) If the Exiting Shareholder wishes to negotiate any aspect of the Exit Plan, the Exiting Shareholder, the Remaining Shareholder and the Company will enter into negotiations in good faith. If the parties agree on the terms of the Exit Plan within 12 months of the date on which draft Exit Plan was first provided, the parties must implement the Exit Plan in accordance with clause 3.1 of this Schedule. If they cannot so agree on the terms of the Exit Plan within 12 months (or such other period as the parties may agree in writing), the Notice of Intention will be deemed to be withdrawn and the Exiting Shareholder must remain a Shareholder of the Company and a party to this Agreement. Unless otherwise agreed in writing between the parties, a standdown period of three years shall apply before the Exiting Shareholder can submit a new Notice of Intention.

### 3 **TRANSFER OF ASSETS AND SHARES**

#### 3.1 **Transfer of assets and shares**

If an Exit Plan is agreed under clause 2.4 of this Schedule, the Shareholders shall procure the Company use all reasonable endeavours to negotiate and enter into all such transactions documents as are necessary to effect the transfer of Transferring Assets to the Exiting Shareholder and transfer the Exiting Shareholder's shares to the Company within 18 months of the Exit Plan being agreed. For the avoidance of doubt, if entry into the transaction documents is a Major Transaction or otherwise constitutes a Reserved Matter under clause 5.1 of this Agreement, the transaction documents must be conditional on the Company obtaining all necessary approvals from the Shareholders.



**ANNEXURES**

- A Deed of Accession
- B Record of Agreement
- C Statement of Expectations



## **DEED OF ACCESSION**

*Date:*

### **PARTIES**

Hamilton City Council and Waikato District Council (*the Existing Shareholders*)

IAWAI – Flowing Waters Limited (*the Company*)

[•] (*the New Shareholder*)

### **BACKGROUND**

- A The Company and the Existing Shareholders are the parties to a shareholders' agreement dated [•] ("the Agreement").
- B Under the Agreement the New Shareholder has agreed to subscribe for shares in the Company and is required to execute this deed.

**NOW BY THIS DEED** the parties agree as follows:

- 1 With effect from [•] (*the New Shareholder*) ("the Effective Date") the New Shareholder:
  - (a) becomes a party to the Agreement as if it had been named as a party to the Agreement and had executed it; and
  - (b) must observe and perform all of the obligations of a Shareholder under the Agreement and will be bound by the terms of the Agreement.
- 2 The Company and the Existing Shareholders agree with the New Shareholder that each of them will observe and perform their respective obligations under the Agreement and will be bound by the terms of the Agreement.



**EXECUTION**

Executed as an agreement.

**Hamilton City Council** by:

\_\_\_\_\_  
\_\_\_\_\_

in the presence of:

\_\_\_\_\_

Name:

Occupation:

Address:

**Waikato District Council** by:

\_\_\_\_\_  
\_\_\_\_\_

in the presence of:

\_\_\_\_\_

Name:

Occupation:

Address:

**IAWAI – Flowing Waters Limited** by:

\_\_\_\_\_  
Director

\_\_\_\_\_  
Director



**[New Shareholder]** by:

\_\_\_\_\_

\_\_\_\_\_

in the presence of:

\_\_\_\_\_

Name:

Occupation:

Address: