



## Meeting of the Hawke's Bay Regional Council

### **Previously Public Excluded** **LATE ITEMS**

**Made public in accordance with the 19 December 2018 Regional Council's confirmed meeting minutes where it is noted that Ngati Kahungunu and Kahutia Limited Partnership have given their agreement to making the 28 November 2018 Public Excluded Agenda and minutes available to the Public.**

**Date:** Wednesday 28 November 2018  
**Time:** 1.00pm  
**Venue:** Council Chamber  
Hawke's Bay Regional Council  
159 Dalton Street  
NAPIER

### **Agenda**

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# HAWKE'S BAY REGIONAL COUNCIL

Wednesday 28 November 2018

## Subject: KAHUTIA – NGATI KAHUNGUNU IWI INCORPORATED CARBON CREDIT PROPOSAL

Item 16

### Purpose of Report

1. This paper reports back to Council on the proposed agreement with Kahutia Limited Partnership (Kahutia LP) for a ten year loan of up to 100,000 of the Council's carbon units (NZUs) and seeks a Council decision to proceed with a loan with conditions.

### Staff Recommendations

2. It is recommended that Council considers and discusses the options for the Council's safe carbon portfolio and provide staff with direction on whether it would like to proceed with a loan to Kahutia LP of 100,000 NZUs or a lesser amount, or to undertake an RFP process for loans of some or all of the Council's safe carbon portfolio, or a combination of both.
3. It is not recommended that the Council either do nothing, as this will not assist with the Council's strategic objective for accelerating afforestation within the region, nor sell its safe carbon portfolio at this time as the future value of the NZUs is likely to appreciate at a rate greater than equivalent funds invested in the Council's managed funds portfolio.

### Background

4. On 3 October 2018 the Corporate and Strategic Committee resolved:
  - 4.1. endorses the Chief Executive negotiating a lease of New Zealand Units to Kahutia Limited consistent with the proposal as detailed
  - 4.2. requests that the Chief Executive provides a draft contract and appropriate legal and financial advice to Council on 24 October 2018 to enable consideration of a decision, as being recommended following, to approve a lease agreement with Kahutia Limited
  - 4.3. recommends that Council approves a lease of up to 100,000 New Zealand Units of the Council's safe carbon portfolio to Kahutia Limited.
5. The strategic context for this initiative is that the Council has identified. In its 2017-2021 Strategic Plan the Council stated it would "Incentivise afforestation of erosion-prone land" and set the following targets:
  - 5.1 By 2030, all farms in critical source areas have phosphorus management plans being implemented, with at least 50% of highly erodible land treated with soil conservation plantings.
  - 5.2 By 2050, all highly erodible land is under tree cover.
6. On 25 July 2018 the Council resolved to sign a memorandum of understanding with Ngati Kahungunu Iwi Incorporated (NKII) for the Kahutia Accord with a stated intention of the Council and NKII to co-invest, both jointly and in aligned investment, in a programme of regional afforestation.
7. This proposal to loan NZUs to Kahutia LP is consistent with the Council's current strategic direction and is complementary to the Council's current works with the Erosion Control Scheme and the Right Tree Right Place study underway. The proposal is also consistent with the stated intention of the Council in its MoU with NKII under the Kahutia Accord.
8. The principal benefit of the proposal is that it utilises a current asset of Council to support further afforestation, while generating a modest return for Council, and does not require the permanent alienation of an asset which has an expected longer term

valuation uplift. As long as the contract contains appropriate safeguards, the risks to the Council are low and considered to be outweighed by the benefits.

9. The Council's current NZU portfolio consists of 105,640 'post-89' NZUs and 14,907 'pre-1990' NZUs. By 2033 the total gross NZUs accrued by the Council's forests will peak at 275,094 NZUs, of which an estimated ~110,000 units is deemed to be 'safe' in that they do not have to be retained or surrendered for future harvest liabilities. The exact quantum of future harvest liabilities will depend upon the timing of future harvests and future field-based carbon measurements. The looming harvest liabilities arising from the harvest of the Council's forest at Tutira can be accommodated within the current and expected Council holdings of NZUs at the end of the 2023 Emissions Trading Scheme reporting period, even with 100,000 NZUs on loan to a third party or parties.

### **Proposed Loan Agreement**

10. Following the October meeting of the Corporate and Strategic Committee, Kahutia LP provided a revised contract, which is attached and while it requires finalising, the key elements are contained within. This newer version differs substantially in two particular respects. The original contract had been expressed as a lease but is now expressed as a loan. This better reflects the fact that the NZUs to be returned to the Council are not the same NZUs as that initially provided but have equivalent surrender value. This works in the same way a monetary loan will be repaid with equivalent cash but it may well be money acquired from another source.
11. The second significant change to the terms of the loan is that interest is now repayable from the end of year one and it is no longer proposed that this be capitalised for the first four years.
12. There has also been the introduction of an interest penalty to apply to non-performance by the borrower. It is recommended that this be set at 5% per annum, not 2% expressed in the draft contract, and apply to both interest and principal payment due at the end of each year that is not repaid on time. It is proposed that this interest be calculated on a daily basis pro rata to the total annual sum due.
13. As previously advised the Council has been invited by the directors of Kahutia LP to co-invest in the company up to, and including, as a 50% joint venture shareholder. If the Council was to take up this option at a 50% shareholding the company would be deemed to be a Council Controlled Organisation and a decision to invest would require a special consultation under the Local Government Act. Any decision to invest substantial capital into the company may also trigger the significance policy and necessitate special consultation as well. It is proposed that the question of whether to invest in Kahutia LP be considered in 2019 once the 'Right Tree Right Place' forestry investment case has been completed.

### **Legal Advice**

14. The draft loan contract has been reviewed by Sainsbury Logan and Williams (SLW) on the Council's behalf. This legal advice is attached.
15. SLW note that while the contract expresses an intent that Kahungunu Asset Holding Company (KAHC) provide security for the loan, we do not have a confirmation of this directly from KAHC at this time. Representatives from NKII attending the Council meeting may be able to confirm that this security has been formally agreed by the board of KAHC. It is recommended that any agreement to loan NZUs to Kahutia LP be done so on the condition that KAHC become a party to the loan agreement and expressly guarantee the necessary security to the satisfaction of the Council's solicitor.
16. SLW recommended that Council seek comfort from Kahutia LP on the afforestation plans to ensure the level of carbon intended to be sequestered will be sufficient to meet the obligations under the loan agreement. Discussions with Kahutia LP have indicated that the company has expressions of interest and a desire to afforest 1600 hectares of land within the region. Representatives from NKII attending the Council meeting will give a presentation to Council on the land that is intended for afforestation and the mix of intended species and area to be planted. It is recommended that the contract require

Kahutia LP to report annually to Council on its achievements in terms of forest area and species planted, forest establishment success and volumes of carbon sequestered.

### Financial Advice

17. The primary cost to the Council from this proposal is the administration and oversight of the contract with Kahutia LP. The cost of transferring NZUs between the Council and Kahutia LP on the NZTES Registry is minor. The principal costs related to NZU registration arise from registering new land for NZUs and the costs in this situation have already been borne by the Council with respect to its own forests and the cost of registering units against land planted by Kahutia LP will be funded by the borrower.
18. The value of the NZUs in question presently reside on the Council's balance sheet as assets and this will remain the case as the loan to Kahutia LP will also be an asset, albeit a non-current one until the loan is repaid.
19. The loan agreement proposes that a 2% per annum interest rate applies to the loan balance. A repayment schedule has not been finally negotiated with Kahutia but if this is set at interest only for the first four years and then 16% per annum repayment of the principal thereafter then interest income to the Council would be 2000 NZUs at a current market value of approximately \$50,000 at the end of year one. In year ten, the interest payable would be 400 NZUs with a value of \$5000. Over the life of the loan, under this repayment schedule, the total NZUs payable as interest would be 14,982 with a current market value of approximately \$375,000. Given the forward price path for NZUs it can be expected that expected returns will actually be higher.
20. The Council presently holds insurance cover on its forestry estate but this cover does not extend to the NZUs attributed to them. In the event of material fire, wind or pest damage the Council is liable for surrendering NZUs to the extent of the damage. As the Council's forests are geographically spread and have a mix of species the portfolio provides a natural hedge against this risk and enables the Council to self-insure. If the Council is loan its NZUs to Kahutia LP or any other party staff recommend insurance is obtained to ensure any liabilities arising from material damage to the Council's forests can be covered while the NZUs are effectively on loan to other parties.
21. Staff have obtained a quotation for cover from its current insurer for the Council's full NZU portfolio, which has a current market value of approximately \$3m, with an annual premium payable of \$3,753 ex GST. The Council's Chief Executive has determined that this cover should be obtained - regardless of the whether NZUs are leased or not - as the value of NZUs is now at a level that the Council's overall portfolio is a valuable asset and warrants protection, and represents a liability to the Council in the event of material damage.

### Options

22. As alternatives to the proposal from Kahutia LP, the Council could proceed with any of the following instead.
23. *Do nothing* – this would involve the Council retaining all of its NZUs at this time. The Council would continue to benefit from the expected increased value of these assets (although this is not guaranteed) but would receive no income from them until such time as the Council decides to sell. This option would not result in any additional trees being established as a result of the Council's NZU portfolio.
24. *Sell the safe carbon NZUs* – the Council could sell all or some of its current safe carbon portfolio for up to \$2.6-2.8m and direct these funds toward Council operations, such as supplementary funding for the Erosion Control Scheme, or set aside the funds for future commercial forestry investment, or add the funds to the Council's managed funds portfolio for financial returns. Under this option the Council could ensure additional tree planting occurs within the region but this is unlikely to be practicable for the 2019 planting year and would not leverage the work already undertaken with landowners by Kahutia LP. If the Council was to use the realised funds for the Erosion Control Scheme they would cease to be a balance sheet asset for the Council as this is a grant-based scheme.

25. *Call for a Request for Proposals (RFP)* – the Council could undertake an RFP process to determine whether there are other parties who wish to borrow some or all of the Council's safe carbon portfolio. In the same way that Kahutia LP have approached this opportunity other parties may wish to borrow NZUs from the Council in order to fund afforestation activity and use their future carbon allocations to repay the loan and any interest. Council could run a competitive process and seek to maximize the level of afforestation achieved for the allocation or seek higher interest/returns on the loan. Kahutia LP could submit their proposal into this process. The benefit of this approach is that the Council may achieve a better rate of return or greater levels of afforestation than proposed by Kahutia LP. However, to date the Council has not received any expressions of interest from other parties for the use of its carbon portfolio. Furthermore, in signing the Kahutia Accord the Council has expressed an intention to work collaboratively with Ngati Kahungunu Iwi Incorporated, as the regional iwi authority, to undertake afforestation activities and choosing other parties over Kahutia LP may be seen as a breach of the good faith provisions the Council sought for inclusion with the Kahutia Accord.
26. *Undertake a combined RFP and loan to Kahutia LP* – the Council could run a RFP for part of the safe carbon portfolio (for example 50% or 50,000 NZUs) and loan the remainder to Kahutia LP under the current proposed terms or similar. Kahutia LP could also compete within the RFP process for the other half of the portfolio. This approach may balance the risks and benefits of the approach outlined above.

### Implications for Tangata Whenua

27. A loan of this nature to Kahutia Limited Partnership is an avenue for the Council to exercise partnership with regional iwi and assist in the development of afforestation on erosion prone Maori land. The Kahutia LP is owned by Ngati Kahungunu Iwi Incorporated, which has 31,241 members, and so working in partnership with Kahutia LP gives the Council the maximum indirect partnership with regional tangata whenua. However, it should be noted that Treaty Settlement Entities within the region may also wish to enter into similar arrangements with the Council and maybe critical if the loan is made exclusively with Ngati Kahungunu Iwi Incorporated via Kahutia LP and an RFP process is not followed.

### Decision Making Process

28. Staff have assessed the requirements of the Local Government Act 2002 in relation to this item and have concluded that the decisions sought in this paper are not significant in terms of the Council's Significance and Engagement Policy. This assessment is based on the fact that the level of community interest and the impact on individuals or groups is likely to be considered low. The proposal does not impact upon levels of service, rates or debts in the current Long Term Plan, and the costs and financial implications for ratepayers are minor. The Council's carbon portfolio is not a strategic asset.

### Recommendation

That Hawke's Bay Regional Council:

1. Receives and notes the ***"Kahutia – Ngati Kahungunu Iwi Incorporated Carbon Credit Proposal"*** staff report.
2. Authorises the Chief Executive to finalise the terms of a loan to Kahutia Limited Partnership for a ten year loan of XXX,000 NZUs consistent with the other terms in the attached draft contract and within this paper, and including an appropriate repayment schedule.
3. Agrees that the loan only be authorised subject to Kahungunu Asset Holding Company becoming a party to the loan agreement and providing security for the loan to the satisfaction of the Council's solicitor.

And/or

4. Directs staff to undertake a Request for Proposals for loans of NZUs from the Council's carbon portfolio for XXX,000 NZUs.

**Authored & Approved by:**

**James Palmer**  
**CHIEF EXECUTIVE**

**Attachment/s**

- [↓1](#) HBRC and Kahutia LP Carbon Loan Agreement
- [↓2](#) Memo from Jonathan Norman re Kahutia
- [↓3](#) List of Titles owned by Kahungunu Asset Holding Co
- [↓4](#) Previously Public Excluded 28 November 2018 Meeting Minutes





Draft 1: 16.10.2018

Item 16

# Carbon credit loan agreement

Kahutia LP

Hawkes Bay Regional Council

Attachment 1

**anderson  
lloyd.**

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Date:

## Parties

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- (1) Kahutia LP (**Borrower**)
- (2) Hawkes Bay Regional Council (**Lender**)

## Background

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The Lender has agreed to make available to the Borrower the Loan upon the terms and subject to the conditions contained in this agreement.

## Agreement

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### 1. Interpretation

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1.1 **Definitions:** In this agreement, unless the context otherwise requires:

**Business Day** means a day (other than a Saturday or Sunday) on which banks are open for business in Napier.

**Dollar Equivalent** means, in respect of an NZU or NZUs, at any time, the New Zealand dollar equivalent for that NZU or NZUs, calculated at the Spot Rate at that time.

**Event of Default** means any of the events specified in clause 11.1.

**Final Repayment Date** means the date falling 10 years after the date on which the Loan was advanced.

**Finance Documents** means:

- (a) this agreement;
- (b) the Security Documents;
- (c) any document entered into for the purposes of amending, replacing, supplementing, novating or acceding to any Finance Document; and
- (d) any other document agreed and designated in writing as such by the Borrower and the Lender.

**General Security Deed** means the general security deed dated on or about the date of this agreement between the Borrower, as grantor, and the Lender, as secured party.

**Government Agency** means any government or any governmental, semi-governmental or judicial agency or authority (including any self-regulatory organisation established under statute or any stock exchange).

**GST** means the goods and services tax chargeable in accordance with the Goods and Services Tax Act 1985.

**Interest Rate** means 2 per cent. per annum

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**Interest Payment Date** means the last day of each Interest Period.

**Interest Period** means, in relation to the Loan, a period of one year as determined under clause 4.2.

**Loan** means the loan of 100,000 NZUs made or to be made by the Lender on the terms set out in this agreement, or, as the context may require, the number of NZUs, or its Dollar Equivalent, for the time being outstanding.

**NZ GAAP** means generally accepted accounting practice as defined in section 8 of the Financial Reporting Act 2013.

**NZU** means a 'New Zealand unit' as defined in the Climate Change Response Act 2002.

**Outstanding Amount** means, at any time, the Principal, interest (including default interest), fees, costs and all other amounts payable by the Borrower under this agreement and outstanding at that time.

**Potential Event of Default** means any event which would, with the passing of time, the giving of notice or the making of a determination or a combination of any of the foregoing, be an Event of Default.

**PPSA** means the Personal Property Securities Act 1999.

**Principal** means, at any time, the aggregate number of NZUs outstanding under the Loan at that time.

**Reference Buyers** means Z Energy Limited, Genesis Energy Limited, The New Zealand Refining Company Limited and Methanex New Zealand Limited, or such other purchasers of NZUs as may be selected by the parties.

**Register** means the New Zealand Emissions Trading Register maintained by the New Zealand Environmental Protection Authority.

**Secured Property** means, at any time, the property the subject of the Security Documents at that time.

**Security Documents** means:

- (a) the General Security Deed;
- (b) the Specific Security Deed;
- (c) any other existing or future security that secures the Borrower's obligations in favour of the Lender (whether or not it guarantees or secures other obligations as well);
- (d) any document entered into for the purposes of amending, replacing, supplementing, novating or acceding to any Security Document; and
- (e) any other document agreed and designated in writing as such by the Borrower and the Lender,

and any reference to the Security Documents shall include a reference to the security created by or pursuant to the Security Documents.

**Specific Security Deed** means the specific security deed (■) dated on or about the date of this agreement between ■, as grantor, and the Lender, as secured party.

**Spot Rate** means the spot rate of exchange for the purchase of NZUs with New Zealand dollars shown on the CommTrade Carbon Exchange administered by OMF (or any other person which takes over administration of that rate) at 11:00 am on a relevant date.

1.2 **Interpretation:** In this agreement, unless the context requires otherwise:

- (a) the **assets** of any person shall be construed as a reference to the whole or any part of its present and future undertaking, property, assets and revenues, including uncalled capital and called but unpaid capital.
- (b) **borrowed money** includes indebtedness in respect of money borrowed, financial guarantees or similar indemnities, acceptance credits, negotiable instruments (other than cheques), recourse obligations for factored debts, rentals or lease payments under finance leases and the deferred purchase price of assets or services (other than assets or services supplied in the ordinary course of ordinary business on normal trade terms) or any other financial arrangement which would be considered as a borrowing for the purposes of NZ GAAP.
- (c) a **clause** or **schedule** is a reference to a clause of, or a schedule to, this agreement.
- (d) an Event of Default or Potential Event of Default is **continuing** if it has not been remedied to the satisfaction of the Lender or waived in writing by the Lender.
- (e) a **directive** includes any present or future directive, order, regulation, request, policy, guideline, requirement or notification by whatever means by any Governmental Agency (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).
- (f) a **disposal** of an asset includes a sale, transfer and any other kind of disposal of, and the grant of an option in respect of, a right or interest (legal or equitable) in that asset (but excluding the payment of money and the creation of security) and an agreement for any of those (and **dispose**, **disposition** and **acquire** shall be construed accordingly).
- (g) the **dissolution** of a person includes the liquidation or bankruptcy of that person its removal from the register, and any equivalent or analogous procedure under the law of any relevant jurisdiction.
- (h) **guarantee** includes any guarantee, indemnity, letter of credit, legally binding letter of comfort, suretyship or other assurance against loss.
- (i) **indebtedness** includes any obligation (whether present or future, actual or contingent, secured or unsecured, as principal or surety or otherwise) for the payment or repayment of money.
- (j) a **law** includes common or customary law and any constitution, decree, judgment, legislation, order, ordinance, regulation, by-law, statute, treaty or other legislative measure, in each case of any jurisdiction whatever, and **lawful** and **unlawful** shall be construed accordingly.
- (k) something having a **material adverse effect** is a reference to it having:
  - (i) a material adverse effect on the financial or trading condition of the Borrower; or
  - (ii) a material impairment on the ability of the Borrower to perform and comply with its obligations under the Finance Documents; or

(iii) a material impairment of the rights available to the Lender under any of the Finance Documents; or

(iv) a material adverse effect on the validity or enforceability of a Finance Document,

and **material adverse change** shall be construed accordingly.

(l) **pay, repay, payment or repayment** includes by way of transfer of NZUs by the Borrower or the Lender (as applicable) to the account in the Registry nominated by the Borrower or the Lender (as applicable) for that purpose from time to time.

(m) **person** includes any individual, firm, company, corporation, entity, association of persons (corporate or not), trust or governmental agency (in each case whether or not having separate legal personality).

(n) **same day funds** means cleared funds immediately available for disbursement.

(o) **security** means a security interest as defined in the PPSA in any personal property and an interest in any other property (including land) created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to the form of the transaction and the identity of the person who has title to the collateral.

(p) **tax** includes any present or future tax, levy, impost, duty, charge, fee, deduction or withholding of any nature and whatever called (including any interest, penalties, fines and charges in respect of taxes) imposed, levied, collected, withheld or assessed by any Government Agency, on whomsoever imposed, levied, collected, withheld or assessed together with any interest, penalty, charge, fee or other amount imposed or made on, or in relation to, any of the foregoing, and **taxation** shall be construed accordingly.

(q) **tax on overall net income** of a person shall be construed as a reference to tax imposed by the jurisdiction in which its principal office is located on all or part of the net income, profits or gains of that person (whether worldwide, or only insofar as such net income, profits or gains are considered to arise in or relate to a particular jurisdiction, or otherwise).

(r) **written** and **in writing** include all means of reproducing words in a tangible and permanently visible form.

(s) **\$** and **New Zealand dollars** means the lawful currency of New Zealand.

### 1.3 Miscellaneous:

(a) The introduction to and headings in this agreement are inserted for convenience only and shall be ignored in construing this agreement.

(b) Unless the context otherwise requires, words denoting the singular number only include the plural and vice versa and words denoting any gender include all genders.

(c) References to any legislation or to any provision of any legislation shall be deemed to be references to that legislation or provision as from time to time amended, re-enacted or substituted and, unless otherwise stated, to New Zealand legislation, and, unless the context otherwise requires, shall also include any statutory instruments issued under any such legislation or provision.

(d) References to any document (however described) shall include references to that document as modified, novated, supplemented, varied or replaced from time to time.



- (e) References to any party to this agreement or any other document shall include its successors or permitted assigns.
- (f) References to a time of day shall be references to New Zealand time unless otherwise stated.
- (g) Anything which may be done at any time may also be done from time to time.

#### 1.4 Payment Obligations:

- (a) Notwithstanding clause 9.1, the Borrower (or any other party with a payment or repayment obligation) shall be permitted to satisfy any NZU payment or repayment obligation, either in whole or in part, in cash on the relevant date by paying or repaying the Dollar Equivalent of the relevant amount of NZUs on that date.
- (b) In respect of any payment or repayment obligation satisfied by payment or repayment in cash, the relevant payment shall be made in same day funds and (for the avoidance of doubt and without limitation) in accordance with the requirements of clauses 9.2, 9.3, 9.4 and 9.6.
- (c) Any amount of NZUs payable under this agreement or any other Finance Document shall be rounded up to the nearest whole NZU. For the avoidance of doubt, such rounding shall only occur on the date on which a payment is made to enable such payment to be made, and not, for example (but without limitation), on amounts of interest accruing on a daily basis under clause 4 or clause 12.

## 2. Facility

2.1 **Grant of Loan:** The Lender agrees to make the Loan available to the Borrower upon the terms and subject to the conditions contained in this agreement.

2.2 **Purpose:** The Borrower shall:

- (a) use the Loan to:
  - (i) sell the relevant NZUs in the emissions trading market in order to raise funds (**Raised Funds**); and
  - (ii) pay interest costs under this agreement; and
- (b) apply all Raised Funds to acquire forestry assets, establish and plant forests and nurseries, train staff, pay overheads, pay transaction costs associated with the provision of the Loan and other costs related to the business of the Borrower.

2.3 **Loan:** The Loan will be made available to the Borrower by the Lender (by way of transfer of the relevant NZUs to the Borrower's account in the Register) on the date falling five Business Days after the date on which all conditions precedent set out in clause 3.1 have been satisfied or waived to the satisfaction of the Lender.

## 3. Conditions Precedent

3.1 **Initial Conditions Precedent:** The obligation of the Lender in relation to the Loan under this agreement is conditional upon the Lender having received the following in form and substance satisfactory to it:

- (a) evidence that the Borrower has an account in the Register;

- (b) evidence that the Borrower has established a NZU trading account and is able to buy and sell NZUs;
- (c) evidence that all consents and authorisations for the Borrower relating to the transfer of NZUs from the Lender to the Borrower have been obtained;
- (d) the following documents executed by all parties thereto:
  - (i) this agreement;
  - (ii) the General Security Deed; and
  - (iii) the Specific Security Deed;
- (e) registration of a financing statement of the PPSR in favour of the Lender in respect of the security interests created under the Security Documents;
- (f) confirmation that the representations and warranties set out in clause 6.1 will be true and accurate and not misleading as of the proposed date of the Loan by reference to the facts and circumstances existing on that date; and
- (g) confirmation from the Borrower that no Event of Default or Potential Event of Default has occurred and is continuing or is likely to occur as a result of the making of the Loan on the relevant date.

#### 4. Interest

- 4.1 **Interest Rate:** The Borrower shall pay interest on the Loan made to it, in respect of each Interest Period for the Loan, at the Interest Rate.
- 4.2 **Interest Period for Loan:** Each Interest Period in relation to the Loan shall be a period of one year's duration, and:
  - (a) the first Interest Period in relation to the Loan shall begin on the date on which the Loan was made and end on the next Interest Payment Date;
  - (b) the second Interest Period shall begin on that Interest Payment Date and end on the following Interest Payment Date;
  - (c) each subsequent Interest Period shall commence on the last day of the previous Interest Period and end on the following Interest Payment Date;
  - (d) an Interest Period which would otherwise end on a day which is not a Business Day shall be extended to the next succeeding Business Day unless the result of that extension would be to carry the Interest Period over into another calendar month, in which case the Interest Period shall end on the immediately preceding Business Day; and
  - (e) no Interest Period may extend beyond the Final Repayment Date.
- 4.3 **Payment:** Interest which accrues under clause 4.1 above shall, in respect of each Interest Period, be calculated on the Loan on the basis of the actual number of days elapsed and a 365 day year, shall accrue from day to day and be paid in arrears on the Interest Payment Date applicable to that Interest Period.

#### 5. Repayment and prepayment

- 5.1 **Repayment:** The Borrower shall repay to the Lender all Outstanding Amounts on the Final Repayment Date.

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5.2 **Voluntary prepayment:** The Borrower may prepay all or any part of the Principal outstanding upon giving to the Lender not less than [10] Business Days' prior irrevocable notice. Any such partial prepayment shall be in a minimum of 500 NZUs, or such other amount as the Lender may agree. Amounts prepaid under this clause shall be applied towards repayment of the Principal under the Facility.

5.3 **Redrawing:** NZUs repaid or prepaid under this agreement may not be re-borrowed, unless otherwise agreed by the parties.

## 6. Representations and warranties

6.1 **Representations and warranties:** The Borrower represents and warrants to the Lender that:

- (a) **Status:** it is a limited partnership validly registered and existing under the Limited Partnerships Act;
- (b) **Power and authority:** it has:
  - (i) the power and authority to own its assets and to carry on its business as, and in such place or places as, it is now being conducted;
  - (ii) the power to enter into, and exercise its rights and perform and comply with its obligations under, each Finance Document to which it is a party; and
  - (iii) taken all necessary corporate action (including the passing of all resolutions) to authorise the entry into each Finance Document to which it is a party and the performance of all its obligations thereunder;
- (c) **Obligations:** its obligations under each Finance Document to which it is a party are legal, valid and binding and enforceable against it, in each case in accordance with its terms, subject to applicable bankruptcy, insolvency, moratorium or similar laws affecting creditors' rights generally and subject also (as to enforceability) to equitable principles of general application regardless of whether enforcement is sought in a proceeding in equity or at law;
- (d) **No laws violated:** neither its entry into the Finance Documents, nor the exercise of any right or the performance or observance of any obligation under the Finance Documents, nor any transaction contemplated thereby, will:
  - (i) violate or contravene any law or regulation to which it is subject; or
  - (ii) conflict with, or result in a breach of, any agreement, document, arrangement, obligation or duty to which it is a party, or by which it or any of its assets may be bound; or
  - (iii) violate any of the documents constituting it or cause any limitation on any of its powers, or on the right or ability of its general partner to exercise those powers, to be exceeded,

and will not result in:

  - (iv) the creation or imposition of any security over any of its assets other than as permitted under a Finance Document;
  - (v) the acceleration of the date for payment of any obligation under any agreement which is binding on it; or
  - (vi) a limitation on its powers or the powers of its general partner to be exceeded

- (e) **Authorisations:**
- (i) each authorisation which is required by it in relation to:
    - (A) the execution, delivery and performance of the Finance Documents to which it is expressed to be a party and the transactions contemplated by those documents;
    - (B) the validity and enforceability of those documents; and
    - (C) its business as now conducted or contemplated,
 has been obtained or effected;
  - (ii) each authorisation referred to in clause 6.1(e)(i) is in full force and effect, it is not in breach of any conditions under them and it has paid all applicable fees for each of them on or before the due date for payment;
- (f) **No default:**
- (i) no Event of Default has occurred and is continuing or will result from its entry into the Finance Documents (to which it is party);
  - (ii) no Potential Event of Default is continuing, or is reasonably likely to result from the making of the Loan;
  - (iii) no event or circumstance has occurred or exists and is continuing which constitutes a breach of, or default under, any other agreement or instrument which is binding on him or to which its assets are subject, which has, or is likely to have, a material adverse effect;
- (g) **Litigation:** no litigation, arbitration, dispute or administrative proceeding before any court, tribunal, arbitrator, government or Government Agency is current or pending or, to the best of its knowledge and belief after due enquiry, threatened in relation to it which is likely to be adversely determined and would, or would be likely to, if so determined, have a material adverse effect;
- (h) **No material adverse effect:** no event or circumstance has occurred which has, or is reasonably likely to have, a material adverse effect;
- (i) **Ranking of obligations:** its payment obligations under each Finance Document to which it is a party will at all times rank *pari passu* in point of priority of payment with all of its other present and future unsubordinated indebtedness, except indebtedness preferred solely by operation of law;
- (j) **Security interests:**
- (i) no security exists over its property over which security is created under the Security Documents other than as created by the Security Documents; and
  - (ii) its right, title, assets and undertakings over which security is purported to be created in favour of the Lender are capable of being encumbered by, and constitute, Secured Property under that security;
- (k) **Good title:** it is the sole legal and beneficial owner of its Secured Property;
- (l) **Solvency:** it is able to pay its debts as they become due in the normal course of business, and the value of its assets is greater than the value of its liabilities (having

regard (in respect of contingent liabilities) to the likelihood of the contingency occurring and any claim it is entitled to make and can reasonably expect to be met to reduce or extinguish the contingent liability);

- (m) **No trust:** it does not enter into any Finance Document as trustee of any trust;
  - (n) **Taxes:** it has paid all taxes payable by it when due other than taxes being contested in good faith where an adequate reserve has been created (and is being maintained) for those taxes;
  - (o) **Proceeds:** it has used the Loan and applied the Raised Funds in accordance with the terms of the Finance Documents;
  - (p) **Compliance with law:** it has not breached any law or regulation where failure to do so would have a material adverse effect;
- 6.2 **Repetition:** The representations and warranties contained in clause 6.1 will be deemed to be repeated by the Borrower on the date of the Loan and on each Interest Payment Date by reference to the facts and circumstances then existing.
- 6.3 **Reliance:** The Borrower acknowledges that the Lender will rely on the representations and warranties contained in clause 6.1 in making the Loan available to the Borrower.

## 7. Undertakings

### 7.1 Positive undertakings: The Borrower shall:

- (a) **Notification:** promptly upon becoming aware of the same, notify the Lender of the occurrence of:
  - (i) an Event of Default or a Potential Event of Default and any action taken (or to be taken) as a result;
  - (ii) any litigation, arbitration, administration or other proceeding in respect of it or any of its assets being commenced or threatened;
- (b) **Compliance with other Finance Documents:** comply with all its obligations under each other Finance Document to which it is a party;
- (c) **Comply with laws etc:** promptly comply with and observe all applicable laws and directives to which it may be subject, if failure to do so would have a material adverse effect;
- (d) **Authorisations:** obtain, effect and promptly renew from time to time all authorisations required, or otherwise appropriate to obtain:
  - (i) to enable it to carry on its business; or
  - (ii) in relation to it or any of its assets,

where failure to do so would have a material adverse effect; or

  - (iii) to perform and comply fully with its respective obligations under the Finance Documents, and the transactions contemplated by the Finance Documents;
  - (iv) for enforceability of the Finance Documents,

in each case, in all material respects;

- (e) **Pay taxes and outgoings:** file all tax returns as required by law, and pay and discharge all taxes, rates, assessments and outgoings upon him or against its property prior to the date upon which penalties become payable except only to the extent that such taxes, rates, assessments and outgoings are being contested in good faith by appropriate proceedings and adequate resources are set aside for their payment;
- (f) **Further Assurance:** promptly, and at its own cost, execute and deliver to the Lender all transfers, assignments and other agreements and do all acts and things in respect of a Finance Document as Lender may deem necessary or desirable to secure the full benefit of their rights under any Finance Document;
- (g) **Purpose:** use the Loan and the Raised Funds for the purpose set out in clause 2.2;
- (h) **Maintenance of Secured Property:**
  - (i) take or defend all reasonable legal proceedings to protect or recover any of its Secured Property; and
  - (ii) keep its Secured Property valid and subsisting and free from liability to forfeiture, cancellation, avoidance or loss; and
- (i) **Insurance:** insure and keep insured (with reputable insurers) all its insurable assets (including inventory) against all risk normally insured against in the business of the Borrower and which should prudently be insured against in accordance with usual commercial and industry practice.

**7.2 Negative undertakings:** The Borrower shall not:

- (a) **Negative pledge:** create or permit to subsist any security over the Secured Property other than pursuant to the Security Documents;
- (b) **Disposal of assets:** other than as permitted under the terms of the Finance Documents, 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 or permit the disposal of the Secured Property; or
- (c) **No change to business:** without the Lender's consent, cease to conduct any material part of its business in operation at the date of this agreement.

**7.3 Limited Partnership Undertakings:**

- (a) The Borrower undertakes to ensure that, unless the Lender has otherwise consented in writing:
  - (i) it does not remove Kahutia General Partner Limited (**Borrower GP**) as its general partner;
  - (ii) no person is appointed as its general partner other than the Borrower GP;
  - (iii) it will not be terminated or dissolved; and
  - (iv) no "Termination Event", as defined in section 86 of the Limited Partnerships Act, occurs in respect of it.



## 8. Changes in circumstances

### 8.1 Illegality:

- (a) **[Reduction of Commitment and prepayment:** If by reason of:
- (i) the introduction of or any change in any law or any change in the interpretation or application thereof, by any Government Agency in each case after the date of this agreement; or
  - (ii) compliance by the Lender with any directive made by any central Government Agency after the date of this agreement.

the Lender is unable, or it becomes impossible or illegal for the Lender, to make available, or maintain the Loan, the Lender may, by notice to the Borrower, cancel the Loan, whereupon on the date on which that Lender stipulates (which may not be earlier than five Business Days before the date which it reasonably determines is the date on which the illegality or impossibility takes effect):

- (iii) the obligation of the Lender to make the Loan available will be cancelled; and
  - (iv) where the Loan has been made available, the Borrower will repay the Outstanding Amount either immediately or, if permitted by law, on the expiry of the current Interest Period relating to it.
- (b) **Consultation:** Without affecting the Borrower's obligations to make any payments under clause 8.1(a), if notice is given to the Borrower under clause 8.1(a) (other than in respect of an illegality), the Borrower and the Lender will, if the Borrower so requests, for a period of 30 days (or such longer period as the Lender may agree) discuss whether there are any mutually satisfactory alternative means by which the Loan might be made or continued in such a way that would avoid or minimise the circumstances giving rise to such a notice.]

**[Change in law consequences to be discussed further]**

### 8.2 Market change

- (a) If no Spot Rate is available for the determination of the Dollar Equivalent and the parties are unable to agree on an alternative method of determining the Spot Rate within five Business Days of the Spot Rate being needed to be determined, the parties shall appoint an independent valuer (**Valuer**) to determine the Dollar Equivalent of the relevant NZUs in accordance with clause 8.2(b). If the parties are unable to agree on the identity of the Valuer within five Business Days of the first party proposing a Valuer, either party may request the president for the time being of Arbitrators and Mediators Institute of New Zealand Inc. (or his or her nominee) to appoint the Valuer.
- (b) The parties shall procure that the Valuer appointed in accordance with clause 8.2(a) to determine the Dollar Equivalent for the relevant day based on the average offered prices for NZUs by the Reference Buyers during a closed offer process of the relevant number of NZUs to each of the Reference Buyers within five Business Days of the Valuer's appointment. The parties shall procure that the Valuer notifies the parties of the Dollar Equivalent within one Business Day of its determination.
- (c) Any determination made by the Valuer in accordance with clause 8.2(b) shall be final and binding on the parties, except in the case of manifest error or fraud. The Valuer shall be acting as an expert and not as an arbitrator.

## 9. Payments

- 9.1 **Currency of account:** Subject to clause 1.4, NZU is the currency of account and payment for each amount at any time payable by the Borrower under this agreement.
- 9.2 **Payments by Lender:** All payments to be made by the Lender to the Borrower under this agreement shall be made for value on the due date to the account of the Borrower in the Register, provided that where the Lender is due to receive a payment from the Borrower under this agreement on the same day as that on and in which it is to make a payment to the Borrower, it may (having given notice to the Borrower no later than the second Business Day before the date of payment) apply the payment to be made by it in or towards satisfaction of the payment to be made to it.
- 9.3 **Payments by the Borrower:** All payments of principal, interest, or fees due from the Borrower shall be made for value on the due date to the account of Lender in the Register previously notified by the Lender to the Borrower.
- 9.4 **Business Days:** If any amount becomes due for payment under this agreement on a day which is not a Business Day, it shall (except to the extent otherwise provided in this agreement) be paid on the next following Business Day and any interest shall be adjusted accordingly.
- 9.5 **Same day transfer:** Each payment to be made under this clause 9 shall be made by same day transfer to the account of the Borrower or the Lender (as applicable) in the Register as advised by the Borrower or the Lender (as applicable) from time to time. For the avoidance of doubt, both the Lender and the Borrower shall use SMS message authorisation (rather than email) when processing any transfers from their respective accounts in the Register to ensure such transfers are completed on the same day.
- 9.6 **Reinstatement:** If a payment made by the Borrower pursuant to a Finance Document is avoided by law:
- (a) that payment will be deemed not to have discharged or affected the obligation of the Borrower in respect of which that payment was made or received; and
  - (b) the Lender and the Borrower will be deemed to 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 that payment had not been made.
- 9.7 **Further assurances:** Each party shall, promptly and at its own cost, do all things necessary in order to complete a transfer of NZUs to the account in the Register of the other party in accordance with the terms of this agreement or any other Finance Document.

## 10. Taxes

- 10.1 **Payments to be free and clear:** All amounts payable by the Borrower under this agreement shall be paid:
- (a) free and clear of any restriction or condition; and
  - (b) (except to the extent required by law or as expressly provided otherwise in the agreement) without any deduction or withholding on account of any tax or any other amount, whether by way of set-off, counterclaim or otherwise.
- 10.2 **Gross-up:** If:
- (a) the Borrower is required by law to make any deduction or withholding from any amount paid or payable by it under this agreement; or

- (b) the Lender is required by law to make any payment on account of tax (other than tax on overall net income of the Lender) or otherwise on or in relation to any amount received or receivable by it under this agreement,

then:

- (c) the Borrower shall ensure that any such deduction or withholding does not exceed the legal minimum and shall pay the amount required to be deducted, withheld or paid to the relevant authority before the date on which penalties attach thereto;
- (d) the amount payable by the Borrower in respect of which that deduction, withholding or payment is required to be made shall be increased to the extent necessary to ensure that, after that deduction, withholding or payment is made, the Lender receives and retains (free from any liability in respect of any such deduction, withholding or payment) a net amount equal to the amount which it would have received and so retained had no such deduction, withholding or payment been made; and
- (e) the Borrower shall promptly deliver to the Lender the receipt issued by the applicable authority evidencing that such deduction or withholding has been made.

**10.3 Tax credit:** Any tax credit or refund received by the Lender in relation to an additional amount paid by the Borrower to the Lender under clause 10.2 shall be refunded to the Borrower unless the Lender determines that it would be prejudiced as a result of such payment. Nothing in this clause, however, shall interfere with the Lender's right to arrange its taxation affairs in whatever manner it deems fit and, in particular, the Lender shall not, whether by virtue of this clause or otherwise, be under any obligation to claim relief from its corporation, profits or similar tax liability in respect of any deduction, withholding or payment referable to this agreement, in priority to any other reliefs, claims, credits or deductions available to it. The notification of the Lender as to any such tax credit or refund shall be conclusive and binding on the Borrower. The Lender will not be obliged to disclose any information regarding its tax affairs and computations.

**10.4 Certificate of exemption:** The Lender:

- (a) confirms that as at the date of this agreement it holds a valid certificate of exemption (**certificate of exemption**) issued pursuant to section RE 27 of the Income Tax Act 2007 and sections 32E to 32I of the Tax Administration Act 1994, or their successor or predecessor provisions;
- (b) agrees to maintain a certificate of exemption during the continuance of the Loan provided it is lawfully able to do so; and
- (c) agrees to notify the Borrower if it ceases to hold, or ceases to be entitled to hold, a certificate of exemption.

## 11. Default

**11.1 Events of Default:** If any of the following occurs, whether or not within the control of the Borrower:

- (a) **Non-payment:** the Borrower fails to pay any amount due under this agreement or any other Finance Document in the manner and in the currency required on its due date; or
- (b) **Other breach:** the Borrower commits any breach of, or omits to observe, any of its undertakings or obligations under any Finance Document (other than those referred to in clause 11.1(a)) and the same has, or is likely to have, a material adverse effect and, in respect of any such breach or omission which is capable of being remedied, such breach or omission is not remedied within 90 days of the Borrower notifying the Lender of such breach or omission; or

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- (c) **Misrepresentation:** any representation, warranty or statement made or deemed to be repeated by the Borrower in any Finance Document or in any notice, certificate, statement or other document contemplated by, or made or delivered pursuant to, any Finance Document, or any information, is or was untrue or incorrect in any material respect when made, deemed to be repeated or delivered, and the same has, or is likely to have, a material adverse effect and, if the circumstances which caused such misrepresentation are capable of remedy, such circumstances are not remedied within 90 days or the Borrower notifying the Lender of such misrepresentation; or
- (d) **Cessation of business or dissolution:** the Borrower ceases to carry on all or substantially all of its business or operations, or an application or an order is made, or a resolution is passed, for the dissolution, winding up or termination of the Borrower, or the winding up, or termination of the Borrower commences;
- (e) **Receiver, etc:** an encumbrancer takes possession, or a trustee, receiver, receiver and manager, administrator, inspector under any companies or securities legislation, or similar official, is appointed in respect of the Borrower or the whole or any part of its assets following default under any indebtedness for borrowed money in excess of \$[150,000]; or
- (f) **Statutory management:** any step is taken to appoint, or with a view to appointing, a statutory manager (including the making of any recommendation in that regard by the Financial Markets Authority) under the Corporations (Investigation and Management) Act 1989 in respect of the Borrower, or the Borrower is declared at risk pursuant to the provisions of that Act;
- (g) **Creditors' process:** any expropriation, sequestration, distress or execution affects any asset of the Borrower having a value of \$[150,000]; or
- (h) **Distress or judgment:** a distress, attachment or other execution for a sum exceeding \$[150,000] is levied or enforced upon, or commenced against, any assets of the Borrower and is not discharged or stayed within 20 days, or a judgment for a sum exceeding \$[150,000] is obtained against the Borrower and is not satisfied, stayed or discharged within 14 days except, in each case, where the Borrower is contesting the same in good faith by appropriate proceedings; or
- (i) **Insolvency:**
  - (i) the Borrower is declared or becomes bankrupt or insolvent, is unable to pay its debts when they fall due, or enters into dealings with or for the benefit of any of its creditors with a view to avoiding, or in expectation of, insolvency, or makes a general assignment or an arrangement, compromise or composition with or for the benefit of any of its creditors in connection with actual or anticipated financial difficulties, or stops or threatens to stop payments generally; or
  - (ii) any legal proceedings or other procedure or formal step is taken without the Lender's prior written consent in relation to:
    - (A) the suspension of payments of the Borrower in connection with actual or anticipated financial difficulties; or
    - (B) a composition, assignment or arrangement with the Borrower's creditors generally, or any class of its creditors, in each case in connection with actual or anticipated financial difficulties;
- (j) **Invalidity of Finance Documents:** any provision of a Finance Document, which in the opinion of the Lender is material:



- (i) ceases to have effect in whole or in part, other than by performance or as permitted by its terms; or
- (ii) becomes wholly or partly void, voidable, illegal, invalid or unenforceable (other than by reason only of a party waiving any of its rights), or the performance of any such provision becomes illegal,

and the same has a material adverse effect, or the Borrower makes any written claim to that effect; or

- (k) **Partnership Agreement:** the partnership agreement of the Borrower is revoked,

then at any time thereafter, without prejudice to any other remedies which the Lender may have, the Lender may by notice to the Borrower cancel its obligations under this agreement whereupon the Borrower shall prepay to the Lender the whole (and not part only) of the outstanding Loan together with accrued interest and all other amounts accrued or outstanding under the Finance Documents within 10 Business Days of receiving such notice.

## 12. Default interest

- 12.1 **Default interest payable:** If the Borrower does not pay any sum (or, as the case may be, amount of NZUs) payable under this agreement when due, it shall pay interest on the amount (and if such amount is expressed in NZUs, on its Dollar Equivalent) from time to time outstanding in respect of that overdue sum for the period beginning on its due date and ending on the date of its receipt by the Lender (both before and after any judgment) in accordance with this clause 12.1.
- 12.2 **Rate of default interest:** Interest payable under clause 12.1 shall be calculated and payable by reference to successive periods, each of which (other than the first, which shall begin on and include the due date) shall begin on the last day of the previous period. Each such period shall be of a duration selected by the Lender from time to time and the rate of interest applicable for a particular period shall be the Interest Rate plus **2**% per annum.
- 12.3 **Payment of default interest:** Interest payable under clause 12.1 shall be payable on the last day of each period in respect of which it is calculated and on the date of receipt of the overdue sum by the Lender. Any interest which is not paid when due shall be added to the overdue sum on a 30 day compounding basis and shall itself bear interest accordingly.

## 13. Assignment and transfer

- 13.1 **Agreement binding:** This agreement is binding on, and is for the benefit of, the parties and their respective successors, permitted assigns and transferees.
- 13.2 **No assignment:** Neither the Borrower nor the Lender may assign or transfer any of its rights or obligations under this agreement or any other Finance Document without the prior written consent of the other party.
- 13.3 **Disclosure:** The Lender may disclose to:
  - (a) any Government Agency; or
  - (b) any affiliate,

such information about the Borrower or its financial condition as is made available to the Lender generally (any such disclosure under paragraph (a) above shall be subject to any confidentiality requirements reasonably requested by the Borrower).

## 14. Notices

14.1 **Writing:** Each notice or other communication to be given or made to any party to this agreement or any other Finance Documents shall:

- (a) **Writing:** be given or made in writing by email or letter and be signed by the sender or an authorised officer of the sender;
- (b) **Address:** be given or made to that party at the address or email address, and marked for the attention of the person (if any), from time to time designated by that party to the other for the purposes of this agreement; and
- (c) **Deemed delivery:** not be effective until received by that party, and any such notice or communication shall be deemed to be received by that party:
  - (i) (if given or made by letter) when left at the address of that party or five Business Days after being put in the post (by airmail if to another country), postage prepaid, and addressed to that party at that address;
  - (ii) (if given or made by email) on completion of transmission to the relevant email address,

provided that any notice or communication received or deemed received after 5pm on a working day in the place to which it is sent, or a day which is not a Business Day in that place, will be deemed not to have been received until the next Business Day in that place.

14.2 **Email:** A notice, request, certificate, approval, demand, consent or other communication to be given or made under this agreement may only be given or made by email where the recipient has agreed in writing that that communication, or communications of that type, may be given or made by email, provided that no prepayment notice under clause 5, or any other notice from the Borrower to the Lender relating to payments may be given or made by email.

14.3 **Initial address and numbers:** The initial address, email address, facsimile number and person (if any) so designated by each party, are set out below:

(a) **The Borrower:**

Address: Level 1, Taikura House, 304 Fitzroy Avenue, Hastings 4153

Email: taine@kiwigarden.co.nz

Attention: Taine Randell

(b) **The Lender:**

Address: [159 Dalton Street, Napier 4110]

Email: [•]

Attention: [•]

## 15. Costs and expenses

15.1 **Costs and expenses:** The Borrower shall pay to the Lender upon demand an amount equal to all reasonable costs and expenses (including reasonable legal expenses and goods and services and similar taxes thereon) incurred or sustained by the Lender in connection with:

- (a) the exercise, enforcement or preservation, or the attempted exercise, enforcement or preservation, of any right under any Finance Document, or in suing for or recovering any sum due under any Finance Document; and
- (b) the granting of any waiver or consent under, or the giving of any variation or release of any Finance Document.

**15.2 Stamp duty and taxes:** The Borrower shall pay all stamp, documentary, transaction, registration and other like duties and taxes (including fines, interest and penalties), if any, which may be payable or determined to be payable in connection with the signing, delivery, registration, performance, exercise of any right under, or enforcement or variation of, any Finance Document, and shall indemnify the Lender against all liabilities in relation to, or resulting from, any delay or omission to pay any such duties or taxes.

**15.3 GST:**

- (a) All payments made under this agreement have been calculated without regard to GST. If any supply by the Lender to the Borrower shall, at the time of supply, be subject to GST (**taxable supply**), the Borrower shall pay to the Lender an amount equal to the amount of GST for which the supplier is liable in respect of the taxable supply (**additional amount**) in addition to the consideration for that taxable supply. For the avoidance of doubt, the date for payment of the additional amount is the date of first payment for the taxable supply.
- (b) Where under, or in connection with this agreement, the Borrower is required to reimburse or indemnify for an amount, the Borrower will pay the relevant amount less the GST input tax credit which the supplier determines that it is entitled to claim in respect of that amount.

## 16. Evidence of debt

- 16.1 Maintain accounts:** The Lender shall maintain, in accordance with its usual practice, accounts evidencing the amounts from time to time lent by and/or owing to the Lender under this agreement.
- 16.2 Accounts prima facie evidence:** In any legal action or proceedings arising out of or in connection with any Finance Document, the entries made in the accounts maintained pursuant to clause 16.1 shall be prima facie evidence of the existence and amounts of the obligations of the Borrower recorded therein.
- 16.3 Certificate:** The certificate of the Lender as to any amount or fact which might reasonably be expected to be within the Lender's knowledge relating thereto shall be prima facie evidence as against the Borrower of that amount or fact.

## 17. Waivers and amendments

- 17.1 No implied waivers:** Time shall be of the essence in relation to any Finance Document but no failure on the part of the Lender to exercise, and no delay on its part in exercising, any right, power or remedy under any Finance Document shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or remedy preclude any other or further exercise thereof or the exercise of any other right, power or remedy.
- 17.2 Amendments:** No amendment to a Finance Document is effective unless it is in writing and signed by all parties to that Finance Document.

## 18. Confidentiality

- 18.1 **Confidentiality:** Each party agrees to keep confidential and not disclose to any person any information which when provided is specifically identified to be confidential by the party providing the information except where such disclosure is:
- (a) in connection with a permitted assignment or novation or other transaction contemplated or permitted under clause 13 (including in connection with preparatory steps such as negotiating with any potential assignee or any other person who is considering contracting with the Lender in connection with a Finance Document);
  - (b) made with the consent of that other party;
  - (c) necessary for the performance of this agreement;
  - (d) required by any law or directive;
  - (e) to its legal advisors or auditors;
  - (f) required in connection with the enforcement of any Finance Document or in a proceeding arising out of or in connection with any Finance Document; or
  - (g) of information which is in or has come into the public domain.

## 19. General

- 19.1 **Survival:** Each of the obligations of the Borrower under clauses 9, 10, **Error! Reference source not found.** and 18 shall survive the payment of all moneys owing under this agreement and the satisfaction of all obligations incurred by the Borrower pursuant to this agreement and any part thereof, and the termination of this agreement.
- 19.2 **Partial invalidity:** If at any time any provision of any Finance Document is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, that illegality, invalidity or unenforceability shall not affect the ability of the Lender to enforce the remaining provisions hereof nor shall the legality, validity or enforceability of those provisions under the law of any other jurisdiction in any way be affected or impaired thereby.
- 19.3 **Remedies cumulative:** The rights, powers and remedies provided in this agreement are cumulative and not exclusive of any rights, powers or remedies provided by law.
- 19.4 **Counterparts:** This agreement may be executed in any number of counterparts, all of which shall together constitute one and the same instrument, and any of the parties hereto may execute this agreement by signing any such counterpart.

## 20. Governing law and jurisdiction

- 20.1 **Governing law:** This agreement shall be governed by and construed in accordance with the laws of New Zealand.
- 20.2 **Submission to jurisdiction:** The Borrower agrees that any legal action or proceedings arising out of or in connection with any Finance Document (**proceedings**) may be brought in the courts of New Zealand and irrevocably submits to the non-exclusive jurisdiction of those courts.
- 20.3 **Non-exclusive jurisdiction:** Nothing contained in this clause shall limit the right of the Lender to take proceedings against the Borrower in any other court of competent jurisdiction, nor will the taking of proceedings in one or more jurisdictions preclude the taking of proceedings in any other jurisdiction, whether concurrently or not.

- 20.4 **Waiver of objection:** The Borrower irrevocably waives any objection which it may have now or hereafter to such courts being nominated as the forum to hear and determine any proceedings, and to settle any disputes, which may arise out of or in connection with any Finance Document, and any claim that any such court is not a convenient or appropriate forum.
- 20.5 **Waiver of immunity:** The Borrower irrevocably agrees that no immunity (to the extent that it may at any time exist) from suit or from attachment (whether in aid of execution, before judgment, or from any other legal process) will be claimed by it or on its behalf or in relation to its assets, any such immunity being hereby irrevocably waived. The Borrower irrevocably agrees that it and its assets are, and will be, subject to any proceedings, attachment or execution in relation to its obligations under any Finance Document.
- 20.6 **Consent to enforcement:** The Borrower irrevocably and generally consents in relation to any proceedings to the giving of any relief or the issue of any process in connection with those proceedings, including the making, enforcement or execution against any assets whatever of any order or judgment which may be given in those proceedings.

Item 16

Attachment 1

## Execution

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### Borrower

**SIGNED** on behalf of **KAHUTIA LP** by its  
general partner **KAHUTIA GENERAL  
PARTNER LIMITED** by

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Signature of director

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Signature of director

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Name of director

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Name of director

### Lender

*[Execution block to be inserted]*



# MEMO

**To:** Joanne Lawrence      **Client:** Hawke's Bay Regional Council  
**From:** Jonathan Norman      **Project:** Kahutia Carbon Credit Proposal  
**Date:** 12 November 2018      **A/c No :** 003502-340

## INTRODUCTION

- 1 We have been provided with the following documents in connection with this matter:
  - 1.1 a paper presented to the Hawke's Bay Regional Council Corporate and Strategic Committee dated 3 October 2018 relating to the Kahutia – Ngati Kahungunu Iwi Incorporated Carbon Credit Proposal ("**Proposal Paper**"); and
  - 1.2 a draft carbon credit loan agreement between Kahutia LP ("**Kahutia**") and Hawke's Bay Regional Council ("**HBRC**") dated 16 October 2018 prepared by Anderson Lloyd ("**Loan Agreement**").
- 2 Kahutia is a limited partnership registered under the Limited Partnerships Act 2016. The general partner of Kahutia is Kahutia General Partner Limited which is a limited liability company owned by Ngati Kahungunu Iwi Incorporated ("**NKII**"). The register of limited partnerships does not include information regarding the identity of limited partners, so we are unable to confirm if NKII is the only limited partner in Kahutia.
- 3 You have asked us to provide:
  - 3.1 general advice in relation to any legal issues associated with the Proposal Paper; and
  - 3.2 specific advice following our review of the Loan Agreement, including whether the terms of the Loan Agreement reflect the issues identified in the Proposal Paper and adequately protect the interests of HBRC.
- 4 Capitalised terms used in this memorandum have the meaning given to them in the Loan Agreement.

## LOAN AGREEMENT

- 5 The proposed transaction is structured as a 10 year loan of 100,000 NZUs by HBRC to Kahutia LP. Under clauses 2.2(a) and (b) of the Loan Agreement, Kahutia is permitted to either sell the NZUs in the market for cash or retain them, and may only use the proceeds of sale (or retained NZUs) to pay interest costs under the loan or:

"[A]cquire forestry assets, establish and plant forests and nurseries, train staff, pay overheads, pay transaction costs associated with the provision of the Loan and other costs related to the business of the Borrower".

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- 6 The interest rate under the loan is 2.00% per annum. The Loan Agreement specifies that interest is paid annually in arrears. Although the Proposal Paper (paragraph 8) refers to an interest capitalisation period of four years and then payment of interest 6 monthly afterwards, the Loan Agreement simply provides for interest to be paid annually throughout the term of the loan.
- 7 The Loan Agreement implies that interest can be paid either in cash or by way of delivery of NZUs but is somewhat defective in that there is no mechanical detail which set out:
  - 7.1 how to calculate the loan balance on which interest is calculated (eg how should changes in the spot price over each year be dealt with); and
  - 7.2 how to calculate the number of NZUs that are required to be delivered in order to satisfy Kahutia's interest obligation if interest is not paid in cash.
- 8 Although this is not a legal matter, it does not appear that receiving interest in NZUs would meet the objective of monetising HBRC's current "safe carbon" portfolio given HBRC would simply be receiving more NZUs which would increase its safe carbon balance (unless the intention was to sell those NZUs in the market upon receipt).
- 9 The Proposal Paper specifies that interest is calculated on the spot price of the outstanding number of NZUs under the loan (ie if the market value of the NZUs lent to Kahutia increased, the amount of interest due would also increase). That is not currently provided for under the Loan Agreement.
- 10 The market price of one NZU today is approximately \$23.85. Currently, the price of one unit is capped at \$25.00, although the spot price has traded above \$25.00 in recent times. However, given the market price is approaching the cap, there is an expectation that the cap will be lifted. In addition, given the significant harvesting programme that will occur in the next 10 – 15 years, it is expected that demand for NZUs will rise over that period. What this means is that the 100,000 NZUs which Kahutia is required to re-deliver at the expiry of the term of the loan could have a significantly greater cash value than the approximately \$2,500,000 that the NZUs are worth today.
- 11 The simplest way for Kahutia to mitigate the risk of an increasing market price for NZUs is to invest in forestry assets which will see it allocated NZUs. HBRC may wish to seek comfort from Kahutia regarding the assets which it intends to acquire with the NZUs, particularly around the number of NZUs that the forestry portfolio is intended to produce over the term of the loan.
- 12 HBRC may also wish to limit the purposes for which Kahutia can use the funds generated from selling the NZUs. As set out in paragraph 5, under the current drafting Kahutia can use the NZUs to acquire forestry assets, but also for paying overheads, training staff, paying transaction costs and paying other costs related to the business of Kahutia.

#### SECURITY

- 13 The Proposal Paper (paragraph 8.4) provides that Kahungunu Asset Holding Company Limited ("KAHC") will grant a general security agreement ("GSA") in favour of HBRC to

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secure the obligations of Kahutia under the Loan Agreement. The Loan Agreement also refers to an additional specific security agreement, although it is not clear from the Loan Agreement what assets are intended to be secured by this agreement.

- 14 KAHC owns shares in the following companies/limited partnerships:
  - 14.1 Aotearoa Fisheries Limited (6.30%);
  - 14.2 Fiordland Lobster Company Limited (6%);
  - 14.3 KAHC Investments Limited (100%);
  - 14.4 Napier Mussels Limited (91%); and
  - 14.5 Pania Reef Fisheries Limited Partnership (50% - as determined by reference to the ownership interests in the general partner).
- 15 KAHC is also recorded as the registered proprietor of 14 titles (which are a combination of Maori land and European titles), a list of which is attached as a schedule to this memorandum. We also understand that KAHC owns fishing quota.
- 16 The GSA would provide HBRC with the ability to enforce security over the shares set out in clause 14 and any other personal property Kahutia owns. There are specific perfection requirements in respect of taking security over shares which we could work through if required.
- 17 A GSA would not give HBRC a registrable mortgage over any land unless the GSA specifically included a provision known as an "agreement to mortgage" (which is not market standard). If security over any land is required, a mortgage should be requested.
- 18 It is not clear whether a security interest is intended to be granted in any fishing quota held by KAHC. While technically a security interest can be granted in fishing quota in New Zealand (as fishing quota are a property right), the process is more complex than granting a security interest in personal property or land and would not be covered by the GSA (ie a separate security agreement would be required).
- 19 As a technical point, KAHC would need to guarantee the obligations of Kahutia under the Loan Agreement in order to have an obligation to HBRC which would be secured by any general security or specific security.

#### **GENERAL REMARKS**

- 20 The Loan Agreement has been adapted from a document dealing with a loan of cash, and needs improvement. Our suggestion is that HBRC seeks further information from Kahutia regarding the proposed investments that it intends to make with the proceeds of the loan in order to confirm whether sufficient NZUs will be generated to repay the loan.
- 21 The position regarding the proposed security interests that are to be granted will also need to be confirmed. It would be useful to receive a copy of the proposed security documents from Anderson Lloyd to review in due course.

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**Attachment 2****Item 16**

- 22 We can also provide a mark-up of the Loan Agreement if required if that would progress matters.

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SCHEDULE – LIST OF TITLES

[see attachment]

Item 16

Attachment 2

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CT	Owner	Status	Legal Description	Indicative Area
HB143/61	Kahungunu Asset Holding Company Limited	Live	Part Lot 1 Deeds Plan 302	563.6664
HB143/62	Kahungunu Asset Holding Company Limited	Live	Lot 2 and Lot 7 Deposited Plan 8517	365.5905
HB143/63	Kahungunu Asset Holding Company Limited	Live	Lot 4-5 and Lot 9-12 Deposited Plan 1215	1224.9834
HB143/64	Kahungunu Asset Holding Company Limited	Part-Cancelled	Lot 1 and Lot 3-6 Deposited Plan 8517	516.8013
HB143/65	Kahungunu Asset Holding Company Limited	Live	Lot 8 Deposited Plan 8517	18.2716
HB178/34	Kahungunu Asset Holding Company Limited	Live	Tautane 4A Block and Tautane 4B Block	208.1096
HB178/41	Kahungunu Asset Holding Company Limited	Live	Tautane 4A Block and Tautane 4B Block	208.1096
HB69/33	Kahungunu Asset Holding Company Limited	Live	Lot 13 and Part Lot 15 Deposited Plan 1215	556.2404
HBA1/988	Kahungunu Asset Holding Company Limited	Live	Section 4 Block VI Tautane Survey District	0.1897
HBD4/738	Kahungunu Asset Holding Company Limited	Live	Lot 1 Deposited Plan 12006	31.1608
HBH2/26	Kahungunu Asset Holding Company Limited	Live	Tautane 6 Block	88.2214
HBH2/28	Kahungunu Asset Holding Company Limited	Live	Tautane 1 Block	17.6038
HBP4/1086	Kahungunu Asset Holding Company Limited	Live	Part Tautane 5 Block Maori Land Plan 527	89.0275
NA65A/808	Kahungunu Asset Holding Company Limited	Live	Lot 16 Deposited Plan 114472	0.3656

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Item 16

Attachment 3





## MINUTES OF THE PUBLIC EXCLUDED MEETING OF THE REGIONAL COUNCIL

### Previously PUBLIC EXCLUDED

<b>Date:</b>	Wednesday 28 November 2018
<b>Time:</b>	the meeting went into public excluded session at 2.30pm and out of public excluded session at 4.15pm
<b>Venue:</b>	Council Chamber Hawke's Bay Regional Council 159 Dalton Street NAPIER
<b>Present:</b>	R Graham - Chairman P Bailey R Barker P Beaven T Belford A J Dick D Hewitt N Kirton F Wilson
<b>In Attendance:</b>	M Mohi – Chairman – Maori Committee J Palmer – Chief Executive P Munro – Te Pou Whakarae J Ellerm – Group Manager Corporate Services I Maxwell – Group Manager Integrated Catchment Management L Hooper – Principal Governance Advisor C Dolley – Group Manager Asset Management Ngahiwi Tomoana – NKII C Pirie – Habitat BPM T Te Huia – Programme Director Kahutia Accord M Ward – Moore Stephens Markhams

## 1. Conflict of Interest Declarations

There were no conflict of interest declarations.

## 16. Kahutia – Ngati Kahungunu Iwi Incorporated Carbon Credit Proposal

- Tracee Te Huia, Kahutia Programme Director, provided an overview of the Kahutia Accord
- Regionally led national 10 year programme to afforest 100k ha of erosion prone land
- supports the Government's goal to be Carbon Zero by 2050 and takes advantage of funds offered through the 1 Billion Trees initiative
- Healing the land, healing our waterways, healing our people by increasing economic development, education, training, and research opportunities, as well as pathways to and through employment
- Kahutia Ltd Directors are Taine Randell, Ngahiwi Tomoana and John-Barry Smith
- Funding applications to date include \$1 Million invested by the Kahungunu Asset Holding Company over 2017 -2018, 6600 NZUs from KAHC (\$165K), application to HBRC to lease 100K (\$2.5 mill) NZUs over 10 years from April 2019, commitment to fund Hawke's Bay Prison Nursery \$2 million led by Kahutia Dec 2018, and Expression of Interest application to Provincial Growth Fund for \$2.6 million submitted July 2018 (total investment funding would be \$6,265,000 for the initial investment round, of which Kahutia will contribute 58.5%)
- Overview of the Financial model provided by Michael of Moore Stephens Accountants

*The meeting adjourned at 3.30pm and reconvened at 3.40pm with the Kahutia representatives having departed*

Tom Belford declared an interest in the item as he has entered into an agreement with Kahutia for Manuka plantings on 25 ha of his land.

- Council has no involvement in operational matters, and wouldn't unless it became a shareholder by entering into a partnership agreement.
- Interest to be calculated daily, at 2%

## Recommendations

That Hawke's Bay Regional Council:

1. Receives and notes the **"Kahutia – Ngati Kahungunu Iwi Incorporated Carbon Credit Proposal"** staff report.
2. Approves the proposal in principle.
3. Authorises the Chief Executive to finalise the terms of a loan to Kahutia Limited Partnership for a ten year loan of 100,000 NZUs consistent with the terms of the proposed contract and this paper, and including an appropriate repayment schedule
4. Agrees that the loan only be authorised subject to Kahungunu Asset Holding Company becoming a party to the loan agreement and providing security for the loan to the satisfaction of the Council's solicitor and subject to Council agreement at the 19 December 2018 Regional Council meeting.

**Kirton/Bailey**

**For: Baker, Bailey, Beaven, Belford, Kirton, Graham**

**Against: Dick, Hewitt, Wilson**

**CARRIED**



**15. Confirmation of Public Excluded Minutes of the Regional Council Meeting Held on 24 October 2018****RC133/18 Resolution**

Public Excluded Minutes of the Regional Council Meeting held on Wednesday, 24 October 2018, a copy having been circulated prior to the meeting, were taken as read and confirmed as a true and correct record as amended.

**Wilson/Bailey  
CARRIED**

**Resolution**

RC134/18 That the meeting moves out of Public Excluded session.

**Barker/Bailey  
CARRIED**

**Closure:**

There being no further business the Chairman declared the meeting closed at 4.30pm on Wednesday 28 November 2018.

Signed as a true and correct record.

**DATE:** .....

**CHAIRMAN:** .....