

Myerson Solicitors LLP

SHAREHOLDERS' AGREEMENT QUESTIONNAIRE & CHECKLIST

A Guide for Clients



myerson

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This Myerson questionnaire and checklist is designed to highlight the range of issues which should be considered when operating a business through a limited company where there is more than one shareholder. In order to regulate the arrangements between the shareholders, it is highly recommended that you put in place a shareholders' agreement and complementary articles of association. This questionnaire and checklist also details what can be covered in a shareholders' agreement, a company's articles of association and directors' service agreements.

By completing this document you will assist us in providing the necessary information we need to produce a suite of documents for you and your company.

Once you have completed the questionnaire and checklist, or if you would like to discuss any points with a specialist Solicitor, please contact our Corporate Commercial team who will be happy to assist you.

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A. INFORMATION ABOUT THE COMPANY AND THE SHAREHOLDERS

1. Please provide the names and addresses of the proposed Shareholders together with the number (and class) of shares already held by each of them (if any) and details of the number (and class) of shares which are proposed to be allotted and issued to each of them.

You may wish to have different classes of shares for Shareholders if you would like each Shareholder, or class of Shareholders, to have different rights with regards to voting, receiving dividends and/or rights to capital.

(Please use the continuation sheet at the back of this document if you need to give any further information, or would like to appoint more directors or Shareholder than there are spaces below.)

Shareholder 1

Name:

Address:.....

.....

Number and class of shares already held:

Number and class of shares to be allotted:

Rights and restrictions attaching to the shares, i.e. voting, dividend and capital rights:

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Shareholder 2

Name:

Address:.....

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Number and class of shares already held:

Number and class of shares to be allotted:

Rights and restrictions attaching to the shares, i.e. voting, dividend and capital rights:

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Shareholder 3

Name:

Address:

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Number and class of shares already held:

Number and class of shares to be allotted:

Rights and restrictions attaching to the shares, i.e. voting, dividend and capital rights:

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2. What is the business of the Company to be? Please give a description.

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3. Who is/are to be Director(s) of the Company and the Company Secretary?

Please note that under the Companies Act 2006 you do not need to have a Company Secretary if you do not wish to have one.

Director 1

Name:

Address:

.....

Date of Birth:

Occupation:

Nationality:

Director 2

Name:

Address:

Date of Birth:

Occupation:

Nationality:

Director 3 / Secretary

Name:

Address:

Date of Birth:

Occupation:

Nationality:

B. DIRECTORS

1. Should each Shareholder be entitled to appoint and remove one Director to represent him on the Board? **Yes** **No**

2. Should a majority of Shareholders be able to remove a Shareholder Director as a director:

(a) in all circumstances **Yes** **No**

(b) in limited circumstances (i.e. gross misconduct or material breach of the Shareholders' Agreement) **Yes** **No**

Please specify limited circumstances:

.....

3. Should each Director's responsibilities be set out in a service agreement/agreement for service? **Yes** **No**

A service agreement or agreement for services is recommended in order to regulate the relationship between the Company and each Director.

Please refer to the Director's Service Contract Section at the end of this Questionnaire and Checklist to provide contract details.

4. Should any of the Director/Shareholders have protected employment provisions applicable to them, whereby they cannot be removed as Directors/employees of the Company unless holders of a majority of the shares remove them:
- (a) in all circumstances **Yes** **No**
- (b) in limited circumstances (i.e. gross misconduct or material breach of the Shareholders' Agreement) **Yes** **No**

Please specify limited circumstances:

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5. Should there be a Chairperson of the Board of Directors? **Yes** **No**
- If so, should he/she have a casting vote? **Yes** **No**

If there is an even number of directors, or there are two Director Shareholders (with one being a majority and the other a minority Shareholder), having a Chairperson with a casting vote will either remove a deadlock at board level, or enable the majority Shareholder to have influence over the decision.

Remember: the Shareholders' Agreement will contain a list of decisions which require the consent of the Shareholders (or a percentage of them), so the Director's powers will be limited by the extra layer of protection that the Shareholders' Agreement provides (see section G below).

6. What will be the minimum number of directors required in order for a directors meeting (and an adjourned directors meeting) to take place and validly transact business?

If there are only 2 directors, it is likely to be 2. If you have "Founding Shareholders" (for example these may be majority Shareholders) you may wish to stipulate that the "Founders" or a certain number of them must be present. This allows some control over meetings. You may also provide that if, at the first meeting a quorum is not present, then the adjourned meeting may require a lesser number of Shareholders so that meetings are not frustrated.

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How often should directors' meetings take place? At least every 3 months?

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C. ANNUAL BUDGET & BUSINESS PLAN

Will the Shareholders procure the preparation of a draft budget and business plan each year, for approval by the board of Directors/a given percentage of Shareholders of the Company? **Yes** **No**

This would usually be required for start-up businesses by the bank.

D. SUCCESSION/TRANSFER OF SHARES

1. If a Shareholder wishes to transfer shares, should he/she first have to offer his/her shares to the other Shareholders on a pro rata basis? **Yes** **No**

2. Should the Company have the option to buy back the shares? **Yes** **No**

Please note that there are tax considerations here: the default tax treatment of the proceeds of sale on a company buyback is income for the recipient unless certain considerations are satisfied.

3. Should a Shareholder be able to (without going through the process of offering his/her shares to the other Shareholders) transfer shares to:

(a) family members including: **Yes** **No**

(i) spouses **Yes** **No**

(ii) co-habitees **Yes** **No**

(iii) children **Yes** **No**

(iv) parents and other relatives **Yes** **No**

(v) other third parties **Yes** **No**

(if so please specify who)

(b) family trusts (may be desirable for tax planning purposes) **Yes** **No**

(c) nominees **Yes** **No**

(d) companies controlled by the Shareholders **Yes** **No**

In all cases at any time:

(aa) whilst the Shareholder continues to work for the Company **Yes** **No**

(bb) after the Shareholder no longer works for the Company **Yes** **No**

(cc) on or after the death of the Shareholder **Yes** **No**

4. Should a Shareholder be bound to offer his/her shares for sale to the other Shareholders/the Company upon one of the following events occurring:

- (a) death Yes No
- (b) critical illness Yes No
- (c) bankruptcy Yes No
- (d) resigning as a director or employee of the Company Yes No
- (e) breach of the shareholders' agreement/articles/service agreement Yes No
- (f) dismissal as an employee of the Company Yes No
- (g) removal as a director of the Company Yes No
- (h) retirement (if so, what is the normal age of retirement for the Company?) Yes No

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- (i) ceasing to be an employee or consultant etc. for any reason whatsoever Yes No

In the above cases, the Shareholders' Agreement will contain "Deemed Transfer Provisions". These provisions require that Shareholders who suffer such an event offer their shares for sale.

5. Provision can be made in the documentation so that the departing Shareholder's shares are valued on a different basis if he/she were a 'bad leaver', but this would not apply if he/she were a 'good leaver'.

For example, a bad leaver could be defined as a Shareholder/Director who has materially breached the terms of the Shareholders' Agreement or his/her service contract. A bad leaver's shares could be valued at 50% or less of their value or the nominal value. Please note good/bad leaver clauses tend to be controversial. Any provision of this nature will need to be considered in detail.

- (a) Should provisions for good leaver/bad leaver be included? Yes No
- (b) If so, what value should a bad leaver receive?
 - (i) half of the market value;
 - (ii) the nominal value;
 - (iii) the amount paid up on his/her shares; or
 - (iv) other

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- (c) If so, which of the events set out in paragraph 3 above should be "good leaver" events (usually these include: death, critical illness, retirement) and which should be "bad leaver" events (usually these include: breach of the Shareholders' Agreement, bankruptcy, dismissal as an employee/Director of the Company). You need to consider what is important to you and your company.
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- (d) Should the "good leaver"/"bad leaver" provisions apply to all Shareholders, or to the holders of certain classes of shares only?
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- (e) On a sale of shares, if a Shareholder has a minority interest, should the value of the shares be discounted to reflect the minority interest? **Yes** **No**

Sometimes the value of a shareholding will take account of other factors in addition to the simple market value. A shareholding which only has a right to receive a dividend but does not have a right to vote, may hold a lower value than other shares with full dividend and voting rights.

6. If a Shareholder leaves the business (for whatever reason) in a given time period, it is possible to restrict the value that the Shareholder will receive for their shares. For example: if a Shareholder leaves in under 1 year, they will be classed as a bad leaver. If they leave in under 2 years they will receive 50% of the market value. Please indicate if you would like an early leaver provision, and if so on what terms?
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7. If a Shareholder sells his/her shareholding and a short time later his/her shares are then sold at a much higher price, should he/she or his/her estate be entitled to some or all of the further proceeds paid for the shares? **Yes** **No**

Please note that these provisions, called "anti-embarrassment provisions", are complicated as they need to deal with all types of exits – share sale, asset sale, liquidation and a float. Also consider if it includes a partial sale and a change of control (whether through sale or investment).

