



Meeting of the Hawke's Bay Regional Council

Date: Wednesday 19 December 2018
Time: 10.15am
Venue: Council Chamber
Hawke's Bay Regional Council
159 Dalton Street
NAPIER

Late Items Attachments Excluded From Agenda

ITEM	SUBJECT	PAGE
13.	Kahutia – Ngati Kahungunu Iwi Incorporated Carbon Credit Proposal	
Attachment 3:	HBRC and Kahutia LP Carbon Loan Agreement 18 12 2018	2
Attachment 4:	KAHC Guarantee and Indemnity 9 11 2018	25
Attachment 5:	Kahutia - HBRC General Security Deed	36
Attachment 6:	Mortgage annexure draft 9 11 2018	61
Attachment 7:	18 December 2018 J Salter SLW Carbon Credit Loan Legal Advice	64

Draft 4: 18.12.2018

Item 13

Carbon credit loan agreement

Kahutia LP

Hawkes Bay Regional Council

Attachment 3

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Table of contents

Parties	3
Background	3
Agreement	3
1. Interpretation.....	3
2. Facility.....	7
3. Conditions Precedent	8
4. Interest.....	8
5. Repayment and prepayment	9
6. Representations and warranties.....	10
7. Undertakings.....	12
8. Changes in circumstances	14
9. Payments.....	15
10. Taxes	16
11. Default	16
12. Default interest	18
13. Assignment and transfer.....	18
14. Notices.....	19
15. Costs and expenses	20
16. Evidence of debt.....	20
17. Waivers and amendments.....	21
18. Confidentiality	21
19. General	21
20. Governing law and jurisdiction.....	22
Execution.....	23

Item 13

Attachment 3

Date:

Parties

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

Background

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

1. Interpretation

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

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

Business Plan means the business plan of the Borrower delivered to the Lender in accordance to clause 3.1(f).

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 Guarantee;
- (c) the Security Documents;
- (d) any document entered into for the purposes of amending, replacing, supplementing, novating or acceding to any Finance Document; and
- (e) 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).

1903140 | 3918783

page 3

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

Guarantee means the guarantee and indemnity dated on or about the date of this agreement given by the Guarantors in favour of the Lender.

Guarantor means Kahungunu Asset Holding Company Limited (company number 1632194).

Interest Rate means 2 per cent. per annum.

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.

Mortgage means the first ranking registered mortgage granted by the Guarantor as mortgagor in favour of the Lender as mortgagee over the property known as "Tautane Station" and comprised in computer interest registers [●] and [●].

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, or as the context requires, its Dollar Equivalent.

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 Mortgage;

- (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.

Spot Rate means the spot offer price for the purchase of one NZU 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 the Guarantor; or
 - (ii) a material impairment on the ability of the Borrower or the Guarantor 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.

1903140 | 3918783

page 6

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- (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 a single transfer of the relevant NZUs to the Borrower's account in the Register) on the date falling five

1903140 | 3918783

page 7

al.

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 necessary consents and authorisations for the Borrower relating to the transfer of NZUs from the Lender to the Borrower have been obtained and are in full force and effect;
 - (d) evidence that all necessary consents and authorisations for the Guarantor relating to the entry into the Guarantee and the grant of the Mortgage have been obtained and are in full force and effect;
 - (e) the following documents executed by all parties thereto:
 - (i) this agreement;
 - (ii) the General Security Deed; and
 - (iii) the Guarantee;
 - (f) a copy of the Borrower's business plan;
 - (g) evidence of registration of a financing statement on the PPSR in favour of the Lender in respect of the security interests created under the Security Documents;
 - (h) evidence of registration of the Mortgage;
 - (i) 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
 - (j) confirmation from the Borrower and the Guarantor 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;

1903140 | 3918783

page 8

al.

- (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 be calculated and 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:

- (a) The Borrower shall repay to the Lender all Outstanding Amounts on the Final Repayment Date.
- (b) The Borrower shall repay to the Loan in instalments on the following dates:

Repayment Date	Amount of Repayment Instalment
The date falling on the fifth anniversary of the date of the Loan	16,667 NZUs
The date falling on the sixth anniversary of the date of the Loan	16,667 NZUs
The date falling on the seventh anniversary of the date of the Loan	16,667 NZUs
The date falling on the eighth anniversary of the date of the Loan	16,667 NZUs
The date falling on the ninth anniversary of the date of the Loan	16,667 NZUs
Final Repayment Date	All Outstanding Amounts.

- 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 first applied toward any due and unpaid interest and then 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; and
 - (iv) no "Terminating Event", as defined in section 86 of the Limited Partnerships Act 2008, has occurred with respect to it;
- (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; and
- (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 day until all Outstanding Amounts are repaid in full 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;
- (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 only 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;
- (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; and
- (j) **Unpaid Capital:** if required by the Lender following the occurrence of an Event of Default or Potential Event of Default, make calls on any unpaid capital commitments of the limited partners of the Borrower.

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, change any material part of its business from that set out in the Business Plan.

7.3 Limited Partnership Undertakings:

- (a) The Borrower undertakes to ensure that, unless the Lender has otherwise consented in writing:
 - (i) it will 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 "Terminating Event", as defined in section 86 of the Limited Partnerships Act, occurs in respect of it.

7.4 Information Undertakings:

- (a) **Quarterly Report:** No later than 30 days after the end of each quarter, the Borrower shall provide to the Lender a report in a form to be agreed between the parties setting out in sufficient detail:

- (i) compliance by the Borrower with the Business Plan;
 - (ii) any expenditure from the Raised Funds in that period;
 - (iii) progress in relation to planting and afforestation activities in that period; and/or
 - (iv) any NZUs that have been allocated to and/or surrendered by the Borrower in that period.
- (b) **Annual Report:** No later than 30 days after each Interest Payment Date, the Borrower shall provide to the Lender a forecast showing:
- (i) NZUs that will be allocated to and/or surrendered by the Borrower in the period from the date of the report to the Final Repayment Date; and
 - (ii) repayment of all Outstanding Amounts under the Loan.

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.

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 any Finance Document and the Lender hereby confirms its preference to receive payments in NZUs.
- 9.2 **Payments by Lender:** All payments to be made by the Lender to the Borrower under any Finance Document 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 any Finance Document 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 any Finance Document 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 in NZUs under any Finance Document 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 the Finance Documents 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 any Finance Document; 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 any Finance Document,

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.

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 or the Guarantor 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 within two Business Days of its due date where non-payment on the due date has arisen solely by reason of administrative error); or

- (b) **Other breach:** the Borrower of the Guarantor 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, in respect of any such breach or omission which is capable of being remedied, such breach or omission is not remedied within 60 days of the Borrower notifying the Lender of such breach or omission; or
- (c) **Misrepresentation:** any representation, warranty or statement made or deemed to be repeated by the Borrower of the Guarantor 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, if the circumstances which caused such misrepresentation are capable of remedy, such circumstances are not remedied within 60 days or the Borrower notifying the Lender of such misrepresentation; or
- (d) **Cessation of business or dissolution:** the Borrower or the Guarantor 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 Guarantor, or the winding up, or termination of the Borrower or the Guarantor 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 Guarantor or the whole or any part of its assets following default under any indebtedness for borrowed money in excess of \$50,000 in respect of the Borrower, or \$1,000,000 in respect of the Guarantor; 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 Guarantor, or the Borrower or the Guarantor is declared at risk pursuant to the provisions of that Act; or
- (g) **Creditors' process:** any expropriation, sequestration, distress or execution affects any asset of the Borrower or the Guarantor having a value of \$50,000 in respect of the Borrower, or \$1,000,000 in respect of the Guarantor; or
- (h) **Distress or judgment:** a distress, attachment or other execution for a sum exceeding \$50,000 in respect of the Borrower, or \$1,000,000 in respect of the Guarantor, is levied or enforced upon, or commenced against, any assets of the Borrower or the Guarantor and is not discharged or stayed within 20 days, or a judgment for a sum exceeding \$50,000 in respect of the Borrower, or \$1,000,000 in respect of the Guarantor, is obtained against the Borrower or the Guarantor and is not satisfied, stayed or discharged within 14 days except, in each case, where the Borrower or the Guarantor is contesting the same in good faith by appropriate proceedings; or
- (i) **Insolvency:**
 - (i) the Borrower or the Guarantor 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 or the Guarantor in connection with actual or anticipated financial difficulties; or
- (B) a composition, assignment or arrangement with the Borrower's or the Guarantor'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 or becomes invalid or unenforceable; or
- (l) **Terminating Event:** a "Terminating Event", within the meaning of section 86 of the Limited Partnerships Act 2008, occurs with respect to the Borrower; or
- (m) **Material Adverse Change:** a material adverse change occurs,

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 any Finance Document 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 3% 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.

1903140 | 3918783

page 18

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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; or
- (c) as required by law,

such information about the Borrower or the Guarantor or their respective 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 or the Guarantor).

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 any Finance Document 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 and Guarantor:**

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: james.palmer@hbrc.govt.nz

Attention: Chief Executive Officer

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 any Finance Document 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 any Finance Document, 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 or any other Finance Document.

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 (or any other Finance Document);
 - (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 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.

1903140 | 3918783

page 21

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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.

Execution

Borrower

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

Signature of director

Signature of director

Name of director

Name of director

Lender

[Execution block to be inserted]

Draft (1): 08.11.2018

Item 13

Guarantee and indemnity

Kahungunu Asset Holding Company Limited

Hawkes Bay Regional Council

Attachment 4

**anderson
lloyd.**

Date: 2018

Parties

- (1) Kahungunu Asset Holding Company Limited (**Guarantor**)
- (2) In favour of Hawkes Bay Regional Council (**Beneficiary**).

Background

This guarantee and indemnity is provided in consideration of the financial accommodation provided by the Beneficiary to the Principal Debtor from time to time.

Covenants

1. Interpretations

1.1 Definitions in Loan Agreement:

- (a) words and expressions defined in the Loan Agreement and used in this deed shall, unless the context otherwise requires, have the meanings given to them in the Loan Agreement; and
- (b) the provisions of clauses 1.2, 1.3 and 1.4 of the Loan Agreement shall apply, where applicable, to this deed (provided that any references to "this agreement" shall be read as references to this deed).

1.2 Definitions: In this deed:

Loan Agreement means the carbon credit loan agreement dated on or about the date of this deed between the Principal Debtor (as borrower) and the Beneficiary (as lender).

Guaranteed Money means, all amounts of any nature which the Guarantor (in any capacity and whether alone, or jointly, or jointly and severally with any other person) is, or may at any time become, liable to pay the Beneficiary under any Finance Document and a reference to Guaranteed Money includes any part of it.

Principal Debt means all amounts of any nature which the Principal Debtor (in any capacity and whether alone, or jointly, or jointly and severally with any other person) is, or may at any time become, liable (whether actually or contingently) to pay or deliver to the Beneficiary (in any capacity and whether alone, or jointly or jointly and severally with any other person) under, pursuant to, or arising out of, any Finance Document, and a reference to Principal Debt includes any part of it.

Principal Debtor means the Borrower.

2. Guarantee and indemnity

- 2.1 **Guarantee:** The Guarantor guarantees to the Beneficiary the due payment and delivery by the Principal Debtor of the Principal Debt.
- 2.2 **Continuing guarantee:** The guarantee in this deed is a continuing guarantee and shall operate irrespective of any intervening payment, settlement of account or other matter or thing whatever,

until a release has been signed by the Beneficiary and delivered to the Guarantor under clause 13.

