
Fisher Funds Growth KiwiSaver Scheme Trust Deed

Fisher Funds Management Limited (*Manager*)

Trustees Executors Superannuation Limited and
Burton Ross Shipley (*Trustees*)

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Date: 11 JUNE 2007

PARTIES

Fisher Funds Management Limited (*Manager*)

Trustees Executors Superannuation Limited and **Burton Ross Shipley** (*Trustees*)

BACKGROUND

- A The Manager wishes to establish a scheme registered under the KiwiSaver Act 2006 (*the KiwiSaver Act*) to be known as the Fisher Funds Growth KiwiSaver Scheme (*the Scheme*).
- B Trustees Executors Superannuation Limited (*the Corporate Trustee*), being a trustee corporation as defined in the KiwiSaver Act, has agreed to act as a trustee of the Scheme.
- C Burton Ross Shipley (*the Independent Trustee*), being an independent trustee as defined in the KiwiSaver Act, has also agreed to act as a trustee of the Scheme.
- D The Trustees are satisfied that this Trust Deed:
- (i) will comply with section 7 of the Superannuation Schemes Act 1989 (*the Superannuation Act*) as applied by section 119 of the KiwiSaver Act;
 - (ii) will not contain any provision that is contrary to those implied by sections 8 to 10 of the Superannuation Act, as applied by sections 120 and 121 of the KiwiSaver Act; and
 - (iii) will not contain any provision that is contrary to the provisions implied in the Trust Deed under section 126 and Schedule 1 of the KiwiSaver Act;

and will obtain a certificate to that effect from a solicitor under section 134(1)(a)(iii) of the KiwiSaver Act.

BY THIS DEED the parties agree as follows:

1 INTERPRETATION

1.1 Definitions

In this Trust Deed, unless the context otherwise requires:

Account means an account established and maintained by the Manager under clause 5;

Auditor means the person for the time being holding office as auditor of the Scheme;

Business Day means a day on which registered banks are open for business in Auckland and Wellington;

Corporate Trustee means the corporate trustee for the time being of the Scheme;

Financial Year means each period of 12 months ending on 31 March, or such other period ending on such other date as the Trustees may determine from time to time, provided that the last Financial Year shall end on the date as at which the Scheme is wound up;

Income Tax Act means the Income Tax Act 2004 and, as the context requires, the Tax Administration Act 1994;

Independent Trustee means the independent trustee for the time being of the Scheme;

Investment Fund means any investment fund established by the Trustees under clause 12.1;

KiwiSaver Member Tax Credit means the member tax credit provided for in subpart KJ of the Income Tax Act and paid to the Scheme in respect of a Member;

Member means a natural person who has been admitted to membership of the Scheme and who is, or may become, entitled to benefits under the Scheme;

Net Value means the value of the assets of the Scheme (or, if applicable, of an Investment Fund) as calculated under clause 7.1 on a Valuation Day;

Participating Employer means an employer which has entered into a Participation Agreement;

Participation Agreement means an agreement entered into between the Trustees and an employer under clause 9, as amended from time to time;

Register means a register maintained for the Scheme pursuant to section 51 of the Securities Act 1978;



Related Company has the meaning given to that term in section 2(3) of the Companies Act 1993;

Scheme Provider Agreement means the scheme provider agreement applying from time to time with respect to the Scheme under the KiwiSaver Regulations 2006;

Superannuation Scheme means a superannuation scheme registered under the Superannuation Act, or any overseas superannuation scheme, in respect of which transfers to or from the Scheme are permissible;

Tax Credit means a credit against a person's tax liability provided for under subpart HL of the Income Tax Act, or any other similar credit;

Trust Deed means this Trust Deed as amended from time to time;

Trustees means the trustees for the time being of the Scheme, and Trustee means either of them;

Unit means a unit in the Scheme (or, if applicable, an Investment Fund) as referred to in clause 6;

Unit Price means the price for a Unit calculated under clause 6.3; and

Valuation Day means a day on which an Investment Fund is valued under clause 7.

1.2 Terms defined in KiwiSaver Act

Each of the terms *Commissioner*, *Contribution*, *Crown Contribution*, *Employer Contributor*, *Employer's Chosen KiwiSaver Scheme*, *Fee Subsidy*, *KiwiSaver End Payment Date*, *KiwiSaver Scheme*, *KiwiSaver Scheme Rules*, *Member's Accumulation*, *Member's Interest*, *New Zealand Superannuation Qualifying Age*, *Permitted Withdrawal* and *SSCWT Rules* has the meaning given to that term by the KiwiSaver Act, and is capitalised for ease of reference.

1.3 Terms defined in Income Tax Act

Each of the terms *Portfolio Allocation Period*, *Portfolio Calculation Period*, *Portfolio Class Net Income*, *Portfolio Class Net Loss*, *Portfolio Class Taxable Income*, *Portfolio Class Taxable Loss*, *Portfolio Entity Tax Liability*, *Portfolio Investment Entity* or *PIE*, *Portfolio Investor Allocated Income*, *Portfolio Investor Allocated Loss*, *Portfolio Investor Class*, *Portfolio Investor Interest Fraction*, *Portfolio Investor Rate* and *Tax File Number* has the meaning given to that term by section HL 18, HL 20, HL 24 or OB 1 of the Income Tax Act as applicable, and is capitalised for ease of reference.

1.4 **Construction**

In the construction of the Trust Deed, unless the context otherwise requires:

- (a) headings appear as a matter of convenience and shall not affect construction;
- (b) references to clauses are to clauses of the Trust Deed;
- (c) references to money are references to New Zealand currency;
- (d) the singular includes the plural and vice versa;
- (e) references to any statutes, regulations and other statutory instruments include all amendments, re-enactments and replacements thereof;
- (f) references to any deed, agreement or other instrument shall be read as referring to such deed, agreement or other instrument as from time to time modified, supplemented or novated; and
- (g) the word "including" and other similar words do not imply any limitation.

2 **ESTABLISHMENT OF THE SCHEME**

2.1 **Establishment date**

The Scheme is established effective on the date when its registration as a KiwiSaver Scheme takes effect.

2.2 **Principal purpose**

The principal purpose of the Scheme is to provide retirement benefits to natural persons in accordance with the KiwiSaver Act.

2.3 **Contributions and other assets held on trust**

The Trustees will hold all contributions and other assets of the Scheme on trust in accordance with the terms of the Trust Deed.

2.4 **Perpetuities**

If the Scheme ceases to qualify under the provisions of section 19 of the Perpetuities Act 1964, the Trustees may with the Manager's approval take such action as they think fit (including re-establishing the trusts of the Scheme and paying over the assets of the Scheme to a new trustee or trustees) in order to prevent the operation of any rule of law relating to perpetuities which might otherwise invalidate any of the trusts of the Scheme.

3 **ADMISSION OF MEMBERS**

3.1 **Admission**

Natural persons shall be admitted to membership of the Scheme:

- (a) by completing an application for membership of the Scheme (in such form and in such manner as the Manager prescribes or otherwise requires from time to time) and contracting directly with the Manager to become a Member of the Scheme in accordance with section 45 or section 55 of the KiwiSaver Act, as applicable; or
- (b) in accordance with section 48 of the KiwiSaver Act, by reason of the Scheme being an Employer's Chosen KiwiSaver Scheme;

and in each case the Trustees may (or, if required by the KiwiSaver Act, shall) also effect transfers into the Scheme in respect of those persons under subpart 3 of Part 2 of the KiwiSaver Act or otherwise in accordance with the KiwiSaver Act.

3.2 **Deemed acceptances**

On admission to membership of the Scheme pursuant to clause 3.1(b), a Member shall be deemed to have consented to the Trustees and the Manager obtaining, holding, using and disclosing personal information in respect of the Member in the same manner, and to the same extent, as if the Member has been admitted to membership of the Scheme pursuant to clause 3.1(a).

3.3 **Cessation of membership**

A person shall cease to be a Member on the first to occur of the person:

- (a) receiving from the Scheme the Member's Accumulation in accordance with the KiwiSaver Scheme Rules (which are implied in the Trust Deed under section 126 and Schedule 1 of the KiwiSaver Act);
- (b) transferring from the Scheme to another KiwiSaver Scheme in accordance with the requirements of subpart 3 of Part 2 of the KiwiSaver Act, or to a Superannuation Scheme in accordance with the requirements of the KiwiSaver Act; and
- (c) receiving notice from the Manager under rule 4(5)(b) of the KiwiSaver Scheme Rules.

4 **CONTRIBUTIONS**

4.1 **Contributions that must be accepted**

Members and employers shall contribute to the Scheme in accordance with Part 3 of the KiwiSaver Act and the Trustees shall accept:



- (a) Contributions that are payable to the Scheme by or in respect of a Member via the Commissioner under the KiwiSaver Act, unless the Manager has reasonable cause to believe that:
- (i) those Contributions have not been correctly deducted or remitted to the Scheme in terms of Part 3 of the KiwiSaver Act; or
 - (ii) the Commissioner has not provided, with respect to those Contributions, the information required under section 79 of the KiwiSaver Act;
- (b) Crown Contributions and Fee Subsidies paid under sections 225 and 226 of the KiwiSaver Act and the KiwiSaver Member Tax Credit;
- (c) Contributions required to be made to the Scheme by or in respect of a Member, by way of salary or wage deductions, under a Participation Agreement; and
- (d) amounts transferred from another KiwiSaver Scheme in respect of a Member in accordance with subpart 3 of Part 2 of the KiwiSaver Act.

4.2 **KiwiSaver Member Tax Credit**

Any KiwiSaver Member Tax Credit paid to the Scheme in respect of a Member shall vest in the Member immediately after it is paid to the Scheme.

4.3 **Contributions that may be accepted**

The Trustees may accept, but shall not be required to accept, Contributions and monies payable to the Scheme by or in respect of a Member other than those referred to in clause 4.1, and may impose such terms and conditions for such acceptance (including, without limitation, as to the amount and mode of payment) as the Trustees and the Manager may agree from time to time.

4.4 **Tax rebates**

If the Scheme is a PIE and receives a tax rebate for tax credits or tax losses in respect of Members or former Members, the Manager may allocate that tax rebate among the Members or former Members in such manner as the Manager in its complete discretion considers appropriate (subject to the requirements of the Income Tax Act). Any amount allocated to a former Member may be paid to that former Member following receipt of the rebate. Any amount allocated to a Member shall be treated as a Contribution to be invested in the Scheme (or, if applicable, the relevant Investment Fund) on behalf of the Member.

5 ESTABLISHMENT OF ACCOUNTS

5.1 Member Account

The Trustees shall establish and maintain for each Member a Member Account, denominated in Units and comprising Units issued in respect of:

- (a) Contributions to the Scheme from the Member;
- (b) any amount transferred into the Scheme in respect of the Member which the Manager determines to allocate to the Member Account;
- (c) the Crown Contribution, any Fee Subsidy and any KiwiSaver Member Tax Credit paid in respect of the Member;
- (d) any other amount received by or payable to the Scheme which the Manager considers should be credited to the Member Account, including (for the avoidance of doubt) any tax rebates received by the Scheme which the Manager allocates to the Member Account;
- (e) any amount transferred to the Member Account under clause 5.3(e)(ii);
and
- (f) where there are two or more Investment Funds, any amount comprised in the Member Account that is switched from one Investment Fund to another Investment Fund;

less Units cancelled in respect of:

- (g) any amount that the Manager determines to debit from the Member Account with respect to costs, expenses, fees or tax payable in respect of the Member pursuant to this Trust Deed or any Participation Agreement;
- (h) any amount comprised in the Member Account that is transferred out of the Scheme to another KiwiSaver Scheme, or to a Superannuation Scheme, in accordance with the KiwiSaver Act;
- (i) the Permitted Withdrawal of any amount comprised in the Member Account;
- (j) where there are two or more Investment Funds, any amount comprised in the Member Account that is switched from one Investment Fund to another Investment Fund;
- (k) any amount required to be paid to the Commissioner in respect of the Member pursuant to section KJ 5(6) of the Income Tax Act; and



- (l) any other amount comprised in the Member Account which the Manager and the Trustees consider should be debited to the Member Account.

5.2 Employer Accounts

The Trustees may establish and maintain for a Member an Employer Account, denominated in Units and comprising Units issued in respect of:

- (a) contributions made to the Scheme by an employer for the Member's benefit;
- (b) any amount transferred into the Scheme in respect of the Member which the Manager determines to allocate to the Employer Account;
- (c) any other amount received by or payable to the Scheme which the Manager considers should be credited to the Employer Account, including (for the avoidance of doubt) any tax rebates received by the Scheme which the Manager allocates to the Employer Account;
- (d) any amount transferred to the Employer Account under clause 5.3(e)(i) or 5.3(e)(ii); and
- (e) where there are two or more Investment Funds, any amount comprised in the Employer Account that is switched from one Investment Fund to another Investment Fund;

less Units cancelled in respect of:

- (f) any amount that the Manager determines to debit from the Employer Account with respect to costs, expenses, fees or tax payable in respect of the Member pursuant to this Trust Deed or the relevant Participation Agreement;
- (g) any amount comprised in the Employer Account that is forfeited to an Employer Reserve Account when the Member leaves a Participating Employer's employment;
- (h) any amount comprised in the Employer Account that is transferred out of the Scheme to another KiwiSaver Scheme or to a Superannuation Scheme in accordance with the KiwiSaver Act;
- (i) the Permitted Withdrawal of any amount comprised in the Employer Account;
- (j) where there are two or more Investment Funds, any amount comprised in the Employer Account that is switched from one Investment Fund to another Investment Fund; and



- (k) any other amount comprised in the Employer Account which the Manager and the Trustees consider should be debited to the Employer Account.

5.3 Employer Reserve Account

The Trustees may establish and maintain for a Participating Employer an Employer Reserve Account, denominated in Units, comprising Units issued in respect of:

- (a) any amount comprised in an Employer Account that is forfeited to the Employer Reserve Account when a Member leaves the Participating Employer's employment;
- (b) any amount transferred into the Scheme which the Manager determines to allocate to the Employer Reserve Account;
- (c) any other amount received by or payable to the Scheme which the Manager considers should be credited to the Employer Reserve Account, including (for the avoidance of doubt) any tax rebates received by the Scheme which the Manager allocates to the Employer Reserve Account; and
- (d) where there are two or more Investment Funds, any amount comprised in the Employer Reserve Account that is switched from one Investment Fund to another Investment Fund;

less Units cancelled in respect of any amount:

- (e) debited from the Employer Reserve Account at the Participating Employer's direction (subject to the Manager's consent, which shall not be unreasonably withheld) for:
 - (i) meeting all or part of the Participating Employer's Contribution obligations;
 - (ii) increasing the Account balances of all or any of the Members employed by the Participating Employer; or
 - (iii) meeting all or part of the costs, expenses, fees or taxes payable with respect to the Participating Employer's participation in the Scheme or its employees' membership of the Scheme;
- (f) that the Manager determines to debit from the Employer Reserve Account with respect to costs, expenses, fees or tax payable pursuant to this Trust Deed or the relevant Participation Agreement;

- (g) comprised in the Employer Reserve Account that at the Participating Employer's direction is:
- (i) transferred out of the Scheme (in accordance with the KiwiSaver Act) to another KiwiSaver Scheme nominated by the Participating Employer; or
 - (ii) reverted to the Participating Employer (for the avoidance of doubt, a Participation Agreement may provide for the reversion of any assets to a Participating Employer);

subject in each case to the Manager's consent (which shall not be unreasonably withheld), the requirements of the KiwiSaver Act and the terms of the relevant Participation Agreement;

- (h) comprised in the Employer Reserve Account that is switched from one Investment Fund to another Investment Fund (where there are two or more Investment Funds); and
- (i) any other amount comprised in the Employer Reserve Account which the Manager and the Trustees consider should be debited to the Employer Reserve Account.

5.4 **Varying Accounts**

The Manager may from time to time establish other Accounts, establish sub-accounts within Accounts or amalgamate two or more Accounts, in each case on such terms and conditions as the Manager considers appropriate.

6 **UNITISATION**

6.1 **Scheme unitised**

The Trustees shall operate the Scheme (or, if applicable, each Investment Fund) on a unitised basis, with the beneficial interests in the Scheme (or each Investment Fund) divided into Units.

6.2 **Equal but not specific interests**

Units referable to the Scheme (or, if applicable, an Investment Fund):

- (a) shall be of one class and shall confer identical rights and interests;
- (b) shall, for the purpose of the definition of Portfolio Investor Class, confer on each Member an equivalent interest in all of the investments comprised in the Scheme or the relevant Investment Fund corresponding to the Member's Interest (or the relevant portion of the Member's Interest), but shall not confer any interest, to the exclusion of any other Member, in any particular investment comprised in the Scheme or the relevant Investment

Fund (with the result that no Member will be entitled to require the transfer of any investment to the Member);

- (c) shall not (where there are two or more Investment Funds) confer any right or interest in the assets of any other Investment Fund; and
- (d) shall, for the purposes of the expression "unit valuer" in section EX 44B(1) of the Income Tax Act, confer on a Member the right to be treated as if there were assigned to that Member an interest in a proportion of the net returns from the investments comprised in the Scheme or the relevant Investment Fund corresponding to the Member's Interest (or the relevant portion of the Member's Interest).

6.3 Unit Price

Each Unit Price shall be determined on each Valuation Day by dividing the Net Value of the assets of the Scheme (or, if applicable, the relevant Investment Fund) by the number of Units then on issue in respect of the Scheme or that Investment Fund. For the avoidance of doubt, the assets used to determine the Unit Price on a Valuation Day shall not include amounts received for which no Units have been issued, and shall include amounts debited, transferred or withdrawn from Accounts for which Units have not been cancelled, at the time of such determination.

6.4 Unitising Contributions

Subject to clause 6.5, in respect of:

- (a) each Contribution and other amount accepted into the Scheme under clause 4;
- (b) any other amount accepted or payable into the Scheme which the Trustees consider should give rise to the issue of Units;
- (c) each Fee Subsidy; and
- (d) where there are two or more Investment Funds, any amount switched from one Investment Fund to another Investment Fund pursuant to clause 12.4(a);

the Trustees shall, on the next Valuation Day after the receipt or transfer, issue Units in the Scheme (or, if applicable, the relevant Investment Fund or Funds) based upon the amount accepted, payable or transferred (net of any amount that the Manager considers appropriate to deduct for fees, expenses, taxes or other liabilities) and the relevant Unit Price or Unit Prices applying on that Valuation Day.



6.5 Delaying unitisation

Without limiting clause 6.4, the Trustees may delay converting into Units under clause 6.4 of any Contributions accepted into the Scheme in respect of any Member or group of Members until such time as the Trustees are reasonably satisfied that those Contributions do not exceed the amount required to be paid to the Scheme in respect of that Member (or those Members collectively) under the KiwiSaver Act and this Trust Deed and have not otherwise been paid in error.

6.6 Ceasing to issue Units

Without limiting clause 6.4 or any other provision of this Trust Deed (but subject at all times to the provisions of the KiwiSaver Act) the Trustees may determine at any time or times that from a specified date no further Units will be issued pursuant to this Trust Deed (or, if applicable, in relation to a specified Investment Fund or Investment Funds) either:

- (a) for a specified period; or
- (b) until the Scheme (or the relevant Investment Fund or Investment Funds) is or are terminated;

and in that case the Trustees shall not, after the date specified and for the period contemplated by paragraph (a) or paragraph (b) (as applicable), issue any further Units under this Trust Deed or in relation to such Investment Fund or Investment Funds.

6.7 Cancelling Units

In respect of amounts debited, transferred or withdrawn from Accounts pursuant to clause 5, the Trustees shall cancel the number of Units determined by dividing the amount debited by the relevant Unit Price or Unit Prices applying on the next Valuation Day after the Trustees determine that the debit, transfer or withdrawal shall be made (provided that, for amounts debited on account of tax payable, the Trustees may use the Valuation Day on which the Trustees finally determine the amounts of tax payable).

6.8 Delaying redemption of Units

Subject to the requirements of the KiwiSaver Act, the Trustees may defer giving effect to a Permitted Withdrawal or any transfer out of the Scheme, or any switch between Investment Funds pursuant to clause 12.4(a), if (and for so long as) the Trustees (on the advice of the Manager, upon which they may rely subject to clause 16.5) determine that having regard to the realisation of assets required in order to make the withdrawal or transfer or the occurrence or existence of any other circumstance or event relating to the Scheme or generally, earlier withdrawal or transfer would be imprudent or is impracticable.

4

6.9 Uncleared funds

Units issued against uncleared funds may be treated as void if the funds are not subsequently cleared.

6.10 Units issued in error

Subject to the requirements of the KiwiSaver Act and the Scheme Provider Agreement, Units that the Trustees determine have been issued in error may be treated as void unless a Member has altered his or her position in good faith to the Member's detriment in reliance on the validity of those Units (in circumstances where relevant law does not require the Units to be treated as void).

6.11 Part Units etc.

For the purposes of this clause 6, the Trustees may at any time and from time to time:

(a) create and cancel part Units; and

(b) consolidate or divide Units;

in each case in such manner as the Manager and the Trustees may agree from time to time.

7 VALUATIONS**7.1 Net Value**

The Trustees shall calculate the Net Value of the assets of the Scheme (or, if applicable, each Investment Fund) each Business Day, or at such other intervals (not exceeding 30 days) as the Trustees may determine, by deducting the liabilities attributable to the Scheme or that Investment Fund from the market value of its assets.

7.2 Determining market value

For the purpose of determining the Net Value of the Scheme (or, if applicable, an Investment Fund) under clause 7.1 the Trustees shall determine the market value of each asset in the Scheme or that Investment Fund on such basis as they consider to be fair and equitable having regard to generally accepted accounting practice as defined by the Financial Reporting Act 1993 (except to the extent that the Manager and the Trustees agree that the Trustees need not have regard to such practice) and may from time to time engage any valuer or other suitably qualified person for the purpose of fixing the market value of any such asset (but are not under any duty to do so).

7.3 **Determining liabilities**

For the purpose of determining the Net Value of the assets of the Scheme (or, if applicable, an Investment Fund) under clause 7.1 the Trustees shall determine the liabilities attributable to the Scheme or that Investment Fund on such basis as they consider to be fair and equitable having regard to generally accepted accounting practice as defined by the Financial Reporting Act 1993 (except to the extent that the Manager and the Trustees agree that the Trustees need not have regard to such practice) and in doing so may (subject to clause 12.2):

- (a) where there are two or more Investment Funds, apportion the liabilities of the Scheme generally among those Investment Funds on such basis as they consider appropriate; and
- (b) take account of each debt, liability, provision, cost, charge, expense, outgoing, tax obligation or other matter as they consider appropriate;

and, for the avoidance of doubt, may exclude certain liabilities from the liabilities taken into account, such as the amounts representing Members' Interests or expenses charged to Accounts (whether or not those amounts are required to be treated as liabilities for accounting purposes) or, if the Scheme is a PIE, where the Trustees on the recommendation of the Manager consider it appropriate to do so, any Portfolio Entity Tax Liability.

8 **BENEFITS**

8.1 **Calculation of Member's Accumulation**

Benefits shall be payable from the Scheme in accordance with the KiwiSaver Scheme Rules (which are implied in the Trust Deed under section 126 and Schedule 1 of the KiwiSaver Act) and, subject to clause 8.2, when the Trustees are required under the KiwiSaver Scheme Rules to calculate an amount representing a Member's Accumulation the Trustees shall calculate that amount by:

- (a) multiplying the Units attributable to the Accounts maintained for the Member by the Unit Price (or, if relevant, the Unit Prices) applying on the next Valuation Day after the Trustees make a final determination that a benefit should be paid;
- (b) deducting an amount equal to the portion of any Employer Account maintained for the Member under clause 5.2 which is referable to unvested Participating Employer Contributions; and

- (c) deducting any further amount that the Trustees consider appropriate to deduct with respect to costs, expenses, fees or tax payable pursuant to this Trust Deed or the relevant Participation Agreement, except that if the Scheme is a PIE and the Trustees in their complete discretion consider it appropriate not to do so, no deduction shall be made from a Benefit on account of any Portfolio Entity Tax Liability.

8.2 Different method of calculation

Subject to clause 8.3, the Trustees:

- (a) must adopt a method of calculating the amount representing the Member's Accumulation that is different from that set out in clause 8.1 if the Trustees determine that the method does not comply with the KiwiSaver Act; and
- (b) may adopt a method of calculating that amount that is different from that set out in clause 8.1 if the Trustees consider it appropriate to do so.

8.3 Different method of calculation must meet certain requirements

Any different method adopted by the Trustees under clause 8.2 must comply with the KiwiSaver Act and be approved by the Manager (such approval not to be unreasonably withheld).

9 PARTICIPATING EMPLOYERS

9.1 Participation Agreement

If an employer elects to become an Employer Contributor the Manager, the Trustees and the employer may enter into an agreement (which shall form part of the Trust Deed) prescribing conditions on which the employer's employees may become Members of the Scheme, including conditions relating to:

- (a) the Contributions payable by the employer;
- (b) the vesting of those Contributions to Members and the treatment of unvested Contributions; and
- (c) such other matters as the Manager and employer consider appropriate, including the manner (and consequences) of terminating the employer's obligations under the agreement;

and the Manager, the Trustees and the employer may amend that agreement from time to time by instrument in writing.

9.2 Terms of Participation Agreement prevail

Subject to clause 9.3, in the event of any conflict or inconsistency between the terms of a Participation Agreement and the other terms contained in this Trust Deed, the terms of the Participation Agreement shall prevail.

9.3 KiwiSaver Act prevails

Notwithstanding any other term in this Trust Deed, no term in a Participation Agreement may be contrary to the requirements of the KiwiSaver Act and any such term shall be void to the extent that it is contrary.

9.4 Meaning of "salary or wages"

Unless otherwise specified in a Participation Agreement, the term "salary or wages" in a Participation Agreement shall have the meaning given to that term by the KiwiSaver Act.

9.5 Employer contributions

Unless otherwise specified in a Participation Agreement:

- (a) the rate of Contributions payable by the Participating Employer is the rate applying before deducting any specified superannuation contribution withholding tax payable under the SSCWT Rules;
- (b) the Participating Employer's Contributions shall, so far as reasonably practicable, be made at the same time as Contributions are deducted from the salary or wages of the relevant Members; and
- (c) the Participating Employer's obligation to make Contributions in respect of a Member under the Participation Agreement shall cease with effect from the date on which that Member first ceases to be employed by the Participating Employer.

9.6 Vesting of employer contributions

Where a Participation Agreement prescribes a vesting scale and a Member has withdrawn a portion of the Member's Interest that includes an amount representing vested Participating Employer Contributions (as determined in accordance with the KiwiSaver Act), the withdrawal shall not cause any Participating Employer Contributions in respect of the Member to vest earlier (or to a greater extent) than those Contributions would have vested had the withdrawal not occurred.

9.7 Contribution rate requirement

It is acknowledged that pursuant to section 66(b)(ii) of the KiwiSaver Act, if a Contribution from a Participating Employer for a Member's benefit does not vest completely in the Member immediately after that Contribution is made, then the Member may not invoke section 66(b)(iii) of the KiwiSaver Act with respect to that Contribution.

9.8 Execution of Participation Agreements

A Participation Agreement may be executed in any number of counterparts, each of which is to be deemed an original, but all of which taken together shall constitute the same instrument.

9.9 **Participating Employer's indemnity**

By its entry into a Participation Agreement, each Participating Employer shall indemnify the Trustees and the Manager against any costs, expenses or other liabilities of any type whatsoever that are incurred as a result of any breach by the Participating Employer of the KiwiSaver Act, the Trust Deed or the relevant Participation Agreement. This indemnity shall survive termination of the Participation Agreement.

9.10 **Modifying membership terms**

If a Member ceases to be employed by a Participating Employer (without another employer agreeing to assume the obligations of the former employer under the relevant Participation Agreement), or if the Member's employer ceases to participate in the Scheme as an Employer Contributor, then:

- (a) the provisions of any relevant Participation Agreement shall cease to apply to the Member; and
- (b) the terms and conditions prescribed for the Member's continuing membership of the Scheme may be modified, subject to the KiwiSaver Act and this Trust Deed, in such manner and to such extent as the Manager and the Trustees jointly consider appropriate.

10 **MANAGEMENT AND ADMINISTRATION OF THE SCHEME**

10.1 **Appointment of Trustees**

The Trustees are appointed, and accept appointment, as trustees of the Scheme with joint and several responsibility (notwithstanding anything to the contrary contained in this Trust Deed) for administering the trusts governing the Scheme in accordance with the Trust Deed and applicable statutes and regulations including the KiwiSaver Act.

10.2 **Appointment of Manager**

The Manager is appointed, and accepts appointment, as administration manager and investment manager of the Scheme upon and subject to the terms and conditions contained or implied in or prescribed pursuant to this Trust Deed.

10.3 **Delegations to Manager**

The Trustees hereby appoint the Manager as the Trustees' delegate to undertake the following management and administration functions in relation to the Scheme and Members:

- (a) promoting the Scheme to prospective Members and other relevant interested persons;

- (b) admitting Members and Participating Employers;
- (c) establishing and maintaining Accounts and Member records, including a Register which meets the requirements of section 51 of the Securities Act 1978;
- (d) arranging for the receipt and acceptance of Contributions and other monies payable to the Scheme, such Contributions and other monies (if accepted into the Scheme) to be placed in an account in the name of the Trustees or a custodian appointed by the Trustees;
- (e) liaising with Members;
- (f) managing and making all decisions relating to investments including the investment, reinvestment or realisation of any investment and the exercise of any voting rights associated with any investment (provided that if the rules for Portfolio Investment Entities apply to the Scheme under the Income Tax Act then the Manager may not act pursuant to this clause 10.3(f) in a manner which contradicts those rules and shall ensure that the investments of the Scheme are such that the Scheme meets the eligibility requirements for a PIE status);
- (g) keeping complete and accurate records of all investments of the Scheme (and, if applicable, each Investment Fund);
- (h) where there are two or more Investment Funds, effecting switches between Investment Funds pursuant to clause 12.4;
- (i) discharging (to the extent contemplated by clauses 6 to 8) the Trustees' obligations with respect to unitisation, valuations and benefit calculations;
- (j) determining whether benefits are payable and arranging for the payment of benefits to or in respect of Members, and for transfers to other KiwiSaver Schemes and Superannuation Schemes;
- (k) appointing and engaging solicitors and other consultants and advisers on such terms as the Manager determines;
- (l) ensuring compliance by the Scheme with the requirements of the KiwiSaver Act, the Securities Act 1978, the Financial Reporting Act 1993 and other applicable legislation, provided that no prospectus or advertisement under the Securities Act 1978 may be registered or distributed unless it has been approved by the Trustees;



- (m) ensuring compliance by the Scheme with all taxation obligations and procedures to ensure compliance with the tax regime applicable to a PIE;
- (n) maintaining all accounting records for the Scheme;
- (o) operating any mortgage diversion facility established under clause 13.1(c);
- (p) discharging all of the obligations of the scheme provider under the Scheme Provider Agreement;
- (q) determining the terms of all contracts to be entered into in respect of the Scheme, provided that the Manager must ensure that at all times the liability of the Trustees in relation to any contract is limited to the assets of the Scheme or the relevant Investment Fund(s) as applicable; and
- (r) exercising such other powers, authorities, functions and discretions as are incidental to the above functions or may be agreed from time to time in writing between the Trustees and the Manager.

In performing the above functions, the Manager shall act in accordance with the terms of this Trust Deed, any services agreement between the parties and any agreed service level obligations of the Manager to the Trustees.

10.4 **Trustees may act**

Nothing in clause 10.3 precludes the Trustees from taking one or more of the actions referred to in clause 10.5 to the extent that the Trustees reasonably believe that doing so is necessary:

- (a) to prevent the Trustees from being in breach of their obligations under any rule of law or to cause such a breach to cease; or
- (b) to cause the Scheme to be managed and administered in accordance with the KiwiSaver Act or other relevant law.

10.5 **Actions of the Trustees**

The actions referred to in clause 10.4 are:

- (a) the Trustees themselves exercising any of the powers, authorities, functions and discretions referred to in clause 10.3 (and, in the event of any conflict between the manner of exercise of such a power, authority, function or discretion by respectively the Trustees and the Manager, the exercise by the Trustees shall prevail);



- (b) the Trustees requiring the Manager to exercise any of the powers, authorities, functions and discretions referred to in clause 10.3 in accordance with the written instructions of the Trustees (the Manager shall comply with any such written instruction); or
- (c) the Trustees, by notice in writing to the Manager, terminating the authority of the Manager to exercise any one or more of the powers, authorities, functions and discretions referred to in clause 10.3.

10.6 **Manager's duties**

The Manager must:

- (a) exercise its powers, authorities, functions and discretions under clause 10.3, or otherwise vested in the Manager under this Trust Deed, in a proper, timely and efficient manner;
- (b) in the exercise and performance of its functions, powers, and duties as Manager, act with the standard of care, diligence, skill and vigilance that would be expected of a person acting in the same capacity and familiar with, and experienced in, the obligations imposed on the Manager under this Trust Deed, and in particular exercise the care, diligence and skill required of it pursuant to section 8 of the Superannuation Schemes Act 1989 as implied by section 120(1) of the KiwiSaver Act; and
- (c) comply, in the exercise and performance of its functions, powers and duties as Manager, with the Scheme Provider Agreement and the investment policy for the Scheme (and, if applicable, each Investment Fund).

10.7 **Delegation by Manager**

The Manager may, on notice to the Trustees, delegate the performance of all or any of the powers, authorities, functions and discretions exercisable by the Manager under this Trust Deed to its officers and employees or to any other person nominated by the Manager, but the Manager will remain liable to the Trustees for the acts and omissions of any such officer, employee or person whether or not the delegate is acting within the terms of the delegated authority.

10.8 **Information and reports to Trustee**

The Manager shall supply the Trustees with the information and reports agreed from time to time between the Trustees and the Manager.

10.9 **Reimbursement of expenses**

In respect of the Scheme, and subject always to rule 2 of the KiwiSaver Scheme Rules, the Manager and the Trustees are entitled to be reimbursed out of the assets of the Scheme (whether from income or capital or both) for and in respect of:

- (a) all costs, charges and expenses (including legal and valuation fees) incurred in connection with the preparation and registration of any offer document, the acquisition, registration, custody, disposal of or other dealings with investments of the Scheme, including bank charges and stamp duty, and the expenses of any agents or nominated company of the Trustees or the Manager both within and outside New Zealand but excluding any incidental expense which is not an out-of-pocket expense or disbursement incurred (by deduction or otherwise) by the Manager or the Trustees;
- (b) all costs, charges and expenses (including legal and valuation fees) incurred in connection with investigating and negotiating the acquisition for the Scheme of any investment, whether or not it is in fact acquired;
- (c) the fees and expenses of the Auditor in relation to the audit of the Scheme;
- (d) all taxes, duties and imposts charged to or payable by the Trustees or the Manager (whether by a taxing authority or by any other person) in connection with the Scheme or the relevant investments on any account whatsoever (except for any Portfolio Entity Tax Liability of the Scheme, if the Manager at its complete discretion determines that such Portfolio Entity Tax Liability is charged to or recoverable from the relevant Member);
- (e) interest and other expenses relating to borrowing and discounts and acceptance and other fees in respect of bill facilities;
- (f) the costs of postage in respect of all cheques, accounts, notices, quarterly and other reports and other documents posted to all or any Members in accordance with the provisions of this Trust Deed;
- (g) the fees and expenses of any solicitor, barrister, valuer, accountant or other person from time to time engaged by the Manager or the Trustees in the discharge of their respective duties under this Trust Deed;
- (h) all costs of preparing, printing and distributing certificates, accounts, cheques, any offer document relating to the Scheme and any Member communications;
- (i) expenses in connection with the keeping of the Register; and
- (j) any other expenses properly and reasonably incurred by the Corporate Trustee or the Manager in connection with carrying out their respective duties under this Trust Deed;



provided that in any case all such charges must comply with the tax regime applicable to a PIE.

10.10 Allocation of expenses

The Trustees may, with the approval of the Manager, charge any amount in relation to which the Manager or the Trustees are entitled to be reimbursed under clause 16 or clause 10.9 to one or more of a particular Member's Accounts, or to a particular Employer Reserve Account, in such manner as the Trustees and the Manager consider equitable.

11 MANAGER'S AND TRUSTEES' POWERS TO INVEST

11.1 Investment directions by the Manager

Subject to clauses 10.4 and 10.5 and this clause 11, pursuant to clause 10.3 the Manager shall manage the investments of the Scheme (and, if applicable, each Investment Fund) and, as necessary, may direct the Trustees to:

- (a) purchase, acquire, sell, transfer or dispose of investments;
- (b) enter into any commitments or liabilities in respect of investments;
- (c) execute and deliver such contracts or other instruments as may be necessary in respect of the foregoing; and
- (d) take any other action which may be required in respect of investments;

and the Trustees shall from time to time, to the extent of the respective funds in their hands or control, act as directed in writing by the Manager.

11.2 Directions of the Manager

- (a) Subject always to clauses 10.4 and 10.5, the Trustees shall act on any direction by the Manager to invest the assets attributable to the Scheme (or, if applicable, an Investment Fund) in accordance with the investment policy for the Scheme or that Investment Fund.
- (b) Notwithstanding clause 11.1 but subject to clause 12.5, the Trustees shall have the right not to act on any direction of the Manager to invest in, acquire or dispose of any investment if in the opinion of the Trustees, conveyed in writing to the Manager, the proposed investment, acquisition or disposition does not accord with the investment policy or is contrary to the provisions of this Trust Deed. The Trustees shall not be liable to Members or the Manager for so refusing to act.
- (c) Neither the Manager nor the Trustees shall be responsible to any Member for the investment performance of the Scheme (or, if applicable, an Investment Fund) arising as a result of an investment policy.



11.3 Advisers

In relation to the purchase or sale of, or any other dealing with, any investment by the Trustees, the Manager may determine the time and mode of, and the consultants, agents, brokers and professional advisors (if any) for, the purchase, sale or other dealing.

11.4 Dealing with related parties

Subject to the prior approval of the Trustees (which may be given in either specific or general terms and is not to be unreasonably withheld) and provided the relevant transaction is on arm's length terms and is disclosed to the Trustees, the Manager may:

- (a) cause any part of the assets of the Scheme (or, if applicable, held for any of the Investment Funds) to be invested or lodged with the Manager or any Related Company of the Manager;
- (b) sell, purchase or otherwise dispose of or acquire any asset or investment to or from the Manager or any Related Company of the Manager, or in any group investment fund, unit trust or other trust or superannuation scheme registered under the Superannuation Act and managed by the Manager or by such Related Company; and
- (c) enter into any contract, agreement or other arrangement with any Related Company of the Manager to provide management or consultancy services or any other services that the Manager considers desirable;

and no adjustment to the remuneration payable to the Manager under clause 15 is to be made for any fee, brokerage or commission paid to a Related Company of the Manager in compliance with this clause 11.4.

11.5 Investments in Trustees' name

The Manager shall cause investments to be vested in the Trustees or their nominee and to be registered in the name of the Trustees or such nominee, in each case as soon as reasonably practicable after receipt of the necessary documents, and must deliver all certificates or other documents of title for safe custody as directed by the Trustees.

11.6 Bank accounts

A bank account or accounts in the name of the Trustees or their nominee must be opened and maintained for the Scheme or each Investment Fund. All moneys held for the Scheme (or the relevant Investment Fund, if applicable) and coming into the hands of the Manager or the Trustees must be paid to the credit of such bank account. The Trustees shall determine the persons authorised to operate such bank accounts.



11.7 Notice of investments to Trustees

The Manager must notify the Trustees of any transaction required to be entered into by the Trustees in relation to borrowing, the giving of security or the purchase, acquisition, sale or disposition of, or dealing with, the investments. The Trustees may request any additional information which they may reasonably require regarding any such transaction including the obtaining of such valuations or other expert advice as the Trustees deem necessary or desirable.

11.8 Trustees' right to limit liability

Before the Manager undertakes the Trustees' entry into any transaction, security or liability of the Scheme (or, if applicable, an Investment Fund), the Trustees may require that their liability is restricted or limited to their satisfaction to the investments for the time being of the Scheme (or of such Investment Fund).

11.9 Derivative financial instruments

For the avoidance of doubt, the Manager may undertake the Trustees' entry into derivative financial instruments for the purposes of investment or risk management.

12 INVESTMENT FUNDS**12.1 Separate Investment Funds**

The Trustees shall establish separate Investment Funds within the Scheme, designed to enable Members to have their savings invested by reference to particular asset classes or mixes of asset classes, if and when directed to do so by the Manager and on terms and conditions directed by the Manager, unless the Trustees reasonably consider that doing so would cause the Trustees to breach their obligations under any rule of law. The terms and conditions directed by the Manager must include a written investment policy for each Investment Fund. This clause 12.1 shall not be construed so as to prohibit the Manager (subject to clause 23.1) transferring value between Investment Funds to accommodate the Scheme being a single taxpayer.

12.2 Exclusive assets and liabilities

Although the Scheme is intended to be treated as one registered KiwiSaver Scheme for the purposes of the KiwiSaver Act, with the statutory and other obligations applicable to it construed accordingly, if two or more Investment Funds are established pursuant to clause 12.1 then (subject to clauses 23.1(r), (t) and (u)) the assets of each Investment Fund shall be the exclusive property of that Investment Fund, and all liabilities incurred in relation to an Investment Fund shall be the exclusive liabilities of that Investment Fund, and the Trustees and the Manager shall in all respects act so as to give effect to these intentions. Without prejudice to the generality of the foregoing:



- (a) the assets held for an Investment Fund shall not be available to meet the liabilities incurred in relation to any other Investment Fund;
- (b) all investments made with the moneys of an Investment Fund shall be held by the Trustees as the exclusive property of that Investment Fund and for the exclusive benefit of the Members who have an interest in that Investment Fund pursuant to the Trust Deed;
- (c) the Trustees and the Manager shall keep separate records and accounts in respect of each Investment Fund, and shall not permit the property, assets or liabilities of any Investment Fund to become intermingled with those of any other Investment Fund (provided that nothing in this subclause shall prevent the assets of any Investment Fund being lent to, deposited with or invested in another Investment Fund); and
- (d) without limiting the generality of this clause 12.2, the provisions of this Trust Deed relating to the indemnities in favour of the Trustees and the Manager, the fees payable to the Corporate Trustee and the Manager and the reimbursement of the Corporate Trustee and the Manager shall be construed in a manner consistent with this clause where separate Investment Funds have been established, that is to say:
 - (i) any amounts payable to the Trustees or the Manager shall be payable from the Investment Fund or Investment Funds to which the matter giving rise to the amount relates (which may, for the avoidance of doubt, be all of the Investment Funds); and
 - (ii) where the amount payable to the Trustees or the Manager relates to more than one Investment Fund, that amount shall be apportioned between those Investment Funds on such fair and equitable basis as may be determined by the Manager with the approval of the Trustees.

12.3 **Winding up or alteration of Investment Funds**

The Trustees shall close, wind up or alter any Investment Fund as and when directed to do so by the Manager, on terms and conditions directed by the Manager, unless the Trustees reasonably consider that doing so would cause the Trustees to breach their obligations under any rule of law.

12.4 **Member entitled to choose Investment Fund(s)**

A Member shall be entitled to choose the Investment Fund or Investment Funds in which the Member's savings will be invested from time to time. In exercising their choice under this clause 12.4, Members shall comply with all rules prescribed by the Manager from time to time regarding:



- (a) changing their choice of Investment Funds (in relation to either amounts already invested or amounts to be invested in the future);
- (b) the manner in which choices should be communicated; and
- (c) any other matters relating to the choice of Investment Funds by Members.

12.5 **Contrary intention**

- (a) All monies available for investment in an Investment Fund shall be invested in accordance with the investment policy for that Investment Fund.
- (b) The establishment of Investment Funds by the Trustees when directed by the Manager, the choice of a default Investment Fund by an employer and the choice of an Investment Fund or Investment Funds by a Member under clause 12.4 shall each be directions given with respect to the investment of trust funds for the purposes of section 13G of the Trustee Act 1956, and the investment obligations of the Trustees under the Trust Deed shall constitute a contrary intention for the purposes of sections 2(5) and 2(5A) of the Trustee Act 1956.

12.6 **Winding up an Investment Fund**

If an Investment Fund is wound up under clause 12.3, the Manager must notify each Member holding Units in that Investment Fund, specifying the Fund to which the Member will be deemed to have elected to transfer the relevant amount if no choice of replacement Investment Fund is exercised within the period prescribed in the notice. The Manager may not charge any direct or indirect fee to a Member for the wind-up of an Investment Fund.

13 **POWERS OF THE TRUSTEES**

13.1 **General powers**

In addition to any other powers granted under the Trust Deed or by law, the Trustees may:

- (a) subject to the written approval of the Manager (such approval not to be unreasonably withheld), appoint and remove any person (including the Manager or a Related Company of the Manager) as an advisory trustee, agent, auditor, custodian trustee or nominee on terms and conditions and with such powers, duties, discretions, indemnities and remuneration as are agreed by the Trustees and the other person, provided that (without limiting any of their other rights) the Trustees may at any time terminate the Manager's appointment to perform any one or more of those functions if the Manager breaches this Trust Deed and either:

- (i) the breach is not capable of being remedied; or
 - (ii) the breach, if capable of being remedied, is not remedied within 10 Business Days of the Manager receiving written notice from the Trustees requiring it to be remedied;
- (b) borrow or raise money for any of the purposes of the Scheme or an Investment Fund on such terms and conditions as the Trustees think fit and secure the repayment of moneys so borrowed, and interest on those moneys, by mortgage over all or any of the assets of the Scheme or that Investment Fund;
- (c) at the direction of the Manager, establish a mortgage diversion facility in accordance with the KiwiSaver Act, if permitted to do so pursuant to section 229(1) of that Act;
- (d) take such actions as the Trustees reasonably consider to be required in order to pay any refunds required or desirable under sections 81 and 101 of the KiwiSaver Act; and
- (e) do anything the Trustees consider necessary or expedient for the administration of the Scheme.

13.2 **Exercise of Trustees' powers**

Subject to the other provisions of the Trust Deed and to a Court of law deciding otherwise, no decision or exercise of a power by the Trustees will be invalidated on the ground that either Trustee (or any director, officer or agent of the Corporate Trustee) had a direct or personal interest in the result of that decision or in the exercise of that power.

14 **REMUNERATION OF CORPORATE TRUSTEE**

Subject to rule 2 of the KiwiSaver Scheme Rules, the Corporate Trustee will be paid such annual fee, calculated daily and payable monthly in arrears, as the Corporate Trustee and the Manager may agree from time to time. That fee shall be determined and expressed as a percentage of the value of the Scheme's gross assets. The fee may be deducted from the assets of the Scheme or paid by cancelling Units in Accounts. The Corporate Trustee is entitled to receive, in addition to the fee referred to in this clause 14, any goods and services tax or duty or similar tax or duty payable in respect of such fee.



15 REMUNERATION OF MANAGER

15.1 Management fee

Subject to rule 2 of the KiwiSaver Scheme Rules and written approval from the Trustees (which shall not be unreasonably withheld), the Manager may charge for its services with respect to the Scheme such annual or other administration, management, membership, transaction or other fees as the Manager determines from time to time. The method of paying such fees shall be determined by the Manager from time to time and notified to the Trustees in writing. The Manager is entitled to receive, in addition to the fees referred to in this clause 15.1, any goods and services tax or duty or similar tax or duty payable in respect of such fees.

15.2 Alteration or waiver of fees

The Manager may waive part or all of any management fee or decrease any management fee and (subject to rule 2 of the KiwiSaver Scheme Rules) the Manager may:

- (a) increase the management fees payable in respect of the Scheme (or, if applicable, any Investment Fund); or
- (b) provided that any such fee is permitted under this Trust Deed, commence charging a fee which is not currently being charged;

subject in each case to the Trustees' written approval, which shall not be unreasonably withheld, and to providing Members with 60 Business Days' prior notice of each such increase;

16 LIABILITY AND INDEMNITIES

16.1 No personal liability of Trustees and Manager

The Trustees and the Manager, in incurring any debts, liabilities or obligations or in taking or omitting any other action pursuant to this Trust Deed for or in connection with the Scheme or an Investment Fund, are and are deemed to be each acting for and on behalf of the Scheme and not in their own respective capacities, and neither of the Trustees nor the Manager is under any personal liability, nor may resort be had to their private property, for the satisfaction of any obligation or claim relating to the Scheme (and only the assets of the Scheme are available for that purpose).

16.2 Indemnification from Scheme assets

If, contrary to the provisions of clause 16.1, either of the Trustees or the Manager is held personally liable to any other person in respect of any debt, liability or obligation incurred by or on behalf of the Scheme or an Investment Fund or any action taken or omitted in connection with the Scheme or an Investment Fund, then that Trustee or the Manager (as applicable) is entitled to

indemnity and reimbursement out of the assets of the Scheme to the full extent of such liability and the costs of any litigation or other proceedings in which such liability has been determined (including, without limitation, legal fees and disbursements).

16.3 Reimbursement of Corporate Trustee and Manager

The Corporate Trustee and the Manager are each entitled to be reimbursed out of the assets of the Scheme (whether from income or capital or both), and to the extent applicable from particular Investment Funds, for and in respect of all direct and indirect expenses, losses, costs or liabilities incurred by them respectively in or about acting as Corporate Trustee or Manager (as applicable) under this Trust Deed (including, without limitation, any expense, cost or liability which may be incurred by the Corporate Trustee or the Manager (as applicable) in bringing or defending any action or suit in respect of the Scheme).

16.4 Indemnity by Manager

The Trustees shall be indemnified by the Manager from and against any debt, liability or obligation owed by the Trustees to a third party to the extent that such debt, liability or obligation is caused by the failure of the Manager or any director or officer of the Manager to show the degree of care and diligence required by it or that director or officer under clause 10.6 or otherwise under this Trust Deed in circumstances where the protections from liability for the Manager and the Trustees under clauses 16.1 and 16.2 are not available.

16.5 Reliance on Manager by Trustees

Subject to the provisions of the KiwiSaver Act and the Trustee Act 1956, a Trustee will not be responsible for any loss incurred as a result of any act, omission, deceit, neglect, mistake or default of the Manager or any agent of the Manager or for checking any information, document, form or list supplied to it by the Manager or by any agent of the Manager that is reasonably believed by the Trustee to be genuine (notwithstanding that an error in the information, document, form or list is reproduced by the Trustee in any step taken by it).

16.6 Breach of duty

No provision of clauses 16.1 to 16.5 has the effect of exempting the Trustee or the Manager or any director or officer of the Corporate Trustee or of the Manager from, or indemnifying a Trustee or the Manager or any such director or officer against, any liability for breach of trust where it or that director or officer fails to show the degree of care and diligence required of it or that director or officer in that capacity, having regard to the provisions of and the powers, authorities and discretions conferred by this Trust Deed.

16.7 Reliance upon advice

The Trustees and the Manager may each accept and act upon the opinion or advice of or information obtained from barristers or solicitors or other consultants in the employ of the Trustees or the Manager or instructed by the Trustees or the



Manager and upon any statement of, or information obtained from, any bankers, stockbrokers, accountants, valuers or other persons appointed or approved by the Trustees or the Manager and believed by the Trustees or the Manager in good faith to be expert or suitably qualified in relation to the matters upon which they are consulted. Neither of the Trustees nor the Manager is liable for anything done or suffered by any of them in good faith in reliance upon any such opinion, advice, statement or information.

16.8 Reliance upon documents

Whenever pursuant to any provision of this Trust Deed any certificate, notice, instruction, direction or other communication shall be given:

- (a) by the Manager to the Trustees, the Trustees may accept as sufficient evidence thereof a document signed on behalf of the Manager by any one of its directors or by any other person or persons duly authorised by the Manager; and
- (b) by the Trustees to the Manager, the Manager may accept as sufficient evidence thereof a document signed on behalf of the Trustees by any one of the directors of the Corporate Trustee or by any other person or persons duly authorised by the Trustees.

16.9 Manager's discretion and authority

Except as otherwise expressly provided in this Trust Deed, the Manager has absolute and uncontrolled discretion as to the exercise of all the powers, authorities and discretions vested in it by this Trust Deed, whether in relation to the manner or as to the mode of and time for their exercise, subject to the giving of any notice to the Trustees and the approval of or supervision by the Trustees whenever required.

16.10 Trustees' discretion and authority

Except as otherwise expressly provided in this Trust Deed, the Trustees have absolute and uncontrolled discretion as to the exercise of all the powers, authorities and discretions vested in them by this Trust Deed, whether in relation to the manner or as to the mode of and time for their exercise.

16.11 Trustees' limited liability to Members

Notwithstanding anything contained in this Trust Deed, except in cases of fraud or dishonesty or where the Trustee has failed to show the degree of care and diligence required of a trustee having regard to the powers, authorities and discretions conferred on the Trustee by this Trust Deed, the KiwiSaver Act and the Trustee Act 1956, in no event is a Trustee bound to make any payment to Members except out of the assets of the Scheme or to be liable to the Members to any greater extent than the investments vested in or received by the Trustees in accordance with this Trust Deed.



16.12 Reliance upon apparently genuine documents

Neither the Manager nor a Trustee is liable for any action taken or thing suffered by the Manager or that Trustee in reliance upon any document or writing of any type reasonably believed by the Manager or that Trustee to be genuine.

16.13 Attributed tax indemnity

If a Member's Account balances are insufficient to meet any liability for tax payable by the Scheme, the Manager or the Trustees (whether current or deferred) which is:

- (a) attributed under the Income Tax Act to a Member; or
- (b) determined by the Trustees or the Manager to be attributable to a Member;

then the Member shall indemnify the Trustees and the Manager for that shortfall.

17 AMENDMENTS

Subject to the KiwiSaver Act this Trust Deed may at any time be amended by deed executed by the Manager and the Trustees, provided that the Manager and the Trustees may not make any amendment that would result in any provision of paragraphs (a) to (g) of section 84B of the State Sector Act 1988 ceasing to apply to the Scheme.

18 APPOINTMENT AND REMOVAL OF TRUSTEES**18.1 Appointment**

A trustee corporation as defined in the KiwiSaver Act and, while required pursuant to section 116(1)(e) of the KiwiSaver Act (with the intention that a trustee corporation shall otherwise be the sole trustee of the Scheme), an independent natural person shall be the trustees of the Scheme.