8. If a Shareholder is to be bound to offer his/her shares for sale to the other Shareholders/the Company upon, for example, death, should life/critical illness insurance be taken out to be paid to the surviving Shareholders/the Company for the purposes of buying out the deceased Shareholder? **Yes** **No**

This insurance ensures that the surviving Shareholders/ the Company can afford to pay (what is usually) the market value for the shares of the deceased. This is done through a cross option between Shareholders. Please note that there are tax considerations here, depending on who pays for the policy, whether it is held on trust and if Company as the other shareholder(s) is/are the recipient.

E. SALE OF THE COMPANY OR ITS BUSINESS OR A FLOTATION OF THE COMPANY

1. Who decides when, and for how much, the Company, or its business, is to be sold or floated? This could be decided by the Shareholders holding a certain percentage of the shares of the Company, or it may require consent from the Founding Shareholders? It could be included in the list of approvals required in section G below.

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2. Who negotiates a sale or float? (A specific individual, or even a group of individuals, such as the Founding Shareholders may be nominated.)

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3. Should the following clauses be included in the shareholders' agreement and articles of association:

3.1 **Drag Along Clause** Yes No

This enables the holders of a requisite percentage of the issued shares (the "Sellers") who wish to sell or float the Company to agree to a sale or a flotation and then to force any dissenting Shareholders to sell or offer their shares on a flotation at the same price per share as will be received by the Sellers. In effect, the dissenting Shareholders are "dragged along" upon a sale or a flotation.

Please specify the % you require

3.2 **Tag Along Clause** Yes No

This enables the holders of any shares to require that, in the event that a sale of a "Controlling Interest" of the Company has been agreed (this is usually 50% or more of the issued voting shares of the Company) then no sale of those shares shall be completed until an offer has been made by the proposed purchaser of such shares, to purchase all of the shares of the Company at the same price per share. In effect, all Shareholders can choose to "tag along".

Please specify the % you require

F. DIVIDEND/RETENTION OF PROFITS POLICY

1. How is the dividend policy to be operated over the next few years? (For example: you may wish to retain all of the profit within the business for the first few years to help fund growth.)

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2. Is a defined proportion of profits to be distributed and a defined proportion of profits retained for use as working capital?

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3. Is there to be a discretionary dividend clause to allow for the payment of dividends only on certain classes of shares at the discretion of the Directors/Shareholders?

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G. RESTRICTED TRANSACTIONS

1. Should certain transactions, the most important transactions, (such as those set out in point 2 below) require the consent of:

- (a) a majority of Shareholders Yes No
- (b) two thirds of Shareholders Yes No
- (c) seventy five percent of Shareholders Yes No
- (d) all Shareholders Yes No
- (e) a certain class of Shareholders, if so, which?..... Yes No

2. Which of the following actions of the Company / Directors are to require Shareholder consent?

- (a) issue of new shares Yes No
- (b) introduction of new Shareholders Yes No
- (c) alterations to share capital Yes No
- (d) purchase of company's own shares Yes No
- (e) change in the nature of the company's business or commencement of a new business by the company Yes No
- (f) expansion into a new geographical area Yes No
- (g) signing of major contracts Yes No
- (h) substantial sale of assets or disposal of business by the company Yes No
- (i) amalgamation or merger Yes No
- (j) formation, acquisition and disposal of subsidiaries Yes No
- (k) charging assets of the company Yes No
- (l) borrowings in excess of limit Yes No
- (m) capital expenditure in excess of limit Yes No
- (n) lending or giving security or financial accommodation Yes No

- (o) appointment and dismissal of directors/employees/agents Yes No
- (p) directors and other employees remuneration Yes No
- (q) acquisition and/or disposal of property Yes No
- (r) factoring and/or assignment of debts Yes No
- (s) alterations to memorandum and articles Yes No
- (t) alterations to company's status as private company Yes No
- (u) winding up Yes No
- (v) distributions by the company Yes No
- (w) legal action (except trade debt recovery) in the name of the company Yes No
- (x) alteration to bank mandate Yes No
- (y) transactions with connected persons Yes No
- (z) Please note that this is not a comprehensive list. Yes No

H. FUNDING PROCEDURE FOR RAISING EQUITY CAPITAL/ DEBT FINANCE

1. How is the Company currently funded?

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2. Are Shareholders to introduce any new funding? Yes No

If yes, will this take the form of equity funding (subscription for shares) or the making of loans/subscriptions for loan stock?

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3. Consider the procedure to be employed to raise further equity finance in the future including Venture Capital Finance (if applicable).

Should existing Shareholders be given the first right of refusal for the introduction of equity finance into the Company?

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Some Shareholders may wish to use their own money to fund the business rather than incurring debt with a third party.

4. Should Shareholders be required to use their best/reasonable endeavours to raise an amount equivalent to their % shareholding in the Company? (For example: if one Shareholder has a 30% share in the Company, he/she will be required to obtain 30% of the funding the Company needs.) This may be considered too onerous and you may simply rely on pre-emption rights on a new issue of shares. **Yes** **No**

5. Can the Board of Directors decide how, when and how much debt finance should be raised or should the consent of a certain percentage of Shareholders be obtained first above a certain level of debt?

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I. RESTRICTIONS

1. Should each Shareholder and/or Director be subject to restrictive covenants prohibiting him/her from carrying on the following activities:

- (a) being interested in a competing business: **Yes** **No**
- (b) soliciting the Company's client's/suppliers: **Yes** **No**
- (c) poaching the Company's staff and other Directors: **Yes** **No**
- (d) using the Company name: **Yes** **No**

Please note, for non-competition covenants to be enforceable they must protect legitimate business interests only, they must also be limited in geographical scope, duration and be confined to the nature of the business in question.

2. If so, for how long and over what area should these restrictions operate? e.g. for 1 year within the following postcodes SK, M, WA.

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J. GUARANTEES

1. Have the existing Shareholders/Directors given any guarantees to secure loans or property belonging to the Company. **Yes** **No**

If so please provide details.

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2. Is responsibility under those guarantees going to be shared in the "Shareholders Proportions"? **Yes** **No**
For example, a Company may have 2 existing Shareholders, one of whom has given a personal guarantee, guaranteeing to pay the Company's rent should the Company fail to do so. Is it intended that all the existing Shareholders will share in the responsibility and liability of the personal guarantee which is equivalent to their % shareholding in the Company? **Yes** **No**

Will the giving of a guarantee require unanimous consent of the Shareholder or a required percentage?

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K. DEADLOCK PROVISIONS

Deadlock provisions are usually only applicable for joint venture arrangements where there are an even number of Directors and/or if the Company is owned on a 50/50 basis (or similar) and are used as a means to resolve fundamental disagreements between the Shareholders.

In the event of there being a deadlock between the Shareholders in relation to any matter (i.e. a majority decision cannot be reached), should this be remedied by:

- (a) having a cooling off period (a few weeks/months in which nothing can happen); **Yes** **No**
- (b) arbitration (alternative to Court resolution); **Yes** **No**
- (c) expert determination of the matter in question; **Yes** **No**
- (d) put/call options over shares (forcing one Shareholder to either sell his shares to the other, or to purchase the other Shareholder's shares from him); **Yes** **No**
- (e) competitive bids for shares; **Yes** **No**
- (f) liquidation / voluntary winding-up of the Company; **Yes** **No**
- (g) If other, please specify:

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L DIRECTOR SERVICE CONTRACT

APPOINTMENT AND DURATION

1. What is the employee's full name and address?

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2. What is the employee's job title?

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3. What is the date of commencement of employment?

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4. Is the employment continuous with a previous employment (e.g. by a group company)? If so, when did the continuous employment commence? Please identify the previous employer.

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5. Is the contract for an indefinite period or for a fixed-term? If it is for a fixed term, please specify the length of the term.

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6. What period of notice should be given by the employer and by the employee?

This should not be less than the statutory minimum which is one week for every year of service up to a maximum of 12 weeks. In more senior roles it is usual to have 3, 6 or occasionally 12 months' notice.

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7. Should a probationary period, which allows for a shorter notice period, be included? If so, how long do you wish the probationary period to be (typically these are 3-6 months but could be longer if required)?

