

# Fisher Funds KiwiSaver Scheme Governing Document

Fisher Funds Management Limited  
(Manager)

Trustees Executors Limited  
(Supervisor)



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## FISHER FUNDS KIWISAVER SCHEME GOVERNING DOCUMENT

Date: 13 October

2016

### PARTIES

**Fisher Funds Management Limited** (*Manager*)

**Trustees Executors Limited** (*Supervisor*)

### BACKGROUND

- A The Fisher Funds KiwiSaver Scheme (*the Scheme*) is a KiwiSaver scheme registered under the KiwiSaver Act 2006 (*the KiwiSaver Act*) which was established by a trust deed dated 11 June 2007.
- B The Scheme is currently governed by a trust deed dated 17 August 2012 (*the Existing Deed*).
- C Fisher Funds Management Limited (*the Manager*) is the manager of the Scheme.
- D Trustees Executors Limited (*the Supervisor*), a corporation licensed as a supervisor under the Financial Markets Supervisors Act 2011 is the trustee of the Scheme.
- E The Manager and the Supervisor wish to amend the Existing Deed by substituting this Governing Document for the Existing Deed in order to comply with the requirements of the FMCA, the KiwiSaver Act and all other relevant legislation, and to make a number of other minor amendments to the Existing Deed as a consequence of the introduction of the FMCA and the amendments to other legislation or for the more efficient operation of the Scheme.

### BY THIS DEED:

In accordance with the power of amendment contained in clause 18 of the Existing Deed, it is declared that on and with effect from the Effective Date, the Existing Deed is amended by substituting the provisions of the Existing Deed with all the provisions of this Governing Document so that, from the Effective Date, the Scheme will be operated, administered, and governed in accordance with the provisions of this Governing Document.



## 1 INTERPRETATION

### 1.1 Definitions

In this Governing Document, unless the context otherwise requires:

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

*Associated Person* has the meaning given to it by the FMCA<sup>1</sup>;

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

*Business Day* means any day other than a Saturday or Sunday, or a public holiday (as defined in the Holidays Act 2003) as observed in Auckland or Wellington;

*Custodian* means a person appointed by the Supervisor to hold the Scheme property under clause 13.3(a) and includes, to the extent the context permits, any sub-custodian appointed by the Custodian to hold such Scheme property under clause 13.3(b);

*Disclosure Document* has the meaning given to it by the FMCA and includes any PDS, Register Entry or Fund Update;

*Effective Date* means, in relation to the Scheme, the date that the Manager elects under clause 19(1)(a) of Schedule 4 to the FMCA to be the date the Scheme is treated as a registered Scheme under FMCA;

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

*FMA* means the Financial Markets Authority, or any successor entity;

*FMCA* means the Financial Markets Conduct Act 2013;

*FMC Regulations* means the Financial Markets Conduct Regulations 2014;

*Fund* means a fund established and maintained by the Manager under clause 12.1;

*Fund Update* has the meaning set out in regulation 5 of the FMC Regulations;

*Governing Document* means this trust deed as amended from time to time;

*Income Tax Act* means the Income Tax Act 2007 and, as the context requires, the Tax Administration Act 1994;

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<sup>1</sup> Section 12(1) of the FMCA.





*KiwiSaver Requirements* means requirements imposed by the following:

- (a) the KiwiSaver Act;
- (b) any legislation enacted under the KiwiSaver Act; and
- (c) the Scheme Provider Agreement in relation to the Scheme.

*Licensed Manager* means a person who holds a licence under the FMCA to act as a manager of a managed investment scheme;

*Licensed Supervisor* means a person who holds a licence to act as a supervisor of a managed investment scheme under the Financial Markets Supervisors Act 2011;

*Manager* means Fisher Funds Management Limited or such other person who is appointed as the manager for the time being of the Scheme in accordance with clause 19;

*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;

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

*Net Value* means in respect of a Fund in the Scheme, the aggregate net value of the assets of the Fund calculated in accordance with clause 7.2.

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

*Participation Agreement* means an agreement entered into in accordance with clause 0 as amended from time to time;

*PDS* means the product disclosure statement or PDS, as defined by the FMCA;

*Qualified Auditor* has the meaning given to it by the FMCA<sup>2</sup>;

*Register* means the register of Members maintained for the Scheme pursuant to the FMCA;

*Register Entry* has the meaning given to it by the FMCA<sup>3</sup>;

*Regulated Offer* has the meaning given to it by the FMCA<sup>4</sup>;

*Related Party* has the meaning given to it by the FMCA<sup>5</sup>;

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<sup>2</sup> Section 461 of the FMCA.

<sup>3</sup> Section 6 of the FMCA.

<sup>4</sup> Section 6 of the FMCA.



*Related Party Benefit* has the meaning given to it by the FMCA<sup>6</sup>;

*Relevant Law* means, as appropriate, all laws applicable to the Manager (including compliance with the terms of its manager licence from the FMA), the Supervisor, the Scheme or a Fund at applicable points in time and which may include, without limitation, the FMCA, the FMC Regulations, the KiwiSaver Requirements, and any frameworks or methodologies issued by the FMA under such legislation;

*Retirement Scheme* means a KiwiSaver scheme, superannuation scheme or workplace savings scheme (each as defined in the FMCA), a superannuation scheme registered under the Superannuation Schemes Act 1989 or any overseas superannuation scheme, in respect of which transfers to or from the Scheme are permissible under Relevant Law<sup>7</sup>;

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

*SIPO* has the meaning given to it by the FMC Regulations<sup>8</sup>;

*Special Resolution* has the meaning given to it in relation to a KiwiSaver scheme by the FMCA<sup>9</sup>;

*Supervisor* means Trustees Executors Limited or such other person who is appointed as the Supervisor for the time being of the Scheme and, where the context requires or allows, this term includes any Custodian;

*Tax or Taxation* means all kinds of taxes, deductions, duties and charges imposed by a government or quasi-government authority, together with interest and penalties (including, but not limited to, any tax liability paid or payable by the Supervisor or the Manager on behalf of or in respect of a Member under the Income Tax Act);

*Unit* means a unit in a 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 a Fund is valued under clause 7, being each Business Day or at such other intervals (not exceeding 30 days) as the Manager may determine.

## 1.2 **Terms defined in KiwiSaver Act**

Each of the terms *Commissioner*, *Contribution*, *Crown Contribution*, *Employer's Chosen KiwiSaver Scheme*, *Instrument of Appointment*, *KiwiSaver End Payment Date*, *KiwiSaver Scheme*, *KiwiSaver Scheme Rules*, *Member's Accumulation*,

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<sup>5</sup> Section 172(2) of the FMCA.

<sup>6</sup> Section 172(1) of the FMCA.

<sup>7</sup> Section 6 of the FMCA.

<sup>8</sup> Regulation 5 of the FMC Regulations.

<sup>9</sup> Section 6 of the FMCA.



*Member's Interest*, and *Permitted Withdrawal* 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 *Attribution Period*, *Investor Class*, *Investor Interest*, *Notified Investor Rate*, *Portfolio Investment Entity* or *PIE*, *Prescribed Investor Rate* and *Tax File Number* has the meaning given to that term by section YA 1 of the Income Tax Act and is capitalised for ease of reference.

### 1.4 **Implied terms under the KiwiSaver Act or the FMCA**

The terms of the KiwiSaver Scheme Rules and the provisions implied into this Governing Document under Relevant Law will apply for so long as they are implied in this Governing Document under Relevant Law despite anything to the contrary in this Governing Document, and any provision in this Governing Document that is contrary to any such implied term will be void to the extent that it is contrary.

### 1.5 **Construction**

In the construction of this Governing Document, 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 this Governing Document;
- (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 and, when the context requires, any regulations made under them;
- (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.

### 1.6 **Footnotes**

Footnotes used in this Governing Document do not form part of this Governing Document, are a guide only and, where they refer to legislative provisions, they are not intended to incorporate those provisions in this Governing Document or affect the interpretation of this Governing Document. However, often they will refer to the legislative provisions which have prompted the inclusion of the reference in this Governing Document to comply with a particular Act or legislation generally. The footnotes refer to legislative provisions in force as at the date of this Governing Document, and they will not necessarily be updated to reflect any changes in legislation.



### 1.7 **Frameworks or methodologies**

Where any frameworks or methodologies are specified in notices issued by the FMA under the FMCA, which would be applicable to a Fund and are inconsistent with this deed, this deed shall be deemed to be modified to the extent necessary to be consistent with such frameworks or methodologies in respect of that Fund.

## 2 **CONSTITUTION OF THE SCHEME**

### 2.1 **Continuation of Scheme**

The Scheme is continued as a KiwiSaver Scheme, on the basis set out in this Governing Document, with effect from the Effective Date.

### 2.2 **Purpose**

The purpose of the Scheme is to provide retirement benefits directly to individuals in accordance with the FMCA and the KiwiSaver Act<sup>10</sup>.

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

Subject to clause 13.3, the Supervisor will continue holding all Contributions to and other assets of the Scheme on trust in accordance with the terms of this Governing Document and Relevant Law<sup>11</sup>.

### 2.4 **Name**

The Scheme and each of the Funds shall be known by such name or names as the Manager shall decide from time to time.

### 2.5 **Perpetuities**

If the Scheme ceases to qualify under the provisions of section 19 of the Perpetuities Act 1964, the Manager may take (and may require the Supervisor to take) such action as the Manager thinks fit (including re-establishing the trusts of the Scheme and paying over the assets of the Scheme to a new Supervisor) 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) in accordance with section 52 of the KiwiSaver Act, in respect of any period during which the Scheme is a default KiwiSaver Scheme for the purposes of the KiwiSaver Act;
- (b) 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

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<sup>10</sup> Section 128(1)(b) of the FMCA.

<sup>11</sup> Sections 152(1)(c), 156 and 157 of the FMCA.



of the Scheme in accordance with section 45 or section 55 of the KiwiSaver Act, as applicable; or

- (c) in accordance with section 48 of the KiwiSaver Act, by reason of the Scheme being an Employer's Chosen KiwiSaver Scheme;

provided that only persons who meet the New Zealand criteria set out in sections 128(2) and (3) of the FMCA shall be admitted to membership of the Scheme,<sup>12</sup> and in each case the Manager 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(a) or clause 3.1(c), a Member shall be deemed to have consented to the Supervisor 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(b).

### 3.3 **Cessation of membership**

Without limiting any other provision of this Governing Document or Relevant Law, 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 this Governing Document under section 116 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 another Retirement 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.

### 3.4 **Offer of Units**

The Manager must not make a Regulated Offer of Units or membership of the Scheme unless:

- (a) The Scheme is registered under the FMCA;
- (b) A PDS has been prepared and lodged on the Disclose Register in respect of the Scheme;
- (c) All of the information that the Register Entry is required to contain under the FMCA has been lodged on the Disclose Register with respect to the Scheme and each Fund.

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<sup>12</sup> Section 128(1)(d), (2) and (3) of the FMCA.



### 3.5 **Disclosure Documents**

- (a) Each Disclosure Document must comply with Relevant Law at the time and, subject to clause 3.5(c), otherwise be in a form provided to the Supervisor in advance of lodgement or supply, as the case may be.
- (b) The Manager must use reasonable commercial endeavours to ensure that the Disclosure Documents for the Scheme and each Fund at all times comply with Relevant Law.
- (c) The Manager shall provide to the Supervisor, unless agreed otherwise with reasonable notice, drafts of all proposed Disclosure Documents (other than Fund Updates, drafts of which will be provided to the Supervisor on request) in respect of the Scheme and each Fund so as to allow the Supervisor to review and provide comments on the draft (which the Supervisor will do in a timely manner or, if a reasonable timeframe for response has otherwise been agreed between the Manager and the Supervisor, within that timeframe).

## 4 **CONTRIBUTIONS<sup>13</sup>**

### 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 Manager 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) Member Tax Credits and any other Crown Contributions;
- (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 or Retirement Scheme in respect of a Member in accordance with subpart 3 of Part 2 of the KiwiSaver Act.

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<sup>13</sup> Section 135(1)(c) of the FMCA.



#### 4.2 **Member Tax Credits**

Any 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 Manager 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, including amounts transferred from another Retirement Scheme in respect of the Member. Subject to the KiwiSaver Act the Manager may impose such terms and conditions for such acceptance (including, without limitation, as to the amount and mode of payment) as the Manager determines.

#### 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 relevant Fund on behalf of the Member.

#### 4.5 **Manager's duty with respect to Contributions accepted**

Without limiting clause 10.5, all money received by the Manager (or an agent of the Manager) in respect of Contributions that are accepted into the Scheme:

- (a) shall be paid by the Manager into a separate bank account maintained for the Scheme or the relevant Fund in the name of the Supervisor (or of a Custodian) in accordance with Relevant Law<sup>14</sup>; and
- (b) shall be subject to the trusts governing the Scheme that are set out in this Governing Document.

### 5 **ESTABLISHMENT OF ACCOUNTS**

#### 5.1 **Member Account**

The Manager 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) Crown Contributions paid in respect of the Member;

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<sup>14</sup> Section 87 of the FMCA and Regulation 49 of the FMC Regulations.



- (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) any amount comprised in the Member Account that is switched from one Fund to another 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 Governing Document 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 Retirement Scheme, in accordance with Relevant Law;
- (i) the Permitted Withdrawal of any amount comprised in the Member Account;
- (j) any amount comprised in the Member Account that is switched from one Fund to another Fund;
- (k) any amount required to be paid to the Commissioner in respect of the Member pursuant to section MK 8 of the Income Tax Act; and
- (l) any other amount comprised in the Member Account which the Manager considers should be debited to the Member Account.

## 5.2 **Employer Accounts**

The Manager 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) any amount comprised in the Employer Account that is switched from one Fund to another 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 Governing Document 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 Retirement Scheme in accordance with Relevant Law;
- (i) the Permitted Withdrawal of any amount comprised in the Employer Account;
- (j) any amount comprised in the Employer Account that is switched from one Fund to another Fund; and
- (k) any other amount comprised in the Employer Account which the Manager considers should be debited to the Employer Account.

### 5.3 **Employer Reserve Account**

The Manager 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 rebate received by the Scheme which the Manager allocates to the Employer Reserve Account; and
- (d) any amount comprised in the Employer Reserve Account that is switched from one Fund to another 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 Governing Document 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 Relevant Law) to another KiwiSaver Scheme or a Retirement 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);
- (h) subject in each case to the prior written consent of the FMA<sup>15</sup> (for so long as such consent is required by any Relevant Law), the Manager's consent (which shall not be unreasonably withheld), the requirements of Relevant Law and the terms of the relevant Participation Agreement; comprised in the Employer Reserve Account that is switched from one Fund to another Fund; and
- (i) any other amount comprised in the Employer Reserve Account which the Manager considers 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 Manager shall operate the Scheme (and each Fund) on a unitised basis, with the beneficial interests in each Fund divided into Units.

#### 6.2 **Equal but not specific interests**

Units referable to a Fund shall:

- (a) be of one class and shall confer identical rights and interests;

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<sup>15</sup> Section 171 of the FMCA



- (b) confer on each Member an equivalent interest in all of the investments comprised in the relevant 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 Fund (with the result that no Member will be entitled to require the transfer of any investment to the Member); and
- (c) not confer any right or interest in the assets of any other Fund.

### 6.3 Unit Price

Each Unit Price shall be determined on each Valuation Day by dividing the Net Value of the relevant Fund by the number of Units then on issue in respect of that Fund, and rounding the product in the manner, and to the number of decimal places, as the Manager may decide in its absolute discretion. For the avoidance of doubt, the Net Value used to determine the Unit Price on a Valuation Day shall not include amounts received for which Units are to be but have not been issued, and shall include amounts debited, transferred or withdrawn from Accounts for which Units are to be but 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 Manager considers should give rise to the issue of Units; and
- (c) any amount switched from one Fund to another Fund pursuant to clause 12.5(a);

the Manager shall issue Units in the relevant Fund or Funds:

- (d) by the next Valuation Day after the acceptance of a valid Contribution, valid application, or valid request to switch (as determined by the Manager); or
- (e) if (and to the extent that) the Manager determines that it is not reasonably practicable for it to issue such Units by the next Valuation Day and advises the Supervisor accordingly, by what the Manager considers to be the next reasonably practicable Valuation Day.

Units issued under this clause 6.4 shall be 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 for the purpose of issuing Units on the day when the Units are issued.



### 6.5 **Delaying unitisation**

Without limiting clause 6.4, the Manager may delay converting into Units under clause 6.4 any Contributions accepted into the Scheme in respect of any Member or group of Members until such time as the Manager is 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 Governing Document 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 Governing Document (but subject at all times to Relevant Law) the Manager, after consulting with the Supervisor, may determine at any time or times that from a specified date no further Units will be issued pursuant to this Governing Document (or, if applicable, in relation to a specified Fund or Funds) either:

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

and in that case the Manager 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 Governing Document or in relation to such Fund or Funds.

### 6.7 **Cancelling Units**

In respect of amounts debited, transferred or withdrawn from Accounts pursuant to clause 5, the Manager shall cancel the number of Units determined by dividing the amount debited by the relevant Unit Price or Unit Prices applying on a day no later than the next Valuation Day after the Manager determines that the debit, transfer or withdrawal shall be made (provided that, for amounts debited on account of Tax payable, the Manager may use the Valuation Day on which the Manager finally determines the amounts of Tax payable).

### 6.8 **Delaying redemption of Units**

Subject to the requirements of Relevant Law but notwithstanding the foregoing provisions, the Manager may (after consulting with the Supervisor) defer giving effect to a Permitted Withdrawal or any transfer out of the Scheme, or any switch between Funds pursuant to clause 12.5(a), if (and for so long as) it determines 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, is impracticable or would otherwise be prejudicial to the interests of the Members of the Scheme (or in the relevant Fund or Funds) as a whole.

### 6.9 **Uncleared funds**

Units issued against uncleared funds may be cancelled if the funds are not subsequently cleared.



#### 6.10 **Units issued in error**

Subject to Relevant Law and the Scheme Provider Agreement, Units that the Manager determines 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**

For the purposes of this clause 6, the Manager 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 (acting reasonably) determines.

### 7 **VALUATIONS<sup>16</sup>**

#### 7.1 **Market Value**

The market value of each asset of or to be acquired by a Fund shall be such of the following as the Manager determines from time to time:

- (a) the latest sale price, or such other market convention, of the asset on any recognised exchange at the time of valuation;
- (b) the amount certified by an independent or suitably qualified person to be the fair value of the asset; and
- (c) the amount agreed upon between the Manager and the Supervisor on the basis of the agreed methodology as the fair value of the asset after taking account of the most recent material sales, valuations, and other information that the Manager and the Supervisor consider to be appropriate.

#### 7.2 **Calculating the Net Value**

On each Valuation Day in respect of each Fund the Manager shall calculate the Net Value of the assets of each relevant Fund by adding the aggregate of the market value of the assets of that Fund on the relevant Valuation Day and the amount of any income that is due to be received by the Fund and deducting the aggregate of all Liabilities of that Fund determined on an accruals basis up to the time of the day (if any) determined by the Manager on the relevant Valuation Day. The amount determined by the Manager must be calculated in accordance with generally accepted accounting practice where it is appropriate and reasonable to do so.

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<sup>16</sup> Section 135(1)(c) of the FMCA.



**7.3 Agreed methodology**

The Net Value shall be calculated by using a methodology determined by the Manager (after consulting with the Supervisor) from time to time, details of which are set out in a separate document lodged on the Disclose Register.

**7.4 Manager's decision is final**

Subject to clause 24.1, the Net Value ascertained by the Manager is final and binding on all persons including without limitation the Manager, the Supervisor and any Member.

**8 BENEFITS<sup>17</sup>**

**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 this Governing Document under section 126 and Schedule 1 of the KiwiSaver Act) and, subject to clause 8.2, when the Manager is required under the KiwiSaver Scheme Rules to calculate an amount representing a Member's Accumulation the Manager shall calculate that amount by:

- (a) multiplying the Units held in each Fund attributable to the Accounts maintained for the Member by the relevant Unit Price (or, if relevant, the Unit Prices) applying on a day no later than the next Valuation Day (except in relation to transfers from the Scheme, which shall be completed within the timeframes set out in the KiwiSaver Act and the Instrument of Appointment) after the Manager makes 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 Manager considers appropriate to deduct with respect to costs, expenses, fees or Tax payable pursuant to this Governing Document or the relevant Participation Agreement, except that if the Scheme is a PIE and the Manager in its complete discretion considers it appropriate not to do so, no deduction shall be made from a benefit on account of any income Tax liability.

**8.2 Different method of calculation**

Subject to clause 8.3, the Manager:

- (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 Manager determines 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 Manager considers it appropriate to do so.

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<sup>17</sup> Section 135(1)(e) of the FMCA.



**8.3 Different method of calculation must meet certain requirements**

Any different method adopted by the Manager under clause 8.2 must comply with the KiwiSaver Act and must not be adopted until after the Manager has consulted with the Supervisor.

**8.4 Partial withdrawals after KiwiSaver End Payment Date**

Where a Member has reached the KiwiSaver End Payment Date the Manager may:

- (a) allow the Member to withdraw an amount or amounts less than the Member's Accumulation in one or more lump sums and/or at regular intervals; and
- (b) subject to the KiwiSaver Act, determine from time to time the minimum amount for each such withdrawal, the permitted manner and frequency of such withdrawals and the minimum balance that must remain in the Scheme and/or any Fund after each such withdrawal.

**8.5 Transferability of entitlements**

- (a) The Manager shall effect transfers to or from the Scheme or between Funds in accordance with the requirements of Relevant Law.<sup>18</sup>
- (b) Subject to the KiwiSaver Act, the Manager may impose such conditions and restrictions (including, without limitation, as to fees, amounts and frequency) as it considers appropriate from time to time on withdrawals from a Member's Accumulation of any amounts transferred to the Scheme from an overseas Retirement Scheme.

**8.6 Member's Accumulation not assignable**

Except as expressly provided by Relevant Law, a Member's Accumulation and any future benefits that will or may become payable to a Member under the Scheme must not be assigned or charged or passed to any other person whether by way of security, operation of law, or any other means.<sup>19</sup>

**8.7 Withdrawals of Member's Accumulation**

Withdrawals of all or part of a Member's Accumulation must only be made in accordance with the KiwiSaver Act and the KiwiSaver Scheme Rules.<sup>20</sup>

**8.8 Scheme mergers**

The Manager may merge a Scheme with another Scheme by transferring the assets in the Scheme to the new Scheme in return for the issuance of Units in the new Scheme equal to the value of the Members' Units in the Scheme (as adjusted in accordance with this Governing Document), in accordance with any Relevant Law.<sup>21</sup> The transfer of a substantial number of Members with Member consent or without

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<sup>18</sup> Subpart 3 of Part 2 of the KiwiSaver Act, the KiwiSaver Scheme Rules and sections 178 to 182 of the FMCA.

<sup>19</sup> Section 127(1) of the KiwiSaver Act and 135(1)(a) of the FMCA.

<sup>20</sup> Section 128(1)(c) of the FMCA.

<sup>21</sup> Sections 179 to 181 of the FMCA. See clause 28 of Schedule 4 of the FMCA regarding the amalgamation of schemes.



Member consent (but with the consent of the FMA) in accordance with the FMCA is authorised for this purpose.<sup>22</sup>

## **9 PARTICIPATING EMPLOYERS**

### **9.1 Participation Agreement**

The Manager and an employer may enter into an agreement (which shall form part of this Governing Document) prescribing certain conditions on which the employer's employees may become Members of the Scheme, including conditions relating to:

- (a) any Contributions payable by the employer in addition to those required under subpart 3A of Part 3 of the KiwiSaver Act;
- (b) the vesting of those additional 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 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 Governing Document, the terms of the Participation Agreement shall prevail.

### **9.3 KiwiSaver Act prevails**

Notwithstanding any other term in this Governing Document, 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 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.

### **9.5 Participating Employer's indemnity**

By its entry into a Participation Agreement, each Participating Employer shall indemnify the Supervisor 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, this Governing Document or the

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<sup>22</sup> Sections 179 to 182 of the FMCA





Participation Agreement. This indemnity shall survive termination of the Participation Agreement.

#### 9.6 **Participation Agreements before Effective Date**

Any Participation Agreement entered into before the Effective Date shall continue unaffected by the amendments to this Governing Document prescribed with effect from the Effective Date.

### 10 **SUPERVISION AND MANAGEMENT OF THE SCHEME**

#### 10.1 **Continued appointment of the Supervisor**

The Supervisor continues as the trustee of the Scheme and is the supervisor of the Scheme for the purposes of the FMCA. The Supervisor is responsible for the functions for which responsibility is attributed to it as supervisor of the Scheme under the FMCA.<sup>23</sup>

#### 10.2 **Exercise of Supervisor's powers and performance of duties**

The Supervisor, in exercising its powers and performing its duties as the supervisor of the Scheme must comply with the duties under the FMCA<sup>24</sup>.

#### 10.3 **No delegation or agency to the Manager**

Except as may be permitted by the KiwiSaver Act and agreed in writing by the Manager and the Supervisor, no powers of the Supervisor are delegated to the Manager and nor is the Manager appointed (or permitted to represent itself) as the agent of the Supervisor.

#### 10.4 **Investments in Supervisor's name**

The Manager must deliver all certificates or other documents of title for safe custody as directed by the Supervisor.

#### 10.5 **Bank accounts**

A bank account or accounts in the name of the Supervisor or a Custodian must be opened and maintained for the Scheme and/or each Fund. All moneys held for the Scheme (or the relevant Fund) and coming into the hands of the Manager or the Supervisor must be paid to the credit of such bank account in accordance with Relevant Law<sup>25</sup>. The Supervisor shall determine the persons authorised to operate such bank accounts.

#### 10.6 **Continued Appointment of the Manager**

The Manager continues to act as the manager of the Scheme for the purposes of Relevant Law and is responsible for performing the functions for which responsibility is attributed to it as manager of the Scheme under Relevant Law.<sup>26</sup>

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<sup>23</sup> Section 152 of the FMCA.

<sup>24</sup> Sections 153 to 155 and 160 of the FMCA.

<sup>25</sup> Section 87 of the FMCA and Regulation 49 of the FMC Regulations.

<sup>26</sup> Section 142 of the FMCA.



## 10.7 **Manager's functions and duties**

The Manager, in exercising its functions as the manager of the Scheme, must comply with the general duties applicable to it under the FMCA and in exercising any powers or performing any duties as manager, comply with the relevant professional standard of care under the FMCA<sup>27</sup>.

Without limiting the generality of the foregoing (or the Manager's powers of management under this Governing Document and all Relevant Law) the Manager shall perform each of the following specific duties in relation to the Scheme:

- (a) establishing and maintaining the Register, and maintaining records for all Accounts, in accordance with the requirements of the FMCA and this Governing Document;<sup>28</sup>
- (b) arranging for the receipt and acceptance of Contributions and other monies payable to the Scheme;
- (c) providing Members with information, notices and disclosures required to be given to them under the FMCA<sup>29</sup> (provided that the Manager shall provide the Supervisor with copies of communications sent to Members considered by the Manager (acting reasonably) to be material to the Scheme as a whole or the overall terms of the offer);
- (d) 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 10.7(d) 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 PIE status);
- (e) effecting switches between Funds pursuant to clause 12.5;
- (f) discharging all functions and duties with respect to unitisation, valuations and benefit calculations;
- (g) subject to the requirements of Relevant Law, determining whether benefits are payable and arranging for the payment of benefits (or, where applicable, refunds) to or in respect of Members, and for transfers to other KiwiSaver Schemes and Retirement Schemes;
- (h) appointing and engaging solicitors and other consultants and advisers, investment managers, and administration managers on such terms as the Manager determines, and the Auditor, subject to the terms in clause 25;

<sup>27</sup> Sections 133 and 142 of the FMCA.

<sup>28</sup> Subpart 4 of Part 4 of the FMCA.

<sup>29</sup> Sections 96, 97 and 100 of the FMCA and Regulations 56, 62 and 65 of the FMC Regulations.



- (i) reporting to the Supervisor if the Manager has reasonable grounds to believe that it may have contravened or is likely to contravene any issuer obligations in a material respect<sup>30</sup>;
- (j) ensuring compliance by the Scheme with the requirements of any Relevant Law;
- (k) doing all things necessary or desirable to ensure compliance by the Scheme with all Taxation obligations and procedures and (while the Scheme is a PIE) to ensure compliance with the Tax regime applicable to a PIE;
- (l) giving and receiving all notices and other information in accordance with Relevant Law;
- (m) maintaining all accounting records for the Scheme and allowing for inspection of those records to the extent required by Relevant Law<sup>31</sup>;
- (n) discharging all of the obligations of the scheme provider under the Scheme Provider Agreement and (if applicable) the Instrument of Appointment;
- (o) 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 (to the extent possible having regard to Relevant Law) the liability of the Supervisor in relation to any contract is limited to the assets of the Scheme or the relevant Fund(s) as applicable;
- (p) arranging for the preparation, audit and lodgement of the financial statements for the Scheme and each Fund, and the preparation of the Scheme's annual reports in accordance with the requirements of Relevant Law; and<sup>32</sup>
- (q) making available to the Supervisor or to the Custodian or the Auditor the whole of the records of the Manager kept pursuant or in relation to this Governing Document whether kept at the Manager's registered office or elsewhere;
- (r) without limiting sections 147 to 151 of the FMCA, giving the Supervisor or the Custodian or the Auditor such oral or written information and such reports and certificates as may be agreed from time to time between the Manager and the Supervisor or as required by Relevant Law or requested by the Supervisor under Relevant Law in order for the Supervisor to perform its duties under the FMCA (such agreement shall not be unreasonably withheld);
- (s) at the request of the Supervisor, giving the Supervisor or the Custodian or the Auditor such oral or written information as may be required with respect to matters relating to the Manager as the manager of the Scheme provided that

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<sup>30</sup> Section 149 of the FMCA.

<sup>31</sup> Section 459 of the FMCA.

<sup>32</sup> Sections 461A, 461D and 461H of the FMCA, and Regulations 62 and 63 of the FMC Regulations.



the Supervisor shall only request such information in the following circumstances:

- (i) after consultation with the Manager; and
- (ii) if the Supervisor reasonably believes that the Manager is unable or is likely to become unable to carry out its obligations under this Governing Document and the Supervisor certifies its belief and the reasons for such request in writing to the Manager;
- (t) providing to the Supervisor on request such information or access to employees or board members of, and (where practical) service providers to, the Manager as the Supervisor reasonably requires;
- (u) notifying the Supervisor if it becomes aware of any issue or circumstance which a reasonable person would believe or anticipate may have a material adverse effect on the interests of Investors or the Manager's licence under the FMCA; and
- (v) exercising all such other powers, authorities, functions, duties and discretions as are incidental to the above.

In performing the above functions and duties, the Manager shall act in accordance with the terms of this Governing Document and Relevant Law.

#### 10.8 Unit pricing errors

- (a) Where there is a unit pricing error, the Manager has the power to alter a Member's Accumulation to the extent reasonably practicable in the circumstances to address partly or entirely the impact of any unit pricing error<sup>33</sup> provided such alteration does not adversely affect the relevant Member's Accumulation or the position of other Members, as compared with the position such Member or Members would have been in had the unit pricing error not occurred.
- (b) The Manager must report to the Supervisor in relation to any material error in the calculation of a Unit Price or material non-compliance with any methodology for pricing Units in a Fund set out in this Governing Document or notices issued by the FMA, and must correct such error or non-compliance and take prescribed steps to the extent required by Relevant Law.<sup>34</sup>
- (c) If, under Relevant Law, a reimbursement and compensation is payable to a Member or a former Member, the Manager must comply with all its obligations under those requirements except that the Manager may, in consultation with the Supervisor, choose not to pay any reimbursement or compensation to a Member or a former Member for a dollar amount less than \$20 or such other amount as the Manager and the Supervisor may agree from time to time.

<sup>33</sup> Section 168(2) of the FMCA.

<sup>34</sup> Section 168 of the FMCA and Regulation 99 of the FMC Regulations.



#### 10.9 **Register to be maintained**

The Manager shall keep and maintain or cause to be kept and maintained in New Zealand in respect of the Scheme an up-to-date register of Members in the Scheme. Such register shall:

- (a) be kept in the manner;
- (b) contain the content;
- (c) be audited; and
- (d) be available for inspection;

as required by the FMCA.<sup>35</sup>

The Supervisor and the Manager shall be entitled to treat the Register as being correct if it reasonably believes that the Register has been adequately maintained.

#### 10.10 **Exercise of Manager's powers and performance of duties**

The Manager acknowledges that in exercising its powers and performing its duties as manager of the Scheme it must comply at all times with its duties under the FMCA.<sup>36</sup>

#### 10.11 **Delegation by Manager**

The Manager may delegate the performance of all or any of the powers, authorities, functions, duties and discretions exercisable by the Manager under Relevant Law or this Governing Document to its officers and employees or (on notice to the Supervisor) to any other person nominated by the Manager including any Associated Person of the Manager, but the Manager will remain liable 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. Any delegation by the Manager must be in writing.

#### 10.12 **Manager may appoint investment managers and administration managers**

The Manager may appoint in respect of the Scheme:

- (a) one or more administration managers (including any Associated Person of the Manager) to assist with the administration and management of the Scheme;
- (b) one or more investment managers (including any Associated Person of the Manager) to manage the Scheme's property;
- (c) any other experts for the provision of services relevant to the Scheme;

and (subject to clause 11.4 in relation to Related Party Benefits) agree with such party the fees that may be charged and the extent to which expenses will be reimbursed.<sup>37</sup>

<sup>35</sup> Sections 215 to 223 of the FMCA and FMC Regulations 109 and 110.

<sup>36</sup> Sections 143 to 151 of the FMCA.



### 10.13 Reimbursement of expenses of the Scheme

All costs, expenses, fees and premiums payable by or to the Supervisor or the Manager in relation to the management and administration of the Scheme and all Tax payable in connection with the Scheme or the relevant investments, and which are to be paid out of the assets of the Scheme may be charged to a particular Member's Account or Accounts, or to a particular Employer Reserve Account, in such manner as the Manager considers fair and equitable. Where those amounts payable from the assets of the Scheme relates to more than one Fund, that amount shall be apportioned between those Funds on such fair and equitable basis as the Manager determines.

## 11 MANAGER'S POWERS TO INVEST

### 11.1 Investment directions by the Manager

Subject to this clause 11 and to compliance with the Scheme's SIPO which covers the relevant Fund, the Manager shall manage the investments of the Scheme and each Fund and may in order to perform its function of managing Scheme investments and property the Manager may direct the Supervisor, or a Custodian on behalf of the Supervisor, in writing as it sees fit from time to time to:

- (a) purchase, acquire, sell, transfer or dispose of investments and property;
- (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 Supervisor shall (and, when a Custodian has been appointed, procure that the Custodian shall) from time to time, to the extent of the respective funds in its hands or control, do all things necessary on its part to act as directed in writing by the Manager.

### 11.2 Supervisor's limited duty to refuse to act on wrongful direction

- (a) The Supervisor must refuse to act (and must direct any Custodian to refuse to act) on a direction of the Manager in the circumstances where such a refusal is required by the FMCA<sup>37</sup> and the Supervisor (and the Custodian) shall not be liable to Members or the Manager for so refusing to act (or for directing any Custodian to refuse to act) on any such direction by the Manager.
- (b) If the Supervisor refuses pursuant to clause 11.2(a) to act on a direction from the Manager (or directs any Custodian to refuse to act), the Supervisor

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<sup>37</sup> Sections 135(1)(f), 146 and 172 to 175 of the FMCA.

<sup>38</sup> Section 160 of the FMCA.



must notify the Manager and the FMA in writing of that fact and the Supervisor's reasons for the refusal or direction<sup>39</sup>.

### 11.3 **Advisers**

In relation to the purchase or sale of, or any other dealing with, any investment for the Scheme, 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. The Manager may agree to pay out of the assets of the Scheme all reasonable expenses of such advisers.

### 11.4 **Related Party Benefits**

- (a) The Manager must not enter into a transaction that provides for a Related Party Benefit to be given except as permitted by the FMCA.<sup>40</sup>
- (b) The Manager must give prior written notice to the Supervisor in respect of any transaction which provides for a Related Party Benefit.
- (c) Neither the Manager nor any such Related Party shall be liable to account to the Supervisor or any Member for any profit arising from any such transaction that gives a Related Party Benefit and that the Manager is permitted to enter into under the FMCA.
- (d) A failure to comply with clause 11.4(a) does not affect the validity of a transaction (subject to any Court order to the contrary).<sup>41</sup>

### 11.5 **Notice of investments to the Supervisor**

The Manager must notify the Supervisor of any transaction required to be entered into by the Supervisor in relation to borrowing and the giving of security over investments or any other assets, rights or property comprised in or relating to the Scheme.

### 11.6 **Supervisor's right to limit liability**

Before its entry into any transaction, security or liability of the Scheme or a Fund the Supervisor may require that its liability is restricted or limited (to its satisfaction) to the investments for the time being of the Scheme or such Fund.

### 11.7 **Derivative financial instruments**

For the avoidance of doubt, the Supervisor may at the direction of the Manager enter into derivative financial instruments for the purposes of investment or risk management.

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<sup>39</sup> Section 160 of the FMCA.

<sup>40</sup> Sections 172 to 175 of the FMCA.

<sup>41</sup> Section 173(6) of the FMCA.



## 12 ESTABLISHMENT OF FUNDS

### 12.1 Separate Funds

- (a) The Manager shall establish and maintain separate Funds within the Scheme, designed to enable Members to have their Member's Accumulation invested by reference to particular asset classes or mixes of asset classes, as and when and on such terms and conditions as the Manager determines provided such terms and conditions are not otherwise inconsistent with this Governing Document and any Relevant Law. Those terms and conditions must include a written SIPO that is developed in consultation with the Supervisor for the Scheme, which covers each Fund and complies with the requirements of Relevant Law,<sup>42</sup> which SIPO may be altered by the Manager time to time with written notice to the Supervisor and subject to the requirements of the FMCA<sup>43</sup>, and all moneys available for investment in a Fund shall be invested in accordance with the SIPO for the Scheme which covers that Fund. This clause 12.1(a) is subject to clauses 12.1(b) to (d).
- (b) The Manager shall provide a copy of the proposed SIPO, or any alteration to that SIPO, to the Supervisor and must lodge the SIPO or alteration (as applicable) with the Registrar of Financial Service Providers to the extent required by the FMCA.<sup>44</sup>
- (c) This clause 12.1 shall not be construed so as to prohibit the Manager (subject to clause 24.1) transferring value between Funds to accommodate the Scheme being a single taxpayer.
- (d) The Manager must report to the Supervisor any contraventions of any limits under a SIPO to the extent required by Relevant Law.<sup>45</sup>
- (e) Subject to clause 16.7, neither the Manager nor the Supervisor shall be responsible to any Member for the investment performance of the Scheme or a Fund arising as a result of the Scheme or a Fund being invested in accordance with the SIPO for the Scheme.

### 12.2 Existing funds

As at the Effective Date, the following Funds have been established:

- (a) Fisher Funds KiwiSaver Conservative Fund; and
- (b) Fisher Funds KiwiSaver Growth Fund.

### 12.3 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

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<sup>42</sup> Section 164 of the FMCA.

<sup>43</sup> Section 164 of the FMCA.

<sup>44</sup> Sections 165 and 166 of the FMCA.

<sup>45</sup> Regulations 94 to 96 of the FMC Regulations.





applicable to it construed accordingly, subject to clause 24.1, the assets of each Fund shall be the exclusive property of that Fund, all liabilities incurred in relation to a Fund shall be the exclusive liabilities of that Fund 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 a Fund shall not be available to meet the liabilities incurred in relation to any other Fund;
- (b) all investments made with the moneys of a Fund shall be held by or on behalf of the Supervisor as the exclusive property of that Fund and for the exclusive benefit of the Members who have an interest in that Fund pursuant to this Governing Document;
- (c) the Manager shall keep separate records and accounts in respect of each Fund, and shall not permit the property, assets or liabilities of any Fund to become intermingled with those of any other Fund (provided that nothing in this subclause shall prevent the assets of any Fund being lent to, deposited with or invested in another Fund); and
- (d) without limiting the generality of this clause 12.3, the provisions of this Governing Document relating to the indemnities in favour of the Supervisor and the Manager, and the fees payable to and the reimbursement of the Supervisor and the Manager, shall be construed in a manner consistent with this clause, that is to say:
  - (i) any amounts payable to the Supervisor or the Manager shall be payable from the Fund or Funds to which the matter giving rise to the amount relates (which may, for the avoidance of doubt, be all of the Funds); and
  - (ii) where the amount payable to the Supervisor or the Manager relates to more than one Fund, that amount shall be apportioned between those Funds on such fair and equitable basis as the Manager determines.

#### 12.4 **Winding up or alteration of Funds**

The Manager may close, wind up or alter any Fund as and when and on such terms and conditions as the Manager determines, subject to providing prior written notice to the Supervisor.

#### 12.5 **Member entitled to choose Fund(s)**

A Member shall be entitled to choose the Fund or Funds in which their Member's Accumulation will be invested from time to time. In exercising their choice under this clause 12.5, Members shall comply with all rules prescribed by the Manager from time to time regarding:

- (a) changing their choice of 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 Funds by Members.

#### 12.6 **Effect of Fund choice**

The choice of a default Fund by an employer and the choice of a Fund or Funds by a Member under clause 12.5 shall, to the extent that the Supervisor has any power of investment under this Governing Document, 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 Supervisor under this Governing Document shall constitute a contrary intention for the purposes of sections 2(5) and 2(5A) of the Trustee Act 1956. However, no direction by an employer or a Member in terms of this clause 12.6 shall exempt the Manager from its responsibilities under the FMCA.<sup>46</sup>

#### 12.7 **Winding up a Fund**

If a Fund is wound up under clause 12.4, the Manager must notify each Member holding Units in that Fund, specifying the Fund to which the Member will be deemed to have elected to transfer the relevant amount if no choice of replacement 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 a Fund.

### 13 **POWERS OF THE SUPERVISOR**

#### 13.1 **General powers**

The Supervisor in exercising its functions as the trustee and supervisor of the Scheme, must comply with the general duties under the FMCA, and in exercising its powers and performing its duties as supervisor, comply with the professional standard of care under the FMCA<sup>47</sup>. In addition to any other powers granted under this Governing Document or by Relevant Law, but subject to the FMCA and to the limitations set out in clause 13.3, the Supervisor may:

- (a) appoint and remove any person (including the Manager or an Associated Person of the Manager) as an advisory trustee or agent on such terms and conditions and with such powers, duties, discretions, indemnities and remuneration as are agreed by the Supervisor and the other person (provided that where the appointee is not the Manager or an Associated Person of the Manager the Supervisor shall give the Manager reasonable prior written notice of the appointment and all relevant terms); and
- (b) do anything the Supervisor, acting reasonably, considers necessary to enable it to discharge its statutory duties in relation to the Scheme.

#### 13.2 **Exercise of Supervisor's powers**

Subject to the other provisions of this Governing Document, Relevant Law and to a Court of law deciding otherwise, no decision or exercise of a power by the

<sup>46</sup> Section 144 of the FMCA.

<sup>47</sup> Section 152 to 155 of the FMCA.



Supervisor will be invalidated on the ground that the Supervisor (or any director, officer or agent of the Supervisor) had a direct or personal interest in the result of that decision or in the exercise of that power.

### 13.3 **Appointment of Custodians**

- (a) The Supervisor may, from time to time (having consulted with the Manager), appoint, in writing, any one or more persons (other than the Manager or an Associated Person of the Manager) to be Custodians in which any of the investments or property of the Scheme are to be vested. The Custodian must meet the external custodianship requirements for such person under the FMCA<sup>48</sup>. The Supervisor shall be jointly and severally liable with the Custodian for the performance by the Custodian of the functions (and subject to the same duties and restrictions) imposed on it pursuant to this clause 13.3(a), the FMCA with respect to the Scheme.
- (b) If authorised in writing by the Supervisor, subject to the Supervisor giving the Manager prior written notice, a Custodian appointed under clause 13.3(a) may itself appoint one or more sub-custodian (other than the Manager or an Associated Person of the Manager) in which any of the investments or property of the Scheme are to be vested. Any sub-custodian appointed under this clause 13.3(b) must meet the requirements for such a person under the FMCA<sup>49</sup>. The Supervisor and the Custodian which appointed that sub-custodian shall be jointly and severally liable with the sub-custodian for the performance by the sub-custodian of all the functions (and subject to the same duties and restrictions) imposed on it pursuant to this clause 13.3(b) and the FMCA with respect to the Scheme.
- (c) Where the Supervisor appoints a Custodian, the Supervisor shall take all reasonable steps to ensure that the custodial functions for the Scheme are performed by the Custodian in the same manner and subject to the same duties and restrictions as if the Supervisor were performing the custodial functions itself and in a manner which complies with all of the obligations relating to holding the Assets as supervisor or custodian expressed or implied in this Governing Document and Relevant Law.
- (d) The Supervisor may agree with the Custodian or sub-custodian appointed pursuant to this clause 13.3, the fees that may be charged and the extent to which expenses will be reimbursed.

### 13.4 **Investment records**

- (a) The Supervisor or Custodian must keep, or ensure that there are kept, complete, accurate and separate records of all investments constituting each of the Funds in accordance with the applicable requirements of Relevant Law.
- (b) The Supervisor or Custodian must keep the records required by clause 13.4(a), or ensure that they are kept, in a manner that enables those records to be conveniently inspected and used by the Manager and the Supervisor or its agents and conveniently and properly audited and reviewed without charge at any time on any Business Day and otherwise in accordance with the applicable requirements of Relevant Law.

<sup>48</sup> Sections 127(1)(f) and 156 of the FMCA.

<sup>49</sup> Section 156 of the FMCA.



- (c) The Manager is entitled to assume that the Supervisor's or Custodian's records of investments are complete and accurate and may rely upon them accordingly.

#### 14 **REMUNERATION OF SUPERVISOR<sup>50</sup>**

Subject to rule 2 of the KiwiSaver Scheme Rules, the Supervisor will be paid such annual fee, calculated daily and payable monthly in arrears, as the Supervisor 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 Supervisor is entitled to receive, in addition to the fee referred to in this clause 14, any goods and services Tax or similar Tax or duty payable in respect of such fee.

#### 15 **REMUNERATION OF MANAGER**

##### 15.1 **Management fee<sup>51</sup>**

Subject to rule 2 of the KiwiSaver Scheme Rules and the provisions of this Governing Document, 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 and notifies to the Supervisor in writing from time to time. The method of paying such fees shall be determined by the Manager from time to time and notified to the Supervisor 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 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 fee or decrease any fee and (subject to rule 2 of the KiwiSaver Scheme Rules and the KiwiSaver Act) the Manager may:

- (a) increase a fee payable in respect of the Scheme (or any Fund, either generally or by any particular Member or Members); or
- (b) provided that any such fee is permitted under this Governing Document, commence charging a fee which is not currently being charged;

subject in each case to notifying the Supervisor and the FMA<sup>52</sup> in writing and to providing Members to whom the increased or new fee will or might apply with 60 Business Days' prior notice.

<sup>50</sup> Section 135(1)(f) of the FMCA.

<sup>51</sup> Section 135(1)(f) of the FMCA.

<sup>52</sup> Section 117 KSA.



## 16 LIABILITY AND INDEMNITIES<sup>53</sup>

### 16.1 No personal liability of Supervisor and Manager

Subject to clause 16.7, the Supervisor and the Manager, in incurring any debts, liabilities or obligations or in taking or omitting any other action pursuant to this Governing Document for or in connection with the Scheme or an 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 the Supervisor 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

Subject to the indemnity limitations under the FMCA<sup>54</sup> and clause 16.7, if, contrary to the provisions of clause 16.1, either the Supervisor 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 a Fund or any action taken or omitted in connection with the Scheme or a Fund, then the Supervisor 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 Power to indemnify investment managers and administration managers

The Manager may agree:

- (a) to limit the liability (in connection with its services in respect of the Scheme) of; and/or
- (b) to indemnify and reimburse out of the Scheme's property,

any investment manager or administration manager appointed in respect of the Scheme, to the fullest extent permitted by the FMCA, in respect of any debt, liability or obligation incurred by or on behalf of the investment manager or administration manager in respect of the Scheme or any action taken or omitted to be taken in connection with the Scheme (including, without limitation, legal fees and disbursements).<sup>55</sup>

### 16.4 Power to indemnify Custodians

The Supervisor may agree:

- (a) to limit the liability (in connection with its services in respect of the Scheme), of; and/or
- (b) to indemnify and reimburse out of the Scheme's property,

<sup>53</sup> Section 135(1)(f) and 136(2) of the FMCA.

<sup>54</sup> Sections 135(1)(f) and 136(1)(b) of the FMCA.

<sup>55</sup> Sections 135(1)(f) and 136(1)(b) of the FMCA.



any Custodian appointed in respect of the Scheme, to the fullest extent permitted by the FMCA, in respect of any debt, liability or obligation incurred by or on behalf of the Custodian in respect of the Scheme or any action taken or omitted to be taken in connection with the Scheme (including without limitation, legal fees and disbursements).<sup>56</sup>

#### **16.5 Reimbursement of Supervisor and Manager**

Subject to the indemnity limitations under the FMCA,<sup>57</sup> and clause 16.7, the Supervisor and the Manager are each entitled to be reimbursed out of the assets of the relevant Fund (whether from income or capital or both), and to the extent applicable from particular Funds, for and in respect of all direct and indirect expenses, losses, costs or liabilities incurred by them respectively in or about acting as Supervisor or Manager (as applicable) under this Governing Document (including, without limitation, any expense, cost or liability which may be incurred by the Supervisor or the Manager (as applicable) in bringing or defending any action or suit in respect of the Scheme).

#### **16.6 Reliance by Manager or Supervisor**

Subject to Relevant Law, neither the Supervisor nor the Manager is or will be responsible for any loss incurred as a result of any act, omission, deceit, neglect, mistake or default of the other party or any agent of the other party or for checking any information, document, form or list supplied to it by the other party or by any agent of the other party that is reasonably believed by it to be genuine (notwithstanding that an error in the information, document, form or list is reproduced by it in any step taken by it).

#### **16.7 Indemnity limitations**

No provision of clauses 16.1 to 16.6 has the effect of exempting the Supervisor or the Manager or any director, officer or employee of the Supervisor or of the Manager from, and no provision of this Governing Document has the effect of indemnifying the Supervisor or the Manager or any such director, officer or employee against, any liability to the extent that doing so would be void under Relevant Law.

#### **16.8 Reliance upon advice**

The Supervisor 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 Supervisor or the Manager or instructed by the Supervisor 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 Supervisor or the Manager and believed by the Supervisor or the Manager in good faith to be expert or suitably qualified in relation to the matters upon which they are consulted. Neither the Supervisor nor the Manager is liable for anything done or suffered by either of them in good faith in reliance upon any such opinion, advice, statement or information.

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<sup>56</sup> Sections 135(1)(f) and 136(1)(b) of the FMCA.

<sup>57</sup> Sections 135(1)(f) and 136(1)(b) of the FMCA.



Without limiting clause 16.8, the Supervisor and/or the Manager may also engage an expert in accordance with the requirements of the FMCA.<sup>58</sup>

#### **16.9 Reliance upon documents**

Whenever pursuant to any provision of this Governing Document any certificate, notice, instruction, direction or other communication is given:

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

#### **16.10 Manager's discretion and authority**

Except as otherwise expressly provided in this Governing Document or required by law, the Manager has absolute and uncontrolled discretion as to the exercise of all the powers, authorities and discretions vested in it by this Governing Document, whether in relation to the manner or as to the mode of and time for their exercise, subject to supervision by the Supervisor (and, where expressly required, giving notice to or obtaining the approval of the Supervisor) and provided the Manager shall not have failed to comply with the requirements of the FMCA the Manager shall not be responsible for any loss, costs, damages, expenses or inconvenience that may result from the exercise or non-exercise of its powers. The Manager shall have no liability for any loss suffered by a Member as a result of any action taken or adjustment made pursuant to clause 24.1.

#### **16.11 Supervisor's discretion and authority**

Except as otherwise expressly provided in this Governing Document or required by Relevant Law, the Supervisor has absolute and uncontrolled discretion as to the exercise of all the powers, authorities and discretions vested in it by this Governing Document, whether in relation to the manner or as to the mode of and time for their exercise.

#### **16.12 Supervisor's limited liability to Members**

Notwithstanding anything contained in this Governing Document, but subject to the indemnity limitations under the FMCA<sup>59</sup>, in no event is the Supervisor 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 Supervisor in accordance with this Governing Document.

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<sup>58</sup> Section 155 of the FMCA.

<sup>59</sup> Section 153 and 154 of the FMCA.



### 16.13 **Reliance upon apparently genuine documents**

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

### 16.14 **Attributed Tax indemnity**

Subject to the indemnity limitations under the FMCA,<sup>60</sup> if a Member's Account balances are insufficient to meet any liability for Tax payable by the Scheme, the Manager or the Supervisor (whether current or deferred) which is:

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

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

### 16.15 **Indemnity by Manager**

The Supervisor shall be indemnified by the Manager from and against any debt, liability or obligation owed by the Supervisor to a third party to the extent that such debt, liability or obligation (regardless of when it came to the Supervisor's attention) was caused by the failure, before 15 August 2012, 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 this Governing Document before 15 August 2012 in circumstances where the protections from liability for the Manager and the Supervisor under clauses 16.1 and 16.2 were not available.

## 17 **AMENDMENTS**

Subject to Relevant Law, this Governing Document may at any time be amended by deed executed by the Manager and the Supervisor, provided that the Manager and the Supervisor may not make any amendment that would result in any provision of paragraphs (b) to (g) of section 84B of the State Sector Act 1988 ceasing to apply to the Scheme.

## 18 **APPOINTMENT AND REMOVAL OF SUPERVISOR**

### 18.1 **Eligibility to be Supervisor**

The Scheme shall have a single Supervisor who:

- (a) is a Licensed Supervisor whose licence covers the Scheme; and
- (b) must not be an Associated Person of the Manager.

### 18.2 **Removal of Supervisor**

- (a) Subject to clause 18.4, the Manager may remove the Supervisor from office with the FMA's prior consent:

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<sup>60</sup> Sections 135(1)(f) and 136(1)(b) of the FMCA.





- (i) with immediate effect, by giving the Supervisor written notice of such removal, if the Manager reasonably believes that the Scheme will be adversely affected if the Supervisor continues to hold office (such notice to specify the grounds on which the Manager has formed this belief); and
- (ii) otherwise upon giving the Supervisor no fewer than 90 Business Days' written notice of such removal;

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

- (b) The Supervisor may be removed from office otherwise in the circumstances prescribed in the FMCA<sup>61</sup> or Part 2 of the Financial Markets Supervisors Act 2011.

### 18.3 Retirement

Subject to clause 18.4 and Relevant Law, the Supervisor may retire at any time upon giving the Manager no fewer than 90 Business Days' written notice of such retirement.

### 18.4 Restrictions on removal/retirement

No removal or retirement under clause 18.2 or clause 18.3 will take effect unless:

- (a) the requirements for such removal or retirement, and for any new supervisor under the FMCA or any other Relevant Law have been met<sup>62</sup>;
- (b) any new supervisor has executed the deed referred to in clause 18.6; and
- (c) all of the investments of the Scheme have been vested in the new supervisor (or in any Custodian).

### 18.5 New appointment

The power of appointing a new supervisor is vested in the Manager, provided that no person shall be appointed as a new supervisor unless qualified for appointment under clause 18.1.

### 18.6 Restrictions on new appointment

Any new supervisor must forthwith upon appointment execute a deed in such form as the Manager may require whereby the new supervisor consents to being appointed as the supervisor and undertakes to the Manager and the Members to be bound by all the covenants on the part of the former Supervisor under this Governing Document from the date of such appointment.

### 18.7 Release of Supervisor

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<sup>61</sup> Section 193(1) of the FMCA.

<sup>62</sup> Section 193(2) of the FMCA.



From the date of execution by a new supervisor of a deed in accordance with clause 18.6, the former Supervisor is absolved and released from all such covenants (except in respect of prior breach) and the new supervisor must exercise all the powers and enjoy and exercise all the rights, and is subject to all the duties and obligations, of the Supervisor under this Governing Document in all respects as if it had been originally named as a party to this Governing Document.

## **19 APPOINTMENT AND REMOVAL OF MANAGER**

### **19.1 Eligibility to be Manager**

The Scheme must have a manager, who:

- (a) must not be an Associated Person of the Supervisor; and
- (b) must be a Licensed Manager.

### **19.2 Removal of Manager**

The Manager shall be removed from office in the circumstances set out in the FMCA<sup>63</sup>.

### **19.3 Manager may retire**

Subject to clause 19.4 and Relevant Law, the Manager may retire as manager of the Scheme at any time upon giving the Supervisor three months' written notice of such retirement.

### **19.4 Restrictions on removal/retirement**

No removal or retirement under clause 19.2 or clause 19.3 will take effect until a new Manager that is qualified for appointment under clause 19.1 has been appointed pursuant to clause 19.5 and has executed the deed referred to in clause 19.6.

### **19.5 Power to appoint new manager**

- (a) The power to appoint a temporary manager under the FMCA<sup>64</sup> shall apply upon the occurrence of a vacancy in the office of manager of the Scheme.
- (b) Subject to Relevant Law, the power of appointing a new permanent manager of the Scheme shall be vested in the retiring manager, provided that no new manager shall be so appointed without the prior written approval of the Supervisor (which shall not be unreasonably withheld).
- (c) Where the Manager does not exercise its power to appoint a new permanent manager within 10 Business Days of a vacancy in the office of Manager of the Scheme occurring, the Supervisor may exercise the power to appoint a new permanent manager of the Scheme.

<sup>63</sup> Sections 185, 209 and 210 of the FMCA.

<sup>64</sup> Sections 186, 187, 189 and 191 of the FMCA.



### 19.6 **Restrictions on new appointment**

Any new manager shall forthwith upon appointment execute a deed in such form as the Supervisor may require whereby the new manager consents to be appointed as the manager and undertakes to the Supervisor and the Members to be bound by all the covenants on the part of the former manager under this Governing Document from the date of such appointment.

### 19.7 **Release of Manager**

Subject to Relevant Law<sup>65</sup>, from the date of appointment of a new manager, the new manager assumes, and the former Manager is absolved and released from all obligations and liabilities under this Governing Document (except in respect of prior breach) and the new manager must exercise all the powers and enjoy and exercise all the rights, and is subject to all the duties and obligations, of the manager under this Governing Document in all respects as if it had been originally named as a party to this Governing Document.

### 19.8 **Manager's entitlements preserved**

Nothing in this clause 19 shall prevent the Manager from receiving a payment, or a benefit, which has accrued to the Manager pursuant to the terms of this Governing Document on or before the Manager's retirement or removal from office (and the Manager shall be entitled to payment of all fees, and reimbursement of any expenses, accrued up to and including the date when it ceases to hold office and subsequently where further assistance is required under clause 19.9).

### 19.9 **Former Manager must hand over records and give reasonable assistance**

The former Manager must hand over records and give reasonable assistance to the new manager in accordance with the requirements of the FMCA.<sup>66</sup>

## 20 **WINDING UP OF THE SCHEME**

### 20.1 **Triggering wind-up**

The Scheme shall be wound up if:

- (a) the Manager notifies the Supervisor in writing of the date the Scheme is to commence being wound up; or
- (b) a Special Resolution of Scheme Participants is passed to wind up the Scheme; or
- (c) the Scheme is required to be wound up pursuant to the FMCA, this Governing Document, by the Courts or by operation of law.<sup>67</sup>

The provisions of the FMCA and the KiwiSaver Act<sup>68</sup> relating to the winding up of the Scheme shall apply to the winding up of the Scheme.

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<sup>65</sup> Section 191 of the FMCA.

<sup>66</sup> Section 190 of the FMCA.

<sup>67</sup> Sections 195 and 211 of the FMCA.



## **20.2 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).

## **21 MEMBERS BOUND BY THIS GOVERNING DOCUMENT**

### **21.1 Provisions benefit Members**

Except where this Governing Document expressly provides otherwise or the context otherwise requires, the terms and conditions of this Governing Document are for the benefit of and binding on each Member and legally enforceable as between the Manager, the Supervisor and Members (including, for the avoidance of doubt, any Member admitted to membership of the Scheme pursuant to clause 3.1(a) or clause 3.1(c) ) and all persons claiming through each Member as if the Member had been party to and had executed this Governing Document.

### **21.2 No interference in management**

Subject to the rights created for Members by this Governing Document, no Member shall be entitled to interfere with or question the exercise or non-exercise by the Manager or the Supervisor of any of the rights, powers, authorities or discretions conferred upon them or any of them by this Governing Document 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.

## **22 LIMITATION OF LIABILITY OF MEMBERS**

### **22.1 No personal obligation to indemnify**

Except as expressly provided by this Governing Document no Member is, by reason solely of being a Member or of the relationship hereby created with the Supervisor or with the Manager, under any personal obligation to indemnify the Supervisor 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.

### **22.2 Limited recourse to assets of the Scheme**

Subject to clause 16.14, the rights (if any) of the Supervisor 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.

### **22.3 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.

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<sup>68</sup> Sections 171, 212 and 213 of the FMCA, and sections 50 to 52 and subpart 3 of Part 2 of the KiwiSaver Act.