2.3 Indemnity: The Guarantor indemnifies the Beneficiary against:

- (a) all claims, liabilities, damages, losses and payments; and
- (b) all costs, charges and expenses (including legal expenses on a full indemnity basis and goods and services and similar taxes thereon),

suffered, incurred or sustained by the Beneficiary at any time as a direct or indirect consequence of:

- (c) any Principal Debt not being recoverable from the Guarantor under the guarantee given in clause 2.1 (including as a result of the obligation to pay the Principal Debt being or becoming void, voidable or unenforceable); or
- (d) any monetary obligation of the Principal Debtor to the Beneficiary not being duly satisfied by the Principal Debtor.

3. Obligations of the Guarantor

3.1 Payment: If the Principal Debtor does not pay any Principal Debt to the Beneficiary on or before its due date, the Guarantor shall (immediately) pay that Principal Debt to the Beneficiary (whether or not demand for payment has been made on the Principal Debtor, the Guarantor or any other person).

3.2 Payments to be free and clear: The Guaranteed Money shall be paid:

- (a) free and clear of any restriction or condition;
- (b) free and clear of and (except to the extent required by law) without any deduction or withholding on account of any tax; and
- (c) without any deduction or withholding on account of any other amount, whether by way of set-off, counterclaim or otherwise.

3.3 Cleared funds: Any Guaranteed Money received by the Beneficiary from the Guarantor shall not satisfy the Guarantor's obligation to pay such amount until it is cleared and immediately available to the Beneficiary.

3.4 No competition: The shall not, unless requested to do so by the Beneficiary:

- (a) take, accept or continue to hold any security from the Principal Debtor or any other person who has given any security to the Beneficiary for any Principal Debt;
- (b) exercise any right or take the benefit of subrogation or contribution, or require marshalling, or claim the benefit of any security now or in the future held by the Beneficiary for the payment of any Principal Debt;
- (c) take steps to:
 - (i) recover (whether directly or by set-off, counterclaim or otherwise); or
 - (ii) accept money or other property, or exercise, enforce or receive the benefit of any rights (including by way of set-off) in respect of,

any indebtedness of any nature owed to it by the Principal Debtor or any other person who has given any security to the Beneficiary for any Principal Debt; or

- (d) claim or prove in the dissolution of the Principal Debtor or any other person in competition with the Beneficiary.

3.5 **Guarantor to account:** If, notwithstanding clause 3.4, the Guarantor:

- (a) takes, accepts or continues to hold any such security, money or other property or receives the benefit of a set-off; or
- (b) proves in the Guarantor's own name in the dissolution of the Principal Debtor, or of any other person who has given any security to the Beneficiary for any Principal Debt (whether or not the Beneficiary has required the Guarantor to do so, or has consented to that Guarantor doing so), for all or any part of any amount due (whether actually or contingently) from the Principal Debtor or such other person to the Guarantor,

the Guarantor shall immediately pay or transfer to the Beneficiary all such security, money, other property or the benefit of set-off, or all amounts received by the Guarantor in relation to any such proof, and all interest accruing thereon, until the Principal Debt is discharged in full and, until that payment or transfer is made, shall hold such security, money or other property, or the benefit of that proof or set-off, and all interest thereon, on trust for the Beneficiary in an amount not exceeding the Principal Debt then outstanding.

4. Nature and extent of obligations

- 4.1 **Unconditional and irrevocable:** Each obligation of the Guarantor under this deed is unconditional, irrevocable and enforceable notwithstanding that any instrument (negotiable or otherwise) relating to all or any part of the Principal Debt may still be outstanding at the date of enforcement.
- 4.2 **Liable as principal:** The Guarantor's liability under this deed shall be as a principal debtor and not merely as surety.
- 4.3 **Other securities:** This deed is in addition to and not in substitution for, is collateral to, and shall not prejudicially affect or be prejudicially affected by, any other security or right which the Beneficiary may have in respect of any Principal Debt. Any security given by the Guarantor to the Beneficiary (whether given before or after the date of this deed) shall constitute security for the Guaranteed Money.

5. Representations

- 5.1 **Representations and warranties:** The Guarantor represents and warrants to the Beneficiary that on the date of this deed:
 - (a) **Status:** it is a company duly incorporated and validly existing under the laws of New Zealand;
 - (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, the Finance Documents to which it is a party; and

- (iii) taken all necessary corporate action (including the passing of all resolutions) to authorise the entry into the Finance Documents to which it is a party and the performance of all its obligations thereunder;
- (c) **Obligations:** its obligations under the Finance Documents 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, re-organisation, 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 to which it is party, nor the exercise of any right or the performance or observance of any obligation under the Finance Documents to which it is party, nor any transaction contemplated thereby, will:
 - (i) violate or contravene any law, regulation or authorisation 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 directors to exercise those powers, to be exceeded,

and will not result in a limitation on its powers or the powers of its directors to be exceeded; and
- (e) **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).

6. Rights of the Beneficiary

6.1 Discretions: The Beneficiary may at any time:

- (a) determine whether or not to enforce this deed or any other security or right;
- (b) enforce this deed without first taking steps or proceedings against the Principal Debtor or any other person;
- (c) make any arrangement or compromise with the Principal Debtor or any other person which the Beneficiary thinks fit;
- (d) retain, carry to an interest bearing suspense account, and appropriate at the Beneficiary's discretion, any amount received by the Beneficiary under this deed (until the Principal Debt has been paid and satisfied in full);
- (e) apply any amount owed or to become owing by the Beneficiary in or towards satisfaction of any Guaranteed Money, and for such purpose the Beneficiary may accelerate the date for payment of any amount owing by the Beneficiary to the Guarantor, notwithstanding the terms upon which such amount is so owing; and
- (f) set-off and apply in or towards satisfaction of the Guaranteed Money or against any other liability of the Guarantor to the Beneficiary any one or more credit balances or deposits of

the Guarantor held by the Beneficiary and any other liabilities of the Beneficiary to the Guarantor and, for any of these purposes, the Beneficiary may break any term deposit.

- 6.2 **No prejudice:** The Beneficiary's rights under this deed are without prejudice and in addition to any other right to which the Beneficiary is at any time entitled (whether under this deed or by law, contract or otherwise), and may be exercised by the Beneficiary without prior notice to the Guarantor, the Principal Debtor or any other person.

7. Gross-up

7.1 Gross-up: If:

- (a) the Guarantor is required by law to make any deduction or withholding from any amount paid or payable by the Guarantor under this deed; or
- (b) the Beneficiary is required by law to make any payment on account of tax (other than tax on overall net income of the Beneficiary, unless the Beneficiary would not have been required to make such payment had the amount been received from the Principal Debtor) or otherwise on or in relation to any amount received or receivable by it under this deed,

then:

- (c) the Guarantor 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 Guarantor in respect of which such deduction, withholding or payment is required to be made shall be increased to the extent necessary to ensure that, after making the deduction, withholding or payment, the Beneficiary receives and retains (free from any liability in respect of any deduction, withholding or payment) a net sum equal to the sum which the Beneficiary would have received and so retained had no such deduction, withholding or payment been made; and
- (e) the Guarantor shall promptly deliver to the Beneficiary the receipt issued by the applicable authority evidencing that such deduction or withholding has been made.

- 7.2 **Tax credit:** Any tax credit or refund received by the Beneficiary in relation to an additional amount paid by the Guarantor to the Beneficiary under clause 7.1 shall be refunded to the Guarantor unless the Beneficiary determines that it would be prejudiced as a result of such payment. Nothing in this clause, however, shall interfere with the Beneficiary's right to arrange its taxation affairs in whatever manner it deems fit and, in particular, the Beneficiary 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 Beneficiary as to any such tax credit or refund shall be conclusive and binding on the Guarantor. The Beneficiary will not be obliged to disclose any information regarding its tax affairs and computations.

8. Default interest

- 8.1 **Default interest payable:** If the Guarantor fails to pay any Guaranteed Money when due (**overdue amount**), the Guarantor shall pay interest (**default interest**) on that overdue amount from its due date until it is paid in full (both before and after any judgment) at the Interest Rate plus **21**% per annum .
- 8.2 **Calculation of default interest:** Default interest shall be calculated and payable by reference to successive periods of a duration selected by the Beneficiary from time to time (being not less than one month), 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, and shall be payable on the last day of each period in respect of which it is calculated and on the date of payment of each overdue amount. Any default interest which is not paid when due shall be added to the overdue amount in respect of which it is payable on a 30 day compounding basis and shall itself bear interest in accordance with this clause 8.

- 8.3 **Credit to be given:** In calculating the amount of any default interest under this clause 8, credit shall be given, to the extent necessary to avoid any double counting, for any interest payable by the Principal Debtor in the nature of default interest which is included in the Principal Debt.

9. Acknowledgements

- 9.1 **Acknowledgements:** The Guarantor acknowledges that:

- (a) for the benefit of the Beneficiary, in entering into this deed, it did not rely on any statement, representation, warranty or information of any nature provided to it by or on behalf of any person (including the Beneficiary, the Principal Debtor or any other guarantor);
- (b) the Beneficiary is not under any duty to disclose information to the Guarantor, or to do or execute anything, relating to the affairs of the Principal Debtor with the Beneficiary;
- (c) the Beneficiary may disclose any information which the Beneficiary may have concerning the Guarantor to a potential assignee or any other person with whom the Beneficiary may wish to enter into contractual relations in connection with any Principal Debt; and
- (d) it has received a copy of each Finance Document.

10. Liability not prejudiced

- 10.1 **Liability not prejudiced:** Neither the liability of the Guarantor, nor any of the rights of the Beneficiary, under this deed shall be affected or discharged by anything which, but for this clause 10.1, might operate to affect or discharge the liability of, or otherwise provide a defence to, the Guarantor (whether or not known to the Guarantor, the Beneficiary or any other person), including:

- (a) any limitation or incapacity of, or affecting, the Principal Debtor or the Beneficiary;
- (b) the granting of any time, credit, indulgence or other concession, to the Principal Debtor or any other person by the Beneficiary;
- (c) any amendment to, or variation of, this deed or any other document, or the Principal Debtor or the Guarantor not receiving notice of any such amendment or variation;
- (d) any other person joining in this deed or giving any other security, or failing or being incompetent to join in this deed or give any other security, or failing to become legally bound to the Beneficiary as intended under any such security;
- (e) the liability of the Principal Debtor or any other person to the Beneficiary in respect of any of the Principal Debt ceasing from any cause whatever (including release or discharge by the Beneficiary), or any other person failing to become legally bound to the Beneficiary as intended or to perform any of their respective obligations to the Beneficiary;
- (f) failure by the Principal Debtor or any other person to provide any security which has been requested by the Beneficiary or any other person;

- (g) any security held or taken in respect of, or any transaction relating to, any Principal Debt being void, voidable, unenforceable, defective or informal, or being released, partially released, discharged, partially discharged or varied in any way;
- (h) any compounding, compromise, release, abandonment, waiver, variation, relinquishment or renewal, of any agreements, securities, documents of title or assets, or any of the rights of the Beneficiary against the Principal Debtor or any other person;
- (i) the enforcement of, or failure to enforce, any rights of the Beneficiary under this deed or any other document, or under any law;
- (j) the dissolution of the Principal Debtor or any other person, or the appointment of any receiver, receiver and manager, statutory manager, voluntary administrator, or similar person, or the establishment of any compromise, deed of company arrangement or other arrangement, in respect of the Principal Debtor or any other person;
- (k) the amalgamation, change in constitution (including in relation to any trust, its trust deed), status or control, or reconstruction or reorganisation, of the Principal Debtor, the Beneficiary or any other person;
- (l) any failure by the Beneficiary to present, demand, or give notice in respect of, any negotiable instrument;
- (m) the making or granting by the Beneficiary (whether alone or together with any other person) to, or at the request of, the Principal Debtor (whether alone or together with any other person) of further advances or accommodation or the withdrawal or restriction by the Beneficiary of any advances or accommodation, or the Guarantor not receiving notice of any such making, granting, withdrawal or restriction;
- (n) any variation to the terms of, or replacement or rearrangement of, any advance made, or accommodation granted, by the Beneficiary (whether alone or together with any other person) to, or at the request of, the Principal Debtor (whether alone or together with any other person), or the Guarantor not receiving notice of any such variation, replacement or rearrangement;
- (o) the powers of any person purporting to act on behalf of the Principal Debtor in relation to the incurring of any Principal Debt proving to be defective in any respect;
- (p) anything done, or omitted or neglected to be done, by the Beneficiary, whether in exercise of the rights, powers and remedies vested in the Beneficiary by this deed or any other document, or otherwise; or
- (q) any other matter or thing whatsoever, other than a release of this deed under clause 13.

11. Assignment

11.1 Deed binding: This deed is binding on, and is for the benefit of, the parties and their respective successors, permitted assigns and transferees.

11.2 No assignment:

- (a) Neither the Guarantor nor the Beneficiary may assign or transfer any of its rights or obligations under this deed without the prior written consent of the other party.
- (b) The Lender may only assign or transfer any of its rights or obligations under this deed to the extent it is also assigning its transferring its rights under the Loan Agreement.

12. Notices

- 12.1 **Notices:** Clause 14 (Notices) of the Loan Agreement applies to this deed as if set out in full herein.

13. Release and reinstatement

- 13.1 **Release:** The Beneficiary shall sign and deliver a release of this deed when the Beneficiary (acting reasonably) is satisfied that:
- (a) the Beneficiary has received all the Guaranteed Money; and
 - (b) no payment received, or to be received, by the Beneficiary may be avoided, or required to be repaid by the Beneficiary, whether under any law relating to insolvency or otherwise.
- 13.2 **Reinstatement:** If any payment received or recovered by the Beneficiary, or any other person on behalf of the Beneficiary, is or may be avoided, whether by law or otherwise, then:
- (a) such payment shall be deemed not to have affected or discharged the liability of the Guarantor under this deed or any other security given by the Guarantor in favour of the Beneficiary, and the Beneficiary and the Guarantor shall be restored to the position in which each would have been if such payment had not been received or recovered; and
 - (b) the Beneficiary shall be entitled to exercise all its rights under this deed which it would have been entitled to exercise if such payment had not been received or recovered,
- notwithstanding that the Beneficiary may have signed a release pursuant to clause 13.

14. General

- 14.1 **Amendments:** This deed may only be amended or varied by the written agreement of the Guarantor and the Beneficiary.
- 14.2 **Partial invalidity:** If at any time any provision of this deed is or becomes illegal, invalid or unenforceable in any respect under the law of any relevant jurisdiction, that illegality, invalidity or unenforceability shall not affect the enforceability of the remaining provisions of this deed, nor shall the legality, validity or enforceability of any provision under the law of any other jurisdiction be in any way affected or impaired thereby.
- 14.3 **Waivers:**
- (a) No term of this deed may be waived except by the Beneficiary in writing.
 - (b) Time shall be of the essence in respect of performance by the Guarantor of its obligations under this deed, but no failure on the part of the Beneficiary to exercise, and no delay on its part in exercising, any right, power or remedy under this deed or any other document relating to any Principal Debt 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 of the Beneficiary.
- 14.4 **Remedies not exclusive:** The rights, powers and remedies provided in this deed are in addition to, and not exclusive of, any rights, powers or remedies provided by law.
- 14.5 **Enforcement:** It shall not be necessary for the Beneficiary to incur any expense or make any payment before enforcing any of the Beneficiary's rights in respect of any obligation of the Guarantor under this deed.

- 14.6 **Payments on demand:** For the avoidance of doubt, all amounts payable to the Beneficiary under this deed (including, but not limited to, all costs and all amounts payable under any indemnity) shall be payable by the Guarantor upon demand (provided that no demand is necessary for the purposes of clause 3.1 and form part of the Guaranteed Money.
- 14.7 **Indemnities:** Each of the indemnity obligations of the Guarantor under this deed constitute continuing obligations, separate and independent from the Guarantor's other obligations under this deed and shall survive payment of the Principal Debt and termination or release of this deed.
- 14.8 **Certificates:** A certificate of the Beneficiary as to any amount or fact which might reasonably be expected to be within the Beneficiary's knowledge shall be prima facie evidence of such amount or fact.
- 14.9 **Consents:** The Beneficiary may give or withhold any approval or consent under this deed in its absolute discretion, and either conditionally or unconditionally.
- 14.10 **Moratorium legislation:** To the fullest extent permitted by law, all legislation which at any time directly or indirectly:
- (a) lessens, varies or affects in favour of the Guarantor any obligation under this deed; or
 - (b) delays, prevents or prejudicially affects the exercise by the Beneficiary of any right, power or remedy conferred by this deed,
- is excluded from this deed.
- 14.11 **Contract and Commercial Law Act 2017:** This deed is for the benefit of, and is enforceable in terms of Part 2, Subpart 1 of the Contract and Commercial Law Act 2017 by, the Beneficiary.

15. Delivery

- 15.1 **Delivery by the Guarantor:** For the purposes of section 9 of the Property Law Act 2007 and without limiting any other mode of delivery, this deed will be delivered by the Guarantor immediately on the earlier of:
- (a) physical delivery of an original of this deed, executed by the Guarantor, into the custody of the Beneficiary or the Beneficiary's solicitors; or
 - (b) transmission by the Guarantor or its solicitors of a facsimile, photocopied or scanned copy of an original of this deed, executed by the Guarantor, to the Beneficiary or the Beneficiary's solicitors.

16. Counterparts

- 16.1 **Counterparts:** This deed may be signed in any number of counterparts, all of which will together constitute one and the same instrument. The parties may execute this deed by signing any such counterpart.

17. Governing law and jurisdiction

- 17.1 **Governing law:** This deed shall be governed by, and construed in accordance with, the laws of New Zealand. The parties submit to the non-exclusive jurisdiction of the courts of New Zealand.

Execution

Executed as a deed poll by:

Guarantor

Signed by **Kahungunu Asset Holdings
Company Limited** by:

Director's signature

Director's signature

Director's full name

Director's full name

Item 13

Attachment 4

Draft: 17 December 2018

Item 13

General security deed

Kahutia LP

Hawkes Bay Regional Council

Attachment 5

**anderson
lloyd.**

Table of contents

Table of contents	2
Parties 3	
Covenants	3
1. Interpretation.....	3
2. Payment and performance	6
3. Security.....	6
4. Further assurance	7
5. Investment securities	9
6. Insurance	10
7. General undertakings	11
8. Representations and warranties	12
9. Security Interest enforceable.....	14
10. Secured Party may remedy breach.....	14
11. Enforcement by Secured Party.....	14
12. Appointment of Receiver	14
13. Application of proceeds	16
14. Tax.....	16
15. Protection of persons dealing with Secured Party or Receiver	17
16. Protection of Secured Party and Receiver	17
17. Investigator	18
18. Attorney	18
19. Liability not prejudiced	19
20. Assignment.....	19
21. Release.....	19
22. Application of the PPSA	20
23. Application of PLA and other laws	21
24. General.....	22
25. Delivery.....	23
26. Counterparts	23
27. Governing law and jurisdiction.....	23
Executed as a deed.....	2
Schedule 1 – Serial numbered goods	3

Date: 2018

Parties

- (1) Kahutia LP (**Grantor**)
- (2) GHawkes Bay Regional Council (**Secured Party**)

Covenants

1. Interpretation

- 1.1 **Definitions in Facility Agreement:** Words and expressions defined in the Facility Agreement and used in this deed shall, unless the context otherwise requires, have the meanings given to them in the Facility Agreement.

- 1.2 **Other definitions:** In this deed, unless the context otherwise requires:

Attorney has the meaning given to it in clause 18.1.

Authorisation includes:

- (a) any consent, authorisation, registration, filing, lodgement, agreement, notarisation, certificate, permission, licence, approval (including any planning approval), authority or exemption from, by or with a Government Agency; or
- (b) in relation to anything which could be fully or partly prohibited or restricted by law if a Government Agency intervenes or acts in any way within a specified period after lodgement, filing, registration or notification, the expiry of that period without intervention or action.

Companies Act means the Companies Act 1993.

Distribution has the meaning given to that term by section 2 of the Companies Act 1993.

Event of Default means:

- (a) an Event of Default as defined in the Facility Agreement; and
- (b) any other event of default, default event, or termination event howsoever described, in any Finance Document.

Facility Agreement means the carbon credit loan agreement dated on or about the date of this deed between the Secured Party as lender and the Grantor as borrower.

Government Agency means:

- (a) a central or local government authority, body or agency;
- (b) a governmental, semi-governmental or judicial person;
- (c) a statutory or regulatory entity; or
- (d) a person (whether autonomous or not) who is charged with the administration of any law or directive.

Investigator means an investigator appointed by the Secured Party under clause 17.

NZ\$, \$ and NZ Dollars mean the lawful currency of New Zealand.

Other Property means all of the Secured Property that is not Personal Property.

Personal Property means all of the Grantor's personal property to which the PPSA applies.

PPSA means the Personal Property Securities Act 1999.

PPSR means the Personal Property Securities Register maintained for the purposes of the PPSA.

Receiver means a receiver, or receiver and manager, appointed by the Secured Party under this deed.

Rights means:

- (a) Distributions;
- (b) bonus shares, debentures or other securities;
- (c) options or rights to take up shares, debentures or other securities; and
- (d) other rights, money or securities of any nature.

Secured Money means all amounts of any nature which the Grantor (whether alone, or jointly, or jointly and severally with any other person, and in any capacity) is, or may at any time become, liable (whether actually or contingently) to pay or deliver to the Secured Party (whether alone, or jointly or jointly and severally with any other person and in any capacity), under the Finance Documents or otherwise, and a reference to Secured Money includes any part of it.

Secured Obligations means all present and future obligations which the Grantor (whether alone, or jointly or jointly and severally with any other person and in any capacity) has or owes to or for the benefit of the Secured Party (whether alone, or jointly and severally with any other person and in any capacity) under the Finance Documents, other than obligations to pay or deliver money.

Secured Property means the whole of the Grantor's present and future undertaking, property, assets and revenues, including amounts uncalled on its shares and amounts called but unpaid, and a reference to the Secured Property includes any part of it.

Security Interest includes a security interest, mortgage, charge, encumbrance, lien, pledge, finance lease, sale and lease back, sale and repurchase, deferred purchase or title retention arrangement, flawed asset arrangement, and any other security or arrangement having like economic effect over any property, assets or revenues.

1.3 **References:** Except to the extent that the context otherwise requires, any reference in this deed to:

- (a) a **clause** or **schedule** is a reference to a clause of, or a schedule to, this deed.
- (b) **constitutional documents** includes any shareholders agreement or joint venture agreement (however described).
- (c) **disposal** includes any sale, assignment, exchange, transfer, concession, loan, lease, surrender, licence, reservation, waiver, compromise, release, dealing, parting with possession, or the granting of any option, right or interest whatever, or any agreement for

any of the same, and **dispose** means to make a disposal, and **acquisition** and **acquire** shall be construed accordingly.

- (d) **guarantee** includes an indemnity, letter of credit, legally binding letter of comfort, suretyship and other agreement the economic effect of which is to provide security, or otherwise assume responsibility, for the indebtedness of another person.
 - (e) **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.
 - (f) a **law** includes common or customary law and any constitution, decree, judgment, legislation, order, ordinance, regulation, by-law, statute, treaty or other legislative measure and **lawful** and **unlawful** shall be construed accordingly.
 - (g) a **person** or **entity** includes an individual, firm, company, corporation, unincorporated body of persons, organisation or trust, and any government, government agency or authority, in each case whether or not having separate legal personality.
 - (h) **proceeds** includes "proceeds" as defined in the PPSA.
 - (i) **tax** includes any present or future tax, levy, impost, rate, duty, charge, fee, deduction or withholding of any nature and whatever called, imposed or levied by a Government Agency, and any related interest, penalty, charge, fee or other amount, and **taxation** shall be construed accordingly.
 - (j) **upon demand** means upon demand by notice in writing signed by or on behalf of the person making demand.
- 1.4 **PLA references:** The expressions **further advance by way of financial accommodation**, **mortgage debenture**, **stated priority limit** and **subsequent mortgage** have the respective meanings given to them under, or in the context of, the PLA.
- 1.5 **PPSA references:** The expressions **accession**, **account receivable**, **chattel paper**, **document of title**, **financing statement**, **financing change statement**, **future advance**, **investment security**, **negotiable instrument**, **personal property**, **possession**, **security interest** and **verification statement** have the respective meanings given to them under, or in the context of, the PPSA.
- 1.6 **Miscellaneous:**
- (a) Headings are inserted for convenience only and do not affect interpretation of this deed.
 - (b) References to a person include that person's successors, permitted assigns, executors and administrators (as applicable).
 - (c) Unless the context otherwise requires, the singular includes the plural and vice versa and words denoting individuals include other persons and vice versa.
 - (d) A reference to any legislation includes any statutory regulations, rules, orders or instruments made or issued pursuant to that legislation and any amendment to, re-enactment of, or replacement of, that legislation.
 - (e) A reference to **including** when introducing an example does not limit the meaning of words to which the example relates to that example or examples of a similar kind.
 - (f) A reference to any document includes reference to that document as amended, modified, novated, supplemented, varied or replaced from time to time.

- (g) Except where inconsistent with the context, the expression **at any time** also means from time to time.
- (h) Unless otherwise stated, reference to a clause or schedule is a reference to a clause of or schedule to this deed.
- (i) An Event of Default is **continuing** unless it has been waived in writing or remedied to the satisfaction of the Secured Party.

2. Payment and performance

- 2.1 **Payment of Secured Money:** The Grantor shall pay its Secured Money to the Secured Party:
- (a) if the terms of the payment of the Secured Money are contained in a Finance Document, in accordance with the provisions of that Finance Document; and
 - (b) otherwise, upon demand by the Secured Party.
- 2.2 **Performance of Secured Obligations:** The Grantor shall perform and observe its Secured Obligations in accordance with the provisions of the Finance Documents.
- 2.3 **Receiver's remuneration:** All remuneration payable to any Receiver shall be payable by the Grantor upon demand and shall form part of the Secured Money.

3. Security

- 3.1 **Charging clause:** As security for:
- (a) the payment or delivery of the Secured Money; and
 - (b) the performance and observance by the Grantor of the Secured Obligations,
- the Grantor:
- (c) grants a Security Interest in all of its present and after acquired Personal Property, and all of its present and future rights in relation to any Personal Property, to the Secured Party;
 - (d) charges all of its present and future interest in, and all of the Grantor's present and future rights in relation to, all its Other Property in favour of the Secured Party; and
 - (e) agrees to mortgage all of its present and future interests in any land, to the Secured Party.
- 3.2 **Nature of charge over Other Property:** The charge under this deed is a fixed charge in respect of all Other Property, except where, but only to the extent that, the charge is not legally and fully effective as a fixed charge, in which event the charge shall be a floating charge.
- 3.3 **Automatic crystallisation:** Any floating charge shall become a fixed charge automatically and immediately in respect of all Other Property subject to the floating charge:
- (a) without the need for any notice or act by the Secured Party, if an Event of Default occurs; and
 - (b) in respect of any such Other Property specified in any notice which may be given by the Secured Party to the Grantor at any time if, in the opinion of the Secured Party, that Other Property is at risk of being seized, taken or becoming subject to any Security Interest other than any Security Interest expressly permitted under a Finance Document.

- 3.4 **De crystallisation:** At any time after the floating charge has taken effect as a fixed charge in respect of any Secured Property, it shall resume the status of a floating charge in respect of that Secured Property if the Secured Party gives written notice to that effect to the Grantor.
- 3.5 **Continuing security:** This deed is a continuing security in respect of the Grantor and shall operate irrespective of any intervening payment, settlement of account or other matter or thing whatever, until a final release has been signed by the Secured Party and delivered to the Grantor in accordance with clause 23.
- 3.6 **Other securities:**
- (a) This deed is collateral to all other security given by the Grantor to the Secured Party whenever executed or given which is at any time held by a Secured Party.
 - (b) The Secured Party may exercise any of its rights, powers and remedies under this deed and any other security given by the Grantor to the Secured Party separately or concurrently. This deed may be enforced against the Grantor without first having recourse to any other rights of the Secured Party.
 - (c) Nothing in this deed shall discharge, abate or prejudice any other Security Interest or guarantee held by any person at any time.
- 3.7 **Priority:**
- (a) The security interest in Personal Property created by this deed has the same priority in respect of all Secured Money, including future advances.
 - (b) For the purposes of sections 91, 92 and 93 of the PLA:
 - (i) the Grantor acknowledges that this deed secures further advances by way of financial accommodation up to a stated priority limit; and
 - (ii) the maximum amount for which this deed has priority in relation to any subsequent mortgage is NZ\$3,000,000 plus interest and costs (and accordingly such amount is the stated priority limit).
 - (c) This clause is included solely to assist the priority of the Secured Party. Nothing in clause 3.7(b) is to be construed as limiting either the Secured Money or the amount of the Secured Money.
- 3.8 **Mortgage:** The Grantor shall, if required by the Secured Party at any time, immediately execute in favour of the Secured Party a mortgage in a form which is commonly used by the Secured Party at that time (or, if there is no such form, in an all obligations form then commonly used by solicitors practising in Auckland) over such of the Grantor's interests in any land as the Secured Party may require. The Grantor acknowledges and agrees that any such mortgage shall be in substitution of the agreement to mortgage given by the Grantor in clause 3.1(e), and shall not in any way affect, or limit, the security interest and charge granted by the Grantor in clauses 3.1(c) and 3.1(d).

4. Further assurance

- 4.1 **Grantor to notify the Secured Party:** The Grantor shall notify the Secured Party of all Secured Property that is:
- (a) land or an interest in land, or other property to which the PPSA does not apply if security is granted over that property;

- (b) an account receivable (other than an account receivable which arises in the ordinary course of the Grantor's normal business), and the identity of the account debtor;
- (c) chattel paper (other than a chattel paper which arises in the ordinary course of the Grantor's normal business), and the identity of the account debtor;
- (d) a document of title in respect of any Secured Property with a value of more than NZ\$10,000;
- (e) an investment security, and whether the investment security:
 - (i) is evidenced by a security certificate;
 - (ii) is traded or settled through a clearing house or securities depository; or
 - (iii) is held by a nominee;
- (f) a negotiable instrument with a face amount of more than NZ\$10,000, and, whether the negotiable instrument is traded or settled through a clearing house or securities depository;
- (g) a serial-numbered good with a value of more than NZ\$10,000; or
- (h) not situated in New Zealand and which has a value of more than NZ\$10,000.

4.2 **When notice must be given:** The Grantor must give notice to the Secured Party pursuant to clause 4.1:

- (a) at the time the Grantor executes this deed; and
- (b) thereafter, at the time:
 - (i) the Grantor acquires any of the Secured Property described in clause 4.1; or
 - (ii) any Secured Property described in clause 4.1 ceases to be situated in New Zealand.

4.3 **Secured Party entitled to obtain possession:** The Grantor shall do anything that the Secured Party requests to enable the Secured Party or its nominee to take possession of the Secured Property described in clauses 4.1(b) to 4.1(f), including, without limitation, delivery of applicable documents of title in relation to that Secured Property.

4.4 **Secured Party entitled to obtain transfers:** The Grantor shall (and will procure that any relevant nominee will), if requested by the Secured Party, deliver to the Secured Party or its nominee a transfer in respect of any of the Secured Property described in clause 4.1(e) and 4.1(f) duly signed by the Grantor and/or its nominee with the name of the transferee, date and consideration left blank.

4.5 **Completion of documents:** If an Event of Default has occurred, the Secured Party may fill in any blanks in any transfer referred to in clause 4.4 and may complete in favour of the Secured Party or its nominee, or any person purchasing under the powers given by this deed or by law, any transfer or any other document signed by or on behalf of the Grantor.

4.6 **Indebtedness owed to the Grantor:** The Grantor shall ensure that any indebtedness owed to the Grantor is evidenced by a negotiable instrument.

4.7 **Accounts receivable and chattel paper:** The Grantor shall, if requested by the Secured Party following the occurrence of an Event of Default:

- (a) provide notice to the account debtor on an account receivable or chattel paper described in clause 4.1(b) or 4.1(c) of the security created by this deed; and
- (b) use its reasonable endeavours to obtain the enforceable agreement of the account debtor, that the account debtor shall not assert defences to claims arising out of the contract or any closely connected contract between the account debtor and the Grantor.

4.8 Obtain consents: The Grantor shall, if requested by the Secured Party, use its reasonable endeavours to obtain the consent of any lessor or other person as soon as practicable if the consent of the lessor or other person is required in connection with the Grantor granting security over any of its property.

4.9 Further assurance: The Grantor shall do anything that the Secured Party requests (including, without limitation, delivering to the Secured Party any transfer, assignment, Security Interest, instrument, document of title, or other deed or document) to enable the Secured Party to:

- (a) ensure the Secured Property is subject to an effective Security Interest;
- (b) perfect the Security Interests created by this deed with the priority required by the Secured Party including, without limitation, in accordance with the PPSA and the Land Transfer Act 2017;
- (c) more satisfactorily secure the Secured Money to the Secured Party, including the granting of fixed or specific Security Interests;
- (d) transfer to, or vest in, the Secured Party (or any purchaser from the Secured Party or a Receiver) any of the Secured Property;
- (e) following the occurrence of an Event of Default, facilitate the realisation of any of the Secured Property;
- (f) enable the Secured Party to register the power of attorney in clause 20 or a similar power;
- (g) exercise all or any of the rights, powers and remedies conferred on the Secured Party or a Receiver by this deed or by law and whether on enforcement or otherwise; and/or
- (h) secure to the Secured Party the full benefit of the provisions of this deed.

Nothing in clauses 4.3 to 4.8 limits this clause 4.9.

5. Investment securities

5.1 Liability for calls: If any call or other amount (a **call**) becomes payable in respect of any investment securities or Rights:

- (a) while the Grantor is the holder of those investment securities or Rights, the Grantor shall pay that call or other amount to the issuer on or before the due date for payment and promptly confirm to the Secured Party that such payment has been made; and
- (b) while the Secured Party or its nominee is the holder of those investment securities or rights, the Grantor shall, upon demand by the Secured Party, pay an amount equal to that call to the Secured Party or, if so agreed with, or required by, the Secured Party, to the issuer and, if paid to the Secured Party, the Secured Party shall pay the call to the issuer.

5.2 Voting rights: Except where any Event of Default has occurred, the Grantor shall be entitled to exercise all voting rights in respect of the investment securities owned by it provided the Grantor

shall not at any time exercise, or refrain from exercising, any voting rights in a manner which could reasonably be expected to adversely affect the Security Interest created by this deed or result in a change in the terms of issue of any of the Secured Property.

- 5.3 **Distributions before Event of Default:** Subject to the terms of the Finance Documents and subject to no Event of Default having occurred, the Grantor shall be entitled to receive and retain all Distributions in respect of any investment securities, and if the Secured Party or its nominee is the holder of any investment securities it shall account to the Grantor for all such Distributions (net of all applicable taxes) received by the Secured Party.
- 5.4 **Distributions after Event of Default:** At all times after the occurrence of any Event of Default, all Distributions in respect of any investment securities shall be held or, as the context requires, applied by the Secured Party in accordance with clause 13. If any such Distribution is received by the Grantor, the Grantor shall promptly pay or transfer it to the Secured Party.
- 5.5 **Exercise of rights:**
- (a) If any Rights to acquire shares, debentures, options or other securities (an **entitlement**) by reason of holding investment securities become exercisable at any time:
 - (i) while the Grantor is the holder of any investment securities, it shall promptly provide full details of that entitlement to the Secured Party and advise the Secured Party whether or not it intends to exercise all or any part of that entitlement; and
 - (ii) while the Secured Party or its nominee is the holder of any investment securities, it shall promptly provide full details of that entitlement to the Grantor and request the Grantor to advise it whether or not it wishes that entitlement or any part of it to be exercised.
 - (b) If the Grantor wishes any entitlement to be exercised, the Grantor shall pay to the issuer or the Secured Party, as the context requires, such amount, and shall do all such other things, as are necessary to exercise the relevant part of that entitlement. If payment is made to the issuer the Grantor shall promptly confirm to the Secured Party that such payment has been made.

6. Insurance

- 6.1 **Insurance undertakings:** The Grantor shall (unless the Finance Documents require otherwise):
- (a) promptly pay all premiums and do all such other things as may be necessary to keep in force all insurance required by the Finance Documents;
 - (b) not do, or permit to be done or occur, anything which prejudices or may prejudice any insurance over the Secured Property; and
- 6.2 **Application of insurance proceeds:** All amounts received under any insurance on the Secured Property shall be applied, at the option of the Grantor (or following an Event of Default which is continuing, at the option of the Secured Party), in or towards reinstatement of the Secured Property (in which case the reinstated Secured Property shall be deemed part of the Secured Property and all the provisions of this deed shall apply to it) or satisfaction of the Secured Money.
- 6.3 **Loss or damage:** If any Secured Property is lost, damaged, destroyed, or ceases to exist, the Grantor will, if required by the Secured Party:
- (c) promptly repair the damage or replace the Secured Property lost, destroyed or ceasing to exist with other property of a like nature and equivalent value; and

- (d) sign any instrument which, in the Secured Party's opinion, may be necessary to give the Secured Party security over any such replacement property.

7. General undertakings

7.1 Positive undertakings: The Grantor shall:

- (a) **Business:** carry on and conduct its business in a proper and efficient manner;
- (b) **Maintenance:** keep its Secured Property in good condition and (where applicable) ensure that its Secured Property is operated in a proper and careful manner at all times;
- (c) **Notices or proceedings:** promptly give written notice to the Secured Party of the receipt of any notice, or the commencement of any proceedings, adversely affecting its Secured Property;
- (d) **Serial numbered goods:** notify the Secured Party promptly of any Secured Property being serial numbered goods (including all of the details referred to in Schedule 2);
- (e) **Acquisition of Subsidiaries or real property:** promptly give written notice to the Secured Party of:
 - (i) its acquisition or formation of any Subsidiary;
 - (ii) any change in the shareholding of any of its Subsidiaries which effects or may effect a change in its control or cause it to cease to be a Subsidiary; and
 - (iii) the particulars of any real property acquired by it;
- (f) **Outgoings:** promptly pay all registration and other fees, charges, taxes and other outgoings payable in respect of ownership and operation of its Secured Property and comply with all relevant laws concerning the use of its Secured Property;
- (g) **Rent on premises:** promptly pay all rents, rates, charges, taxes and other outgoings payable in respect of the premises where its Secured Property is kept;
- (h) **Uncalled amounts:** procure that any amount which is uncalled on any shares issued by it is called up in accordance with the terms of issue of those shares or, if there are no such terms, by such instalments as the Secured Party directs following the occurrence of an Event of Default, and is applied in or towards payment of the Secured Money, or in such other manner as the Secured Party agrees in writing;
- (i) **Inspection:**
 - (i) permit the Secured Party or its authorised agent at all times to enter the premises where its Secured Property is kept and inspect that Secured Property (including all accounting records and other documents relevant to its business);
 - (ii) allow the Secured Party or its authorised agent to take copies or record details as it considers necessary; and
 - (iii) otherwise give the Secured Party or its agent all reasonable assistance at any time to enable it or its agent to carry out the inspection;
- (j) **Proceedings:** whenever requested by the Secured Party, take or defend such legal proceedings as the Secured Party may consider advisable for the protection or recovery of its Secured Property; and

- (k) **Notices:** promptly upon receipt, deliver to the Secured Party a copy of any notice of meeting or other notice to holders of any investment securities forming part of its Secured Property, and a copy of any resolution passed by holders of any investment securities forming part of its Secured Property.

7.2 Negative undertakings: The Grantor shall not:

- (a) **No accessions:** allow any of its Secured Property to become an accession to any property that is not Secured Property, or to be affixed to any land that is not Secured Property;
- (b) **Name change:** change its name without first notifying the Secured Party of the new name not less than 21 days before the change takes effect;
- (c) **Place of business or incorporation:** relocate its principal place of business outside New Zealand or change its jurisdiction of incorporation;
- (d) **Move Secured Property:** move any of its Secured Property from the jurisdiction in which it is situated as at the date of this deed;
- (e) **Disposal:** dispose of, or permit the disposal of, any of its Secured Property except as permitted by a Finance Document;
- (f) **Security:** create or permit to subsist any Security Interest over any of its Secured Property, except as expressly permitted by a Finance Document;
- (g) **Waiver:** waive any of its rights or release any person from any of its obligations in connection with its Secured Property;
- (h) **Set-off:** except as expressly permitted by a Finance Document:
 - (i) directly or indirectly claim, exercise or attempt to exercise a right of set off or counterclaim (whether it's or any other person's right) against the Security Property; or
 - (ii) permit any of its Secured Property that is an account receivable to be subject to any right of set-off or combination of accounts (other than rights that arise solely by operation of law); or
- (i) **Prejudice security:** do, or omit to do, anything which could prejudicially affect the Security Interests created by this deed, render any of its Secured Property liable to forfeiture or cancellation, or cause or contribute to a material deterioration in the value of any of its Secured Property.

8. Representations and warranties

8.1 General: The Grantor represents and warrants that:

- (a) **Authorisations:** all Authorisations required or desirable to enable it to create the Security Interests created by this deed and to ensure that such Security Interests have the priority and ranking they are expressed to have, have been obtained or effected and are in full force and effect;
- (b) **No filing or stamp taxes:** it is not necessary that this deed be filed, recorded or enrolled with any court or other authority or that any stamp, registration or similar tax be paid on or in relation to this deed or the transactions contemplated by this deed;

- (c) **Title:** it has good title to its Secured Property and, subject to this deed, it is beneficially entitled to receive all proceeds derived from its Secured Property;
- (d) **Ownership of assets:** it is the sole legal owner of its Secured Property, free of any Security Interest, other than a Security Interest expressly permitted by Finance Document;
- (e) **No trust:** it does not enter into this deed as trustee of any trust; and
- (f) **Effective security:** this deed creates in favour of the Secured Party, the Security Interests which it is expressed to create with the ranking and priorities they are expressed to have.

8.2 Relating to the Secured Property: The Grantor represents and warrants that:

- (a) **Securities paid up:** all investment securities forming part of its Secured Property are fully paid up;
- (b) **No lien:** there is no money owing by it to the issuer of any investment securities forming part of the Secured Property in respect of which the issuer is entitled to a lien on any of those investment securities;
- (c) **Securities properly issued:** all investment securities forming part of its Secured Property have been properly and validly issued in accordance with the Companies Act and the constitutional documents of the relevant issuer;
- (d) **No pre-emptive rights, etc:** the constitutional documents of the issuer of all investment securities forming part of the Secured Property contain no pre-emptive rights or other impediment to the Secured Party's ability to sell or otherwise dispose of those investment securities on enforcement of the Security Interests created by this deed; and
- (e) **No default, etc:** no account debtor on an account receivable or chattel paper of the type described in clause 4.1(b) or 4.1(c) is in default under the contract between the account debtor and the Grantor.
- (f) **Serial numbered goods:** the information in Schedule 2, if any, is true and correct and includes the details of all the Grantor's serial numbered goods (if any) that are not inventory.

8.3 Repetition: The Grantor shall be deemed to repeat the representations and warranties in clauses 8.1 and 8.2 on the first day of each month until the Grantor is released from its obligations under this deed by reference to the facts and circumstances then existing.

8.4 Acknowledgements: The Grantor acknowledges that:

- (a) for the benefit of the Secured Party, in entering into this deed, it did not rely on any statement, representation, warranty or information of any nature provided to it by or on behalf of any person (including the Secured Party or any other person);
- (b) the Secured Party is not under any duty to disclose information to it or to do or execute anything, relating to the affairs of the issuer of any investment securities with that Secured Party; and
- (c) the Secured Party may disclose any information which that Secured Party may have concerning the Grantor to a potential assignee or any other person with whom that Secured Party may wish to enter into contractual relations in connection with any Secured Money.

9. Security Interest enforceable

- 9.1 **When security enforceable:** The Security Interests created by this deed shall become enforceable if an Event of Default occurs.

10. Secured Party may remedy breach

- 10.1 **Right to remedy breach:** If the Grantor fails to comply with any obligation under this deed, the Secured Party may (without prejudice to its other rights, powers and remedies) pay all amounts and do all such other things as it deems necessary or desirable to remedy any such default or otherwise protect the Security Interests created by this deed.
- 10.2 **Reimbursement of expenditure incurred:** The Grantor shall reimburse the Secured Party, upon demand, for all expenditure incurred by the Secured Party under clause 10.1 (including all legal costs as between solicitor and client), together with interest on those amounts calculated at a rate determined by the Secured Party to be the applicable default interest rate under the Finance Documents on a daily basis from the date upon which such expenditure is incurred until it is reimbursed by the Grantor and, until reimbursed, the amount and interest on the amount shall form part of the Secured Money.

11. Enforcement by Secured Party

- 11.1 At any time after the occurrence of an Event of Default, the Secured Party may (without it being necessary to give any prior notice to the Grantor, and without prejudice to any other rights, powers or remedies it may have under this deed or by law) do any or all of the following:
- (a) declare the Secured Money to be due and payable, whereupon it shall immediately become due and payable;
 - (b) whether or not a Receiver has been appointed, exercise any of the powers of a Receiver, or which a person would have if appointed as a Receiver under this deed;
 - (c) exercise any powers in relation to the Secured Property that are conferred upon the Secured Party by law (including under Part 9 of the PPSA);
 - (d) pay any expenses incurred in the exercise of any of such powers out of the revenue from, or proceeds of realisation of, the Secured Property;
 - (e) enter on any land or premises where the Secured Property may be situated and take possession of the Secured Property;
 - (f) sell or dispose of the Secured Property in such manner and generally on such terms and conditions as the Secured Party thinks fit, and the Secured Party shall have power to buy in or rescind or vary any contract for sale and may re-sell without being responsible for any loss occasioned and may transfer the Secured Property free from adverse interests; and
 - (g) let or bail the Secured Property for such term and for such rent and generally on such terms and conditions as the Secured Party thinks fit.

12. Appointment of Receiver

- 12.1 **Power to appoint Receiver:** The Secured Party may (whether or not the Secured Party has exercised any of its powers under clause 11.1), in relation to the Grantor:
- (a) at any time after the occurrence of any Event of Default; or
 - (b) at the Grantor's request,

appoint in writing any person or persons (whether an officer of the Secured Party or the Grantor or not) to be Receiver of all or any of the Secured Property. A Receiver shall be the agent of the Grantor, and the Grantor alone shall be responsible for the acts and defaults of the Receiver. The Secured Party may remove any Receiver and may appoint a new Receiver in place of a Receiver who has been removed, retired or died, or in addition to a Receiver already appointed.

12.2 Powers of Receiver: Every Receiver appointed in respect of any Secured Property of the Grantor shall (in addition to the powers which a receiver, or receiver and manager, has at law) have power to do all or any of the following things, in such manner and on such terms and conditions as the Receiver thinks fit:

- (a) enter upon and take possession of that Secured Property;
- (b) carry on, or concur in carrying on, any business of the Grantor;
- (c) carry out necessary repairs, effect insurances, and do anything else which the Grantor could do in the conduct of its business;
- (d) employ, appoint or terminate the employment or appointment of, any officer, manager, employee or agent;
- (e) dispose, or agree to the disposal, of any interest in that Secured Property;
- (f) give receipts for money, and do all acts, matters and things which the Receiver thinks proper for realising that Secured Property;
- (g) acquire an interest in any asset to form part of that Secured Property;
- (h) compromise, settle or submit to arbitration any accounts, claims, questions or disputes which may arise in connection with the business of the Grantor;
- (i) bring, take, defend or compromise any proceedings in the name of the Grantor or otherwise;
- (j) sign in the name and on behalf of the Grantor, and/or affix the common seal (if any) of the Grantor to, all documents which the Receiver considers necessary or expedient;
- (k) vary, or agree to the variation of, any contract or arrangement to which the Grantor is a party;
- (l) make calls upon shareholders and contributories in respect of any uncalled amounts on shares in the Grantor and enforce payment of all unpaid calls, for which purpose the provisions contained in the constitution of the Grantor, or otherwise provided by law, in respect of calls shall (with necessary modifications) apply, shall continue to subsist notwithstanding any change in directors of the Grantor, and shall be exercisable to the exclusion of the powers of the directors;
- (m) exercise and enforce all rights, powers and remedies which the Grantor could exercise over or in relation to its assets while a going concern, whether or not the Grantor is then in liquidation;
- (n) raise or borrow any money and secure the same with interest by any form of Security Interest over that Secured Property in priority to, equally with, or subsequent to, any Secured Money or the Grantor, or otherwise;
- (o) generally do, procure or allow such acts and things in respect of that Secured Property as if the Receiver had absolute ownership of that Secured Property and carried on the

business of the Grantor for the Receiver's own benefit, without being answerable for any consequent loss or damage;

- (p) delegate any of the Receiver's powers to any person or persons for such time as the Secured Party approves; and
- (q) do all or any of the things in paragraphs (a) to (p) above alone or in conjunction with any receiver or receiver and manager appointed by the holder or holders of any other security interest over that Secured Property.

12.3 Remuneration of Receiver: The Secured Party may fix the remuneration of a Receiver at an amount, or on a basis, agreed with the Receiver or, failing agreement, as determined by the Secured Party.

13. Application of proceeds

13.1 Distribution: All amounts received by the Secured Party or a Receiver, whether in the exercise of their powers or otherwise, shall (subject to the claims of all secured and unsecured creditors (if any) ranking in priority to the Security Interests created by this deed) be applied:

- (a) first, in payment of all costs, charges and expenses (including tax and legal costs as between solicitor and client and the remuneration of the Receiver) of and incidental to the exercise of the powers of the Secured Party or Receiver;
- (b) secondly, in payment to the Secured Party of the Secured Money in such manner and order as the Secured Party determines; and
- (c) lastly, in payment of any surplus to the Grantor or other person or persons entitled to it.

13.2 Appropriation: All amounts received by the Secured Party under this deed shall be appropriated as between principal, interest and other amounts in such manner as the Secured Party determines, notwithstanding any rule of law, any purported appropriation made by the Grantor or any other person, or any other matter or circumstance.

13.3 Money actually received: In applying any money toward satisfaction of the Secured Money the Grantor will be credited only with the money available for that purpose which is actually received by the Secured Party. The credit will date from the time of receipt.

13.4 Contingent liabilities: If any Secured Money is contingently owing or not yet owing at the time any application of money is made under clause 13.1, the Secured Party may deposit a sum not exceeding that amount in an interest bearing deposit account, on such terms and conditions as the Secured Party thinks fit, with any person (including the Secured Party or any of its related entities), until that amount ceases to be contingently owing or becomes actually payable. At that time the Secured Party may retain for its own account the amount which is then actually payable to it and deal with any balance in accordance with clause 13.1.

14. Tax

14.1 Payments to be free and clear: The Secured Money shall be paid:

- (a) free and clear of any restriction or condition;
- (b) free and clear of and (except to the extent required by law) without any deduction or withholding on account of any tax or directive; and
- (c) without any deduction or withholding (except to the extent required by law) on account of any other amount, whether by way of set-off, counterclaim or otherwise.

14.2 Gross-up: If:

- (a) the Grantor is required by law to make any deduction or withholding from any amount paid or payable by the Grantor under this deed; or
- (b) the Secured Party is required by law to make any payment on account of tax (other than tax on overall net income of the Secured Party) or otherwise on or in relation to any amount received or receivable by it under this deed,

then:

- (c) the Grantor shall ensure that any such deduction or withholding does not exceed the legal minimum and shall pay the amount required to be so deducted, withheld, or paid to the relevant authority before the date on which penalties attach thereto; and
- (d) the amount payable by the Grantor 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 to the Secured Party receives and retains (free from any liability in respect of any such deduction, withholding or payment) a net amount equal to the amount which the Secured Party would have received and so retained had no such deduction, withholding or payment been made.

15. Protection of persons dealing with Secured Party or Receiver

15.1 Purchaser or other person: No purchaser or other person dealing with the Secured Party or a Receiver, or with any agent or attorney of the Secured Party or a Receiver, shall be concerned:

- (a) to enquire:
 - (i) whether any Security Interest created by this deed has become enforceable;
 - (ii) whether a Receiver has been properly appointed;
 - (iii) whether the powers which the Secured Party or a Receiver, agent or attorney, as the case may be, is exercising or purporting to exercise have become exercisable;
 - (iv) as to the necessity for, or the expediency of, the stipulations or conditions subject to which any sale or disposal is made; or
 - (v) otherwise as to the propriety or regularity of any disposal, calling in, collection or conversion of any money or asset or any other matter in connection with the exercise of any of the powers of the Secured Party or any Receiver; or
- (b) to see to the application of any amount paid to or received by the Secured Party or a Receiver, agent or attorney, as the case may be.

15.2 Damages only remedy: The remedy of the Grantor in respect of any actionable impropriety or irregularity in the exercise, or purported exercise, of any rights, powers or remedies by the Secured Party or a Receiver, agent or attorney, as the case may be, shall be in damages only.

16. Protection of Secured Party and Receiver

16.1 Proceeds of sale: If the Secured Party or a Receiver sells any Secured Property pursuant to this deed or otherwise, the Secured Party and the Receiver shall be accountable only for any purchase money which they actually receive.

16.2 Entry into possession: If the Secured Party or a Receiver enters into possession of any Secured Property:

- (a) it shall not be liable to account as mortgagee in possession in respect of that Secured Property or for any loss which a mortgagee in possession might otherwise be held liable for; and
- (b) it may at any time give up possession of any Secured Property.

16.3 No liability: Neither the Secured Party nor any Receiver shall be accountable for any losses which may occur in, or as a result of, the exercise, purported exercise or non-exercise of any of the rights, powers or remedies of the Secured Party or the Receiver, and any such losses which are borne by the Secured Party or the Receiver shall form part of the Secured Money.

16.4 Indemnity: The Secured Party and each Receiver shall be entitled to be indemnified out of the revenue from, or proceeds of sale of, the Secured Property against all costs, losses, expenses or liabilities sustained or incurred in the exercise, purported exercise or non-exercise of the Secured Party's or the Receiver's rights, powers and remedies, including any cost, loss, expense or liability consequent upon any mistake or error of judgment.

17. Investigator

17.1 Power to appoint: The Secured Party may at any time, if, in its reasonable opinion the financial position of the Grantor has deteriorated or the value to the Secured Party of this deed has diminished or may diminish and notwithstanding that no Event of Default may have occurred, appoint in writing any person or persons (whether an officer of the Secured Party or the Grantor or not) to act, at the cost of the Grantor, as an Investigator of the Grantor. An Investigator shall be the agent of the Grantor, and the Grantor alone shall be responsible for his or her acts and defaults. The Secured Party may remove any Investigator and may appoint a new Investigator in place of an Investigator who has been removed, retired or died, or in addition to an Investigator already appointed.

17.2 Joint and several appointment: If the Secured Party appoints two or more persons as Investigators then, unless the appointment expressly states otherwise, those persons shall be deemed to have been appointed, and be entitled to act jointly and individually.

17.3 Powers of Investigator: An Investigator shall have power to investigate the affairs of the Grantor in such manner as he or she thinks fit, including the power to:

- (a) enter, without prior notice, any land or premises owned or occupied by the Grantor at any time;
- (b) make enquiries from any person (including, without limitation, any director, officer, employee, professional advisor or business associate of the Grantor) regarding the business, assets or financial position of the Grantor; and
- (c) inspect and take copies of or extracts from any document relating to the affairs of the Grantor, whether those documents are held by the Grantor, any professional advisor or any other person.

17.4 Grantor to assist Investigator: The Grantor shall do everything requested by an Investigator to enable the Investigator to exercise his or her powers.

17.5 Remuneration of Investigator: The Secured Party may fix the remuneration of an Investigator at an amount, or on a basis, agreed with the Investigator or determined by the Secured Party. The Grantor will pay all remuneration due to the Investigator on demand. Until paid, that remuneration will form part of the Secured Money.

18. Attorney

- 18.1 **Appointment:** For the purpose of enabling the Secured Party to obtain the full benefit of this deed, the Grantor irrevocably appoints the Secured Party and every person authorised by the Secured Party for such purpose, individually, to be the attorney of the Grantor (**Attorney**):
- (a) at any time (whether before or after the occurrence of any Event of Default), to do anything which the Grantor agrees to do under the provisions of this deed or which, in the Attorney's opinion, is necessary or expedient to give effect to any right, power or remedy conferred on the Secured Party or a Receiver by this deed, by law or otherwise; and
 - (b) at any time after the occurrence of any Event of Default:
 - (i) to sign any transfer of, and to transfer, the Secured Property to any person on a sale thereof;
 - (ii) to commence, prosecute, settle and compromise actions or proceedings relating to any Secured Property; and
 - (iii) to exercise any other rights, powers or remedies which the Grantor may have as the holder, owner or beneficiary of any Secured Property.
- 18.2 **Delegation and conflict:** Each Attorney may:
- (a) delegate its powers (including this power of delegation) to any person for any period, and revoke a delegation; and
 - (b) exercise or concur in exercising the Attorney's powers even if the Attorney has a conflict of duty in doing so, or has a direct or personal interest in the means or result of that exercise of such powers.
- 18.3 **Ratification:** The Grantor hereby ratifies anything done by its Attorney or its delegate in accordance with this clause 18.
19. **Liability not prejudiced**
-
- 19.1 **Liability not prejudiced:** Neither the liability of the Grantor, nor any of the rights of the Secured Party, under this deed shall be affected or discharged by anything which, but for this clause 21.1, might operate to affect or discharge the liability of, or otherwise provide a defence to, the Grantor (whether or not known to the Grantor, the Secured Party or any other person).
20. **Assignment**
-
- 20.1 **Deed binding:** This deed is binding on, and is for the benefit of, the parties and their respective successors, permitted assigns and transferees.
- 20.2 **Grantor may not assign:** The Grantor may not assign or transfer any of its rights or obligations under this deed without the prior written consent of the Secured Party.
- 20.3 **Secured Party may assign and transfer:** The Secured Party may assign and/or transfer all or part of its rights or obligations under this deed without the consent of the Grantor.
21. **Release**
-
- 21.1 **Release:** The Grantor shall not be entitled to be released from its obligations and liabilities under this deed nor (except as provided for in clause 25.2) to have any Secured Property released from this deed, unless the Secured Party is satisfied (in its sole discretion) that:

- (a) the whole of the Secured Money and Secured Obligations has been fully paid, satisfied and performed; and
- (b) no payment received, or to be received, by the Secured Party may be avoided, or required to be repaid by the Secured Party, under any law relating to insolvency or otherwise.

21.2 Release of Secured Property: If the Grantor disposes of any Secured Property and that disposal is expressly permitted by a Finance Document, that Secured Property shall, unless an Event of Default has occurred, be automatically released from the Security Interests created under this deed with effect from the day of such disposal and the Secured Party shall do all such acts which are reasonably requested by the Grantor in order to release the relevant Secured Property from the Security Interests created under this deed.

21.3 Reinstatement: If any payment received or recovered by the Secured Party, a Receiver, or any other person on behalf of any of them is or may be avoided by law or required to be repaid to a liquidator or similar official:

- (a) such payment shall be deemed not to have affected or discharged the liability of the Grantor under this deed or any other security given by the Grantor in favour of the Secured Party;
- (b) the Secured Party and the Grantor shall, to the maximum extent permitted by law, be restored to the position in which each would have been if such payment had not been received or recovered; and
- (c) the Secured Party shall be entitled to exercise its rights which it would have been entitled to exercise if such payment had not been received or recovered;

notwithstanding that the Secured Party may have signed a release pursuant to clause 21.1 or 21.2.

22. Application of the PPSA

22.1 No consent or subordination: Nothing in this deed shall be construed as:

- (a) an agreement to subordinate any Security Interest created by this deed in favour of any person;
- (b) an agreement to defer or postpone the date of attachment of the Security Interests in this deed;
- (c) a consent by the Secured Party to any other Security Interest attaching (as that term is used in the context of the PPSA) to, or any other Security Interest subsisting over, any Secured Property; or
- (d) a consent by the Secured Party to any property that is not Secured Property becoming an accession to any Secured Property.

22.2 Verification statement: The Grantor waives its right to receive a copy of the verification statement confirming registration of a financing statement or financing change statement relating to the Security Interests created by this deed.

22.3 Contracting out of PPSA rights: The Grantor:

- (a) agrees that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to this deed, or the Security Interests created by this deed; and

- (b) waives its right to:
 - (i) receive a statement of account under section 116 of the PPSA;
 - (ii) receive notice of the Secured Party's proposal to retain personal property under section 120(2) of the PPSA;
 - (iii) object to the Secured Party's proposal to retain any Secured Property under section 121 of the PPSA;
 - (iv) not have goods damaged when the Secured Party (or any person on its behalf) removes an accession under section 125 of the PPSA;
 - (v) receive notice of the removal of an accession under section 129 of the PPSA; and
 - (vi) apply to the Court for an order concerning the removal of an accession under section 131 of the PPSA.

23. Application of PLA and other laws

23.1 Mortgage debenture: This deed is intended to take effect as a mortgage debenture.

23.2 Relationship with PLA:

- (a) The covenants, conditions and powers implied in mortgages of goods by section 96 of the PLA do not apply to this deed.
- (b) The covenants, conditions and powers implied in mortgages of land by section 95 of the PLA do not apply to this deed, other than the following sections of Part 1 of Schedule 2 to the PLA (which will continue to apply):
 - (i) sections 4 to 10 (inclusive); and
 - (ii) sections 14 to 17 (inclusive).

23.3 Relationship with other laws:

- (a) Subject to clause 23.2, the rights, powers and remedies provided in this deed are in addition to, and not exclusive of, any rights, powers or remedies provided by law.
- (b) If any provision in this deed conflicts with the provisions of any law or any provisions implied by any law (after taking account of the implied covenants, conditions and powers negated by clause 23.2) then:
 - (i) if the provisions of or implied by that law may be varied or negated, the provisions of this deed will take precedence and the provisions of or implied by that law will be deemed not to apply to this deed or to apply only as varied by the provisions of this deed; or
 - (ii) if the provisions of or implied by that law may not be varied or negated, then the provisions of this deed shall be read subject to the provisions of or implied by that law.

23.4 Contract and Commercial Law Act 2017: The remedies of damages and cancellation as against the Secured Party under or in connection with the assignment by way of security of the Assigned Property under clause 3.1(c) are expressly excluded for the purposes Part 2, subpart 3 of the Contract and Commercial Law Act 2017.

24. General

- 24.1 **Amendments:** This deed may only be amended or varied by the written agreement of the Grantor and the Secured Party.
- 24.2 **Partial invalidity:** If at any time any provision of this deed is or becomes illegal, invalid or unenforceable in any respect under the law of any relevant jurisdiction, that illegality, invalidity or unenforceability shall not affect the enforceability of the remaining provisions, of this deed, nor shall the legality, validity or enforceability of any of those provisions (or as the case may be, the remaining provisions) under the law of any other jurisdiction be in any way affected or impaired thereby.
- 24.3 **Waivers:**
- (a) No term of this deed may be waived except by the Secured Party in writing.
 - (b) Time shall be of the essence in respect of performance by the Grantor of its obligations under this deed, but no failure on the part of the Secured Party to exercise, and no delay on the part of the Secured Party in exercising, any right, power or remedy under this deed or any other document relating to any Secured Money 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 of the Secured Party.
- 24.4 **Remedies not exclusive:** The rights, powers and remedies provided in this deed are in addition to, and not exclusive of, any rights, powers or remedies provided by law.
- 24.5 **Indemnities:** Each of the indemnity obligations of the Grantor under this deed shall constitute a continuing obligation, separate and independent from the Grantor's other obligations under the Finance Documents to which it is party and shall survive payment of the Secured Money and termination or release of this deed.
- 24.6 **Enforcement:** It shall not be necessary for the Secured Party to incur any expense or make any payment before enforcing any of its rights in respect of any obligation of the Grantor under this deed.
- 24.7 **No merger or marshalling:** The right of the Secured Party to payment of any Secured Money (including under any negotiable instrument or any other agreement or arrangement) shall not merge in the Grantor's obligation to pay that Secured Money under this deed. The Secured Party has no duty to marshal in favour of the Grantor or any other person.
- 24.8 **Conflict of provisions:** In the event of conflict between a provision of this deed and a provision of any other Finance Documents (in the sense that it is impossible to comply with both), the Secured Party may, in its sole and absolute discretion, determine which shall prevail.
- 24.9 **Payments on demand:** For the avoidance of doubt, all amounts payable to the Secured Party under this deed (including, but not limited to, all costs and all amounts payable under any indemnity) shall be payable by the Grantor upon demand (provided that no demand is necessary for the purposes of clause 2.1(a)) and form part of the Secured Money.
- 24.10 **Certificates:** A certificate of the Secured Party as to any amount or fact which might reasonably be expected to be within the Secured Party's knowledge shall be prima facie evidence of that amount or fact.
- 24.11 **Consents:** The Secured Party may give or withhold an approval or consent conditionally or unconditionally and in its absolute discretion.

24.12 Moratorium legislation: To the fullest extent permitted by law all legislation which at any time directly or indirectly:

- (a) lessens, varies or affects in favour of the Grantor any obligation under this deed; or
- (b) delays, prevents or prejudicially affects the exercise by the Secured Party of any right, power or remedy conferred by this deed,

is excluded from this deed.

24.13 Contracts Privity: For the purposes of Part 2, subpart one of the Contract and Commercial Law Act 2017:

- (a) this deed is made for the benefit of and is intended to be enforceable by the Secured Party; and
- (b) each Receiver, Attorney and Investigator is entitled to enforce against the Grantor each provision of this deed which confers a benefit upon a Receiver, Attorney or Investigator (as the case may be). However, none of them needs to consent to any amendment made to this deed.

25. Delivery

25.1 Delivery by Grantor: For the purposes of section 9 of the PLA and without limiting any other mode of delivery, this deed will be delivered by the Grantor immediately on the earlier of:

- (a) physical delivery of an original of this deed, executed by the Grantor, into the custody of the Secured Party or the Secured Party's solicitors; or
- (b) transmission by the Grantor or its solicitors of a facsimile, photocopied or scanned copy of an original of this deed, executed by the Grantor, to the Secured Party or the Secured Party's solicitors.

26. Counterparts

26.1 Counterparts: This deed may be signed in any number of counterparts, all of which together constitute one and the same instrument. The parties may execute this deed by signing any such counterpart.

27. Governing law and jurisdiction

27.1 Governing law: This deed shall be governed by, and construed in accordance with, the laws of New Zealand. The parties submit to the non-exclusive jurisdiction of the courts of New Zealand.

Executed as a deed

Grantor

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

Signature of director

Signature of director

Name of director

Name of director

Item 13

Attachment 5

Schedule 1 – Serial numbered goods

Serial numbered goods (including motor vehicle(s)/aircraft) that are equipment or consumer goods:

Motor vehicles

Complete if serial numbered goods consist of any motor vehicle(s) other than inventory:

make or name of manufacturer	model no.	model year	Registration no. (if any)	vehicle id. no. (if any)	chassis no. (if any)	colour

Aircraft

Complete if serial numbered goods consist of any aircraft other than inventory:

make or name of manufacturer	model no.	model year	class of aircraft	*registration mark	*nationality mark (if any)	*serial no.

* The registration mark, nationality mark (if any) and the serial number must be given as they appear in the certificate of registration issued by the Director of Civil Aviation.

Operative Clause

As security for performance of its obligations under the Guarantee, the Mortgagor covenants and agrees with the Mortgagee so as to incorporate in this mortgage the provisions of the above mortgage memorandum and the terms set out in the Annexure Schedule(s) and, for the better securing to the Mortgagee the payment of the monies secured by this mortgage, and compliance by the Mortgagor with the terms of this mortgage, the Mortgagor hereby mortgages to the Mortgagee all the Mortgagor's estate and interest in the land in the above certificate(s) of title or computer register(s).

Amendments to Memorandum

The provisions of the Memorandum No. 2017/4339 incorporated into and applying to this Mortgage are amended as follows:

1. The following definitions are added to clause 1(c):

"Guarantee" means the guarantee and indemnity dated on or about [] between the Mortgagor and the Mortgagee.
2. The definition of "secured agreement" is deleted.
3. The following new clause 1(d)(A) is inserted after clause 1(d):

Incorporated terms: The terms **"Business Day"**, **"Event of Default"** and **"Guaranteed Money"** shall have the same meaning in this instrument as in the Guarantee.
4. Clauses 1(e) and 1(f) are deleted and replaced with "Intentionally Deleted".
5. All references to "default" in the instrument are replaced with references to "Event of Default".
6. All references to "secured agreement" in the instrument are replaced with references to "Guarantee".
7. Clause 2(a) is deleted and replaced with the following:

In this instrument, the expression "the secured moneys" means the Guaranteed Money.
8. Clause 3(a)(i) is amended by deleting "and, to the extent that there is no such agreement, then upon demand".
9. Clause 3(a)(ii) is deleted and replaced with the following:

(ii) duly and faithfully comply with its obligations under the Guarantee; and
10. Clause 3(b) is deleted and replaced with "Intentionally Deleted".
11. Clause 5(e)(i) is amended by inserting the words "other than an amendment in writing signed by the mortgagee" after "this mortgage".
12. Clause 5(g) is deleted and replaced with the following:

Attorney to provide further assurance: For the purpose of enabling the mortgagee to obtain the full benefit of this instrument the mortgagor irrevocably appoints the mortgagee and every officer of the mortgagee, individually, to be the

attorney of the mortgagor to, at any time (whether before or after the occurrence of an Event of Default), do anything which the mortgagor is obliged to do under the provisions of this instrument and which has not been done by that party after being requested to do so by the mortgagee within a reasonable period (having regard to all of the circumstances existing at that time).

13. Clause 7 is deleted and replaced with "Intentionally Deleted".
14. Clause 8(b) is amended by inserting the words "at any time after the occurrence of an Event of Default which is continuing" after the word "may" in the second line.
15. Clause 9 is amended by inserting the words ", to the extent possible and subject to the terms of any lease it has granted in respect of the property," after the word "must". **[AL note: clause 9 (land use and maintenance covenants) to be considered by KAHC in light of the land and its use]**
16. Clause 10 is deleted and replaced with "Intentionally Deleted".
17. Clause 11 is deleted and replaced with "Intentionally Deleted".
18. Clause 12 is deleted and replaced with "Intentionally Deleted".
19. Clause 13 is deleted and replaced with "Intentionally Deleted".
20. Clause 14 is deleted and replaced with "Intentionally Deleted".
21. Clause 15 is deleted and replaced with "Intentionally Deleted".
22. The first three lines of clause 16(a) are deleted and replaced with the following:
Rights and powers generally: At any time after the occurrence of an Event of Default and while it is continuing the mortgagee may (without it being necessary to give any prior notice to the mortgagor and without prejudice to any other rights, powers or remedies it may have under this instrument or by law):
23. Clause 20 is deleted and replaced as follows:
The mortgagee is only permitted to assign or transfer its rights in this mortgage in accordance with the requirements of clause [11] (Assignment) of the Guarantee.
24. Clause 22 is amended by replacing the first sentence, clause 22(a) and clause 22(b) with the following:
The parties agree that the following provisions apply in respect of any notice or other communication given or made in connection with this instrument:
 - (a) **method of giving notice:** notice shall be given in accordance with the requirements of clause [12] (Notices) of the Guarantee;
 - (b) Intentionally Deleted;
25. Clause 23 is deleted and replaced with "Intentionally Deleted".
26. Clauses 24(a) and (b) are deleted and replaced with "Intentionally Deleted".
27. Clause 24(f)(i) is deleted and replaced with "Intentionally Deleted".
28. Clause 24(j) is deleted and replaced with:

(j) **Relationship with PLA**

The covenants, conditions and powers implied in mortgages of land by section 95 of the Property Law Act 2007 do not apply to this mortgage.

29. Clause 25 is deleted and replaced with "Intentionally Deleted".

Item 13

Attachment 6

MEMO

To:	Hawkes Bay Regional Council	Client:	Hawkes Bay Regional Council
From:	Jonathan Norman	Project:	Carbon Credit Loan
Date:	18 December 2018	A/c No :	

INTRODUCTION

- 1 You have asked us to summarise how certain issues raised by councillors in relation to the proposed Carbon Credit Loan to Kahutia LP ("**Kahutia**") have been dealt with in the final form of documentation negotiated with Kahutia's legal advisors.
- 2 A summary of the final agreed structure is as follows:
 - 2.1 Kahutia will borrow 100,000 NZUs from the Hawkes Bay Regional Council ("**HBRC**") safe carbon portfolio;
 - 2.2 Kahutia will be required to transfer NZUs annually to satisfy the payment of interest and the repayment of principal as follows:
 - (i) interest will be calculated at 2.00% per annum daily on the outstanding balance of the Loan; and
 - (ii) principal will be repaid by transferring 16,667 NZUs on the fifth, sixth, seventh, eighth and ninth anniversary of the Loan, and the final repayment date;
 - 2.3 the default interest rate is 5.00% per annum (the original 2.00% plus a default rate of 3.00%);
 - 2.4 if Kahutia does not transfer NZUs, it must make a cash payment determined by reference to the spot price for NZUs on the date that the payment is due;
 - 2.5 the spot price for NZU is calculated by reference to the price listed on the OMF CommTrade Carbon Exchange at 11.00am on the relevant day;
 - 2.6 Kahutia will grant a general security agreement over all of its present and future personal property;
 - 2.7 Kahungunu Asset Holding Company Limited ("**KAHC**") will give a guarantee of Kahutia's payment obligations under the loan agreement. Because KAHC is not a participant in the Emissions Trading Scheme it will need to satisfy any demand under the guarantee in cash; and

JON-003502-340-71-V1JON

- 2.8 as security for the guarantee, KAHC will grant a first ranking mortgage to HBRC over the property it owns known as Tautane Station, an approximately 3,375 ha sheep and beef property currently leased to Taratahi Institute of Agriculture.

RISK MITIGATION

- 3 You have additionally asked us to summarise how risks identified by council in response to the original council paper have been mitigated.

Repayment schedule

- 4 As set out in paragraph 2.2(ii) above, the repayment schedule is now interest only in years one to four, with the principal of the loan being repaid over the next six years. The repayment schedule for principal is set out in clause 5.1(b) of the loan agreement.

Interest and default interest

- 5 The mechanic for calculation of interest has been clarified in clause 4.3, and is now clear that interest is calculated and accrues daily on the Loan. This is set out in clause 12.2 of the loan agreement.

- 6 As set out in paragraph 2.3 above, the default interest rate is now 5.00% per annum on amounts that are due but unpaid. This is covered in clause 12.2 of the loan agreement.

Payment in NZUs

- 7 Clause 1.4 of the loan agreement sets out the mechanic for determining the value of NZUs if a payment is to be made in cash. Clause 9.1 now includes a provision specifically stating that HBRC's preference is to receive payments in NZUs.

KAHC guarantee and security

- 8 As described above, KAHC has provided a separate guarantee of the payment obligations of Kahutia, provided that it will satisfy the obligations in cash rather than in NZUs. To that extent, the guarantee is a "payment guarantee" (ie a guarantee of the payment of money) and not a "performance guarantee" (ie a guarantee of the performance of an obligation). Given that KAHC is not a participant in the ETS, it will not be in a position to transfer NZUs to HBRC and would not be able to acquire them in the market, therefore we understand KAHC's requirement for this to be a payment guarantee only.

- 9 We do not consider that HBRC's position is prejudiced by KAHC's guarantee being included in a separate document and KAHC not being a party to the loan agreement.

- 10 As security for the guarantee, KAHC will grant a first ranking mortgage over Tautane Station. HBRC should be able to enforce that security and sell that property if both Kahutia and KAHC fail to satisfy the payment obligations under the loan agreement and the guarantee.

Use of the loan proceeds

JON-003502-340-71-V1JON

- 11 We have agreed several mitigants with Kahutia in relation to the use of the loan proceeds:
- 11.1 The purpose for the loan set out in clause 2.2 restricts the use of the loan proceeds.
- 11.2 Under clause 3.1 of the loan agreement, as a condition precedent to the making of the loan, Kahutia is required to provide HBRC with a business plan, which must be in form and substance satisfactory to HBRC. Our expectation is that this would set out budgeted expenditure showing how funds are to be spent, what forestry activity Kahutia intends to undertake and the NZUs that it is forecast to earn from those forestry activities.
- 11.3 Under clause 7.2(c) of the loan agreement, Kahutia is now restricted from changing any material part of its business from that set out in the business plan provided to HBRC without HBRC's consent. This means that Kahutia cannot undertake other business activities than those agreed in the business plan unless HBRC provides its consent. We have also reviewed an extract from the limited partnership agreement of Kahutia which provides that Kahutia's business is restricted to "forestry, carbon credit trading, production of honey and any related business or activity".
- 11.4 A new set of information undertakings has been included under clause 7.4(a). This requires Kahutia to provide a quarterly report setting out:
- (i) progress against the business plan;
 - (ii) expenditure from funds generated by the sale of NZUs;
 - (iii) progress in relation to planting and afforestation activity; and
 - (iv) the number of NZUs it has earned or surrendered over that period.
- Kahutia is also required to provide an annual report under clause 7.4(b). This is forward looking and requires Kahutia to provide a forecast of the number of NZUs it will earn over the remaining period of the loan and how it will repay the Outstanding Amount under the Loan.
- 11.5 In our view, the information undertakings will give HBRC visibility over whether Kahutia is meeting its obligations, as well as whether it will be in a position to repay the loan from NZUs that it is forecast to earn. This will allow HBRC to take action if it has concerns regarding Kahutia's compliance with the business plan, or its ability to repay the loan.

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