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DUTIES

8. Will the employee be a statutory director of the Company? **Yes** **No**
9. Who will the employee report to?
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10. Does the employee require any specific qualification/registration to carry out their job? If so, what is this, and what is the relevant professional body?
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REMUNERATION AND BENEFITS

11. How much salary will the employee receive? When will this be reviewed?
.....
12. How will the employee be paid (e.g. monthly in arrears on the last day of the month)?
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13. Will a bonus be provided? **Yes** **No**
If so, please provide details
.....
14. Will commission be provided? **Yes** **No**
If so, please provide details
.....
15. Will the employee be offered an opportunity to join an occupational pension scheme, or receive an entitlement to contributions to a personal pension plan? **Yes** **No**
If so, how much will employer and employee contributions be?
.....
16. Is there a contracting out certificate in place (this contracts employees out of the State Second Pension, previously SERPS)? **Yes** **No**
17. Is there a stakeholder pension scheme available? **Yes** **No**

18. Will the employee be offered a company car or a car allowance? Is it a condition of employment or retaining a company car that the employee have a valid driving licence?

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19. If a company car is being provided, who will bear the cost of insuring taxing, servicing and maintaining and repairing the car? Also, who will bear the cost of private and business use of fuel?

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20. Will private medical and/or permanent health insurance be offered? **Yes** **No**

If so, please specify which and provide outline details:

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21. Will death in service benefit be available? **Yes** **No**

If so, please state the value (e.g. 3 times annual salary):

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22. Are there any other benefits?

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PLACES OF WORK AND HOURS

23. Where will the employee usually work?

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24. Will the employee be expected to travel extensively and possibly relocate if required?

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25. What will the employee's normal working hours be?

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- 26. Do you require the employee to opt out of the Working Time Regulations (that is, to agree to work more than 48 hours a week on average)? It may be appropriate to enter into a separate agreement in this regard. **Yes** **No**

HOLIDAYS AND SICKNESS

- 27. When does the Company's holiday year run from and to?
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- 28. How many days' holiday a year should be given? This should not be less than 28 days in total (inclusive of public and bank holidays).
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- 29. Will contractual sick pay be offered in addition to statutory sick pay and, if so, for how long? Please note that there is no obligation to provide contractual sick pay, this is entirely at the Company's discretion.
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- 30. Should the contract include a provision allowing for termination on short notice after a certain length of sickness absence? For example, if the employee is ill for more than 130 days in any period of 12 months, the Company can terminate employment at any time on statutory notice.
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OUTSIDE INTERESTS

- 31. What outside business interests can the employee have (e.g. an interest in any other business or activity which is not competitive with or similar to that of the Company)?
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- 32. Does the employee have any outside interests that you are currently aware of?
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CONFIDENTIAL INFORMATION AND TRADE SECRETS

The definition of confidential information is very important. Any confidential information which is not specified exactly, may not necessarily be protected as a Court could consider the definition too wide to be enforceable. Where a full definition is provided, this gives the Company better prospects of action against the employee if they breach this provision.

33. What does the Company consider constitutes confidential information to which the employee would have access and which would substantially damage the business if disclosed to a third party?

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POST TERMINATION RESTRICTIONS

In order to prevent unfair competition from an employee after their employment ends, it is advisable to have restrictions in the employment contract. In order for such restrictions to be enforceable, the Company must have a legitimate business interest to protect, the restraints must be reasonable in time and area and they must be no wider than necessary to protect the Company's business interest. If this is not the case, the Courts will decide that the restrictions are too wide to be enforceable. A consistent approach should be taken in relation to employees holding similar roles/ seniority.

It is important that these post termination restrictions mirror the restrictions in the Shareholders' Agreement.

34. Would you consider it appropriate to include restrictive covenants in the employee's contract? **Yes** **No**

35. What type of activities are you particularly concerned to protect against:

- Being engaged in any business (in a restricted area) which is in competition with the Company? If so, what restricted area would you propose? **Yes** **No**

If so, what restricted area would you propose?

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.....

- Soliciting business from any client or prospective client of the Company? **Yes** **No**
- Dealing with any client or prospective client of the Company? **Yes** **No**
- Soliciting or employing of other employees? **Yes** **No**

If so, what level or group of employees could damage your business by leaving?

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- Interfering with the supply of goods or services to the Company? **Yes** **No**

PAY IN LIEU OF NOTICE

36. Would you consider, if the contract was terminated, making a payment in lieu of notice (PILON)? If so, a clause can be included in the contract in order to protect post-termination restrictions. Please note that there are tax consequences in including such a clause. **Yes** **No**

Please note:

- Our standard Service Agreement is appropriate for employers that are not companies listed on any recognised investment exchange. Please let us know if there is any likelihood of such listing.
- Our standard Service Agreement is drafted exclusively from the perspective of the employer.
- Please provide copies of any policies or procedures which may be relevant.
- Please note any other issues which we should be aware of.

CONTINUATION PAGE

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