## 23 NOTICES AND INFORMATION TO MEMBERS

### 23.1 Notices

- (a) A notice under this Governing Document, and (without limiting any enabling provision in the KiwiSaver Act) any other Scheme-related communication intended for a Member, may be given to the Member personally by:
- (i) leaving it at the Member's last known address recorded in the Register; or
  - (ii) sending it addressed to the Member at the Member's last known address recorded in the Register by ordinary prepaid post, or, if that address is outside New Zealand, by airmail, prepaid post or advertisement;
  - (iii) sending it to the information system specified by the Member for the purpose of receiving notices by electronic means; or
  - (iv) 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 address, to the electronic address and/or to the information system, and the Register shall be altered accordingly. Any notice given to Members by the Manager must be copied to the Supervisor 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 Supervisor with a sample of such a notice.

### 23.2 Manner of notice

Any notice or document 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 or document was properly addressed and posted. Without limiting section 11(a) of the Electronic Transactions Act 2002, a notice or document 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 5.00 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). Any notice sent to the information system specified by the Member for the purpose of receiving that notice by electronic means will be deemed to have been received once it has left the sender's information system.

### 23.3 Signature of notice

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



#### 23.4 **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.

#### 23.5 **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 Governing Document 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.

### 24 **TAXATION AND MEMBER TAX CREDITS**

#### 24.1 **PIE Tax compliance**

The Manager 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 select from the available options under the Income Tax Act the method for paying the Scheme's PIE Tax liability and to make any elections provided for in the Income Tax Act required to give effect to that selection;
- (b) to retain any amount to which a Member otherwise would be entitled if that amount is required to be paid to the Commissioner pursuant to the Income Tax Act;
- (c) to make any other elections as to the method of calculation, allocation or attribution of Tax, having regard to the requirements of the Income Tax Act;
- (d) to allocate Tax rebates received by the Scheme or anticipated to be received by the Scheme to Members in accordance with clause 4.4;
- (e) to carry out any other Tax calculations, allocations or attributions required by the Income Tax Act;
- (f) to elect to offset Tax liabilities and rebates in respect of more than one Fund or more than one Member to the extent permissible by the Income Tax Act, and to make such adjustments;
- (g) to allocate the costs associated with the Scheme being a PIE among Members and Funds (to the extent practical);
- (h) to take all steps as the Manager considers necessary or desirable to ensure 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 declining contributions or switching some or all of a Member's



Accumulation from one Fund to another as if the Manager had received a request to that effect from the relevant Member;

- (i) to require that before a Member is accepted into the Scheme he or she provides their Tax File Number, Prescribed Investor Rate and any other information required by the Income Tax Act, and that at any time a Member must confirm such details or provide such other information as required by the Income Tax Act on request from the Manager;
- (j) to value Tax losses of the Scheme for the purpose of determining the Net Value of a Fund in such manner as the Manager thinks fit having regard to the Income Tax Act, generally accepted accounting practice as defined by the Financial Reporting Act 2013 and the Scheme's stated policies (if any) from time to time;
- (k) to adjust a Member's Unit holding by cancelling or issuing Units as the Manager considers necessary or desirable in its complete discretion, whether in accordance with the Income Tax Act or otherwise to the extent permitted by law, at any time (including immediately prior to the redemption of the Member's Units); and
- (l) to take all steps and do all things as the Manager thinks necessary or desirable in its complete discretion to transition a Fund to and from being a PIE or to administer the Fund as a PIE.

#### 24.2 **Withholding Tax from benefits**

If the Manager is obliged by Relevant 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.

#### 24.3 **Member Tax Credit**

For the purposes of obtaining and administering 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 Member Tax Credits in accordance with the Tax Administration Act 1994;
- (b) in the case of a Member with units in two or more Funds, to credit any Member Tax Credit paid in respect of the Member to the Member's Account on a pro rata basis between the Funds; and
- (c) to require a Member (or his or her personal representative, or another relevant person for the purposes of the Administration Act 1969) wishing to withdraw from the Scheme any amount arising from a Member Tax Credit to provide a statutory declaration stating the periods for which the Member has had his or her principal place of residence in New Zealand.



#### 24.4 **Changes in Tax legislation**

Without limiting clause 1.5(e), following any amendment to or re-enactment of the Income Tax Act (a *Revision*):

- (a) all of the discretions and powers available to the Manager where the Scheme is a PIE, whether under this clause 24 or otherwise, shall continue to apply with such modifications as are necessary to reflect the Revision;
- (b) the Manager shall have the discretion to apply all of the requirements of the Revision to the Scheme and the Members on such basis as it considers appropriate, taking into account such factors as the Manager considers relevant; and
- (c) to the extent reasonably possible taking into account the nature of the Revision, any references in this Governing Document to terms defined in the Income Tax Act which are amended or replaced as a result of the Revision shall be deemed to be references to those defined terms as amended by the Revision.

### 25 **AUDITOR**

#### 25.1 **Appointment and remuneration**

A Qualified Auditor selected by the Manager, in consultation with the Supervisor and entitled by Relevant Law to act as such<sup>69</sup> must be appointed as Auditor of the Scheme and the Register. The Manager and the Supervisor must agree upon the services to be performed and reports to be provided by the Auditor and their scope having regard to requirements under the FMCA<sup>70</sup>. The remuneration of the Auditor shall be determined by the Manager on an arm's length basis.

#### 25.2 **Removal/retirement**

The Auditor may at any time and from time to time be removed by the Manager with notice to the Supervisor. The Manager must remove the Auditor if the Supervisor believes it to be in the best interests of the Scheme and/or Members and instructs the Manager to remove the Auditor. The Auditor may retire upon giving the Manager 30 days' written notice.

#### 25.3 **Power to appoint Auditor**

The power to appoint a new Auditor shall be vested in the Manager, subject to the consultation with the Supervisor in accordance with clause 25.1.

#### 25.4 **Restrictions on Auditor**

The Auditor may be the auditor of the Manager, or of the Supervisor, or of an Associated Person of either the Manager or the Supervisor or of any other trust whether of a similar nature to the Scheme or otherwise.

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<sup>69</sup> Section 461E of the FMCA.

<sup>70</sup> Section 218 of the FMCA and Regulations 108 and 109 of the FMC Regulations.





## 25.5 **Compliance with FMCA auditor requirements**

The Manager must comply with the requirements of the Relevant Law relating to the appointment of the Auditor and the Auditor's opportunity to report to the Supervisor.<sup>71</sup>

## 26 **MEETINGS**

The Manager may call a meeting of Members at any time and, when required by the FMCA, the Manager must call a meeting of Members, in each case, in the manner and on the basis set out in the FMCA and the FMC Regulations.<sup>72</sup> A meeting of Members shall be conducted in accordance with the requirements of the FMCA.

## 27 **PAYMENTS TO MEMBERS**

### 27.1 **Method of payment**

Subject to the KiwiSaver Act, any moneys payable by the Manager (or by the Supervisor at the Manager's direction) to a Member or the Member's personal representative, or to another relevant person for the purposes of section 65 of the Administration Act 1969, under the provisions of this Governing Document may be paid by cheque or direct credited to any bank account nominated by the Member or other recipient.

### 27.2 **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 Manager (and, to the relevant extent, the Supervisor).

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<sup>71</sup> Clauses 1 to 3 of Schedule 13 to the FMC Regulations.

<sup>72</sup> Sections 161 to 163 of the FMCA and Regulations 83 and 91 of the FMC Regulations.



## 28 **GOVERNING LAW**

This Governing Document shall be interpreted and administered in accordance with New Zealand law.<sup>73</sup>

## 29 **NOTICES BETWEEN MANAGER AND SUPERVISOR**

Any certificate, notice, communication or information required by this Governing Document to be given by the Manager to the Supervisor or by the Supervisor to the Manager must be given in writing or by facsimile communication or electronic communication and addressed to the secretary, director or principal officer of the party to whom it is intended to be given at its registered office or other usual place of business (or such other address as may from time to time be notified by one party to the other) and must be signed by a duly authorised officer on behalf of the party giving it.

## 30 **DELIVERY**

For the purposes of section 9 of the Property Law Act 2007 (and without limiting any other mode of delivery) this Governing Document will be delivered by each party on the earlier of:

- (a) physical delivery of an original, executed by the relevant party, to the other party or its solicitors; or
- (b) transmission by the relevant party or its solicitors (or any other person authorised in writing by the relevant party) of a facsimile, photocopied or scanned copy of an original, executed by the relevant party, to the other party or its solicitors.

## 31 **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.

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<sup>73</sup> Section 128(1)(a) of the FMCA.




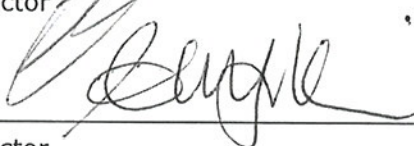
## Execution and date

Executed and delivered as a deed.


Date: 13 OCTOBER 2016


Signed by **Fisher Funds Management Limited:**

  
\_\_\_\_\_  
Director

  
\_\_\_\_\_  
Director

Signed by **Trustees Executors Limited:**

  
\_\_\_\_\_  
Director/Authorised signatory

  
\_\_\_\_\_  
Director/Authorised signatory

Robert Gatward

Melanie Lyn Hewitson



2016/201 (1 of 1)

in the presence of:

Witness signature:



Witness name:

Adesh Kaur  
Business Analyst  
Auckland

Occupation:

Address: