

# Second deed of amendment and restatement

The New Zealand Guardian Trust Company Limited

Foodstuffs South Island Limited

Foodstuffs (South Island) Properties Limited, Murdoch  
Manufacturing Limited, Cash Wholesalers (South Island)  
Limited, Trents Wholesale Limited, Trents Wholesale (Liquor)  
Limited, Cash Wholesalers Limited, Transport South Island  
Logistics Limited and PCNW Limited

**anderson  
lloyd.**

Date: 25 October 2019

## Parties

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- (1) The New Zealand Guardian Trust Company Limited (**Supervisor**)
- (2) Foodstuffs South Island Limited (**Foodstuffs**)
- (3) Foodstuffs (South Island) Properties Limited, Murdoch Manufacturing Limited; Cash Wholesalers (South Island) Limited, Trents Wholesale Limited, Trents Wholesale (Liquor) Limited; Cash Wholesalers Limited, Transport South Island Logistics Limited and PCNW Limited (**Guaranteeing Subsidiaries**)

## Background

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- A. Foodstuffs, the Guaranteeing Subsidiaries and the Supervisor are parties to a Trust Deed dated 25 March 1992 as subsequently amended and restated by a Deed dated 5 February 2016 (**Trust Deed**).
- B. Foodstuffs, with the consent of the Depositors and Security Stockholders (as those terms are defined in the Trust Deed prior to amendment by this Deed) in accordance with the approval requirements of the Trust Deed, wishes to further amend the Trust Deed by restating it on the form set out in the Schedule to this Deed with effect from the date on which each of the conditions set out in clause 3.1 are satisfied (**Effective Date**).
- C. The parties have agreed to enter into this Deed to effect the amendment to, and restatement of, the Trust Deed.

## Deed

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### 1. Amendment and restatement

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- 1.1 Subject to clause 2, with effect from the Effective Date:
  - (a) the Trust Deed shall be amended and restated in the form set out in the Schedule to this Deed (to the intent that such Schedule represents a restated form of agreement comprising the terms of the original Trust Deed as subsequently amended and restated, including as amended and restated by this Deed); and
  - (b) references in the Trust Deed to "this Deed" shall be references to the Trust Deed as amended and restated by this Deed.
- 1.2 The parties each confirm and acknowledge that from the Effective Date, their obligations and covenants under, and the provisions of, the Trust Deed shall continue and remain in full force and effect (except to the extent modified by this Deed).
- 1.3 Each of Foodstuffs and the Guaranteeing Subsidiaries acknowledge that from the Effective Date, the guarantees granted by each of the under the Trust Deed continue in full force and effect.

## 2. Release of charge

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- 2.1 As a consequence of the amendment and restatement of the Trust Deed pursuant to clause 1 of this Deed, with effect from the Effective Date, the Supervisor releases and discharges Foodstuffs and each of the "Charging Subsidiaries" (as that term is defined in the existing Trust Deed) from the security interests and charges given in favour of the Supervisor under clause 3 of the existing Trust Deed (**Charge**).
- 2.2 If any payment that was received by the Supervisor under the Charge before the Effective Date is set aside, clawed back, or required to be repaid in accordance with any legal requirements, the Supervisor is entitled to exercise its rights under the Charge as if it had not released the Foodstuffs and the Charging Subsidiaries from their obligations.
- 2.3 The parties will do all things necessary to give effect to the release and discharge of the Charges under this clause 2.
- 2.4 The release and discharge of the Charges under this clause 2, is for the benefit of, and is intended to be enforceable by, Foodstuffs, the Charging Subsidiaries and any other person having an interest in the property the subject of the Charges for the purposes of subpart 1 of Part 2 of the Contract and Commercial Law Act 2017.

## 3. Conditions precedent

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- 3.1 The amendment and restatement in clause 1 is subject to, and conditional upon, the following matters having first been provided for or confirmed, to the satisfaction of the Supervisor:
  - (a) an opinion from Foodstuffs' solicitors, Anderson Lloyd, as to due execution and enforceability of this Deed;
  - (b) an opinion from Foodstuffs' solicitors, Anderson Lloyd, confirming compliance with all requirements of the Financial Markets Conduct Act 2013 (**FMCA**) and other applicable laws in respect of the amendment and restatement of the Trust Deed;
  - (c) a certificate from Foodstuffs' solicitors, Anderson Lloyd, that the Trust Deed, as amended and restated by this Deed, will comply with sections 104-106 of the FMCA;
  - (d) a directors' certificate signed by two directors of Foodstuffs confirming that:
    - (i) all Depositors with deposits on issue under the Trust Deed (**Depositors**) have consented to the amendments to the Trust Deed as amended and restated by this Deed, or have been repaid in full, or have been fully cash collateralised, supported by information showing:
      - (A) details of all Depositors at the time the notice to Depositors seeking consent to the amendments to the Trust Deed is distributed;
      - (B) details of all positive consents received by Foodstuffs from Depositors;
      - (C) details of all negative responses received by Foodstuffs from Depositors and confirmation of repayment of those Depositor's deposits by Foodstuffs (including that such repayment is permitted under the terms of the relevant deposit); and
      - (D) details of any non-responding Depositors (**Non-Responding Depositors**) and the amount set aside by Foodstuffs in relation to such Depositors in an escrow account (**Escrow Account**), together with confirmation that such amount is sufficient to satisfy repayment of such deposits and other amounts owing to Non-Responding Deposits pursuant to the Trust Deed;

- (ii) the financial covenants and events of default of the Trust Deed as amended and restated by this Deed are substantially consistent with equivalent provisions provided in favour of Foodstuffs' senior funders; and
  - (iii) all Security Stockholders have consented to the terms of the Trust Deed as amended and restated by this Deed;
  - (e) entry by Foodstuffs and the Supervisor into an escrow deed, on agreed form, relating to the operation of the Escrow Account; and
  - (f) a certificate from the Foodstuffs' auditor, KPMG, confirming that they have perused the Directors' certificate referred to in clause 2.1(d) above, and giving such certifications as agreed between Foodstuffs and the Supervisor.
- 3.2 If the Supervisor has not notified Foodstuffs in writing on or before 29 November 2019 (or such later date as the Supervisor and Foodstuffs may agree) that it has received, and found satisfactory to it in form and substance, the documents and evidence specified in clause 2.1 (a) – (f) inclusive, this Deed shall terminate and be of no force or effect and the Effective Date shall be taken not to have occurred or be capable of occurring.

#### 4. Warranties

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- 4.1 Foodstuffs and each of the Guaranteeing Subsidiaries represents to the Supervisor that:
- (a) it is incorporated, has full power to enter into and comply with its obligations under this Deed and has taken all corporate and other action and obtained all consents needed to enable it to do so;
  - (b) its obligations under this Deed are legal, valid, binding and enforceable in accordance with their respective terms, subject to equitable principles and insolvency laws of general application; and
  - (c) all information provided by it or by any other person on its behalf to the Supervisor in connection with this Deed was true in all material respects as at the date that information was provided, and remains so.

#### 5. General

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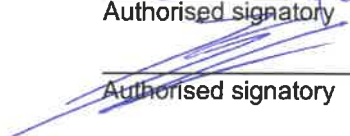
- 5.1 **Costs:** Foodstuffs will be responsible for each party's costs and expenses (including legal fees) in connection with the negotiation, preparation and implementation of this Deed.
- 5.2 **Counterparts:** This Deed may be signed in any number of counterparts, each of which will be deemed an original, and all of which taken together will constitute one and the same instrument.
- 5.3 **Partial invalidity:** If any provision of this Deed is or becomes invalid or unenforceable, that provision will be deemed deleted from this Deed. The invalidity or unenforceability of that provision will not affect the other provisions of this Deed, all of which will remain in full force and effect to the extent permitted by law, subject to any modifications made necessary by the deletion of the invalid or unenforceable provision.
- 5.4 **Further assurances:** Each party will do all things and execute all documents reasonably required to give effect to the provisions and intent of this Deed.
- 5.5 **Amendment:** No amendment to this Deed will be effective unless it is in writing and signed by each party.
- 5.6 **Assignment:** No party will assign or otherwise transfer any of its rights or obligations under this Deed to any other person.

5.7 **Governing law and jurisdiction:** This Deed is governed by, and shall be construed in accordance with, the laws of New Zealand, and the parties submit to the non-exclusive jurisdiction of the courts of New Zealand to determine all proceedings or matters arising in relation to this Deed.

## Execution

Signed for and on behalf of **The New Zealand Guardian Trust Company Limited** as Supervisor in the presence of:

  
\_\_\_\_\_  
Authorised signatory

  
\_\_\_\_\_  
Authorised signatory

\_\_\_\_\_  
Signature of witness

### WITNESS TO BOTH SIGNATURES:

\_\_\_\_\_  
Name of witness

Full Name: Debra Gail Morton

Residential Address: Auckland

\_\_\_\_\_  
Occupation

Occupation: Corporate Trusts Administrator

\_\_\_\_\_  
Signature:

\_\_\_\_\_  
Address

  
ACT 1913

Signed by **Foodstuffs South Island Limited** by:

\_\_\_\_\_  
Director's signature

\_\_\_\_\_  
Director's signature

\_\_\_\_\_  
Director's full name

\_\_\_\_\_  
Director's full name

Signed by **Foodstuffs (South Island) Properties Limited** by:

\_\_\_\_\_  
Director's signature

\_\_\_\_\_  
Director's signature

\_\_\_\_\_  
Director's full name

\_\_\_\_\_  
Director's full name

5.7 **Governing law and jurisdiction:** This Deed is governed by, and shall be construed in accordance with, the laws of New Zealand, and the parties submit to the non-exclusive jurisdiction of the courts of New Zealand to determine all proceedings or matters arising in relation to this Deed.

## Execution

---

Signed for and on behalf of **The New Zealand Guardian Trust Company Limited** as Supervisor in the presence of:

\_\_\_\_\_  
Authorised signatory

\_\_\_\_\_  
Authorised signatory

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name of witness

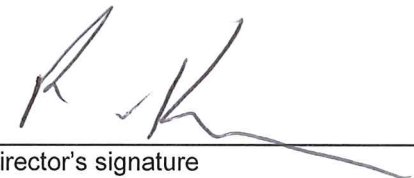
\_\_\_\_\_  
Occupation

\_\_\_\_\_  
Address

Signed by **Foodstuffs South Island Limited** by:

  
\_\_\_\_\_  
Director's signature

*Maree Gray*  
\_\_\_\_\_  
Director's full name

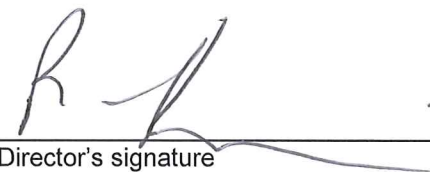
  
\_\_\_\_\_  
Director's signature

*Russell McKenzie*  
\_\_\_\_\_  
Director's full name

Signed by **Foodstuffs (South Island) Properties Limited** by:

  
\_\_\_\_\_  
Director's signature

*Maree Gray*  
\_\_\_\_\_  
Director's full name

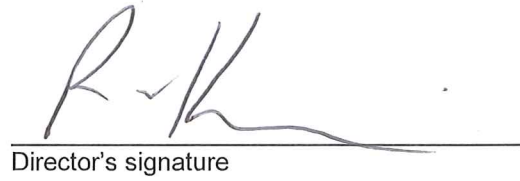
  
\_\_\_\_\_  
Director's signature

*Russell McKenzie*  
\_\_\_\_\_  
Director's full name

Signed by **Murdoch Manufacturing Limited**  
by:

  
Director's signature

Marcel Gray  
Director's full name

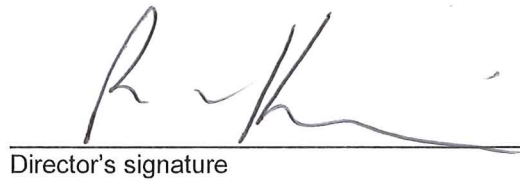
  
Director's signature

Russell McKenzie  
Director's full name

Signed by **Cash Wholesalers (South Island) Limited** by:

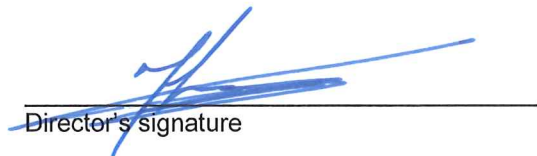
  
Director's signature

Marcel Gray  
Director's full name

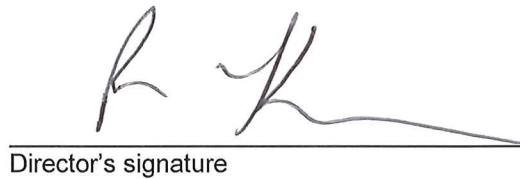
  
Director's signature

Russell McKenzie  
Director's full name

Signed by **Trents Wholesale Limited** by:

  
Director's signature

Marcel Gray  
Director's full name

  
Director's signature

Russell McKenzie  
Director's full name

Signed for and on behalf of **Trents Wholesale (Liquor) Limited** by **Stephen Grant Anderson**,  
its sole director in the presence of:

  
Stephen Grant Anderson

M Sullivan  
Signature of witness

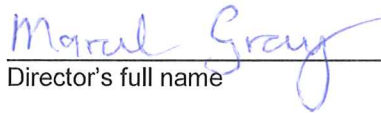
Mark Sullivan  
Name of witness

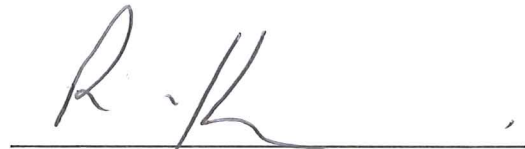
Company Secretary  
Occupation


Christchurch  
Address

Signed by **Cash Wholesalers Limited** by:

  
\_\_\_\_\_  
Director's signature


  
\_\_\_\_\_  
Director's full name

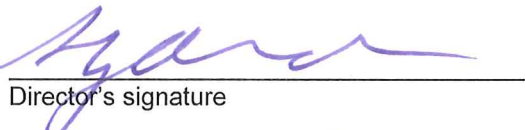
  
\_\_\_\_\_  
Director's signature

  
\_\_\_\_\_  
Director's full name

Signed by **Transport South Island Logistics Limited** by:

  
\_\_\_\_\_  
Director's signature

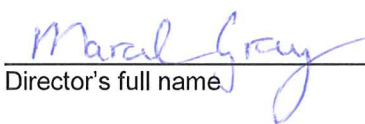
  
\_\_\_\_\_  
Director's full name

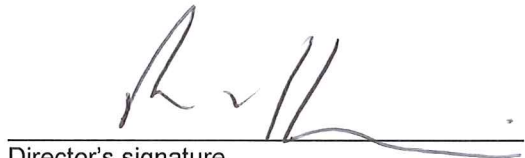
  
\_\_\_\_\_  
Director's signature

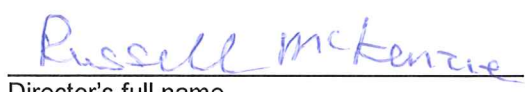
  
\_\_\_\_\_  
Director's full name

Signed by **PCNW Limited** by:

  
\_\_\_\_\_  
Director's signature

  
\_\_\_\_\_  
Director's full name

  
\_\_\_\_\_  
Director's signature

  
\_\_\_\_\_  
Director's full name



## Schedule – Form of restated Trust Deed

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# **Trust Deed Relating to the Issue of Deposits**

between

Foodstuffs South Island Limited

and

The New Zealand Guardian Trust Company Limited

and

Guaranteeing Subsidiaries

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## Trust Deed Relating to the Issue of Deposits

Date:

2019

### Parties

1. **Foodstuffs South Island Limited ("FSSI")**
  2. **The New Zealand Guardian Trust Company Limited ("Supervisor")**
  3. **Guaranteeing Subsidiaries**
- 

### Background

- A. FSSI, the Guaranteeing Subsidiaries and Trustees Executors Limited ("TEL") as trustee entered into a Trust Deed dated 25 March 1992 (as subsequently amended) under which FSSI has from time to time issued debt securities in the form of Deposits and debenture stock (or other secured indebtedness) ("Original Deed").
- B. TEL subsequently retired as trustee under the Original Deed, and on 5 February 2016 FSSI appointed The New Zealand Guardian Trust Company Limited as replacement Supervisor under clause 10.11 of the Original Deed.
- C. The Original Deed was amended and restated by way of a Deed dated 5 February 2016 to meet the requirements of the FMCA, reflect the appointment of the new Supervisor and make certain other amendments ("Existing Deed").
- D. FSSI intends to enter into new banking and security arrangements with its debt financiers, under a security trust deed dated on or about the date of this deed (as amended or replaced from time to time) ("Security Trust Deed").
- E. FSSI has obtained the consent of all Depositors and Security Stockholders (as those terms are defined in the Existing Deed) in accordance with the approval requirements of the Existing Deed to further amend the Existing Deed by restating it on the terms set out in this Deed, with effect from [ ] 2019 ("Effective Date").

### It is agreed:

#### 1. **Appointment; Definitions; Interpretation**

##### **Appointment**

- 1.1 FSSI appoints the Supervisor, and the Supervisor accepts appointment as, the supervisor of FSSI's issue of Deposits, on the terms and subject to the provisions of this Deed and applicable law.
- 1.2 The Supervisor agrees to:
  - (a) act on behalf of the Holders in relation to:
    - (i) FSSI;

- (ii) any matter connected with this Deed or the terms of a regulated offer of Deposits; and
    - (iii) any contravention or alleged contravention of the Issuer Obligations; and
  - (b) supervise FSSI's performance:
    - (i) of its Issuer Obligations; and
    - (ii) in order to ascertain whether the assets of FSSI and any Guaranteeing Subsidiary that are or may be available, whether by way of security or otherwise, are sufficient or likely to be sufficient to discharge the Principal Moneys, interest and other monies payable on, or in relation to the Deposits as they become due; and
  - (c) perform or exercise any other functions, duties, and powers conferred or imposed on the Supervisor by or under the FMCA, the Financial Markets Supervisors Act 2011 or this Deed.
- 1.3 The Supervisor shall hold the following in trust for the benefit of the Holders:
  - (a) the right to enforce FSSI's duty to repay, or to pay interest, under the terms of the Deposits;
  - (b) any security for repayment of the Deposits; and
  - (c) the right to enforce any other duties that FSSI, any Guaranteeing Subsidiary, and any other person has under:
    - (i) the terms of the Deposits; or
    - (ii) the provisions of this Deed or the FMCA in relation to the Deposits.
- 1.4 The Supervisor:
  - (a) must:
    - (i) act honestly in acting as supervisor under this Deed;
    - (ii) in exercising its powers and performing its duties as supervisor, act in the best interests of the Holders;
    - (iii) exercise reasonable diligence in carrying out its functions as supervisor;
  - (b) must do all the things it has the power to do to cause any contravention or alleged contravention of the Issuer Obligations in respect of the Deposits to be remedied unless it is satisfied that the contravention will not have a material adverse effect on the Holders;
  - (c) subject to any court order made under section 210 of the FMCA, must act in accordance with any direction given by a Special Resolution of Holders that is not inconsistent with any enactment, rule of law or this Deed in relation to:
    - (i) seeking a remedy to a contravention or alleged contravention of the Issuer Obligations in respect of the Deposits; and
    - (ii) any other matter connected with the Supervisor's functions; and

- (d) in exercising its powers and performing its duties as Supervisor, must exercise the care, diligence, and skill that a prudent person engaged in the business of acting as a licensed supervisor (as those terms are defined in the FMCA) would exercise in the same circumstances.
- 1.5 The Supervisor is not liable for anything done, or omitted to be done, in good faith in giving effect to a direction given to it by the Holders in accordance with this Deed.
- 1.6 FSSI acknowledges that this Deed is made for the benefit of and, subject to clause 2.10 and the other express terms of this Deed, is intended to be enforceable by any person who is from time to time a Holder and the Supervisor.

## Definitions

- 1.7 In this Deed (including the Background and the schedules) unless the context or subject otherwise requires:

"Accounts"	means financial statements or group financial statements, together with the statements of accounting policies, reports and notes, including any directors' report and (in the case of the audited Accounts) auditor's report attached to or intended to be read with any of those statements (as applicable);
"Applicable Laws"	has the meaning given in clause 1.9;
"Approved Operator"	means an "approved operator" as described and defined in a 'Group Franchise Agreement' or a 'Trading Membership Agreement' (as those terms are defined in the Constitution);
"Assets"	means all or any part of the present and future undertaking, property, assets (including Tangible Assets and, in particular, Goodwill and Leasehold Interests) and revenues (including any right to receive revenues) of a Company whatsoever and wheresoever and its issued but uncalled and called but unpaid capital and includes all present and after acquired personal property in which a Company has rights;
"Auditor"	means at any time the person holding the office as auditor of FSSI or such other qualified auditor (as such term is defined in section 461 E of the FMCA as may be mutually approved by the Supervisor and FSSI);
"Business Day"	means a day (other than a Saturday or Sunday) on which registered banks are open for general banking business in Auckland and Christchurch;
"Certificate"	means any written evidence or indication of a Deposit issued pursuant to and in accordance with this Deed

	pursuant to the provisions of clause 8.2;
"Charge"	includes any security interest, mortgage, trust, pledge, lien, assignment by way of security, hypothecation or encumbrance (including the charge, lien or retained security title of a conditional vendor), sale where settlement is deferred for more than six months, financing lease, sale and repurchase, sale and leaseback or any other security arrangement of whatsoever nature (including by way of reservation of title) and "charged" shall be construed accordingly;
"Companies Act"	means the Companies Act 1993;
"Company"	means any body corporate and shall include a person where the context so permits;
"Compliance Certificate"	means a compliance certificate substantially in the form set out in the Fourth Schedule (or such other form approved by the Supervisor from time to time) and addressing the additional matters set out in clause 7 and delivered in accordance with clause 6.1(d);
"Constitution"	means the constitution of FSSI registered under the Companies Act from time to time;
"Court"	means any court of competent jurisdiction;
"Date of Enforcement"	means the date on which the Guaranteeing Group obligations created by this Deed are enforced;
"Deposit"	means any deposit, (including member deposits and trading deposits), credit balance or other unsecured debt obligation or instrument in any form and however described issued by FSSI subject to the terms and conditions of this Deed;
"Derivative Product"	means: <ul style="list-style-type: none"><li>(a) any transaction (including any agreement with respect to any such transaction):<ul style="list-style-type: none"><li>(i) which is a rate swap transaction, swap option, basis swap, forward rate transaction, commodity swap, commodity option, equity or equity index swap, equity or equity index option, bond option, interest rate option, foreign exchange transaction, cap transaction, floor transaction, collar transaction, currency swap transaction, cross-currency rate swap transaction, currency option, credit protection transaction, credit swap, credit</li></ul></li></ul>



default swap, credit default option, total return swap, credit spread transaction, repurchase transaction, reverse repurchase transaction, buy/sell-back transaction, securities lending transaction, weather index transaction or forward purchase or sale of a security, commodity or other financial instrument or interest (including any option with respect to any of these transactions); or

- (ii) which is a type of transaction that is similar to any transaction referred to in paragraph (i) above that is currently, or in the future becomes, recurrently entered into in the financial markets (including terms and conditions incorporated by reference in such agreement) and which is a forward, swap, future, option or other derivative on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, economic indices or measures of economic risk or value, or other benchmarks against which payments or deliveries are to be made; or
- (b) any combination of the transactions in paragraphs (i) and (ii) above;

"Director"

means a director of FSSI (or if the context shall specifically or expressly require, any Subsidiary);

"Distribution"

means a distribution as that term is defined in section 2 of the Companies Act (and as if company includes any person) and shall exclude all Monthly Rebates;

"Effective Date"

has the meaning set out in Background E;

"Event of Default"

means an event specified in clause 5.1;

"Financial Indebtedness"

means any indebtedness or other monetary liability (whether present or future, actual or contingent) relating to any financial accommodation including indebtedness or other monetary liability for or in respect of:

- (a) moneys borrowed or raised (whether or not for cash consideration) and debit balances at banks or other financial institutions;
- (b) any debt security (as defined in the FMCA)

including the Deposits, amounts raised under or in connection with any note purchase facility or the issue of any bond, debenture, note, loan stock or similar instrument;

- (c) any amount raised by acceptance under any acceptance credit facility;
- (d) receivables sold, factored or discounted (otherwise than on a non-recourse basis);
- (e) any share or stock which by its terms of issue is redeemable;
- (f) any (i) conditional sale or title retention arrangement otherwise than in the ordinary course of business or (ii) finance lease or (iii) deferred payment arrangement in each case that is arranged primarily as a method of raising finance or financing the acquisition of that asset (including any hire purchase or sale and repurchase/leaseback);
- (g) any Derivative Product (and, when calculating the value of any such Derivative Product at any time, only the mark to market value (or, if any actual amount is due as a result of the termination or close-out of that transaction, that amount) at that time will be taken into account);
- (h) amounts raised under any other transaction or series of transactions (including any forward sale or purchase agreement) having the commercial effect of a borrowing or raising of money; or
- (i) any guarantee (including a Member Guarantee), indemnity, bond (including any performance bond), letter of credit or similar assurance which guarantees or indemnifies against or for financial loss of any person arising in connection with any type of indebtedness otherwise referred to in this definition (or any counter-indemnity obligation in respect of any of the same);

"Financial Year"

means a financial year of the Group, ending 28 February (or, in any leap year, 29 February);

"FMCA"

means the Financial Markets Conduct Act 2013;

"FMCR"

means the Financial Markets Conduct Regulations 2015;

"Goodwill"	has the meaning prescribed under NZ GAAP;
"Group" or "Consolidated Group"	means FSSI and its Subsidiaries;
"Guarantee"	means any guarantee, indemnity, letter of credit, suretyship, bond, third party security or any other obligation (whatever called and of whatever nature):  (a) to pay, purchase, provide funds (whether by the advance of money, the purchase of or subscription for shares or other securities, the purchase of assets, rights or services or otherwise) for the payment or performance of; or  (b) otherwise to be responsible or assume liability for or in respect of,  any indebtedness or obligation of another person;
"Guaranteed Moneys"	means the Principal Moneys, all interest payable on the Deposits and all other amounts payable to the Holders (whether current or in the future) and all other moneys payable to, or at the direction of, the Supervisor, in any case under or pursuant to this Deed;
"Guaranteeing Group"	means, at any time, the Obligors at that time;
"Guaranteeing Subsidiary"	means, as at the Effective Date, each of:  (a) Foodstuffs (South Island) Properties Limited; (b) Murdoch Manufacturing Limited; (c) Cash Wholesalers (South Island) Limited; (d) Trents Wholesale Limited; (e) Trents Wholesale (Liquor) Limited; (f) Cash Wholesalers Limited; (g) Transport South Island Logistics Limited; (h) PCNW Limited,  and any Subsidiary which shall at any time subsequently become a Guaranteeing Subsidiary pursuant to clause 4.13 and in each case remains a Guaranteeing Subsidiary;
"Holders"	means the several persons for the time being entered in the Register as holding Deposits and includes their personal representatives;

"Insolvency Event"

means, in relation to a person, the occurrence of any of the following events:

- (a) that person ceases or threatens to cease to carry on all or any material part of its business or operations;
- (b) an application is made (which is not withdrawn, stayed or dismissed within 10 Business Days of being made) to a court for an order, or an order is made, or an effective resolution is passed or legal proceedings issued (other than a vexatious or frivolous proceeding which is withdrawn, stayed or dismissed within 10 Business Days of being issued), or any corporate action is taken, notice is given or other formal step is taken for the dissolution or reorganisation of that person except for the purpose of, and followed by, a solvent reconstruction, merger, consolidation or voluntary liquidation or voluntary administration previously approved in writing by the Supervisor;
- (c) that person convenes a meeting for the purpose of making, or proposes to enter into, any general assignment, arrangement, compromise or composition with or for the benefit of all or a class of its creditors with a view to avoiding insolvency or a notice of intention to remove it from the register is given, in each case except for the purpose of, and followed by, a solvent reconstruction, merger, consolidation or voluntary liquidation or voluntary administration previously approved in writing by the Supervisor;
- (d) an encumbrancer takes possession, or a trustee, receiver, receiver and manager, administrator, liquidator, provisional liquidator, inspector under any companies or securities legislation, or similar official, is appointed in respect of that person or the whole or any of its assets, or formal steps are taken with a view to any such appointment (including the board of directors requesting that a secured creditor or any other person appoint a receiver to that person);
- (e) a security interest over any assets of that person is enforced in respect of an amount in excess of 1% of Total Tangible Assets of the

Group;

- (f) a distress, attachment or other execution is levied or enforced upon, or commenced against, any assets of that person and is not discharged or stayed within 10 Business Days, except, in each case, where the Supervisor is satisfied that that person is contesting the same in good faith by appropriate proceedings;
- (g) that person is declared or becomes insolvent, is unable to pay its debts when they fall due, or is presumed or deemed unable to pay its debts in accordance with any applicable legislation;
- (h) that person has committed an act of bankruptcy, has been adjudicated bankrupt, or made an assignment of property or composition of debts under any law relating to bankruptcy, or (in accordance with Part 5 of the Insolvency Act 2006) has entered into a no asset procedure;
- (i) that person suspends or stops or threatens in writing to suspend or stop payments generally or a moratorium is agreed or declared in respect of or affecting all or any of its indebtedness;
- (j) due to financial difficulties (whether actual or anticipated), that person negotiates with one or more of its creditors (excluding any Holder in its capacity as such) with a view to rescheduling any of its indebtedness; that person seeks or obtains protection from its creditors under any statute or any other law;
- (k) that person is declared to be a corporation at risk under the Corporations (Investigation and Management) Act 1989;
- (l) a statutory or judicial manager is appointed over all or any of the assets of that person;
- (m) any recommendation is made by the Financial Markets Authority to the Minister of the Crown who is responsible for administration of the Corporations (Investigation and Management) Act 1989 that that person be placed in statutory management under that Act;
- (n) all of the directors of that person resign, or signal their intention to resign; or

	(o) anything analogous or having a substantially similar effect to any of the events specified in paragraphs (a) to (o) above happens under the laws of any applicable jurisdiction in respect of that person;
"Issuer Obligations"	has the meaning given to it in the FMCA;
"Leasehold Interests"	means leasehold interests as included (whether as tangible or intangible assets) in the statement of financial position of FSSI and as amortised in accordance with NZ GAAP;
"Liabilities"	has the meaning prescribed under NZ GAAP;
"Material Subsidiary"	means at any time any Subsidiary of FSSI where either:  (a) the Total Tangible Assets of that Subsidiary comprise more than 5% of the Total Tangible Assets of the Consolidated Group at that time; or  (b) the EBITDA of that Subsidiary comprises more than 5% of the EBITDA of the Consolidated Group at that time;
"Member"	means all 'trading members' (as defined in the Constitution) of FSSI whether those persons are also shareholders of FSSI or not;
"Member Guarantee"	means any guarantee entered into by an Obligor in favour of a third party financier to guarantee the liability of a Member to that third party financier;
"Monthly Rebates"	means:  (a) rebates paid by FSSI to Members on a monthly basis and calculated with regard to the relevant Member's bulk purchasing and repack purchasing volumes from the Group;  (b) rebates paid by FSSI to Members on a monthly basis and calculated with regard to the relevant Member's purchasing volumes of specific products, comprising, as at the date of this Agreement, the rebate paid to Members for the volume of milk purchases from Synlait, and including each other such rebate introduced by FSSI from time to time to Members;
"Non-Guaranteeing Subsidiary"	means a Subsidiary that is not a Guaranteeing Subsidiary;
"NZ GAAP"	means generally accepted accounting practice as

	defined in section 8 of the Financial Reporting Act 2013;
"Obligors"	means FSSI and each Guaranteeing Subsidiary and "Obligor" means any of them;
"Other Rebates"	means all rebates paid by FSSI to Members other than Monthly Rebates;
"outstanding"	means, in relation to the Deposits, all the Deposits issued other than: <ul style="list-style-type: none"><li>(a) those which have been repaid pursuant to their terms and conditions;</li><li>(b) those in respect of which the date for repayment pursuant to their terms and conditions has occurred and the repayment moneys wherefore (including all interest accrued thereon to the date for such redemption) have been duly paid to or to the order of the Holder or the Supervisor or remain available for payment against presentation of the or Deposits;</li><li>(c) those which have become void pursuant to their terms and conditions; and</li><li>(d) those which have been cancelled pursuant to their terms and conditions;</li></ul>
"Permitted Security Interest"	means, in relation to an Obligor: <ul style="list-style-type: none"><li>(a) a lien which arises by operation of law in the ordinary course of business of that Obligor and securing obligations which are not overdue and which is discharged within 90 days (or such later date as the Supervisor may agree in writing);</li><li>(b) a purchase money security interest in any goods (which may extend to any proceeds of those goods) that is:<ul style="list-style-type: none"><li>(i) created in the ordinary course of its business and on arm's-length commercial terms; and</li><li>(ii) in respect of obligations that are not overdue; and</li><li>(iii) discharged within 90 days (or such later date as the Supervisor may agree in writing);</li></ul></li><li>(c) a security interest over the assets of a company</li></ul>

which becomes an Obligor after the Effective Date and such security interest:

- (i) exists at the date that company becomes an Obligor; and
- (ii) is not created in contemplation of that company becoming an Obligor,

provided that:

- (iii) the maturity date of any indebtedness secured by such security interest shall not be extended;
  - (iv) such indebtedness shall be repaid, and such security interest released (to the satisfaction of the Supervisor), as soon as practicable after the company becomes an Obligor but in any case within 180 days (or such later date as the Supervisor may agree in writing) after that date; and
  - (v) the principal amount secured by such security interest shall not be increased without the prior written consent of the Supervisor;
- (d) any security interest over any asset acquired by that Obligor after the date of the Effective Date if:
- (i) such security interest exists at the time of acquisition and is not created in contemplation of that acquisition; and
  - (ii) the principal amount secured by such security interest has not been increased in contemplation of or since the acquisition of the asset by that Obligor,

provided that:

- (iii) the maturity date of any indebtedness secured by such security interest shall not be extended; and
- (iv) such indebtedness shall be repaid, and such security interest released (to the satisfaction of the Supervisor), as soon as practicable after the acquisition but in any



case within 180 days (or such later date as the Supervisor may agree in writing) after that date;

- (e) any security interest in relation to personal property that is created or provided in the ordinary course of business on arm's-length commercial terms by:
  - (i) a transfer of an account receivable or chattel paper;
  - (ii) a lease for a term of more than 1 year; or
  - (iii) a commercial consignment,in each case that does not secure payment or performance of an obligation;
- (f) any security interest arising out of a netting or set-off arrangement entered into by it in the ordinary course of its banking arrangements for the purpose of netting debit and credit balances of Obligors;
- (g) any security interest which the Supervisor agrees in writing will be a Permitted Security Interest for the purpose of this Deed;
- (h) any security interest created under the 'Security Documents' (as defined in the Security Trust Deed) or which otherwise secures any Secured Indebtedness; or
- (i) any security interest, the total amount of Financial Indebtedness secured by which, when aggregated with all other Financial Indebtedness secured by security interests (not being security interests permitted by any other paragraph of this definition) created or permitted to arise or subsist by any Obligor does not exceed 5% of the Total Tangible Assets of the Group (or its equivalent in another currency) at any time;

"Principal" and "Principal Moneys"

means the face amount of any Deposit (other than premium (if any), interest and other continuing financial charges, costs and expenses, fees and commissions) payable on repayment of the Deposit in accordance with the terms and conditions of issue;

"Register"

means the register(s) kept pursuant to clause 8.3;

"Registered Address"	means at any time any registered Holder's address as recorded in the Register;
"Related Company"	has the meaning given to that expression in section 2 of the Companies Act but as if the word "subsidiary" in that section had the same meaning as "Subsidiary" in this Deed (and as if "company" includes any person);
"Related Person"	means: <ul style="list-style-type: none"><li>(a) any Related Company of an Obligor;</li><li>(b) any person which is treated as an associated company of an Obligor in accordance with NZ GAAP;</li><li>(c) any person which beneficially owns (or together with its related person(s), determined on the basis set out in paragraphs (a) and (b) above, beneficially owns) whether directly or indirectly 20% or more of the equity share capital or voting rights (as defined in the Takeovers Code) of an Obligor;</li><li>(d) any related person (determined on the basis set out in paragraphs (a) or (b) above) of any person referred to in paragraph (c) above; and</li><li>(e) any relative, director, shareholder, general partner, partner, limited partner, trustee, board member or beneficiary (as applicable) of an Obligor;</li></ul>
"Secured Contingent Liabilities"	means those guarantees entered into by FSSI or any Guaranteeing Subsidiary in favour of a third party financier to guarantee the liability of a Member to that third party financier and in consideration for the giving of which, FSSI or the Guaranteeing Subsidiary (as the case may be) obtains a Charge over some or all of the Assets of that Member and/or a third party and/or that Member's personal assets, where not a Company;
"Secured Indebtedness"	means any Financial Indebtedness of FSSI or the Obligors secured by a Charge given by the Guaranteeing Group (or any one of them);
"Security Trust Deed"	has the meaning given in background paragraph D;
"Share Investments"	means any investment in shares or other equity securities but excludes shares held in any subsidiary;
"Special Resolution"	means a special resolution of Holders as described in

	clause 16(a) of the First Schedule;
"Subsidiary"	of any person means: <ul style="list-style-type: none"><li>(a) any subsidiary of that person within the meaning given to that term in section 5 of the Companies Act 1993 (and as if the term "company" includes any entity incorporated in a jurisdiction other than New Zealand);</li><li>(b) any subsidiary of that person determined in accordance with NZ GAAP; and</li><li>(c) a person controlled, or any trust created, by that person;</li></ul>
"Test Date"	means 28 February (or, in any leap year, 29 February), 31 May, 31 August and 30 November in each calendar year, with the first Test Date being 30 November 2019;
"Total Assets"	means, in respect of a person or group, on any date, the aggregate amount, determined in accordance with NZ GAAP, of the book values of the assets of that person or group as would be disclosed by financial statements of that person or consolidated financial statements of that group, if they were prepared in accordance with NZ GAAP as at that date;
"Total Contingent Liabilities"	means the aggregate amount of all Member Guarantees (whether or not an Obligor also obtains a charge over some or all of the assets of that Member and/or third party and/or that Member's personal assets, where that Member is not a company);
"Total Tangible Assets"	means, in respect of a person or group, on any date, Total Assets except for those assets which, according to NZ GAAP, would be classified as intangible assets;
"Trust Deed" and "this Deed"	means this Trust Deed and its schedules as modified, supplemented or novated from time to time in accordance with the provisions of this Deed.

## **Interpretation**

- 1.8 In this Deed, unless the context otherwise requires:
- (a) subject to clause 1.7, words defined in the Companies Act or the FMCA shall have the same meanings where used in this Deed and in the case of conflict the definitions in the FMCA shall prevail over those in the Companies Act;
  - (b) headings are inserted for convenience only and do not affect the interpretation of this Deed;
  - (c) references to clauses, schedules and parties are to clauses of and the schedules and parties to this Deed;

- (d) references to any statute or regulation shall refer also to that statute or regulation as from time to time amended, modified, extended or re-enacted and to any legislation enacted in substitution for any such statute or regulation and to any instruments, plans, regulations, permissions, orders and directions from time to time made, issued or deriving from them;
- (e) 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 amended, modified, supplemented, novated or replaced;
- (f) each reference to a party to this Deed shall be read as a reference to that party and its successors and assigns;
- (g) where more than one party to this Deed is bound by any provision of this Deed such provision shall bind them jointly and each of them severally;
- (h) the plural includes the singular and vice versa;
- (i) reference to any gender includes each other gender;
- (j) a "person" includes an individual, a corporation sole, a Company, any association of persons whether corporate or unincorporate, any state or government or department or agency and any legislative body, authority or agency whether having separate legal personality or not;
- (k) the words "written" or "writing" include any means of and any means capable of effecting visible reproduction or representation from which the user may derive information;
- (l) "consent" means consent in writing;
- (m) a "month" means a calendar month;
- (n) "redemption" includes repayment and "redeem" includes repay and vice versa;
- (o) a "security interest" includes a "security interest" (as defined in section 17 of the Personal Property Securities Act 1999), a mortgage, encumbrance, lien, pledge, charge (whether fixed or floating), finance lease, deferred purchase, sale and repurchase, flawed asset, sale and leaseback, title retention, assignment by way of security, trust, hypothecation, and any other security agreement or arrangement of whatsoever nature (however described) that in substance secures payment or performance of an obligation without regard to the form of the transaction and the identity of the parties;
- (p) a "directive" includes any present or future directive, order, regulation, guideline, request, requirement, voluntary credit restraint programme or notification by whatsoever means, or a change in interpretation or application of any law, in either case by any governmental agency or any person or persons or body charged with the administration of any law (in each case, whether or not having the force of law but, if not having the force of law, the compliance with which is in accordance with the general practice of persons to whom the directive is addressed);
- (q) "disposal" means:

- (i) any sale, assignment, exchange, transfer, concession, loan, gift, lease, surrender of lease, licence, reservation, waiver, compromise, release;
  - (ii) any parting with possession or parting with ownership of, or the granting of any option, right or interest, or otherwise dealing with or any agreement to do any of those things; and
  - (iii) the payment of money or any distribution by way of dividend,  
but excludes the creation of a security interest, and "dispose" means to make a disposal, and "acquisition" and "acquire" shall be construed accordingly;
- (r) something having a "material adverse effect" is a reference to it having, as determined in the opinion of the Supervisor, a material adverse effect on:
- (i) the business, operations, property or condition (financial or otherwise) of FSSI or the Group taken as a whole;
  - (ii) the ability of FSSI or the Obligors taken as a whole to perform their obligations under this Deed; or
  - (iii) the validity or enforceability of, or the effectiveness or ranking of any rights or remedies of any person under this Deed,  
and "material adverse change" shall be construed accordingly; and
- (s) all references to money are to the currency of New Zealand (unless otherwise stated);
- (t) a right granted or reserved may be exercised from time to time; and
- (u) any covenant, conditions or agreement to be observed or performed by the parties to do or not to do any act or thing shall be construed as including also a covenant, condition or agreement to or not to suffer, permit, allow or cause to procure such act or thing and any such covenant, condition or agreement shall be observed and performed from time to time.

### **No Effect**

- 1.9 The parties agree that this Deed has no effect to the extent that it contravenes, or is inconsistent with, the FMCA or the FMCR (together the "Applicable Laws") or any term implied in this Deed by the Applicable Laws.

## **2. Issue of Deposits**

### **Issue**

### **Deposits**

- 2.1 FSSI may issue Deposits under this Deed at such time to such persons on such terms and conditions (not being inconsistent with the provisions of this Deed) as may be contained in or endorsed on the Certificate to be issued or otherwise, provided that no Deposits may be issued by FSSI if FSSI is in breach, or would as a result of such issue be in breach, of any of the limitations contained in clause 3.4 or any other provision of this Deed.

### **Provisions relating to Deposits**

- 2.2 The Deposits shall be held by Holders as unsecured Deposits in all respects with the benefit of and subject to such of the provisions of this Deed as are applicable having regard to the class of such Deposits and the terms and conditions endorsed on or relating to the Certificate or contained in any deed, or other document (whether supplemental to this Deed or not) issued or executed by FSSI relating to any Deposit and purporting to confer or impose terms and conditions affecting Holders and those provisions, terms and conditions shall be binding on FSSI, the Holders and all persons claiming under or through them respectively. The Holders and all persons claiming under or through them are deemed to have notice of all such relative provisions, terms and conditions.

### **Pari Passu obligations**

- 2.3 FSSI covenants with the Supervisor that (subject to their relative terms and conditions) the Deposits will constitute unsecured obligations of FSSI and will rank at least pari passu with all of FSSI's unsecured and unsubordinated indebtedness other than indebtedness that is preferred by statute, operation of law or this Deed.

### **Ranking**

#### **Ranking of Deposits**

- 2.4 Deposits shall rank as to payment of the face amount and any interest, subject to and immediately after payment in full of the principal and interest of any Secured Indebtedness and, subject to their relative terms and conditions, inter se the Deposits shall rank pari passu as to payment of the Deposits evidenced thereby notwithstanding that they may be issued at different times or on different terms.

### **Priority**

- 2.5 Except as otherwise provided in this Deed the order of priority set out above in clause 2.4 shall apply in all circumstances and in particular all Secured Indebtedness shall always rank in priority above Deposits whenever issued and notwithstanding that it be subscribed for or issued or acquired after Deposits have been subscribed for or issued or acquired and notwithstanding that any person subscribing for or being issued with or otherwise acquiring Secured Indebtedness is at the time aware that Deposits have been subscribed and issued and are outstanding at the date of the subscription or issue or acquisition of the Secured Indebtedness.

### **Validity of issue**

- 2.6 No Holder shall be concerned or obliged to enquire whether any Deposit has been issued in accordance with this Deed. All Deposits issued for valuable consideration shall be deemed to be validly issued and constituted by this Deed and entitled to the benefit of the provisions of this Deed notwithstanding that it may subsequently be determined that the issue of such Deposit was in breach of this Deed, but without prejudice to the Supervisor's rights under or pursuant to this Deed against FSSI and the Guaranteeing Subsidiaries in relation to such breach.

### **Covenant to pay**

- 2.7 FSSI acknowledges its indebtedness to the Supervisor in respect of the Principal Moneys outstanding from time to time in respect of the Deposits and interest on the

Principal Moneys whenever such Deposits are issued and covenants with the Supervisor to pay to the Supervisor when due, in the manner in which the same is payable, at such place as the Supervisor shall by notice in writing direct, the Principal Moneys of such Deposits and that until such payment FSSI will pay to the Supervisor interest on such Deposits in the manner in which such interest is payable in accordance with the terms and conditions of issue of such Deposits.

- 2.8 Notwithstanding the provisions of clause 2.7, FSSI shall, unless and until otherwise requested by the Supervisor or prevented by law, pay all Principal Moneys and interest in respect of the Deposits issued by it to the Holder (as the case may require) in accordance with the terms and conditions of issue of such Deposits and each such payment shall operate as payment to the Supervisor in satisfaction, to the extent of the payment, of the indebtedness acknowledged by this clause.

#### **Right to deduct withholding and other taxes**

- 2.9 FSSI shall be entitled to deduct from any amount payable to a Holder the amount of any tax or duty required to be deducted under the laws of New Zealand and where any such deduction has been made and accounted for by FSSI to the Commissioner of Inland Revenue or other appropriate authority and the balance of the amount payable has been paid to the Holder concerned, the full amount payable to such Holder shall (subject to any agreement to the contrary with the Holder) be deemed to have been duly paid and satisfied by FSSI.

#### **Proceedings against**

- 2.10 No Holder shall be entitled to proceed directly against FSSI or any Guaranteeing Subsidiary for the enforcement or observance and performance of any term or condition of the relevant Deposit unless the Supervisor fails to so proceed having become bound to do so and such failure shall continue provided that this clause shall not affect the right of any Holder to proceed directly against FSSI or any Guaranteeing Subsidiary under or in respect of any agreement between those parties (other than this Deed).

#### **Supervisor**

- 2.11 No Holder shall be entitled to proceed directly for the enforcement or observance or performance of any provision of this Deed that is solely for the benefit of the Supervisor either against FSSI or any Guaranteeing Subsidiary or against the Supervisor.

#### **Unclaimed Money**

##### **Held by FSSI**

- 2.12 Subject to the terms and conditions of any Deposit, any payment to a Holder at its last Registered Address that shall be returned unclaimed for a period of six months and any amount due to a Holder whose address is unknown shall be either retained by FSSI for such Holder or (if held by or on behalf of the Supervisor) paid by or on behalf of the Supervisor to FSSI (without prejudice to the rights of the person entitled to it in priority to FSSI) and (in either case) retained by FSSI for such Holder until claimed without liability to invest the same or pay interest thereon.

## **Forfeiture**

- 2.13 Any amount unclaimed where the Holder has not operated on the account for the relevant period of time referred to in the Unclaimed Money Act 1971, whether by deposit, or withdrawal or instruction in writing, must be repaid to the Holder or held by FSSI (as the case may be) to be paid to the Crown in accordance with the provisions of the Unclaimed Money Act 1971.

## **3. Covenants**

### **Positive Covenants**

- 3.1 Each Obligor will, and will ensure that each other Obligor that is its Subsidiary will:

- (a) **Applicable Laws:** at all times comply with all Applicable Laws;
- (b) **Default:** promptly notify the Supervisor of the occurrence of any Event of Default, (on becoming aware of any such event and giving full details of it and of any steps taken or to be taken as a result) and, upon receipt of a written request to that effect from the Supervisor, confirm whether, save as previously notified to the Supervisor and to the best of its knowledge and belief, any such event has occurred;
- (c) **Comply with all Laws:** except as provided in clause 3.1(a), duly and promptly comply in all respects with all laws and directives applicable to it where failure to do so would have, or would be reasonably likely to have, a material adverse effect;
- (d) **Authorisations:** obtain, give effect to, exercise, maintain in full effect, renew and comply with all consents, conditions and things (including any necessary franchises, patents, leases and licences) necessary:
  - (i) to carry on its continuing business or in respect of any real property or intellectual property owned, occupied or otherwise used by it or any of its Subsidiaries where failure to do so would have, or would be reasonably likely to have, a material adverse effect; and
  - (ii) to enable it to perform and comply with its obligations under, or for the validity, legality or enforceability or admissibility in evidence of, this Deed;
- (e) **Pay Taxes:** file all tax returns as required by law, and pay or discharge all taxes on it or its assets within the time allowed, without incurring a penalty for late payment, except only to the extent that those taxes are being contested in good faith by appropriate proceedings and adequate reserves are set aside for the payment of such taxes;
- (f) **Inspection:** permit the Supervisor and persons appointed by the Supervisor on reasonable notice and at reasonable times to inspect its premises, assets, books, documents and records;
- (g) **Corporate Status:** do all things necessary to maintain its corporate existence in its current jurisdiction of incorporation;



- (h) **New Subsidiaries:** ensure that any Subsidiary acquired, created or formed by it promptly becomes a Guarantor in accordance with clause 4.13 to the extent required to ensure compliance with clause 3.4(a)(iii);
- (i) **Related Person Loans:** ensure that any loan or advance provided by one or more Related Persons to an Obligor:
  - (i) is provided on an unsecured basis or, if secured, is subordinated in point of priority to any Secured Indebtedness; and
  - (ii) does not provide any acceleration rights (and if secured, any enforcement rights) to the relevant Obligor or Related Person which is exercisable while any amounts are owing to in relation to any Secured Indebtedness, in each case without the prior consent of the Supervisor;
- (j) **Further assurances:** at the request of the Supervisor, do or procure the doing of all things and execute or procure the execution of all documents as are, in the opinion of the Supervisor, necessary or desirable to ensure that the Holders obtain (or are able to exercise) all the rights and benefits intended to be conferred on them under this Deed;
- (k) **Maintain intellectual property rights:** take all formal or procedural actions (including all registrations and payment of fees) required to maintain its intellectual property where failure to do might have a material adverse effect; and
- (l) **Ranking of Obligations:** ensure that all Deposits rank as to payment in accordance with clause 2.4.

### **Negative Covenants**

- 3.2 Each Obligor will not, and will ensure that no other Obligor that is its Subsidiary will, without the prior written consent of the Supervisor:
- (a) **Negative Pledge:** create, allow to be created, or permit to exist any security interest over the whole or any part of its assets except a Permitted Security Interest;
  - (b) **Disposal:** whether by a single transaction, or a number of related or unrelated transactions and whether at the same time or over a period of time, dispose of any asset other than that an Obligor may:
    - (i) **Inventory:** dispose of any inventory in the ordinary course of, and for the purpose of carrying on, its ordinary business and on arm's-length commercial terms;
    - (ii) **Money:** part with money in the ordinary course of its ordinary business and on arm's-length commercial terms;
    - (iii) **Assets:** renew or replace any of its assets (other than any shares, intellectual property, motor vehicles or aircraft) with other assets comparable as to type, value and quality;

- (iv) **Real Property:** in the case of any real property, grant a lease, tenancy or licence to occupy that real property in the ordinary course of its ordinary business and on arm's-length commercial terms;
  - (v) **Obsolete Assets:** dispose of, on arm's-length commercial terms, obsolete or surplus assets which are not required for the efficient operation of its business or the business of the Group;
  - (vi) **Borrowed Money:** apply the proceeds of money borrowed or raised for the purposes for which it was borrowed or raised;
  - (vii) **Permitted Distributions:** dispose of any assets by way of Distribution permitted under clause 3.2(d);
  - (viii) **Joint venture:** dispose of all or part of any share capital or other interest in any joint venture undertaken between that Obligor and an Approved Operator to the relevant Approved Operator (or a Related Party of that Approved Operator);
  - (ix) **Money Market Investments:** invest funds temporarily in the purchase or making of prudent money market investments in accordance with any applicable treasury policies approved by the Supervisor, or realise such investments;
  - (x) **Disposal of Assets:** dispose of any assets (other than shares in the capital of any Group member not otherwise permitted under clause 3.2(b)(viii)) for cash where the higher of the market value or consideration receivable (when aggregated with the higher of the market value or consideration receivable for any other disposal by any relevant person, other than any permitted under clauses 3.2(b)(i) to 3.2(b)(ix) above), does not exceed 15% of Total Assets of the Group (or its equivalent in another currency or currencies) in any Financial Year; and
  - (xi) **Supervisor consent:** dispose of any assets with the prior written consent of the Supervisor;
- (c) **Make Loans etc:** make any loans, advances or other financial accommodation to, provide any financial assistance to, guarantee the liabilities of, or repay in whole or in part or otherwise assume any indebtedness of any person (or permit any such loan, advance, financial accommodation, financial assistance or guarantee to remain outstanding) other than:
- (i) pursuant to any Financing Document (as defined in the Security Trust Deed);
  - (ii) to or of any Obligor;
  - (iii) under any Member Guarantee;
  - (iv) to a Member where such Member is an incorporated joint venture between that Obligor and an Approved Operator and where the aggregate of such financial accommodation to Members in respect of all Obligors under this clause 3.2(c)(iv), and financial accommodation permitted under clause 3.2(c)(v) below, does not exceed 5% of the Total Tangible Assets of the Group at any time; and

- (v) in the ordinary course of business where the aggregate of such financial accommodation in respect of all Obligor (excluding that financial accommodation permitted under clauses 3.2(c)(i) to 3.2(c)(iii)) (inclusive) above but including that financial accommodation permitted under clause 3.2(c)(iv) does not exceed 5% of the Total Tangible Assets of the Group at any time;
- (d) **Transactions with Related Persons:** notwithstanding any other provision of this Deed:
  - (i) dispose of any assets or provide any services to, or purchase any assets or accept any services from, or enter into any other transaction with, or for the benefit of, a Related Person (other than an Obligor) other than a bona fide transaction for fair value on arm's-length commercial terms and in the ordinary course of business of the Obligor including, for the avoidance of doubt:
    - (1) as permitted under clause 3.2(b)(viii); and
    - (2) under any Monthly Rebates;
  - (ii) make any loan or provide any other financial accommodation to any Related Person other than:
    - (1) an Obligor; or
    - (2) a Member in the ordinary course of business (as permitted under clause 3.2(c));
  - (iii) enter into any guarantee in respect of an obligation of a Related Person other than:
    - (1) an Obligor; or
    - (2) under a Member Guarantee;
- (e) **Distributions:** pay or make, or allow to be paid or made, any Distribution after a Date of Enforcement if the relevant Event of Default is continuing or would occur as a result from making that Distribution;
- (f) **Shares:**
  - (i) acquire its own shares (unless it is required to do so by law), issue shares redeemable at the option of the holder of the shares or on a specified date, or exercise any option to redeem its shares (in any case, other than in accordance with the relevant Obligor's constitution);
  - (ii) pass any resolution that any of its capital that has not been called up, is not to be capable of being called up or otherwise alter, or allow to be altered, any term attaching to, or acquire or redeem, any of its own shares in a manner which would cancel or reduce the liability of any shareholder in relation to a share held in the Obligor prior to that alteration, acquisition or redemption (or consent to, or enter into, any arrangement which would have that effect); or

- (iii) allow any of its assets to be applied directly or indirectly in connection with any of the foregoing;
- (g) **Change Place of Incorporation:** change its jurisdiction of incorporation or place of domicile for taxation purposes or move its principal place of business outside New Zealand;
- (h) **Obligors:** make any change in respect of an Obligor which causes FSSI to no longer control the Obligor;
- (i) **Financial Assistance:** give financial assistance to any person, directly or indirectly, for or in connection with the purchase of shares issued or to be issued by it or by its holding company, other than in compliance with the requirements of the Companies Act;
- (j) **Amalgamation:** enter into any amalgamation, consolidation, merger, demerger, reconstruction or make any proposal to do any such things with any other company other than another Obligor (other than a solvent reconstruction, merger, consolidation, voluntary liquidation or voluntary administration previously approved by the Supervisor);
- (k) **Tax Grouping:**
  - (i) be, or apply to the Commissioner of Inland Revenue to be, a member of a group of companies pursuant to and for the purposes of the Goods and Services Tax Act 1985 except where all other members of that group of companies are Obligors;
  - (ii) be, or apply to the Commissioner of Inland Revenue to be, a member of a group of companies for any tax year for income tax purposes pursuant to and for the purposes of the Income Tax Act 2007 except where all other members of that group of companies are Obligors; or
  - (iii) transfer or acquire any tax losses except where:
    - (1) such transfer or acquisition is to or from any other Obligor;
    - (2) the tax losses are made available to the Obligor pursuant to an election made under section IC 5(2)(a) of the Income Tax Act 2007; or
- (l) **Year-end:** change its Financial Year-end.

### **Insurance Covenants**

3.3 **Obligation:** Each Obligor agrees that, unless the Supervisor has otherwise consented in writing, it will:

- (a) **Property Insured:** insure and keep insured all its insurable assets (including its inventory) against loss or damage by fire, earthquake, explosion, flood, theft, all risks normally insured against in the business of the Obligor and all other insurable risks which should prudently be insured against in accordance with prudent commercial practice (including all insurance required by law) or which may from time to time be required to be insured against by the Supervisor, in each case for their full replacement value (or such other value as the Supervisor may agree in writing);

- (b) **Third Party Cover:** take out and maintain all other proper insurance against third party liability (with insurers acceptable to the Supervisor) which it is prudent to insure against in accordance with prudent commercial practice for such amount as the Supervisor may reasonably require or approve;
- (c) **Policy:** when required by the Supervisor, give to the Supervisor a copy of each insurance policy effected pursuant to this clause 3.3 duly certified by the insurer, together with a certificate of currency in respect of each such policy;
- (d) **Premiums Paid:** ensure that all premiums, charges and other expenses necessary for maintaining in full force and effect each insurance policy required by this clause are duly and punctually paid (and at the request of the Supervisor, it will deliver the relevant receipts and/or confirmations from the insurer to the Supervisor);
- (e) **No Prejudice:** not do or omit to do, or permit to be done or occur or not done, anything which prejudices any insurance;
- (f) **Other Evidence:** at the request of the Supervisor from time to time, produce evidence satisfactory to the Supervisor that each insurance policy is current and in full force and effect and that all premiums due in respect of each insurance policy have been paid; and
- (g) **Notification:** promptly notify the Supervisor of any material claim under any insurance policy, and of any cancellation, amendment, lapse or non-renewal of any insurance policy or any similar event or circumstance.

### **Financial Covenants**

3.4 The following financial covenants will apply:

- (a) **Ratios:** The Obligors undertake in favour of the Supervisor that:
  - (i) **Interest Cover Ratio:** the Interest Cover Ratio shall on each Test Date be greater than or equal to 2.50:1.00.
  - (ii) **Balance Sheet Ratios:**
    - (1) the Balance Sheet Ratio (no Contingent Liability) shall at all times be less than or equal to 55%; and
    - (2) the Balance Sheet Ratio (with Contingent Liability) shall at all times be less than or equal to 80%.
  - (iii) **Guaranteeing Group Coverage:**
    - (1) the Total Assets of the Guaranteeing Group shall at all times be equal to or greater than 90% of the Total Assets of the Consolidated Group;
    - (2) EBITDA of the Guaranteeing Group shall on each Test Date be equal to or greater than 90% of EBITDA of the Consolidated Group; and
    - (3) at all times each Material Subsidiary shall be a member of the Guaranteeing Group at that time.

(b) **Definitions:** For the purposes of this clause 3.4:

**"Balance Sheet Ratio (no Contingent Liability)"** means, on any date, the ratio (expressed as percentage) of A to B where:

- (i) "A" is Secured Debt of the Guaranteeing Group on that date; and
- (ii) "B" is Total Assets of the Guaranteeing Group on that date;

**"Balance Sheet Ratio (with Contingent Liability)"** means, on any date, the ratio (expressed as percentage) of A to B where:

- (i) "A" is Secured Debt (with Contingent Liability) of the Guaranteeing Group on that date; and
- (ii) "B" is Total Assets of the Guaranteeing Group on that date;

**"EBIT"** means, in respect of a person or group, for any period ending on a particular date, the sum of operating profit or loss (which shall be expressed as a negative amount) of that person or group for that period from ordinary operations:

- (i) before transaction costs, Interest Expense and income tax; and
- (ii) after minority interests have been excluded as would be disclosed by financial statements of that person, or consolidated financial statements of that group, if they were prepared in accordance with NZ GAAP; and
- (iii) before deducting any Other Rebates payable;

**"EBITDA"** means, in respect of a person or group, for any period ending on a particular date, EBIT adjusted to exclude (by adding back) any deductions in respect of amortisation and depreciation, plus any negative extraordinary items and less any positive extraordinary items, in each case relating to such person or group for that period and as determined in accordance with NZ GAAP;

**"Interest Cover Ratio"** means, in respect of the Guaranteeing Group, on any date, the ratio of A to B, where:

- (i) "A" is EBITDA of the Guaranteeing Group in respect of the 12 month period ending on that date; and
- (ii) "B" is Interest Expense of the Guaranteeing Group in respect of the 12 month period ending on that date;

**"Interest Expense"** means, in respect of a person or group, and in respect of a period, all interest expenses of that person or group during that period, including any outgoings in the nature of interest (i) paid or payable during that period or (ii) in relation to finance leases, and plus or minus (without double counting) the net amount of any difference in payments paid or received during that period under any interest rate hedging arrangement;

**"Secured Debt"** means on any date, the aggregate on that date of the principal amount of all Financial Indebtedness secured under and pursuant to the Security Trust Deed and includes, for the avoidance of doubt, the principal amounts of Financial Indebtedness arising under the USPP Documents (as that

term is defined in the Security Trust Deed) but excludes the Total Contingent Liabilities; and

**"Secured Debt (with Contingent Liability)"** means the sum of Secured Debt and Total Contingent Liabilities on that date.

- (c) **Calculation:** The calculations required to be made under this clause 3.4 shall be tested:
- (i) on each Test Date by reference to the Compliance Certificate most recently delivered pursuant to clause 6.1(d); and
  - (ii) in respect of the last 12 month period ending on each Test Date; and
  - (iii) in relation to finance leases and operating leases by reference to NZ GAAP as at the Effective Date and prior to the Group's adoption of IFRS 16.
- (d) **Changes to NZ GAAP:**
- (i) If, in the reasonable opinion of FSSI or the Supervisor, any changes to NZ GAAP materially alter the effect of the undertakings in this clause 3.4 or the related definitions, FSSI and the Supervisor will negotiate in good faith to amend the relevant provisions so that they have an effect comparable to that at the date of this Deed.
  - (ii) If the amendments are not agreed within 30 days (or any longer period agreed between FSSI and the Supervisor), then FSSI will provide, together with its Accounts, any reconciliation statements (audited, where applicable) necessary to enable calculations based on NZ GAAP as they were before those changes, and the changes will be ignored for the purposes of this clause 3.4.

#### 4. **Guarantee**

##### **Guarantee**

- 4.1 Each of the Guaranteeing Subsidiaries jointly and severally unconditionally guarantees the due and punctual payment by FSSI and the Guaranteeing Subsidiaries in accordance with the provisions of this Deed of the Deposits as and when the same shall become due and payable and the due observance and performance by FSSI and each of the other Guaranteeing Subsidiaries of all of their obligations under this Deed.

##### **Payment**

- 4.2 Whenever any default has been made by FSSI or any other Guaranteeing Subsidiary in the payment of all or any of the Deposits each other Guaranteeing Subsidiary will immediately, whether or not demand has been made, pay such moneys to the Supervisor to the intent that the same may be applied by the Supervisor pursuant to this Deed.

### **No Discharge**

- 4.3 The liability of each Guaranteeing Subsidiary under this guarantee shall not be abrogated, prejudiced or affected by any of the following:
- (a) the granting of time, credit or any indulgence or other concession to FSSI or to any other guarantor (including any Guaranteeing Subsidiary) by the Holders or any of them or by the Supervisor or by any compounding, compromise, release, abandonment, waiver, variation, relinquishment or renewal of any securities, documents of title, assets or of any of the rights of the Holders or any of them or of the Supervisor against FSSI or any Guaranteeing Subsidiary or by anything done or omitted or neglected to be done by the Supervisor or the Holders or any of them in exercise of the authorities, powers and discretions vested in them by this Deed or by any other dealing, matter or thing which but for this provision might operate to abrogate, prejudice or affect their respective guarantees;
  - (b) the liability of any other guarantor (including any Guaranteeing Subsidiary) ceasing from any cause whatsoever (including the release or discharge by the Holders or any of them by the Supervisor);
  - (c) any other person joining in this or giving any similar guarantee;
  - (d) the liquidation, winding-up, receivership, voluntary administration, statutory management or other reconstruction or dissolution of or any change in constitution or corporate identity or loss of corporate identity of FSSI or any guarantor (including any Guaranteeing Subsidiary);
  - (e) any guarantor (including any Guaranteeing Subsidiary) being incompetent to give this guarantee or any other guarantee or failing to become legally bound in whole or in part under any of them respectively;
  - (f) failure by any Material Subsidiary to become (or, as the case may be, remain) a Guaranteeing Subsidiary as required by or otherwise in accordance with this Deed; or
  - (g) any modification or addition to this Deed made pursuant to the provisions of this Deed.

### **Principal Obligation**

- 4.4 This guarantee shall be a principal obligation and shall be treated as in addition to and not in substitution for or collateral to any other security or right which the Supervisor may have under or by virtue of this Deed and in particular shall be independent of any other security to the intent that this guarantee may be enforced against each Guaranteeing Subsidiary without first having recourse to any such securities or rights and without taking steps or proceedings against FSSI or any other guarantor (including any Guaranteeing Subsidiary) and notwithstanding that any other security may be in whole or part unenforceable by reason of any rule of law or equity and notwithstanding the loss by the Supervisor of any other security or any acts or omissions on the part of the Supervisor, and irrespective of whether any steps or proceedings are being or have been taken against any other Guaranteeing Subsidiary (whether in its capacity as a guarantor or otherwise) and for any other person.



### **Continuing Guarantee**

- 4.5 Subject to clauses 4.6 and 4.15, this guarantee is to be a continuing guarantee and accordingly shall be irrevocable and shall remain in full force and effect until the whole of the Deposits have been paid or satisfied.

### **Enforcement**

- 4.6 The Supervisor may as regards all or any of the Guaranteeing Subsidiaries determine from time to time whether it shall enforce or refrain from enforcing this guarantee and unless otherwise directed by a Special Resolution, may from time to time make any arrangement or compromise with any Guaranteeing Subsidiary which the Supervisor may think expedient in the interests of the Holders.

### **Payments in Gross**

- 4.7 All moneys from time to time received by the Supervisor in reduction of the Deposits from or on account of FSSI or any Guaranteeing Subsidiary including any dividends upon the liquidation of FSSI or any other Guaranteeing Subsidiary or any other guarantor from any other person and capable of being applied by the Supervisor in reduction of the Deposits shall be regarded as payments in gross without any right on the part of any Guaranteeing Subsidiary to stand in the place of the Supervisor in respect of or to claim the benefit of any moneys so received as against FSSI or any other Guaranteeing Subsidiary until the whole of the Deposits have been paid or satisfied so that in the event of any Guaranteeing Subsidiary or other guarantor going into liquidation the Supervisor shall be entitled to prove against it for the total indebtedness of FSSI in relation to the Deposits.

### **Suspense Account**

- 4.8 In the event of the liquidation of any Guaranteeing Subsidiary or any other guarantor, no Guaranteeing Subsidiary shall prove in such liquidation in competition with the Supervisor and each Guaranteeing Subsidiary hereby authorises the Supervisor to prove for all moneys which such Guaranteeing Subsidiary has paid hereunder or are otherwise owing to it and have not been repaid to it by any other Guaranteeing Subsidiary and to retain and to carry to a suspense account and appropriate at the discretion of the Supervisor any amount received until the Supervisor shall have received one hundred cents in the dollar in respect of the indebtedness of FSSI and each other Guaranteeing Subsidiary in relation to the Deposits. Each Guaranteeing Subsidiary hereby waives in favour of the Supervisor all rights whatever against the Supervisor and FSSI and any other guarantor or other person or their or its estate and assets so far as necessary to give effect to anything in this guarantee contained.

### **Other Securities**

- 4.9 This guarantee shall not prejudicially affect or be prejudicially affected by any guarantee now or later held by the Supervisor for the Deposits but such other guarantee shall be deemed to be collateral herewith and no Guaranteeing Subsidiary will as against the Supervisor in any way claim the benefit or seek the transfer of any such security or any part or any right of recourse.

### **Payments Avoided**

- 4.10 If any payment made to the Supervisor or to any Holder by or on behalf of any Guaranteeing Subsidiary be voided by law such payment shall be deemed not to have discharged or affected the liability of each Guaranteeing Subsidiary and in that event the Supervisor and each Guaranteeing Subsidiary shall be restored to the position in which each would have been and be entitled to exercise all the rights which each would have had if such payment had not been made.

### **Rights Suspended**

- 4.11 Each Guaranteeing Subsidiary shall in respect of any sums paid by it, and in respect of any other rights which may accrue howsoever to it in respect of any sum so paid, rank and be entitled to enforce the same only after the Deposits shall have been duly paid and satisfied.

### **Principal Debtor**

- 4.12 Although as between FSSI and each Guaranteeing Subsidiary the joint and several liability of each Guaranteeing Subsidiary to the Supervisor may be that of sureties only, nevertheless as between each Guaranteeing Subsidiary and the Supervisor the liability of each Guaranteeing Subsidiary shall be deemed to be the liability of a principal debtor and such liability shall not be affected or diminished by any other provision of this Deed or by any other act indulgence or omission which but for this present provision would have operated to release any Obligor wholly or partly from its liability under this Deed to the Supervisor.

### **Further Guaranteeing Subsidiaries**

- 4.13 FSSI shall procure:
- (a) any Company that shall become a Material Subsidiary; and
  - (b) any other Subsidiary if required to ensure compliance with clause 3.4(a)(iii),
- shall promptly become a Guaranteeing Subsidiary by executing and delivering to the Supervisor a Deed in the form or substantially in the form prescribed in the Third Schedule of this Deed, guaranteeing the Deposits and agreeing to become bound by this Deed as a Guaranteeing Subsidiary, together with a certificate of a director of the relevant Subsidiary, in a form and substance satisfactory to the Supervisor.

### **Compliance by Guaranteeing Subsidiaries**

- 4.14 FSSI hereby covenants with the Supervisor that it will use its voting powers in and representation on the board of directors of each Guaranteeing Subsidiary in such manner as to ensure compliance and observance by each Guaranteeing Subsidiary at all times with the provisions of this Deed.

### **Release of Guaranteeing Subsidiaries**

- 4.15 At any time before the Date of Enforcement, upon the request in writing and at the cost of FSSI and without approval by the Depositors (unless in the opinion of the Supervisor the interests of the Depositors would be materially prejudiced), the Supervisor may:

- (a) release any Guaranteeing Subsidiary from its guarantee and other obligations under or pursuant to this Deed; and
- (b) execute all documents which may be necessary to effect any such release or discharge,

provided that:

- (c) two directors of FSSI have certified in writing that, in their opinion, the following conditions are satisfied:
  - (i) to the best of the directors' knowledge and belief (after having made due enquiry) no Event of Default or other event which, with the passing of time or the giving of notice or fulfilment of both, would constitute an Event of Default:
    - (1) has occurred and is continuing as at the date of the certificate; or
    - (2) would occur as a result of the release;
  - (ii) as at the date on which the release is intended to be effective, there will be no Guaranteed Money owing (other than contingently under this Deed) by that Guaranteeing Subsidiary; and
    - (1) based on the most recent financial statements provided to the Supervisor under clause 6.1; and
    - (2) having regard to all other circumstances that the directors know or ought to know affect, or may affect, the financial position of the Consolidated Group or the Guaranteeing Group respectively,  
  
the covenants in clause 3.4(a)(iii) of the Facility Agreement will continue to be complied with after the intended date of release; and
- (d) the Supervisor (acting reasonably) has no reason to believe that those conditions are not satisfied.

## 5. Events of Default and Enforcement

### Events of Default

- 5.1 The Supervisor shall upon receiving a direction to do so by a Special Resolution, and may at its option without any such direction, by written notice to FSSI, declare all of the Principal Moneys to be immediately due and payable on the happening of any one or more of the following events:
- (a) **Principal Moneys:** if default shall be made in the payment on the due date of any Principal Moneys or for three (3) Business Days in the payment of interest on the Principal Money;
  - (b) **Other Moneys:** if default shall be made for a period of three (3) Business Days after written demand for the payment of any other moneys due and payable by FSSI or any Guaranteeing Subsidiary pursuant to this Deed;
  - (c) **Specific Obligations:** an Obligor breaches or fails to comply with any of the obligations imposed on it under clauses 3.1(a), 3.2(a) or 3.4;

- (d) **Other Breaches:** an Obligor breaches or fails to comply with any of the obligations imposed on it under this Deed (other than those referred to in clauses 5.1(a), 5.1(b) or 5.1(c)) and such breach or failure to comply (if capable of remedy) continues for 10 Business Days from the earlier of the relevant Obligor first becoming aware of that breach or failure or the Supervisor having given notice of the breach or failure to FSSI or the relevant Obligor;
- (e) **Insolvency Event:** an Insolvency Event occurs in relation to an Obligor;
- (f) **Security Trust Deed:** the occurrence of an event of default (however described) which results in any security right under the Security Trust Deed being enforced or becoming capable of enforcement;
- (g) **Cross-Default:**
  - (i) any Financial Indebtedness of an Obligor (other than in respect of Deposits but including any Secured Indebtedness) is declared due and payable or is placed on demand prior to its specified maturity as a result of an event of default or review event or default event (in each case, however described); or
  - (ii) any commitment for any Financial Indebtedness of an Obligor is cancelled or suspended by a creditor of an Obligor as a result of an event of default or review event (in each case, however described),

provided that no Event of Default will occur under this clause 5.1(f) if the aggregate amount of Financial Indebtedness, or commitment for Financial Indebtedness, falling within sub-clauses (i) to (ii) above is less than 1% of the Total Tangible Assets of the Group (or its equivalent in any other currency or currencies);

### **Supervisor's Powers**

- 5.2 At any time after the Deposits have become payable in accordance with this clause 5, the Supervisor may, in its discretion and shall upon receiving a direction to do so by Special Resolution, and without further notice, declare the Deposits to have become immediately due and payable, and the Deposits shall immediately be due and payable, and institute such proceedings as it thinks fit to enforce payment of the Guaranteed Moneys, including by enforcing the guarantee given by the Guaranteeing Subsidiaries under clause 4 and the Supervisor may execute and do all such assurances and things as the Supervisor may think fit.

### **Money held by Supervisor**

- 5.3 If the Supervisor shall hold any moneys that represent Principal or premium (if any), interest or other continuing financing charges, costs, expenses, fees and commissions on any Deposits that have become void according to their terms and conditions or to which clause 2.12 applies the Supervisor shall pay the same to FSSI provided there are no outstanding claims in respect of those Deposits and subject to payment or retention of all costs, charges, fees, costs of realisation, expenses and liabilities incurred and payments made by or on behalf of the Supervisor in relation with such amounts.

### **Trust Proceeds of Conversion**

- 5.4 All moneys received by the Supervisor after the Date of Enforcement shall (subject to payment or provision out of or for any debts or liabilities having priority to the Deposits) to be held and applied:

**First** (subject to any order made by any Court) in payment or retention of all costs, charges, fees, costs of realisation, expenses and liabilities incurred and payments made by or on behalf of the Supervisor under this Deed and of all remuneration payable to the Supervisor including interest as provided in this Deed;

**Secondly** in payment of preferential payments (if any) payable under the provisions of the Seventh Schedule of the Companies Act and otherwise at law;

**Thirdly** in or towards payment of any prior ranking Financial Indebtedness (including, without limitation, any Financial Indebtedness secured by the Security Trust Deed);

**Fourthly** repayment to the Holders of the Deposits, and payment of all other unsecured obligations, on a pari passu basis; and

**Fifthly** subject to the rights of any subsequent encumbrancers or secured parties, in payment of the surplus (if any) of such moneys to FSSI or such other person as required by law or otherwise as the Supervisor may direct.

### **Power to Call for and Rely on Certificate of Indebtedness**

- 5.5 For the purposes of determining the appropriate payment to be made to any Holders pursuant to clause 5.4, or the voting entitlement of any Holder under this Deed, the Supervisor may (but need not) require any Holder to provide it with a certificate giving details of all amounts of any particular kind due or alleged to be due in respect of that Holder's Deposit as at any date. The Supervisor shall be entitled to rely upon the accuracy and correctness of any such certificate. Each Holder shall also provide the Supervisor with whatever information it may require for the purpose of this clause. The Supervisor shall incur no liability in so acting or for the consequences of so acting should any such certificate or information prove to have been incorrect, or for failing to request or obtain any such certificate or information.

## **6. Financial and other information**

### **Financial Information**

- 6.1 FSSI shall deliver to the Supervisor (and in each case in a form and containing a level of detail, and, in respect of (d) only, in substance satisfactory to the Supervisor):
- (a) **Yearly:** as soon as reasonably practicable and in any event within 120 days of the end of each Financial Year, audited Accounts of the Group as at the end of and for that Financial Year;
  - (b) **Half-Yearly:** as soon as reasonably practicable, and in any event within 45 days after 31 August in each year, unaudited Accounts of the Group as at the end of and for that financial half-year;
  - (c) **Management accounts:** as soon as reasonably practicable, and in any event within 45 days after the end of each financial quarter-end of the Group,

management accounts for the Group, consisting of a summary profit and loss statement and balance sheet;

- (d) **Compliance Certificate:** with each set of Accounts delivered pursuant to clause 6.1(a), 6.1(b) or 6.1(c), a Compliance Certificate signed by two directors of FSSI or by one director of FSSI and either the chief executive officer or the chief financial officer of FSSI:
  - (i) attaching in reasonable detail workings which form the basis for the calculation of the financial ratios set out in clause 3.4, provided that in respect of the Test Date falling on the last day of the relevant Financial Year or financial half-year a Compliance Certificate is only required to be provided at the time of delivery Accounts under clauses 6.1(a) and 6.1(b) and providing a reconciliation of the relevant Accounts (in a form to be agreed) in respect of the effect of IFRS 16; and
  - (ii) certifying the matters set out in clause 7.1.

### **Preparation of Financial Information**

- 6.2 FSSI shall ensure that all Accounts (and all management accounts) delivered to the Supervisor under clause 6.1:
  - (a) **NZ GAAP:** are prepared in accordance with NZ GAAP consistently applied (except to the extent agreed by the Supervisor in writing); and
  - (b) **Fair View:** give a true and fair view in accordance with NZ GAAP of the financial position of the Consolidated Group and the results of the operations of the Consolidated Group as at the end of and for the period for which those Accounts are prepared.

## **7. Resolutions and Reports for Supervisor**

### **Reporting**

- 7.1 FSSI covenants with the Supervisor that it will:
  - (a) **Compliance Certificate – Additional Reporting:** If FSSI is required to issue a Compliance Certificate under clause 6.1(d), then such Compliance Certificate shall include certifications on behalf of the Directors as to the following matters:
    - (i) stating to the best of their knowledge and belief after having made due enquiry whether or not since the last Test Date:
      - (1) any matters have occurred which in their opinion may have a material adverse effect on the interest of the Holders and if so giving particulars;
      - (2) all interest and Principal due and payable on the Deposits has been paid or otherwise dealt with in accordance with the terms of issue;
      - (3) FSSI has or its agents have duly maintained the Register;
      - (4) FSSI and each Guaranteeing Subsidiary have duly observed and performed their obligations under the Trust Deed;

- (5) any trading or capital loss that has been sustained by the Guaranteeing Group or any member of it which is material to the Guaranteeing Group taken as a single entity and if so, particulars;
- (6) any material contingent liabilities have been incurred by any Obligor (other than Secured Contingent Liabilities or in the ordinary course of business) and if so the amount and whether or not any contingent liability has matured or is likely to mature within the succeeding twelve (12) months which will have a material adverse effect on any Obligor in its ability to repay the Deposits;
- (7) any circumstances affecting the Guaranteeing Group or any member of it have occurred which may have a material adverse effect on the interest of any class of Holders and if so, particulars;
- (8) there has been any material change in the nature of the business of the Guaranteeing Group taken as a whole and if so particulars of that change;
- (9) any Subsidiaries which are Non-Guaranteeing Subsidiaries have been formed or acquired;
- (10) any circumstances known to them that may materially adversely affect the ability of the Guaranteeing Group to pay its Liabilities due within the next 3 months;
- (11) FSSI or any Guaranteeing Subsidiary has changed its name (including the name appearing on the certificate of incorporation or any name under which it trades in the ordinary course of its business), the location of its principal place of business or its place of incorporation and whether or not FSSI or any Guaranteeing Subsidiary intends to make any such change during the immediately following reporting period;

and also stating:

- (12) that there are no Charges over the Assets of any Obligor other than Permitted Security Interests (and in the case of Charges arising by operation of law, stating the course of action proposed by FSSI to discharge that Charge);
- (13) particulars of all investments, loans, financial accommodation, and guarantees made or given by any member of the Guaranteeing Group to or on behalf of any Non-Guaranteeing Subsidiary or Related Company other than Secured Contingent Liabilities or trade credit advanced in the ordinary course of business;
- (14) any event has happened which has given or could give rise to an Event of Default and, if so particulars of that event;
- (15) particulars of all major purchases (being purchases over \$10 million) not in the ordinary course of business;
- (16) the amount of Deposits outstanding;

- (17) details of Secured Debt (as that term is defined in clause 3.4(b)); and
  - (18) details of all Subsidiaries which are not Material Subsidiaries.
- (ii) Stating that, having considered the financial position (including contingent liabilities) of the Guaranteeing Group as a going concern which the Directors are satisfied will be the case and the statement of financial position referred to above and also such budgets, reports, projections, certificates and assurances as they deem necessary and its anticipated trading and sources of finance arranged or expected on reasonable grounds to be arranged during the twelve (12) months from the relevant certification date, the Directors certify that to the best of their information and belief they are of the opinion that:
- (1) the Deposits have been issued without breach of any of the provisions of this Deed; and
  - (2) the Guaranteeing Group will be able to meet or otherwise satisfy in accordance with accepted commercial practice all its liabilities which fall due or are anticipated to become payable during the 12 months from the date of the certificate.
- (b) **Auditors Report:** within 120 days of the end of FSSI's financial year to furnish to the Supervisor a report by the Auditor stating as of the date of the last audited statement of financial position concerned:
- (i) **Breaches:** whether or not in the performance of its duties as Auditor it has become aware of any of the circumstances described in section 199(2) of the FMCA or any breach of the provisions of this Deed or the terms of the Deposits or any other matter which in its opinion is relevant to the exercise or performance of the powers or authorities conferred or imposed on the Supervisor by the Companies Act, the FMCA, this Deed or by law and if so giving particulars and in particular (but without prejudice to the generality of the foregoing) whether it has objected to any of the principles and practices applied in the preparation of such last audited statement of financial position;
  - (ii) **Investigation required:** whether or not its audit has disclosed any matter calling in its opinion for further investigation by the Supervisor in the interests of the Holders and if so, particulars;
  - (iii) **Registers:** whether or not FSSI or its agents have duly maintained the Register, in all material respects in accordance with the requirements of the FMCA and whether it contains the information required by the FMCA;
  - (iv) **Compliance Certificates:** that it has perused the Compliance Certificate furnished pursuant to clause 6.1(d) in terms of the annual Accounts required to be delivered under clause 6.1(a) and the Compliance Certificates provided pursuant to clause 6.1(d) since the last report by the Auditor given pursuant to clause 7.1(b) and that:



- (1) so far as matters that it has observed in the performance of its duties as Auditor are concerned, the statements and information contained in such certificates are fairly stated; and
  - (2) where relevant, the figures set out in each Compliance Certificate have been correctly extracted from the audited financial statements of the Group;
  - (v) **Material Changes:** whether it has knowledge of any material change during the immediately preceding financial year in the method of valuation of any part of the Assets or Liabilities of the Guaranteeing Group or any member of it;
  - (vi) **Payments:** whether or not from normal audit tests it has conducted it is satisfied that all Deposits have been paid or otherwise satisfied when due; and
  - (vii) **Other:** Any other matter required to be set out in that report by the FMCA or the FMCR.
- (c) **Balance Date and Financial Year of Company and its Subsidiaries:** ensure that FSSI and each of its Subsidiaries will, unless the Supervisor otherwise approves in any particular case, have and continue to have the same balance date and financial year for the purposes of their respective audited annual financial accounts;
- (d) **Change in Subsidiaries:** give notice in writing to the Supervisor of:
- (i) the acquisition or formation by FSSI or any Guaranteeing Subsidiary of any Subsidiary including the name thereof and furnish to the Supervisor a copy of the most recent statement of financial position and profit and loss account of any Subsidiary so acquired;
  - (ii) any change in the shareholding of a Subsidiary which does or may effect a change of control or direction thereof by FSSI or by a Guaranteeing Subsidiary;
- (e) **Notice of Investments in Non-Guaranteeing Subsidiaries and Related Companies:** give notice in writing to the Supervisor of any investment in the share capital of, loan or financial accommodation made available to, or guarantee or indemnity of the obligations of, a Non-Guaranteeing Subsidiary or a Related Company (other than a Member in the ordinary course of business) or any increase of any such existing investment, loan, financial accommodation, guarantee or indemnity not later than five (5) Business Days after;
- (f) **Give Notice if Financial Limits Exceeded:** immediately give notice in writing to the Supervisor if any of the limits imposed by clause 3.4 have been or are about to be exceeded (other than the Interest Cover Ratio in clause 3.4(a)(i) which is only required to be tested on each Test Date);
- (g) **Notice of Proceedings:** immediately give notice to the Supervisor of the service of any material notice affecting the Assets or any part of them (and not being in connection with the normal conduct of its business) or of the

commencement of any proceedings which would or may have a material adverse effect;

- (h) **Notice of Demand Under Guarantee of Non-Guaranteeing Subsidiary or Related Company:** immediately inform the Supervisor of any demand made on any Guaranteeing Group Member under any guarantee of the obligations of any Related Company and whether or not any payment thereunder will result in a breach of the provisions of clause 3.4;
  - (i) **Notice of Insurances:** at the same time as the Compliance Certificate in respect of the financial year of FSSI is furnished to the Supervisor, furnish to the Supervisor a certificate by an officer of FSSI or by an insurance broker approved by the Supervisor listing all policies of insurance effected pursuant to clause 3.3 and affecting the Assets and giving such details as the Supervisor may require and including notice of any claims over \$1,000,000;
  - (j) **Requested information and reports:** if requested by the Supervisor (or a person authorised by the Supervisor to exercise its powers), within the time and in the manner (which must be reasonable in the circumstances) specified by the Supervisor:
    - (i) make available to the Supervisor all documents and records relating to FSSI; and
    - (ii) provide the Supervisor with any other reports (which have been, if requested by the Supervisor, signed by at least two Directors or one Director and either the chief executive officer or the chief financial officer of FSSI), information, confirmations or financial statements required by the Supervisor (or other authorised person).
- The reports, information, confirmations or financial statements may be about any matter relevant to the performance of the Supervisor's functions and include forward-looking reports;
- (k) **Contravention or possible contravention of Issuer Obligations:** if it has reasonable grounds to believe that it has contravened, may have contravened, or is likely to contravene any of its Issuer Obligations in a material respect, as soon as practicable:
    - (i) deliver to the Supervisor a report of the contravention or possible contravention to the Supervisor; and
    - (ii) advise the Supervisor of the steps (if any) that FSSI has taken or intends to take in light of the contravention or possible contravention and the date by which the steps were taken or are to be taken;
  - (l) **Serious financial problems:** if it becomes aware of information on the basis of which it could reasonably form the opinion that it is, or is likely to become, insolvent, as soon as practicable:
    - (i) deliver to the Supervisor a report to the Supervisor containing all information relevant to that matter that is in the possession or under the control of FSSI and that was obtained in the course of, or in connection with, the performance of its functions as issuer; and

- (ii) advise the Supervisor of the steps (if any) that FSSI intends to take in respect of that matter and the date by which the steps are to be taken;
- (m) at the same time as it notifies the Registrar of Financial Service Providers under section 95 of the FMCA, notify the Supervisor of any “prescribed change” as defined in section 95(2) of the FMCA; and
- (n) provide the Supervisor, or any other person who is entitled to request a document or other information from FSSI, with the requested document or information as soon as practicable but in any event within 5 Business Days of receipt of the request.

### **Inspection and further information**

7.2 FSSI shall from time to time:

- (a) **Records:** at the request of the Supervisor make available for the Supervisor's inspection the accounting and other records which shall relate to the Deposits; and
- (b) **Further information:** give to the Supervisor such information as it shall require with respect to all matters relating to such records.

### **Presentation of reports**

7.3 The certificates, resolutions and reports of the Directors required pursuant to clauses 6 and 7.1 may be wholly or partly amalgamated in one or more documents or presented separately as the Directors may decide.

## **8. Certificates and Register**

### **Trusts and Equities**

8.1 FSSI may enter on the Register notice of any trust but shall not be bound to and FSSI may recognise any trust or equity affecting the ownership of any Deposit or any money represented thereby but shall not be bound to except as ordered by a Court or as required by any applicable New Zealand law.

### **8.2 Certificates**

- (a) **Certificates:** Subject to the terms and conditions of issue of any Deposit, and any requirement at law, FSSI shall issue to every Holder a Certificate which contains the information required under, and which otherwise complies with the FMCA and any other applicable law and is to be in or to the effect of the form set out in the Second Schedule (or in such other form as the Supervisor shall approve).
- (b) **Benefit of Deed:** The Deposits shall be held with the benefit of and subject to the provisions of this Deed, the conditions endorsed on the Certificate and the further conditions contained in the Second Schedule or such (if any) of them as are applicable thereto respectively and any further special conditions not inconsistent with this Deed as may be required by the terms of issue of the Deposit or as may be required by or approved by the Supervisor and the aforesaid provisions, conditions and special conditions shall be binding on FSSI, the Holders and all persons claiming through them respectively.

- (c) **Execution:** Such Certificate shall be executed by FSSI in such manner as may be permitted by law.
- (d) **Replacement Certificates:** FSSI may at any time issue:
  - (i) with the consent in each case of the Holder concerned and subject to satisfactory indemnification and security therefor, a replacement Certificate as appropriate in substitution for such lost, stolen, damaged, defaced, destroyed or incorrect Certificate;
  - (ii) a balance Certificate where the obligation evidenced by the Certificate has been discharged in part,

provided always that the aggregate nominal amount of the Deposits specified in any such new Certificate or Certificates shall not exceed the aggregate nominal amount of the Deposits specified in the existing Certificate or Certificates which are to be exchanged or (as the case may be) the aggregate nominal amount of such Deposits plus the nominal amount of any additional Deposits to be issued by FSSI to the holder of the Certificate or Certificates being exchange contemporaneously with such exchange. Nothing shall permit FSSI to alter the terms of issue upon which the Deposits were originally issued.

### 8.3 Register

- (a) **Register to be kept:** FSSI shall maintain and keep a Register or Registers in respect of the Deposits issued by it at the registered office of FSSI or some place in New Zealand to which the Supervisor shall consent which is sufficient to enable the Directors and the Supervisor to ascertain the nature, ownership, terms and conditions of any of its Deposits. FSSI shall also comply with all statutory requirements necessary to be fulfilled in respect of such Registers.
- (b) **Maintenance of Register:** The Registers may be kept either among FSSI's general accounting records or separately and shall be kept in a manner and form that will enable it to be conveniently and properly audited.
- (c) **Change of Address:** Each Holder (whether joint or several) shall notify FSSI immediately of any change of its name or address and thereupon the Register shall be altered accordingly.
- (d) **Inspection:** The Supervisor and any person authorised in writing by the Supervisor shall be at liberty at all reasonable times during office hours to inspect the Register and to take copies of and extracts from the same. FSSI will ensure that the Register is available for inspection in accordance with the requirements of sections 221 to 225 of the FMCA and otherwise to the extent required by law.
- (e) **Disclosure and Inspection:**
  - (i) FSSI shall, if a Holder so requests, make available for inspection, and provide a copy of, or copies of extracts from, the Register which relates to the Deposits registered in the name of that Holder, and all other information and matters required by the Applicable Laws.

- (ii) FSSI and the Supervisor may, at all reasonable times during office hours and subject to any Applicable Laws, inspect and take extracts from the Register.
- (iii) FSSI will procure that the Register is available for inspection in accordance with the requirements of sections 221 to 225 of the FMCA and otherwise to the extent required by law.
- (f) **Audit:** The Register shall be kept to the reasonable satisfaction of the Supervisor and audited by the Auditor in accordance with the applicable auditing and assurance standards by the Auditors (or such other auditors that are acceptable to the Supervisor) annually within 4 months of FSSI's balance date and at such other times as the Supervisor may request in writing if the Supervisor has reasonable grounds for believing that the requirements of this clause 8.3 are not being complied with.

## 9. Modification of Trust Deed and Substitution

### 9.1 Modifications

- (a) **Right to amend:** The provisions of this Deed may not be amended or replaced unless the amendment or replacement is made:
  - (i) with the consent of the Supervisor; or
  - (ii) (despite anything to the contrary in this Deed or in any enactment, rule of law, or agreement, including anything relating to the consent of any person to the making of amendments to this Deed) under section 109 of the FMCA, sections 22(7) or 37(6) of the Financial Markets Supervisors Act 2011 or any other power to amend or replace this Deed under an enactment.
- (b) **Supervisor consent:** Subject to section 112(2)(b) of the FMCA, the Supervisor must not consent to an amendment to, or a replacement of, this Deed unless:
  - (iii) either:
    - (1) the amendment or replacement is approved by, or is contingent on approval by, the Holders; or
    - (2) FSSI and the Supervisor are satisfied that the amendment or replacement does not have a material adverse effect on the Holders; and
  - (iv) the Supervisor certifies to that effect and certifies, or obtains a certificate from a lawyer, that this Deed, as amended or replaced, will comply with sections 104 to 106 of the FMCA on the basis set out in the certificate.
- (c) **Holder consent:** The approval of the Holders for the purposes of clause 9.1(b) must be the approval of a Special Resolution of:
  - (v) the Holders; or

- (vi) by each class of Holders that is or may be adversely affected by the amendment or replacement.

9.2 Subject to clause 9.1, the Supervisor may agree with the Obligors to make any modifications to this Deed, or to the terms and conditions of any Deposit without consent of the Holders if the modifications:

- (a) **Technicalities:** are made to correct a manifest error or is of a formal or technical nature; or
- (b) **Other Obligations:** are necessary to ensure that the obligations imposed upon any Obligor under this Deed correspond with or do not conflict with the obligations imposed on that Obligor under or pursuant to the FMCA or the Companies Act or by any other applicable statutory provision; or
- (c) **Applicable Law:** are made to comply with the requirements or any modification of the requirements of any applicable law.

### **Waivers**

9.3 Subject to clause 9.1 and to any applicable law or to a direction given by Special Resolution, the Supervisor may by notice to FSSI waive any breach or anticipated breach by any Obligor under this Deed or of the terms and conditions of any Deposit either wholly or in part for a specified period or indefinitely and on such other terms and conditions as it deems expedient if it shall be satisfied that the interests of the Holders generally will not thus be materially prejudiced, provided that no such waiver shall prejudice the rights of the Supervisor or the Holders in respect of any other breach.

### **Notice of Amendment**

9.4 Within 5 Business Days after an amendment to, or replacement of, this Deed, FSSI must ensure that notice of the amendment or replacement and a copy of the certificate relating to such amendment or replacement, is lodged with the Registrar of Financial Service Providers.

## **10. Auditor**

### **Consultation with Supervisor**

10.1 For so long as any Deposits are outstanding, FSSI must:

- (a) before recommending the appointment or reappointment of a person as an Auditor:
  - (i) consult with the Supervisor on the appointment or reappointment; and
  - (i) ensure that any comments of the Supervisor concerning the proposed auditor are brought to the attention of the person or persons appointing or reappointing the Auditor;
- (b) notify the Supervisor if the Auditor resigns from appointment, or declines to accept appointment or reappointment, and must pass on to the Supervisor any explanation provided by the Auditor for resigning from appointment or declining to accept appointment or reappointment; and

- (c) not attempt to prevent a person who has resigned from appointment as the Auditor, or declined to accept appointment or reappointment as the Auditor, from offering an explanation, or disclosing to the Supervisor the reason, for resigning or declining appointment or reappointment.

### **Specified Engagement**

- 10.2 For so long as any Deposits are outstanding, FSSI must, before recommending the appointment or reappointment of a person as the Auditor:
- (a) give the Supervisor an opportunity to be a party to an assurance engagement carried out by an auditor in relation to FSSI's compliance with this Deed for the purpose of the Supervisor obtaining assurance of matters relevant to the exercise or performance of the powers or duties of the Supervisor; and
  - (b) consult with the Supervisor on the nature and scope of any such engagement.

### **Terms of Appointment**

- 10.3 For so long as any Deposits are outstanding, FSSI must ensure that the following terms are included in the terms of appointment of an auditor in its capacity as Auditor:
- (a) that the Auditor will, at the beginning of the audit, review, or engagement, give the Supervisor an opportunity to meet with the Auditor, without any representative of FSSI being present, in order to allow the Supervisor an opportunity to raise any issues or concerns relevant to the exercise or performance of the powers or duties of the Supervisor; and
  - (b) that the Auditor will give the Supervisor an opportunity to meet with the Auditor, without any representative of FSSI being present, to discuss matters arising in the performance of the audit, review, or engagement and to answer any questions the Supervisor may have concerning the audit, review, or engagement.

### **Auditor reporting**

- 10.4 FSSI will provide any information to the Auditor which is required to enable the Auditor to comply with the reporting obligations contained in sections 198 and 199 of the FMCA and take all other steps reasonably requested by the Auditor in relation to compliance with those sections.

### **Applications to court**

- 10.5 The Supervisor may, at any time, apply to the court for an order:
- (a) under section 208 of the FMCA, if the Supervisor is satisfied that:
    - (i) FSSI and any guarantor are unlikely to be able to pay all money owing in respect of any Deposits as and when due; or
    - (ii) FSSI is insolvent (as defined in the FMCA) or the financial position or management of FSSI is otherwise inadequate; or
    - (iii) there is a significant risk that the interests of Holders will be materially prejudiced for any other reason; or

- (iv) the provisions of this Deed are no longer adequate to give proper protection to the interests of the Holders; or
- (b) under section 210 of the FMCA and within 20 Business Days (or, with leave of the court, within any longer period) after the passing of a Special Resolution, directing it not to comply with such Special Resolution,

and it may support or oppose any application to the court made by or at the instance of the Financial Markets Authority or any Holders (where applicable). The Supervisor shall, subject to clause 11.5, be indemnified by FSSI against all expenses incurred in relation to any such application or proceedings.

### **Power to engage expert**

- 10.6 The Supervisor is entitled, in performance of the Supervisor's functions, to engage an expert (for example, an auditor, investigating accountant, valuer, or actuary) if the Supervisor considers, on reasonable grounds that it requires the assistance of the expert to:
- (a) determine the financial position of FSSI; or
  - (b) review the business, operation, or management systems, or the governance, of FSSI.
- 10.7 Where the Supervisor engages an expert pursuant to clause 10.6, FSSI shall provide reasonable assistance to the expert to allow the expert to provide the assistance and (without limiting clause 11.18) the fees and expenses of the expert, which must be reasonable in the circumstances, shall be paid by FSSI.

## **11. Incidental Provisions relating to and Remuneration of Supervisor**

### **Investment of trust money**

- 11.1 Any moneys at any time held by the Supervisor subject to the trusts of this Deed may be invested in the name of the Supervisor or its nominee either in any investments whatsoever at the Supervisor's discretion, or, if FSSI so requests, in the purchase of Deposits and the Supervisor shall have power to vary or transpose such investments for others of a like nature and deal with or dispose of them and all income from such investments shall belong to FSSI.

### **Delegation of Powers**

- 11.2 The Supervisor, whenever it thinks it expedient in the interests of the Holders to do so, may:
- (a) where permitted to do so by the FMCA or as permitted by, and then subject to, conditions imposed under the Financial Markets Supervisor Act 2011, delegate at any time (at the expense of FSSI) to any person any of the trusts, powers, authorities or discretions vested in the Supervisor by this Deed which cannot conveniently be exercised by it or through its employees upon such terms and conditions (including the power to sub-delegate) as the Supervisor may think fit and (subject to clause 11.8) the Supervisor shall not be responsible for any loss incurred by any misconduct or default on the part of any such delegate or sub-delegate;



- (b) authorise such person as it thinks fit to act as its representative at any meeting; and
- (c) in addition to the exercise of the powers contained in clause 10.5, apply to the Court for directions in relation to any question arising either before or after the Date of Enforcement.

### **Protection of the Supervisor**

11.3 By way of supplement to the law relating to supervisors and to facilitate the discharge of its duties under this Deed but subject always to any statutory provision, it is expressly declared that the Supervisor:

- (a) **Reliance on advice and information:** may obtain and act in reliance on:
  - (i) **Advisors opinions:** the opinion of or any information obtained from any reputable barrister, solicitor, valuer, authorised financial adviser, surveyor, auctioneer, chartered accountant or other appropriately qualified expert;
  - (ii) **Directors' certificates:** a certificate signed by any two (2) Directors on behalf of them all that any particular transaction or thing is expedient or commercially desirable and not detrimental to the interests of the Holders or as to any matter prima facie within their knowledge as sufficient evidence of such matter or the expediency or desirability of such transaction or thing; and
  - (iii) **Reports:** the statements contained in any certificate or report given pursuant to this Deed as conclusive evidence of the facts stated in such certificate or report;
- (b) **Resolutions:** shall not be responsible for relying upon any resolution purporting to have been passed at any meeting of Holders which the Supervisor believes to have been properly passed even though it appears that such resolution is not valid by reason of a defect in the convening of the meeting or the proceedings thereat or otherwise;
- (c) **Application of Funds:** shall not be responsible for any money paid by Holders or be bound to see the application of those moneys;
- (d) **Defects in title to assets:** shall not be bound or concerned to enquire into or be liable for any defects in the title of any Obligor to its Assets whether such defects or failure might have been discovered upon examination or enquiry or remedied or not;
- (e) **Discretion as to exercise of powers:** save as otherwise provided in this Deed shall have absolute discretion as to the exercise of all trusts and powers, authorities and discretions vested in it hereby and as to the commencement, conduct, settlement or compromise of any action, proceedings or claims and (provided it shall have acted with reasonable care and diligence) shall not be responsible for any loss, costs or damages that may result;
- (f) **Validity of Certificate:** shall not be liable to any Obligor or any Holder for accepting as valid any Certificate subsequently found to be forged or not authentic, provided that the Supervisor shall have exercised due care and diligence in attempting to establish the validity of any such Certificate; and

- (g) **This Deed:** shall not be bound to give notice to any person of the execution or coming into force of this Deed.

### **Role of Supervisor**

- 11.4 In addition to its duties and obligations set out in the this Deed, the Supervisor has all of the duties and obligations at law, including without limitation those set out in sections 112(1), 112(2) and 113 of the FMCA.

### **Indemnity**

- 11.5 Subject to the limitations placed on indemnities of supervisors under the FMCA but otherwise without prejudice to the right of indemnity by law given to Supervisors, the Supervisor and every attorney, manager, agent or other person appointed by the Supervisor under this Deed shall be indemnified by the Guaranteeing Group for all liabilities and expenses incurred in the exercise or purported execution of the powers or trusts under this Deed or any attempt thereat and against all actions, costs, claims and demands in respect of any matter or thing done or omitted relating to this Deed other than a claim arising out of a wilful default, negligence or wilful breach of trust and the Supervisor may retain and pay out of any moneys received under this Deed all sums necessary to effectuate such indemnity and also the remuneration and disbursements of the Supervisor as provided in this Deed.

### **11.6 Freedom to transact business**

- (a) **Representative capacity:** Nothing in this Deed shall prohibit the Supervisor, its holding company or any of their subsidiaries (collectively in this clause 11.6 called "the Supervisor"), their directors or officers from being a Holder or holder of shares or other securities of any Group member or from acting in any representative capacity for a Holder or holder of shares or other securities of any Group member or for any Group member or any of its subsidiaries, related companies or associated companies or any holder of shares or other securities of any of them.
- (b) **Transactions:** The Supervisor may enter into any transactions with any Group member, its subsidiaries, related companies or associated Companies in the ordinary course of business and shall not be accountable to any of the aforementioned Companies or the Holders for any profits arising from such transactions.

### **Supervisor may represent Holders**

- 11.7 The Supervisor may of its own volition or pursuant to any direction given by the Holders or any class of them represent such Holders generally in any transaction or proceedings concerning them generally.

### **Supervisor's Duty of Care**

- 11.8 No provision of this Deed shall have the effect of exempting the Supervisor from, or indemnifying the Supervisor against any liability where the Supervisor fails to comply with the duties set out in clauses 1.4(a) and 1.4(d).

### **Supervisor's Indemnity**

- 11.9 If the Supervisor shall receive a request or direction (other than by Special Resolution) pursuant to the provisions of clauses 4.6 or 5.2, or otherwise under this Deed the Supervisor shall not be bound to comply with such request unless the Supervisor shall first be indemnified to its satisfaction against all actions, proceedings, claims and demands to which the Supervisor may be rendered liable and all expenses which it may incur by so doing.

### **Retirement of Supervisor**

#### **Resignation or removal of Supervisor**

- 11.10 Subject to clause 11.11 below, in the case of a resignation or removal under paragraphs 11.10(a), 11.10(b) or 11.10(d):
- (a) the Supervisor may resign at any time by giving not less than 90 days' written notice to FSSI;
  - (b) FSSI may remove the Supervisor from office by giving not less than 90 days' written notice to the Supervisor;
  - (c) the Supervisor may be removed by the Financial Markets Authority or FSSI under Part 2 of the Financial Markets Supervisors Act 2011; or
  - (d) the Holders may remove the Supervisor from office upon the passing of a Special Resolution of Holders to that effect.

#### **Requirements for Retirement and Removal**

- 11.11 The Supervisor may not:
- (a) be removed or resign under clauses 11.10(a), 11.10(b) or 11.10(d) unless:
    - (i) all functions and duties of the position have been performed;
    - (ii) another licensed supervisor has been appointed, and accepted the appointment, in its place; or
    - (iii) the court consents; and
  - (b) be removed by FSSI under clause 11.10(b) without:
    - (i) the Financial Market Authority's consent; and
    - (ii) the approval by a Special Resolution of Holders.

#### **Appointment of a new Supervisor**

- 11.12 If any of the circumstances described in clauses 11.10(a) to (d) occur, FSSI will, subject to clauses 11.11(a)(i) and 11.11(a)(iii) and 11.11(b), (where applicable), have the right to appoint a successor Supervisor, which must be a person who is authorised to act as a supervisor under the Financial Markets Supervisors Act 2011.

#### **Approval by Special Resolution**

- 11.13 Where a successor Supervisor is to be appointed, then the removal of the Supervisor and the appointment of the successor Supervisor shall be subject to approval by Special Resolution.

### **Failure to Appoint Supervisor**

11.14 Other than where the successor Supervisor requires approval pursuant to clause 11.13, if a successor Supervisor has not been appointed by FSSI or has not accepted an appointment within 60 days after any such notice, then the retiring Supervisor may, on behalf of FSSI, appoint a successor Supervisor. In circumstances where the successor Supervisor requires approval by Special Resolution, any failure of FSSI to appoint or have approved a successor Supervisor will entitle the Holders, by Special Resolution, to appoint a new Supervisor.

### **Successor Supervisor**

11.15 Where an appointment under this clause 11 is accepted by a successor Supervisor:

- (a) the successor Supervisor will succeed to, and become vested with, all the rights, powers and obligations of the retiring Supervisor under this Deed and, as from that time, the retiring Supervisor shall be discharged from its rights, powers and obligations;
- (b) the retiring Supervisor must transfer to the successor Supervisor all moneys, investments, property and books held by the Supervisor under this Deed;
- (c) the successor Supervisor shall execute all such documents which are necessary or appropriate and in such form as may be reasonably required by the other parties to this Deed, such that the successor Supervisor is bound by all the covenants on the part of the Supervisor under this Deed from the date of such appointment; and
- (d) FSSI shall execute all such documents which are necessary or appropriate and in such form as may be reasonably required by the retiring Supervisor, such that the retiring Supervisor is indemnified to its satisfaction in respect of the effectiveness of its retirement and any actions of the successor Supervisor.

### **Notice**

11.16 FSSI agrees to notify all Holders of the appointment of any new supervisor as soon as reasonably practicable following the appointment and to lodge notice of the change in Supervisor in accordance with the Applicable Laws.

### **Supervisor's Powers Cumulative**

11.17 The powers, authorities and discretions hereby conferred upon the Supervisor shall be in addition to any powers, authorities and discretions which may from time to time be vested in Supervisors by law and to any powers, authorities and discretions which may from time to time be vested in the Supervisor as a Holder.

### **Remuneration**

11.18 FSSI shall pay to the Supervisor by way of remuneration for its services as Supervisor such remuneration as shall from time to time be agreed between FSSI and the Supervisor provided always that if FSSI and the Supervisor fail to agree on any amount payable to the Supervisor under this sub-clause the dispute shall be referred to a single arbitrator if the parties can agree on one and otherwise to two arbitrators, one to be appointed by FSSI and one by the Supervisor, in accordance with the Arbitration Act 1996.

- (a) **Expenses:** Unless agreed otherwise in writing with the Supervisor from time to time, FSSI will also pay all expenses including travelling expenses reasonably incurred by or on behalf of the Supervisor in connection with:
- (i) the preparation, execution and registration of this Deed;
  - (ii) the exercise by the Supervisor of any power conferred on the Supervisor by this Deed or upon any Holder including the taking of any expert advice (including the cost of any advice taken pursuant to clause 11.3(a) or otherwise) deemed necessary or expedient by the Supervisor;
  - (iii) any breach or default in the observance or performance by FSSI or any of the Guaranteeing Subsidiaries of the covenants obligations and conditions of this Deed;
  - (iv) the convening and holding and carrying out of any directions or resolutions of any meeting of Holders;
  - (v) any application under the trusts and provisions hereof for its consent to or approval of any act or matter.
- (b) **Payments Continuing:** The Supervisor's remuneration and payments shall continue to be payable until the trusts under this Deed shall be finally wound up and whether or not the trusts under this Deed are in administration by or under the direction of the Court.
- (c) **Payments added to Guaranteed Moneys:** All expenses incurred by, all payments made in the lawful exercise of the powers conferred upon and all remuneration payable to, the Supervisor shall be payable by FSSI on demand and shall form part of the Guaranteed Moneys and shall be satisfied before any payment is made out of them to the Holders and until payment shall carry interest at 2 percent above the official cash rate published by the Reserve Bank of New Zealand, from time to time, from the date on which they have become payable.
- (d) **Consents etc:** FSSI will also pay on demand any reasonable charges made by the Supervisor for work done by it in connection with any application under the trusts or provisions of this Deed for its consent to or approval of any thing, act or matter.

## 12. Miscellaneous Provisions

### Appointment of Supervisor as Attorney

- 12.1 Each Obligor irrevocably appoints the Supervisor and the Supervisor's manager or assistant manager, corporate trusts (from time to time and whosoever shall be such officeholder shall automatically be appointed as attorney) severally to be its attorney or attorneys and in its name and on its behalf to enter into, execute and do all assurances, Deeds, instruments, acts and things whatsoever which shall in the opinion of any such attorney be necessary or expedient or that it ought to execute and do for the purposes of carrying out any trust or obligation hereby declared or imposed upon it or for giving to the Holders or to the Supervisor on their behalf the full

benefit of any of the provisions of this Deed and generally to use its name in the exercise of all or any of the powers by this Deed conferred on the Supervisor.

## 12.2 Notices

- (a) **Method of Giving:** Any notice, requisition, demand or request under this Deed must be in writing and given on behalf of FSSI or any Guaranteeing Subsidiary or the Supervisor or any Holder by an officer, agent or attorney or by its or his respective solicitors (as the case may be) and may be given:
- (i) to any Holder, by sending it through the post in a pre-paid letter, or by delivery, addressed in the case of each Holder to his Registered Address or by email or facsimile to his Registered Address;
  - (ii) to FSSI or any Guaranteeing Subsidiary by delivery, facsimile, or post, to its registered office or by email to the email address nominated by FSSI or the Guaranteeing Subsidiary; and
  - (iii) in the case of the Supervisor, by delivery, facsimile, email or post to the office of the branch of the Supervisor which normally undertakes and performs the administration of the trusts, or to its registered office or to its principal place of business or by email to the email address nominated by the Supervisor by notice in writing from time to time.
- (b) **Joint Names:** In the case of joint Holders, a notice given to the Holder (as the case may be) whose name stands first in the Register in respect of such holding shall be sufficient notice to all the joint holders.
- (c) **Effectiveness:** Notices given pursuant to this Deed shall be deemed to have been made or given:
- (i) **Delivery:** in the case of personal delivery when received;
  - (ii) **Mail:** in the case of posting on the second Business Day following the date of posting; and
  - (iii) **Facsimile or email:** in the case of facsimile or email, on the Business Day on which it is transmitted or, if transmission occurs after 5pm on a Business Day or, if transmitted not on a Business Day, on the next Business Day after the date of transmission.

## Costs

- 12.3 FSSI shall pay all costs, registration fees and other expenditure incidental to the preparation of this Deed.

## Governing law

- 12.4 This Deed is governed by and shall be construed in accordance with New Zealand law.

## Invalidity

- 12.5 If any provision of this Deed shall be invalid, void, illegal or unenforceable, the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.

## Execution

## **FIRST SCHEDULE - MEETINGS OF HOLDERS**

To the extent that there is any inconsistency between the provisions of this Deed (including this First Schedule) and Schedule 11 of the FMCR, the provisions of this Deed (including the First Schedule) shall prevail to the extent permitted by law.

### **1. Convening**

- (a) The Supervisor or FSSI may at any time of their own volition convene a meeting of the Holders.
- (b) FSSI shall, whenever required to do so pursuant to the FMCA, convene a meeting of the Holders.
- (c) The Supervisor (subject to its being indemnified to its satisfaction against all costs and expenses to be incurred) shall at the request in writing of any Holders holding not less than 10% in nominal amount of the Deposits convene a meeting of the Holders. Any such request shall state the nature of the business proposed to be dealt with at the meeting.
- (d) Whenever FSSI is about to convene a meeting it shall advise the Supervisor in writing of the place, day and hour of the meeting and the nature of the business to be transacted and shall obtain the prior approval in writing of the Supervisor to the draft of the documents to be sent to the Holders concerned and if the Supervisor shall so require shall include with the documents sent to such Holders any statement which the Supervisor requires to make in relation to the meeting and the matters to be dealt with thereat. Whenever the Supervisor is about to convene a meeting it shall advise FSSI in writing of the place, day and hour of the meeting and the nature of the business to be transacted.

### **2. Place**

Each meeting shall be held on a Business Day in Christchurch or at such other place as the Supervisor determines or approves.

### **3. Notice**

- (a) Fifteen (15) Business Days' notice of every meeting of Holders (exclusive of the day on which it is given, the following day and the day of the meeting) shall be given:
  - (i) to every Holder; and
  - (ii) to every legal personal representative or an assignee in bankruptcy of a deceased or bankrupt Holder who, but for their death or bankruptcy would have been entitled to receive notice of the meeting.
- (b) Notice of every meeting shall be given in the manner provided in clause 12.2(a) of the Trust Deed.
- (c) Every notice shall specify the place, day and hour of the meeting and the general nature of the business to be transacted but it shall not be necessary to



specify in the notice the terms of the resolutions to be proposed, except in the case of a resolution proposed to be passed as a Special Resolution in which case the text of the proposed resolution shall be set out. Where the proposed Special Resolution is so specified, only that resolution as set out shall be entitled to be passed at that meeting unless all of those who are entitled to attend and vote at that meeting agree to amend the text of the resolution or the Supervisor, at its sole discretion, amends the text of the resolution to cure any patent or typographical error.

- (d) If a Special Resolution is to be submitted to the meeting:
  - (i) a draft of the proposed notice of the meeting (including any explanatory memorandum) must be given to the Supervisor at least 10 Business Days before the notice is given under subclause (a); and
  - (ii) the notice of the meeting must be accompanied by a document containing the Supervisor's comments on the proposed Special Resolution (but only if the Supervisor has provided those comments in writing to FSSI at least 5 Business Days before the notice is given under subclause (a)).
- (e) If the meeting is convened by FSSI, a copy of the notice shall be sent to the Supervisor. If the meeting is convened by the Supervisor, a copy of the notice shall be sent to every director of FSSI and the Auditor of FSSI.
- (f) The accidental omission to give notice to, or the non-receipt of notice by, any person entitled thereto shall not invalidate the proceedings at any meeting.
- (g) At least 7 days' notice of any adjourned meeting at which a Special Resolution is to be proposed shall be given in the same manner as the notice convening the original meeting and such notice shall state the requisite quorum. No notice of any other adjourned meeting need be given if the meeting is to be adjourned for less than 30 days.

#### **4. Method of holding meetings**

- (a) A meeting of Holders may be held by a quorum of Holders:
  - (i) being assembled together at the time and place appointed for the meeting;
  - (ii) participating in the meeting by means of audio, audio and visual or electronic communication; or
  - (iii) by a combination of both of the methods in paragraphs (i) and (ii) above.

#### **5. Quorum**

- (a) No business shall be transacted at any meeting unless the requisite quorum is present at the commencement of business.
- (b) The quorum for passing a Special Resolution shall be Holders present in person or by representative who hold Deposits with a combined nominal value of no less than 25% of the nominal value of the Deposits held by those Holders entitled to vote.

- (c) The quorum for the transaction of any business at a meeting of Holders other than the passing of a Special Resolution of Holders shall be at least two (2) Holders present in person or by representative and who together hold a combined nominal value of no less than 10% of the nominal value of the Deposits held by those Holders entitled to vote.
- (d) If within half an hour after the time appointed for the meeting of a quorum is not present, the meeting, if convened upon the request of Holders, shall be dissolved. In any other case it shall stand adjourned to such day and time not being less than ten days thereafter and to such place as may be appointed by the chairman and at such adjourned meeting the Holders (as the case may be) present in person or by representative shall be a quorum for the transaction of business.
- (e) Notice of any such adjourned meeting at which a Special Resolution is to be submitted shall be given in the same manner (except in respect of the period of notice) as of an original meeting and such notice shall state that the Holders present in person or by representative at the adjourned meeting whatever their number and whatever the amount of relevant Deposit held by them shall form a quorum.

## 6. **Chairman**

A person nominated in writing by the Supervisor shall preside at every meeting and if no such person is nominated or if at any meeting the person nominated is not present within fifteen minutes after the time appointed for holding the meeting Holders present (as the case may be) shall choose one of their number to be chairman.

## 7. **Right to Attend and Speak**

Any director, officer or solicitor of, or any other person authorised by, the Supervisor or FSSI may attend any meeting and all such persons shall have the right to speak at the meeting.

## 8. **Adjournment**

- (a) The chairman may, with the consent of any meeting at which a quorum is present, and shall if so directed by the meeting shall, adjourn the meeting from time to time and from place to place.
- (b) No business shall be transacted at any adjourned meeting except business which might have been lawfully transacted at the meeting from which the adjournment took place.

## 9. **Only Persons on Register Recognised**

The persons registered as Holders in the Registers and no other person or persons shall be recognised and treated as the legal holders of the Deposits whether such persons are or are not in fact the owners of the Deposits.

## 10. Authority to Vote

- (a) A Holder who is an individual may vote personally or by his representative and a Holder which is a Company may vote by its representative.
- (b) In this paragraph "representative" means:
  - (i) in the case of a Holder being an individual, a person appointed by an instrument by way of proxy or by a power of attorney; and
  - (ii) in the case of a Holder being a Company or corporation sole either:
    - (1) a person appointed by an instrument of proxy or by a power of attorney; or
    - (2) a director of the Company.
- (c) The following persons shall be exclusively entitled to vote in person or by representative in respect of the Deposit mentioned:
  - (i) the persons registered as Holders in the Register in respect of the Deposits recorded as owned by them respectively; and
  - (ii) the persons who are entitled to receive notice of the meeting pursuant to paragraph 3(a) in respect of the Deposits devolving upon them respectively.

## 11. Proxies

- (a) The instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing or if the appointor is a Company either under its seal or under the hand of an officer or attorney so authorised.
- (b) A person appointed to act as a proxy need not be a Holder and a holder of a proxy shall have the right to speak at the meeting.
- (c) The instrument appointing a proxy and the power of attorney or other authority (if any) under which it is signed, or a copy of such power or authority certified by a solicitor or notary public or in such other manner as the Supervisor shall approve, shall be deposited at such place as the Supervisor, or FSSI with the approval of the Supervisor, may in the notice convening the meeting direct or (if no such place is appointed) then at the registered office of FSSI not less than forty eight hours (or such other shorter period as FSSI may direct in the notice convening the meeting) before the time appointed for holding the meeting or adjourned meeting or for the taking of a poll at which the person named in the instrument proposes to vote and subject as hereinafter provided in default the instrument of proxy shall not be treated as valid **PROVIDED ALWAYS** that the Supervisor may in its absolute discretion accept as valid any instrument of proxy notwithstanding that such instrument or any power of attorney or other authority is received or produced at a place other than that specified above or out of time. FSSI shall close the Register for forty eight hours (or such other shorter period as is referred to above) prior to the time appointed for holding the meeting or adjourned meeting to enable the Supervisor to ascertain the identity

of Holders who may attend the meeting or adjourned meeting and their authority to appoint a proxy.

- (d) An instrument of proxy may be in any usual or common form or in such other form as the Supervisor shall approve and may make provision for directions to be given by the grantor to vote in favour of or against any proposed resolution.
- (e) A proxy, whether in a usual or common form or not, shall unless the contrary is stated thereon, be valid as well for any adjournment of the meeting as for the meeting to which it relates and need not be witnessed. Notwithstanding any provision contained in an instrument of proxy, no instrument of proxy shall be valid after the expiration of twelve months from the date of its execution but this provision shall not be construed to apply to the appointment of an attorney or representative otherwise than by an instrument of proxy.
- (f) An instrument of proxy in favour of:
  - (i) the chairman of FSSI; or
  - (ii) the chairman of the meeting or the chairman (however expressed),

shall be valid and effectual as though it were in favour of a named person and shall in the case of sub-paragraph (i) above constitute the person holding the office of the chairman of FSSI and in the case of sub-paragraph (ii) above constitute the person who chairs the meeting for which the proxy is used (whether on adjournment or not) the lawful proxy of the appointor.

## 12. **Holder may Appoint Attorney**

Any Holder may by power of attorney appoint an attorney (who need not be a Holder) to vote and act on his behalf at any meeting. Any attorney shall be entitled to produce evidence of his appointment at any time before the time appointed for the holding of or at the meeting or adjourned meeting or for the taking of a poll at which he proposes to vote. An attorney if so empowered may appoint a proxy for the Holder granting the power of attorney.

## 13. **Corporate Representatives**

A person who is a director of a Holder or otherwise authorised by a Holder being a Company, or authorised by a Holder being a corporation sole to act for it at any meeting shall in accordance with his authority until his authority is revoked by the Company concerned be entitled to exercise the same powers on behalf of that Company as that Company could exercise if it were an individual Holder and shall be entitled to produce evidence of his authority to act at any time before the time appointed for the holding of or at the meeting or adjourned meeting or for the taking of a poll at which he proposes to vote.

## 14. **Rights of Representatives**

- (a) A representative shall have the right to demand or join in demanding a poll and shall (except and to the extent to which the representative is specially directed

to vote for or against any proposal) have power generally to act at the meeting for the Holder concerned.

- (b) The Supervisor and any officer of the Supervisor may be appointed a representative.

## 15. **Voting Procedure and Polls**

- (a) A resolution put to the vote at a meeting shall be decided on a show of hands unless a poll is (before or on the declaration of the result of the show of hands) demanded by the chairman or the Supervisor or any representative of the Supervisor or by one or more Holders holding or representing not less than 5% in nominal value of the Deposits. Unless a poll is so demanded a declaration by the chairman that a resolution has been carried or carried unanimously or by a particular majority or lost shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution.
- (b) On a show of hands each person present at the meeting and entitled to vote shall have one vote only. On a poll every Holder who is present in person or by a proxy or an attorney or a representative shall have one vote for every \$1 nominal amount of Deposits of which they are holder.
- (c) If a poll is duly demanded it shall be taken in such manner as the chairman may direct and the result of such poll shall be deemed to be the resolution of the meeting at which the poll was demanded.
- (d) In the case of an equality of votes whether on a show of hands or on a poll the chairman of the meeting at which the show of hands takes place or at which the poll is demanded shall be entitled to a casting vote in addition to the votes (if any) to which he may be entitled as a Holder (as the case may be) or on behalf of Holders.
- (e) A poll demanded on the election of a chairman or on a question of adjournment shall be taken forthwith. A poll demanded on any other question shall be taken either immediately or at such time (not being more than thirty days from the date of the meeting) and place as the chairman may direct. The result of such poll shall be deemed to be the resolution of the meeting at which the poll was demanded. No notice need be given of a poll not taken immediately.
- (f) The demand for a poll shall not prevent the continuance of a meeting for the transaction of any business other than the question on which the poll has been demanded.
- (g) On a poll votes may be given either personally or in the case of Deposits by representative. On a poll a person entitled to more than one vote need not use all his votes or cast all the votes he uses in the same way.
- (h) In the case of joint Holders, the vote of the senior who tenders a vote whether in person or, in the case of Deposits, by representative, shall be accepted to the exclusion of the votes of the other joint Holders and for this purpose seniority shall be determined by the order in which the names stand in the Register in respect of the joint holding.

- (i) A vote given in accordance with the terms of an instrument of proxy or power of attorney or other form of appointment shall be valid notwithstanding the previous death, insanity or (in the case of a Company) liquidation of the principal or revocation of the proxy, or power of attorney or other form of appointment or of the authority under which the proxy was executed or the transfer of the Deposits in respect of which the vote is given provided that no intimation in writing of such death, insanity, liquidation, revocation or transfer is received by the Supervisor or FSSI at its registered office before the commencement of the meeting or adjourned meeting at which the proxy is used.

## 16. Special Resolutions

- (a) The expression "Special Resolution" means a resolution approved by Holders holding an aggregated of at least three-fourths (3/4) in a nominal value of the Deposits held by those persons who are entitled to vote, and who vote on the question.
- (b) Without limiting the rights, powers and discretions conferred on the Supervisor by this Deed and subject to the proviso to this paragraph a meeting of Holders shall, in addition to all other powers which by this Deed are specified as exercisable by Special Resolution, have the following powers exercisable by Special Resolution namely:
  - (i) power to sanction either unconditionally or upon any conditions:
    - (1) the release of FSSI from the payment of all or any part of the Deposits; or
    - (2) the release of any Guaranteeing Subsidiary from its guarantee and from its obligations to the Supervisor in respect of the Holders; or
    - (3) the release of any guarantee created by or pursuant to the Trust Deed;
  - (ii) power to sanction the exchange of Deposits for, or the conversion of Deposits into shares, stock, debentures, debenture stock or other obligations or securities of FSSI or any other Company formed or to be formed;
  - (iii) power to postpone or, with the concurrence of FSSI, to accelerate, the day when the Principal Moneys of the Deposits shall become payable and to suspend or postpone for a time the payment of interest on Deposits;
  - (iv) power to sanction any alteration, release, modification, waiver, variation or compromise or any arrangement in respect of the rights of the Holders against FSSI and/or the Guaranteeing Subsidiaries or against their respective properties howsoever such rights shall arise;
  - (v) power to assent to any modification, alteration, variation or addition to the provisions contained in this Deed or the conditions attaching to the Deposits proposed or agreed to by FSSI and authorise the Supervisor to

- concur in and execute any supplemental trust Deed effecting such modification, alteration, variation or addition;
- (vi) power to give any sanction, assent, release or waiver of any breach or default by FSSI or any Guaranteeing Subsidiary under any of the provisions of this Deed;
  - (vii) subject to the FMCA, power to discharge, release or exonerate the Supervisor from all liability in respect of an act of commission or omission for which the Supervisor has or may become responsible under this Deed;
  - (viii) power to sanction any scheme for the reconstruction of FSSI or any Guaranteeing Subsidiary or for the amalgamation of FSSI or any Guaranteeing Subsidiary with any other Company where such sanction is necessary;
  - (ix) subject to the provisions of this Deed, power to approve the appointment of a new Supervisor; and
  - (x) power to authorise or direct the Supervisor to concur in and execute any supplemental Deed or other document embodying such sanction, modification, addition, authority or approval, assent, release, waiver, direction or request.
- (c) A Special Resolution passed at a meeting of the Holders duly convened and held in accordance with this Deed shall, subject to the provisions of subclause (d) of this clause, be binding upon all the Holders whether present or not present or entitled to be present or not at the meeting and each of the Holders and the Supervisor (subject to the provisions of its indemnity contained in this Deed) shall be bound to give effect thereto accordingly and the passing of any such resolution shall as between the Supervisor and the Holders be conclusive evidence that the circumstances justify the passing thereof, the intention being that it shall rest with the meeting to determine without appeal whether or not the circumstances justify the passing of any such resolution.
- (d) A Special Resolution which:
- (i) sanctions any alteration to the right of the Holders to recover interest on or repayment of their Deposits in accordance with the terms of issue thereof;
  - (ii) sanctions or directs waiver by the Supervisor of any breach by FSSI of its obligations in regard to payment of interest on or Principal of the Deposits;
  - (iii) relates to the exercise or non-exercise or manner of exercise by the Supervisor of any of its trusts, obligations or powers which are exercisable by virtue exclusively of breaches of the matters mentioned in (ii) above (there being no breach of any other provision of the Deed and no other event mentioned in clause 5.1 having occurred);
  - (iv) otherwise exclusively affects the rights and interests of the Holders,
- shall be of no force and effect unless:
- (1) it has been assented to in writing by the holders of not less than three-fourths (3/4) in nominal amount of the Holders; or

- (2) it is or has been approved or sanctioned by Special Resolution of Holders.

**17. Minutes to be Kept**

Minutes of all resolutions and proceedings at every meeting shall be made by the Supervisor or, if the Supervisor shall not be present at such meeting, by some person appointed by the chairman of such meeting and duly entered in books from time to time provided for that purpose by the Supervisor at the expense of FSSI and any such minutes as aforesaid if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had or by the chairman of the next succeeding meeting of Holders shall be prima facie evidence of the matters stated in them and until the contrary is proved every such meeting in respect of the proceedings of which minutes have been made shall be deemed to have been duly held and convened and all resolutions passed or proceedings had thereat to be duly passed and conducted. Copies of such minutes shall be furnished by the Supervisor to FSSI as early as possible after the holding of the meeting to which they refer.

**18. Resolution in Writing**

- (a) Anything that may be done by the Holders by a resolution or Special Resolution passed at a meeting of Holders may be done by a resolution in writing signed by at least three-fourths (3/4) of the Holders having the right to vote on that resolution, holding in the aggregate Deposits conferring the right to cast not less than three-fourths (3/4) of the votes which could be cast on that resolution so long as the following conditions are met:
- (i) all the Holders entitled to receive notice if a meeting were called to pass the resolution or Special Resolution shall receive notice, in accordance with paragraph 3, or the resolution to be passed in writing;
  - (ii) the Supervisor and FSSI shall be sent notice of the resolution to be passed in writing at the same time as it is sent to the relevant class or classes of Holders and;
  - (iii) FSSI must, within 5 Business Days after a resolution is passed in this manner, send a copy of the resolution to every Holder entitled to vote who did not sign the resolution and on whose behalf the resolution was not signed.
- (b) Any such resolution may consist of several documents in similar form, each signed by one or more Holders.
- (c) Any such resolution may be signed by a Holder, or an agent or attorney of the Holder duly authorised in writing, or if the Holder is a Company, either under its seal or signed by an officer or attorney so authorised or by any director, secretary, general manager, investment manager or other person who appears to the Supervisor to have authority to sign the resolution on behalf of that Company.



**19. Class Meetings**

If there shall be outstanding Deposits which, in the opinion of the Supervisor, are not identical and do not form one single series or class then Deposits which, in the opinion of the Supervisor, are identical in all material respects, except as to interest rate and maturity date, shall be deemed to constitute a separate series or class of Deposits, and the foregoing provisions of this schedule shall have effect, subject to the following modifications;

- (a) a resolution which, in the opinion of the Supervisor affects one series or class of Deposits only shall be deemed to have been duly passed if passed at a separate meeting of the holders of the Deposits of that series or class;
- (b) a resolution which, in the opinion of the Supervisor, affects all or any two or more series or classes of Deposits and does not give rise to a conflict of interest between the holders of Deposits of any of the series or classes so affected, shall be deemed to have been duly passed if passed at a single separate meeting of the holders of the Deposits of the series or classes so affected;
- (c) a resolution which, in the opinion of the Supervisor, affects more than one series or class of Deposits and gives rise, or may give rise, to a conflict of interest between the holders of the Deposits of any of the series or classes so affected, shall be deemed to have been duly passed only if passed at separate meetings of the holders of the Deposits of each series or class so affected; and
- (d) to all such meetings the preceding provisions of this schedule shall mutatis mutandis apply as though references therein to Deposits and Holders were references to the Deposits of the series or class in question and to the holders of such Deposits respectively.

**20. Sole Holder**

Notwithstanding that there may at any time be only one holder of Deposits in respect of which a meeting is to be called so that a "meeting" of that class is not technically possible, a meeting shall nevertheless be called, so that the provisions of paragraph 7 may be complied with.

## SECOND SCHEDULE

(Form of Certificate)

**Certificate No:** \_\_\_\_\_ **Amount of Deposit: \$** \_\_\_\_\_

**FOODSTUFFS SOUTH ISLAND LIMITED**

**Registered Office:** \_\_\_\_\_

### DEPOSIT CERTIFICATE

The Deposit evidenced by this Deposit Certificate is created and issued pursuant to the Constitution of FSSI and constituted by a Trust Deed dated [ \_\_\_\_\_ ] between FSSI, the Guaranteeing Subsidiaries named in the Trust Deed and The New Zealand Guardian Trust Company Limited (as Supervisor for the Holders) as amended from time to time ("Trust Deed") which Deposit is issued with the benefit and subject to the provisions of the Trust Deed and the Conditions endorsed on this certificate.

### THIS IS TO CERTIFY THAT

1. **THE** Holder named in the table appearing below ("Table") is the registered holder of the amount of Deposit set out in this certificate.
2. **THE** Deposit held by such Holder bears interest at the rate per annum set out in the Table and is redeemable on the date set out in the said Table after the word "Redemption".
3. **INTEREST** on the Deposit evidenced by this Deposit Certificate is payable or, if the Deposit is issued as compounding interest Deposit, compounded quarterly/half-yearly on the \_\_\_\_\_ day of \_\_\_\_\_ in each year until redemption, calculated on the amount of principal moneys of the Deposit from time to time outstanding.

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Name and Address of  
Holder:

Amount of Deposit:  
(in words)

Rate of Interest:

Redemption:

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**DATED** this day of

Signed for and on behalf of **Foodstuffs South Island Limited** by its duly authorised signatory in the presence of:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Full name of authorised signatory

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name of witness

\_\_\_\_\_  
Occupation

\_\_\_\_\_  
Address

**NOTES:**

- (1) This Deposit Certificate must be surrendered
  - (a) before redemption; and
  - (b) before any transfer of the whole or any part of the Deposit comprised in this certificate can be registered.
- (2) All payments of principal and interest will be made in New Zealand.
- (3) All sums specified in this Deposit Certificate relate to New Zealand currency.
- (4) A copy of the Trust Deed may be inspected at the registered office of FSSI.

Note: All terms used above and in the Conditions endorsed on this certificate which commence with capital letters are defined in the Trust Deed.

**CONDITIONS**

To be included



observe fulfil and perform and to be bound by all the covenants, powers, obligations, conditions and provisions imposed on relating to or affecting it by or under this Deed or the Trust Deed including the schedules to it or by the terms of issue of any Deposit.

- (5) The Subsidiary irrevocably appoints the Supervisor severally to be its attorney and in its name and on its behalf to enter into, execute, sign and do all assurances, Deeds, instruments, acts and things whatsoever which shall in the opinion of the attorney be necessary or expedient or that it ought to execute, sign and do for the purpose of carrying out any trust or obligation declared or imposed upon it or for giving to the Holders or to the Supervisor on their behalf the full benefit of any of the provisions of the Trust Deed or this Deed and generally to use its name in the exercise of all or any of the powers hereby or by the Trust Deed conferred on the Supervisor o.
- (6) The Subsidiary covenants with the Supervisor duly to perform and observe the obligations imposed on the Subsidiary by this Deed and the Trust Deed.

**Executed as a Deed**

**FOURTH SCHEDULE - FORM OF COMPLIANCE CERTIFICATE**

To: **The New Zealand Guardian Trust Company Limited** ("the Supervisor")

From: **Foodstuffs South Island Limited** ("FSSI")

This Compliance Certificate is given by the undersigned, being directors of FSSI and is given pursuant to clause 6.1(d) of the Trust Deed Relating to the Issue of Deposits between FSSI, the Supervisor and the Guaranteeing Subsidiaries dated [ ] 2019 ("Trust Deed").

Terms defined in the Trust Deed have the same meaning in this certificate.

We certify on behalf of FSSI that as at [ ] ("Test Date") to the best of our knowledge and belief, having made due enquiry:

1. no Event of Default is continuing;
2. no financial undertaking set out in clause 3.4 of the Trust Deed has been breached at any time in, or in respect of, the period from *[insert previous Test Date/date of amended and restated Trust Deed]* to and including the Test Date; and
3. the amounts set out below are true and correct.

**Calculations (as at the Test Date):**

## A. Interest Cover Ratio (clause 3.4(a)(i))

EBITDA (A)	NZ\$
Interest Expense (B)	NZ\$
Ratio of A to B	[ ]:[ ]
<b>Maximum Permitted Ratio</b>	<b>2.50:1.00</b>

## B. Balance Sheet Ratio (no Contingent Liabilities) (clause 3.4(a)(ii)(1))

Secured Debt (A)	NZ\$
Total Assets (B)	NZ\$
Ratio of A to B (expressed as a percentage)	%
<b>Maximum Permitted Ratio</b>	<b>55%</b>

## C. Balance Sheet Ratio (with Contingent Liabilities) (clause 3.4(a)(ii)(2))

Secured Debt (with Contingent Liability) (A)	NZ\$
Total Assets (B)	NZ\$
Ratio of A to B (expressed as a percentage)	%
<b>Maximum Permitted Ratio</b>	<b>80%</b>

## D. Guaranteeing Group Coverage Ratio (clause 3.4(a)(iii))

Total Assets of the Guaranteeing Group (A)	NZ\$
Total Assets of the Consolidated Group (B)	NZ\$
Ratio of A to B (expressed as a percentage)	%
<b>Minimum Permitted Ratio</b>	<b>90%</b>

EBITDA of the Guaranteeing Group (A)	NZ\$
EBITDA of the Consolidated Group (B)	NZ\$
Ratio of A to B (expressed as a percentage)	%
<b>Minimum Permitted Ratio</b>	<b>90%</b>

EBITDA for each subsidiary of an Obligor	NZ\$
Total [Tangible] Assets for each subsidiary of an Obligor	NZ\$

**Dated**


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 Signature of Director

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 Signature of Director/CEO/CFO

[Compliance Certificate to:

- address the matters required to be certified in clause 7.1(a); and
- provide a reconciliation of the relevant Accounts (in a form to be agreed with the Supervisor) in respect of the effect of IFRS 16 as required under clause 3.4(d) of the Trust Deed.]