18.2 Removal of Trustee

Subject to clause 18.4, the Manager may remove either Trustee from office:

- (a) with immediate effect, by giving the Trustee written notice of such removal, if the Manager reasonably believes that the Scheme will be adversely affected if the Trustee continues to hold office (such notice to specify the grounds on which the Manager has formed this belief); and
- (b) otherwise upon giving the Trustee no fewer than 120 Business Days' written notice of such removal;

and in either case the Manager shall ensure that a replacement trustee is appointed with effect immediately following that Trustee's removal from office.

18.3 Retirement

Subject to clause 18.4, either Trustee may retire at any time upon giving the Manager no fewer than 120 Business Days' written notice of such retirement.

18.4 Restrictions on removal/retirement

Except where an Independent Trustee need not be replaced pursuant to section 116(1)(e) of the KiwiSaver Act, no removal or retirement under clause 18.2 or clause 18.4 will take effect until a new Corporate Trustee or Independent Trustee (as applicable) has been appointed pursuant to clause 18.5 and both the new trustee and any continuing trustee have executed the deed referred to in clause 18.6 and all of the investments of the Scheme have been vested in the new trustee and any continuing trustee.

18.5 New appointment

The power of appointing a new Trustee (in place of a Trustee which has been removed from office or retired) is vested in the Manager.

18.6 Restrictions on new appointment

Any new trustee must forthwith upon appointment execute a deed in such form as the Manager may require whereby the new trustee consents to being appointed as a trustee and undertakes to the Manager and the Members to be bound by all the covenants on the part of the former trustee or trustees under the Trust Deed from the date of such appointment.

18.7 Release of trustee

From the date of execution by a new trustee of a deed in accordance with clause 18.6, the retiring trustee is absolved and released from all such covenants under this Trust Deed (except in respect of prior breach) and the new trustee and any continuing trustee must thereafter exercise all powers and enjoy and exercise all the rights, and are subject to all the duties and obligations, of the trustee or trustees under this Trust Deed in all respects as if such trustee or trustees had been originally named as a party to this Trust Deed.

19 WINDING UP OF THE SCHEME**19.1 Triggering wind-up**

The Trustees shall wind up the Scheme if the Manager resolves in writing that the Scheme is to be wound up, or if the Scheme is required to be wound up under either of sections 168 and 169 of the KiwiSaver Act. If the Manager resolves in writing that the Scheme is to be wound up then the Manager shall, as soon as practicable after passing that resolution, provide a copy of the resolution to the Trustees, and the wind-up shall take effect on the date specified for that purpose in the resolution.

19.2 Procedure for wind-up

In winding up the Scheme, the Trustees shall comply with the provisions of



sections 173 to 176 of the KiwiSaver Act relating to the winding up of a KiwiSaver Scheme.

19.3 **Termination of Participation Agreements**

If the Scheme is wound up then each Participating Employer shall be treated as having terminated that Participating Employer's obligations under the relevant Participation Agreement on the effective wind-up date (and the relevant Account balances shall be dealt with accordingly).

20 **MEMBERS BOUND BY THIS TRUST DEED**

20.1 **Provisions benefit Members**

Except where this Trust Deed expressly provides otherwise or the context otherwise requires, the terms and conditions of this Trust Deed are for the benefit of and binding on each Member (including, for the avoidance of doubt, any Member admitted to membership of the Scheme pursuant to clause 3.1(b)) and all persons claiming through each Member as if the Member had been party to and had executed this Trust Deed.

20.2 **No interference in management**

Subject to the rights created for Members by this Trust Deed, no Member shall be entitled to interfere with or question the exercise or non-exercise by the Manager or the Trustees of any of the rights, powers, authorities or discretions conferred upon them or any of them by this Trust Deed or in respect of all or any of the assets of the Scheme, or to exercise any right, power or privilege in respect of any investment comprised in the Scheme.

21 **LIMITATION OF LIABILITY OF MEMBERS**

21.1 **No personal obligation to indemnify**

Except as expressly provided by this Trust Deed no Member is, by reason solely of being a Member or of the relationship hereby created with the Trustees or with the Manager, under any personal obligation to indemnify the Trustees or the Manager or any creditor of them or of any of them in the event of there being any deficiency in the assets of the Scheme as compared with the liabilities to be met from those assets.

21.2 **Limited recourse to assets of the Scheme**

Subject to clause 16.13, the rights (if any) of the Trustees or the Manager or of any creditor to seek indemnity are limited to having recourse to the assets of the Scheme and do not extend to a Member personally in such person's capacity as a Member.

21.3 **No liability to contribute to any shortfall**

On the winding up of the Scheme, no Member will have any liability to contribute to any shortfall in the assets of the Scheme.



22 NOTICES AND INFORMATION TO MEMBERS

22.1 Notices

- (a) A notice under this Trust Deed, and any other Scheme-related communication intended for a Member, may be given to the Member personally by:
- (i) leaving it at the Member's registered address; or
 - (ii) sending it addressed to the Member at the Member's registered address by ordinary prepaid post, or, if that address is outside New Zealand, by airmail, prepaid post or advertisement; or
 - (iii) subject to the member having given his or her electronic address to the Manager (as contemplated by section 219 of the KiwiSaver Act) or having otherwise consented to accept Scheme-related information in an electronic form, by means of an electronic communication.
- (b) A Member must notify the Manager of any change to the Member's registered or electronic address and the Register shall be altered accordingly. Any notice given to Members by the Manager must be copied to the Trustees by the Manager provided that, where notices are given to Members in substantially the same form but with personalised details in respect of each Member, it shall be sufficient to provide the Trustees with a sample of such a notice.

22.2 Manner of notice

Any notice sent by post will be deemed to have been given at the expiration of 2 Business Days after posting, and in proving service it will be sufficient to prove that the envelope or wrapper containing the notice was properly addressed and posted. A notice sent by email will be deemed to have been received on the day of transmission if a confirmation of transmission or receipt is obtained (and if the date of transmission is not a Business Day, or the transmission is sent after 5 p.m. on a Business Day, then the notice will be deemed to have been given on the next Business Day after the date of confirmation of transmission).

22.3 Signature of notice

The signature to any notice to be given by the Manager or the Trustee may be written or printed or otherwise provided in accordance with the Electronic Transactions Act 2002.

22.4 Calculation of notice periods

Where a given number of days' notice or notice extending over any other period is required to be given, neither the day of giving the notice nor the day upon which the notice will expire shall be reckoned in the number of days or other period.

22.5 **Receipt of notice**

Any notice or document delivered or sent by post or electronic communication to or left at the registered address for service of any Member pursuant to the provisions of this Trust Deed will (notwithstanding that the Member is then deceased and whether or not the Manager has notice of such deceased Member's death) be deemed to have been duly given until some other person is registered in the place of the Member.

23 **TAXATION AND KIWISAVER MEMBER TAX CREDITS**


23.1 **PIE tax compliance**

The Manager, in consultation with the Trustees, may elect that the Scheme be a PIE, or cease to be a PIE, at its complete discretion. The Manager shall have the following additional powers and discretions in respect of the Scheme for so long as the Scheme is a PIE:

- (a) to determine, on such basis as the Manager thinks appropriate at its complete discretion, classes of Members, applying the definition of Portfolio Investor Class in section OB 1 of the Income Tax Act;
- (b) to determine the Portfolio Allocation Period and the Portfolio Calculation Period for the Scheme in accordance with section HL 15 of the Income Tax Act;
- (c) to determine, on such basis as the Manager thinks appropriate at its complete discretion, the assessable income (for tax purposes) of the Scheme for a Portfolio Allocation Period and to allocate (in such manner and on such basis as the Manager considers appropriate at its complete discretion having regard to section EG 3 of the Income Tax Act) such income to each Portfolio Investor Class for that Portfolio Allocation Period, for the purposes of section HL 18(3) of the Income Tax Act;
- (d) to determine, on such basis as the Manager thinks appropriate at its complete discretion, the deductions incurred in deriving the assessable income allocated to a Portfolio Investor Class of Members for a Portfolio Allocation Period for the purposes of section HL 18(4) of the Income Tax Act;
- (e) to determine, on such basis as the Manager thinks appropriate at its complete discretion, the Portfolio Class Net Income or the Portfolio Class Net Loss, as the case may be, for each Portfolio Investor Class for a Portfolio Allocation Period for the purposes of section HL 18 of the Income Tax Act;
- (f) to determine, on such basis as the Manager thinks appropriate at its complete discretion, the Portfolio Class Taxable Income or the Portfolio



Class Taxable Loss, as the case may be, for each Portfolio Investor Class:

- (i) for a Portfolio Allocation Period, for the purposes of section HL 19 of the Income Tax Act; and
 - (ii) for a tax year, for the purposes of section HL 29 of the Income Tax Act;
- (g) to determine each Member's Portfolio Investor Interest Fraction for any period, based on what that Member's proportionate interest in any distribution by the Scheme to Members would be in that period, if such a distribution were to be made;
- (h) to determine, on such basis as the Manager thinks appropriate in its complete discretion, the Scheme's Portfolio Entity Tax Liability or rebate, as the case may be, for the applicable calculation period, for the purposes of section HL 20 of the Income Tax Act;
- (i) to elect (taking into account such factors as the Manager considers relevant at its complete discretion) whether to determine the Scheme's Portfolio Entity Tax Liability pursuant to section HL 21 or section HL 22 or section HL 23 of the Income Tax Act, and to make any elections required to give effect to such determination;
- (j) to retain any amount to which a Member otherwise would be entitled if that amount is required to be paid to the Commissioner of Inland Revenue pursuant to section HL 21(5) of the Income Tax Act;
- (k) to make any other elections or exercise any options as to the method of calculation, allocation, attribution or payment of tax as the Manager thinks fit having regard to the interests of Members generally and the requirements of the Income Tax Act;
- (l) to determine, on such basis as the Manager considers appropriate at its complete discretion, the amounts of any rebates of tax under section KI 1 of the Income Tax Act available to the Scheme by virtue of section HL 20(2) or section HL 26 or section HL 27(11)(b) of the Income Tax Act;
- (m) to determine, on such basis as the Manager considers appropriate at its complete discretion, the amount of any rebate of tax referred to in paragraph (l) that is attributable to a Member and to make available to the Member the benefit of that rebate of tax in such manner as the Manager considers appropriate in its complete discretion;
- (n) to determine, on such basis as the Manager considers appropriate at its complete discretion, the amount of any credits against income tax payable 

by the Scheme that is available to the Scheme by virtue of section HL 27 of the Income Tax Act;

- (o) to determine, on such basis as the Manager considers appropriate at its complete discretion, the amount of any tax credit referred to in section HL 27(1) of the Income Tax Act that is available to be allocated to a Portfolio Allocation Period and allocating (in such manner and on such basis as the Manager considers appropriate at its complete discretion) such tax credit to that Portfolio Allocation Period for the purposes of section HL 27(3) of the Income Tax Act;
- (p) to determine, on such basis as the Manager considers appropriate at its complete discretion, the amount of tax paid or payable by the Scheme that is attributable to a Member;
- (q) to carry out any other tax calculations, allocations or attributions required by the Income Tax Act;
- (r) to adjust a Member's Interests in such manner, as the Manager thinks necessary or desirable at its complete discretion, whether in accordance with section HL 7 of the Income Tax Act or otherwise to the extent permitted by law, at any time (including immediately prior to paying any Benefit or accepting a Switching Request), having regard to the effect of:
 - (i) the Member's Portfolio Investor Rate; and
 - (ii) the Member's Portfolio Investor Allocated Income, Portfolio Investor Allocated Loss and associated Tax Credits as adjusted for any expenses and any other amount required by the Income Tax Act from time to time which the Manager determines it is appropriate to charge to the particular Member,

on the Scheme's Portfolio Entity Tax Liability and the amount of any rebate under section HL 26 or HL 27 of the Income Tax Act;

- (s) to allocate tax rebates received by the Scheme or anticipated to be received by the Scheme to Members in accordance with clause 4.4;
- (t) to elect to offset tax liabilities and refunds in respect of more than one Investment Fund (where there are two or more Investment Funds) or more than one Member, and make such adjustments as the Manager thinks fit at its complete discretion to the extent permitted by the Income Tax Act;
- (u) where there are two or more Investment Funds, to make a payment to one Investment Fund from another in order to compensate for:



- (i) any loss suffered by the relevant Investment Fund in respect of which the other Investment Fund has obtained a benefit as a result of the two Investment Funds not being separate entities for tax purposes; or
- (ii) any benefit which the relevant Investment Fund would have obtained if it was a separate entity for tax purposes;

but which the Investment Fund has not obtained because the two Investment Funds are not separate entities for tax purposes;

- (v) to allocate the costs associated with the Scheme being a PIE between Members (and, where applicable, Investment Funds) on such basis as the Manager (in consultation with the Trustees) thinks appropriate, to the extent practical, at its complete discretion;
- (w) to take all steps that the Manager considers necessary or desirable to ensure that the Scheme is eligible or continues to be eligible as a PIE, or otherwise to comply with the requirements of the Income Tax Act relating to PIEs, including (at the Manager's complete discretion):
 - (i) declining Contributions; or
 - (ii) treating units issued to a Member as void ab initio to the extent to which the Member's Interest exceeds the investor interest size requirement prescribed in section HL 9(1) of the Income Tax Act; or
 - (iii) where there are two or more Investment Funds, switching some or all of a Member's Interest from one Investment Fund to another as if the Manager had received a switching request to that effect from the relevant Member;
- (x) to require that before being accepted into the Scheme a Member provides his or her Tax File Number, Portfolio Investor Rate and any other information required by the Income Tax Act or other applicable legislation, and that at any time a Member must confirm such details on request from the Manager or the Trustees;
- (y) to disclose any information, including issuing any statements and providing any information to Members as required by the Income Tax Act in respect of their tax position in relation to the Scheme, and providing any information (including personal information) to the Commissioner or any other person where the Manager considers it reasonably necessary or desirable to do so in order to administer the Scheme's taxation obligations; and



- (z) to value tax losses of the Scheme or an Investment Fund, for the purpose of valuing Units, in such manner as the Manager thinks fit at its complete discretion having regard to section HL 28 of the Income Tax Act and to the valuation basis used for the Scheme from time to time;

and the Manager may take all other steps and do all things that the Manager thinks necessary or desirable from time to time at its complete discretion to convert the Scheme to or from being a PIE in accordance with this Trust Deed, or to carry out functions relating to the Scheme or an Investment Fund as a result of the Scheme being a PIE.

23.2 **Withholding tax from benefits**

If the Trustees are obliged by law to make, or may make and determines to make, any deduction or withholding on account of taxes from any payment to be made to a Member, the Manager shall make such deduction or withholding and pay such amount to the Commissioner or other taxing authority. On payment of the net amount to the relevant Member, the full amount payable to the relevant Member shall be deemed to have been duly paid and satisfied.

23.3 **KiwiSaver Member Tax Credit**

For the purposes of obtaining and administering KiwiSaver Member Tax Credits payable to the Scheme in respect of Members, the Manager shall have the following additional powers and discretions in respect of the Scheme:

- (a) to make claims for KiwiSaver Member Tax Credits in accordance with section 68C of the Tax Administration Act 1994;
- (b) in the case of a Member with units in two or more Investment Funds, to credit any KiwiSaver Member Tax Credit paid in respect of the Member to the Member's Account in a pro rata basis between the Investment Funds; and
- (c) to require a Member wishing to withdraw from the Scheme any amount arising from a KiwiSaver Member Tax Credit to provide a statutory declaration stating the periods for which the Member has his or her principal place of residence in New Zealand.

24 **AUDITOR**

24.1 **Appointment and remuneration**

A person or firm of chartered accountants selected by the Manager and approved by the Trustees, and otherwise qualified under section 2C of the Securities Act 1978, must be appointed as Auditor of the Scheme. The Manager and the Trustees must agree upon the services to be performed by the Auditor and their scope. The remuneration of the Auditor shall be determined by the Manager on an arm's length basis.

24.2 Removal/retirement

The Auditor may at any time and from time to time be removed by the Manager subject to the approval of the Trustees or, if the Trustees believe it to be in the interests of the Scheme and/or Members, the Trustees may instruct the Manager to remove the Auditor. The Auditor may retire upon giving the Manager 30 days' notice in writing.

24.3 New appointment

Any vacancy in the office of Auditor must be filled by the Manager, subject to the approval of the Trustees, appointing as Auditor a person or firm of chartered accountants qualified under section 2C of the Securities Act 1978.

24.4 Restrictions on Auditor

The Auditor may be the Auditor of the Manager, or of a Trustee, or of any other trust whether of a similar nature to the Scheme or otherwise.

25 PAYMENTS TO MEMBERS**25.1 Method of payment**

Subject to the KiwiSaver Act, any moneys payable by the Trustees to a Member or the Member's personal representative under the provisions of this Trust Deed may be paid by cheque or direct credited to any bank account nominated by the Member or the Member's personal representative.

25.2 Satisfaction of moneys payable

Payment of every cheque, if duly presented and paid, and in respect of direct credits the giving by the Manager of the encoded payment instructions to the paying bank, will be due satisfaction of the moneys payable and will be good discharge to the Trustees and to the Manager.

26 GOVERNING LAW

This Trust Deed shall be interpreted and administered in accordance with New Zealand law.

27 NOTIFICATION TO TRUSTEES

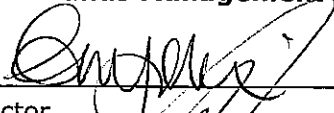
Any notification to the Trustees required under this Trust Deed shall be sufficient if given to the address specified by the Corporate Trustee.

28 **GENERAL**


The parties acknowledge that this Deed may be executed in several counterparts, will be binding on the parties upon each having executed an identical copy and will be treated as having been made upon the execution of it by the last party to execute a copy.

IN WITNESS WHEREOF this deed has been executed the day and year first appearing above.

Fisher Funds Management Limited by



Director



Director

~~**Trustees Executors
Superannuation Limited** by~~

Director

Director



28 **GENERAL**

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Fisher Funds Management Limited by

Director

Director

**Trustees Executors
Superannuation Limited** by

Director

[Signature]
Yogesh Mody

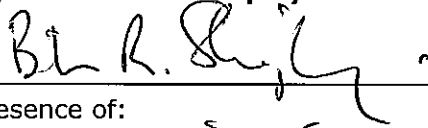
Clynton Neil Hardy

Director

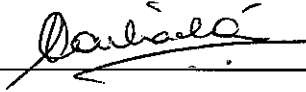


2007/003/2

Signed by **Burton Ross Shipley**



In the presence of:



Name:

Occupation: **Shahazad Contractor
Corporate Business Analyst
Auckland**

Address:

