

HEADS OF AGREEMENT

ACCESS TO AND USE OF THE VALETTA IRRIGATION SCHEME TO GENERATE ELECTRICITY

THIS AGREEMENT is made on the _____ day of March 2011

PARTIES:

- 1 VALETTA IRRIGATION LIMITED ("Valetta")
- 2 CANPOWER LIMITED ("CanPower")

BACKGROUND:

- A Valetta is a co-operative company which owns and operates the Valetta Irrigation Scheme.
- B Valetta wishes to change the Scheme from an open race delivery of water to a piped delivery and have contracted Bosch Irrigation Limited ("Bosch") to pipe the Scheme.
- C CanPower is a company that is related to Bosch. CanPower wishes to access and use the water within the Scheme above the 260 m contour to generate electricity ("the Hydro Section") and have approached Valetta with a proposal to generate electricity from the Scheme.
- D Valetta in conjunction with Bosch and CanPower have drafted an agreement granting CanPower access to and use of the Scheme to generate electricity ("the Access Agreement").
- E Valetta and CanPower propose entering into a formal agreement based on the Access Agreement.
- F Valetta and CanPower propose being bound by the terms of the Access Agreement as provided for in this Agreement.

AGREEMENT:

- 1 The parties have reached substantial agreement over the form of the Access Agreement and intend being contractually bound to each other in the terms thereof a copy of which is attached as Schedule A to this Agreement except as provided for in this Agreement ("the Access Agreement").
- 2 The Access Fee shall be the contract price for Separable Portion B of the Construction Contract between Valetta and Bosch being approximately NZD\$6,000,000.00 based on an exchange rate of NZD \$0.735 to USD \$1.00.
- 3 The parties have identified between them the following outstanding issues arising from the tender over which agreement has not yet been reached being:
 - 3.1 The treatment of the Access Fee for tax purposes.
 - 3.2 Schedules to the Access Agreement.
 - 3.3 Ownership of the Hydro Works (being principally the power generation plant).("the issues")

CB Y AM RB

- 4 In respect of each of the issues identified in clauses 3.1 to 3.3 above such matters will be resolved using the following procedure:
- 4.1 It is the parties' expectation that the issues will be settled between them by negotiations held in good faith.
 - 4.2 The representatives of each party will endeavour to resolve the issues within 10 working days of this Agreement.
 - 4.3 If the issues are not resolved in accordance with clause 4.2 the parties will ask Beca, in conjunction with any other consultant nominated by Bosch, to assist them in resolving those issues within a further 10 working days.
 - 4.4 If the issues are not resolved in accordance with clause 4.3 the parties agree to attend mediation and the mediator will be appointed jointly by the parties or, where the parties cannot agree on a mediator within 10 working days appointed by the chair person of LEADR New Zealand Incorporated or the Chair Person's nominee. The mediator will conduct the mediation in accordance with those guidelines agreed to between the parties or if the parties cannot agree on those guidelines within 10 working days following the appointment of the mediator, in accordance with those guidelines set by the mediator.
 - 4.5 If the issues are not resolved in accordance with clause 4.4 within a further 20 working days then either party may in its discretion, require the issues to be resolved by arbitration conducted in accordance with the Arbitration Act 1996.
- 5 In resolving the issues in accordance with clause 4 herein the parties agree to take into account the following:
- 5.1 The background of the dealings between them including the terms and conditions that have already been agreed to.
 - 5.2 The reasonable (objective) commercial considerations applying to each party.
 - 5.3 Evidence of the commercial dealings and terms applying between other parties in similar situations, primarily relating to access to irrigation schemes within the South Island for generating electricity.
- 6 The parties agree that upon each of the issues being resolved in accordance with clause 4 such resolution shall then form part of and be incorporated into the Construction Contract and bind each of them as if it had been inserted in the Construction Documents from its commencement.
- 7 Notwithstanding the outstanding resolution of any issue each party must continue to perform its other obligations under this Agreement and the Access Agreement pending any issue(s) being resolved.
- General**
- 8 The parties agree to do all things and execute all deeds, instruments, transfers or other documents that may be necessary or desirable to give full effect of the provisions of this Agreement.
- 9 This Agreement may be executed in any number of counterparts. All counterparts together shall be taken to constitute one instrument.

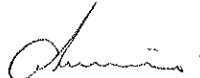
GB

AJ AM RB

10 If there is any dispute between the parties regarding the terms of this document then that dispute will likewise be dealt with in accordance with the provisions set out clause 4.

EXECUTION:

Signed by **VALETTA IRRIGATION LIMITED**
by its Directors in the presence of:



Director


Director

Signed by **CANPOWER LIMITED** by its
Directors in the presence of:



Director

Director


Director
Chris Stachura

CB J AM RD

SCHEDULE A
ACCESS AGREEMENT

CB JP KM/RO

VALETTA IRRIGATION LIMITED

CANPOWER LIMITED

ACCESS TO AND USE OF THE VALETTA IRRIGATION SCHEME TO GENERATE ELECTRICITY

DRAFT


WHITE FOX & JONES
LAWYERS

CB
AM
yp
ke

ACCESS TO AND USE OF THE VALETTA IRRIGATION SCHEME TO GENERATE ELECTRICITY

Deed Dated:

PARTIES

- 1 VALETTA IRRIGATION LIMITED ('Valetta')
- 2 CANPOWER LIMITED ('CanPower')

BACKGROUND

- A Valetta is a co-operative company which owns and operates the Valetta Irrigation Scheme ('the Scheme') for the benefit of Valetta's shareholder farmers ('the Farmers').
- B The water for the Scheme is provided under Resource Consents to take and use water for irrigation held by Rangitata Diversion Race Management Limited ('RDRML') as set out in **Schedule 1** ('RDRML Resource Consents') and a Water Supply Agreement with RDRML to take and use water for irrigation as set out in **Schedule 2** ('the Water Supply Agreement').
- C The Farmers take and use water from the Scheme for irrigation and rely on the operation of the Scheme for their farming operations.
- D Valetta wishes to change the Scheme from an open race delivery of water to a piped delivery and have contracted Bosch Irrigation Limited ('Bosch') to pipe the Scheme.
- E CanPower is a company that is related to Bosch. CanPower wishes to access and use the water within the Scheme above the 260 m contour to generate electricity ('the Hydro Section') and have approached Valetta with a proposal to generate electricity from the Scheme.

AGREEMENT

1 Conditions

- 1.1 **Conditions precedent:** This Deed is conditional on:
 - 1.1.1 Valetta obtaining written consent from RDRML to use water from the Scheme to generate electricity on terms satisfactory to Valetta and CanPower in all respects.
 - 1.1.2 Valetta obtaining all consents and shareholders resolutions necessary for Valetta to enter into this Deed.
 - 1.1.3 Valetta purchasing and/or leasing land for Valetta's Works and the Hydro Works on terms satisfactory to Valetta and CanPower in all respects.
 - 1.1.4 Valetta obtaining the Easements necessary to pipe the Hydro Section of the Scheme on terms satisfactory to Valetta and CanPower in all respects.
 - 1.1.5 Valetta being granted Consents to undertake Valetta's Work and to pipe the Scheme on terms satisfactory to Valetta and CanPower in all respects.
 - 1.1.6 CanPower being granted Consents to undertake the Hydro Works and to use water to generate electricity on terms satisfactory to CanPower and Valetta in all respects.

CB

JHC AMI RAO

- 1.2 **Interdependence:** This Deed is conditional and dependent on Valetta and Bosch entering into and confirming as unconditional an agreement to pipe the Scheme ('Construction Contract').

If the Construction Contract is cancelled due to failure to confirm all of its conditions, then this Deed is deemed to be cancelled and the parties shall be released from any and all of their obligations in respect of this Deed with effect from the date of cancellation of the Construction Contract. For the avoidance of doubt, this clause 1.2 does not apply where the Construction Contract is cancelled after it has been confirmed unconditional.

- 1.3 **Cancellation:** If any condition in clause 1.1 is not fulfilled by 1 September 2013 either party may cancel this Deed by giving written notice to the other party and if so cancelled this Deed, subject to clause 26.1 shall be of no further force or effect and all parties shall be released from their obligations under this Deed. The cancellation of this Deed shall not affect a party's accrued rights or obligations at the date of cancellation.

2 Fundamental Principles

- 2.1 **Fundamental Principles:** This Agreement is subject to the following Fundamental Principles:

- 2.1.1 The purpose of the Scheme is to supply water to the Farmers for irrigation. Access to the Scheme and the use of water to generate electricity shall at all times be incidental to the operation of the Scheme for irrigation and must not limit the amount of water available to the Farmers for irrigation;
- 2.1.2 RDRML Resource Consents must not be compromised or put at risk;
- 2.1.3 Valetta's Rights to take and use water from the Rangitata Diversion Race ('RDR') for irrigation at the maximum amount and at the maximum rates of flow permitted by RDRML or under the Resource Management Act must not be compromised or put at risk;
- 2.1.4 Access to land necessary to maintain and operate the Scheme must not be compromised or put at risk;
- 2.1.5 CanPower (or Bosch) will pay all costs, directly or indirectly incurred in carrying out all works for the Hydro Section except to the extent that:
- 2.1.5.1 such costs are the result of default by Valetta, RDRML or the Farmers; or
- 2.1.5.2 such costs are incurred after practical completion of the Hydro Section; or
- 2.1.5.3 such costs are addressed by the Construction Contract.
- 2.1.6 That water will only be available to generate electricity during such times as water is available from the RDR and, subject to clause 4, Valetta gives no warranty as to the availability of water or that water will be available on an uninterrupted basis;

CB JH AM RO

- 2.1.7 Subject to clause 7.3, CanPower shall transfer the Hydro Works and all assets (including Consents) which comprise the Hydro Works on the termination, cancellation or expiry of this Deed, whichever is the earlier;
- 2.1.8 CanPower must not do anything or omit to do anything to:
- 2.1.8.1 Reduce the volume of water available and taken or able to be taken by the Farmers from the Scheme;
 - 2.1.8.2 Affect the quality of water available and taken or able to be taken by the Farmers from the Scheme;
 - 2.1.8.3 Affect any Resource Consents held by Valetta or RDRML or make it more difficult or costly for Valetta or RDRML to renew or vary any of its Resource Consents; or
 - 2.1.8.4 Do anything or fail to do anything which might place Valetta in breach of the Water Supply Agreement; or
 - 2.1.8.5 Affect detrimentally the operation or operational flexibility of the Scheme or the operations of any of the Farmers.
- 2.2 **Application of Fundamental Principles:** The parties agree that:
- 2.2.1 CanPower shall not do or omit to do anything that might or could detrimentally affect the Fundamental Principles; and
 - 2.2.2 The Fundamental Principles must be given effect to in the interpretation and application of this Agreement.
- 2.3 **Benefit:** The provisions of this clause 2 are for the benefit of Valetta, CanPower, RDRML and the Farmers.

3 Access to and use of the Scheme

- 3.1 **Access to and use of the Scheme:** Valetta agrees that, subject to fulfilment of the conditions clause 1.1 and the other terms of this Deed, CanPower may during the Irrigation Season for the Term access and use the Scheme to generate electricity.
- 3.2 **Access Points:** CanPower shall only access the Scheme at locations set out in **Schedule 3**.
- 3.3 **No guarantee of water:** CanPower acknowledges and agrees that:
- 3.3.1 Water will only be available for use to generate electricity during the Irrigation Season, and subject to clause 4, that during the Irrigation Season the availability of water is subject to and will at all times be determined by Valetta's own requirements with respect to the supply of water to the Farmers for irrigation.
 - 3.3.2 The supply of water is not guaranteed and may not be available due to the terms and provisions of RDRML Resource Consents which do not guarantee a continuous supply of water.

GB JLS AM PKE

- 3.4 **Increase or change in water volumes:** Valetta shall prior to the Irrigation Season give notice to CanPower of any expected increases or changes in water volumes for the next Irrigation Season. Such notice shall not be binding on Valetta and subject always to clause 3.5.
- 3.5 **Priority right to determine the amount of water:** Notwithstanding clause 3.4 but subject always to clause 4, Valetta shall have an absolute priority right and unfettered discretion to determine the amount of water which is taken from the RDR and flow rates as necessary for irrigation and therefore available to generate electricity.
- 3.6 **Interruptions to access:** Notwithstanding any other term of this Deed, Valetta may interrupt the flow of water in the Scheme at any time Valetta reasonably considers it necessary to do so in accordance with this clause 3.6. In all situations of interruptions Valetta shall use reasonable endeavours to minimise the period of interruption.

Planned Interruptions

- 3.6.1 In situations where Valetta determines the need for the interruption to:
- 3.6.1.1 enable Valetta to inspect, effect alterations, maintenance, repairs or additions to any part of the Scheme; or
 - 3.6.1.2 avoid the risk of danger to persons, damage to property or interference with the regularity or efficiency of the supply of water; or
 - 3.6.1.3 preserve and protect the proper working of the Scheme; or
 - 3.6.1.4 comply with any of its obligations to RDRML under the Water Supply Agreement; or
 - 3.6.1.5 due to interruptions in the supply of water to the Scheme from the RDR to enable RDRML to carry out maintenance or capital works on the RDR or as otherwise determined by RDRML; or
 - 3.6.1.6 ensure compliance with any Resource Consents;

Valetta shall give CanPower not less than three (3) Business Days notice of any planned interruption and Valetta shall liaise with CanPower over the timing of the interruption to minimise inconvenience to CanPower. The parties agree that where reasonably practicable planned interruptions shall occur outside of the Irrigation Season.

Unplanned Interruptions

- 3.6.2 In situations where the Valetta does not know of the need for the interruption in advance, including without limitation:
- 3.6.2.1 faults in the Scheme or the RDR caused by equipment failure, accident, storm or similar event; or
 - 3.6.2.2 emergencies; or

GB YLS AM PKD

3.6.2.3 Force Majeure Evant; or

3.6.2.4 as required by RDRML or any Authority;

Valetta shall give CanPower such notice as it is able to give in the circumstances in respect of unplanned interruptions. If no notice is given of the interruption, Valetta will promptly after the interruption give notice to CanPower of the interruption, the reasons therefore and the expected duration of the interruption. Valetta will use its best endeavours to minimise interruptions and to bring any interruptions to an end as promptly as possible.

4 Use of Hydro Section

4.1 The Hydro Section must only be used as expressly set out in this Deed:

4.1.1 By CanPower for the purpose of the generation of electricity; and

4.1.2 By Valetta or any other person for the purpose of the distribution of water for irrigation or stock water.

4.2 Valetta shall pay CanPower for taking water out of the Hydro Section in proportion to the amount of electricity lost due to Valetta taking the water ('Valetta Payments') and CanPower shall pay Valetta for any water over and above 4.44 cumecs ('Additional Water') in proportion to the amount of additional electricity generated due to the Additional Water ('CanPower Payments') for the Irrigation Season. The Valetta Payments, CanPower Payments and terms of payment ('the Payments') shall be determined as follows:

4.2.1 Valetta shall give written notice to CanPower specifying the amount of water to be taken out of Hydro Section and the location of the take, and/or Additional Water no later than 3 months prior to the commencement of the Irrigation Season.

4.2.2 CanPower shall within 10 working days after service of Valetta's notice give written notice to Valetta specifying the amount of electricity which will be lost and/or additional electricity gained, proposed CanPower Payments and/or Valetta Payments and terms of payment ('Proposed Payments') ('CanPower's Response').

4.2.3 Valetta shall within 15 working days after service of CanPower's Response give written notice to CanPower disputing the Proposed Payments and/ or terms of payment specifying the payments proposed by the Valetta and/or terms of payment, in which case the Payments shall be determined in accordance with clause 4.4.

4.2.4 If Valetta fails to give such notice (time being of the essence) Valetta shall be deemed to have accepted the Proposed Payments specified in CanPower's Response and the extension of time for commencing arbitration proceedings contained in the Arbitration Act 1996 shall not apply.

4.3 Immediately following service of Canpower's Response, the parties shall endeavour to agree upon the Payments, but if agreement is not reached within 10 working days then the Payments shall be determined by an independent Chartered Professional Engineer acting as an expert and not as an arbitrator as follows:

CB JG AM / RD

- 4.3.1 An engineer shall be appointed by agreement between the parties to determine the Payments within 10 working days of Valetta giving Canpower notice disputing the Proposed Payments.
- 4.3.2 If the parties cannot agree upon an engineer within the required timeframe either party may request that an engineer be appointed by the President (or his or her delegate) for the time being of the Institution of Professional Engineers New Zealand (IPENZ). Such nomination shall be final and binding upon the parties.
- 4.3.3 The engineer shall determine the Payments having regard to the loss or gain of profit to Canpower due to the take or Additional Water (as the case may be), and such determination shall, absent manifest error, be deemed to be binding on the parties and the Payments for the purposes of clause 4.3.
- 4.3.4 The engineer shall give written notice of the Payments to the parties.
- 4.3.5 The costs of and incidental to the determination shall be bourn equally by the parties.
- 4.3.6 Upon determination of the Payments Valetta shall confirm in writing within 3 days whether or not it wishes to take water or supply Additional Water based on the Payments determined by the engineer.
- 4.4 Notwithstanding clause 4.3, Valetta may take water out of the Hydro Section without payment to CanPower as follows:
- 4.4.1 From the Hydro Section immediately above Turbine 2 up to 500 l/sec for irrigation; and
- 4.4.2 Up to 10 l/sec for stock water.
- 4.5 For the avoidance of doubt, Valetta may use the Hydro Section to distribute water below the Hydro Section without payment to CanPower, however will give CanPower 3 months written notice of Valetta's intention to distribute Additional Water below the Hydro Section, including details as to the amount of Additional Water to be distributed.

5 Access fee

- 5.1 **Access fee:** In consideration for Valetta granting access to and use of the Scheme to generate electricity, CanPower will pay Valetta an access fee in the amount of \$6,000,000 on practical completion of the Hydro Section as defined in the construction contract between Bosch and Valetta.

NB: Subject to tax advice as to treatment and wording.

- 5.2 **No additional charge:** Valetta shall not levy any additional charge to CanPower for the right to access the Scheme.
- 5.3 **Payments and deductions:** All payments under this Deed shall be made on demand, without any set-off, counterclaim or equity and without deduction of any taxes, or other governmental charges.

CB

YJL AM

6 Valetta's Works

- 6.1 **Valetta's Works:** Valetta agrees to carry out the works in accordance with the specifications and timetable set out in **Schedule 4 (being Separable Portions A and B as set out in the Construction Contract)** ('Valetta's Works').
- 6.2 **Maintenance and Compliance:** Valetta agrees that it will at all times carry out all action and works necessary and required to maintain and operate the Scheme including the Hydro Section in accordance with Best Practice.
- 6.3 **Alterations, replacement and additions to Valetta's Works:** If Valetta proposes to carry out any works on or affecting the Hydro Section, Valetta shall submit to CanPower for its approval all of the designs, plans, specifications and other documents to construct and implement the works.

7 Hydro Works

- 7.1 **Maintenance by CanPower:** CanPower agrees that it will at all times carry out all action and works necessary and required to maintain and operate the Hydro Works in accordance with Best Practice and so as to ensure the Fundamental Principles are not breached.
- 7.2 **Alterations, replacement and additions to the Hydro Works:** If CanPower proposes to carry out any additional works, CanPower shall submit to Valetta for its approval all of the designs, plans, specifications and other documents to construct and implement the additional works and this Deed shall apply to the additional works as if they were Hydro Works.
- 7.3 **Ownership and risk in Hydro Works:** The parties agree that ownership and risk in the Hydro Works shall be as set out below:
- 7.3.1 all risk in the assets that comprise the Hydro Works shall remain with CanPower until termination, cancellation or expiry of this Deed;
- 7.3.2 title and ownership to the Hydro Works shall transfer to Valetta, unencumbered, on termination, cancellation or expiry of this Deed in consideration for the rights granted to CanPower under this Deed; and
- 7.3.3 CanPower shall have no obligation to make good or remedy any changes made to the Scheme except as required to meet any statutory or regulatory requirements.

Provided that CanPower shall not be obliged to transfer the Hydro Works to Valetta while Valetta remains in breach of this Deed.

- 7.4 **Hydro Works on transfer:** Subject to clause 7.3, CanPower shall ensure that the Hydro Works and any assets which comprise the Hydro Works are in good working order on transfer taking into account the age and fair wear and tear and provide Valetta with a maintenance programme for the Hydro Works setting out maintenance which has been carried out on the Hydro Works during the Term of this Deed.

8 Insurance

GB
 JFC AM KB

- 8.1 **Valetta:** Valetta shall obtain and keep current insurance throughout the Term, at its own expense, to cover the Scheme (not including the Hydro Works) as part of Valetta's general insurance of the Scheme (at such level and for such risks as recommended by Valetta's insurance brokers and/or insurers) and shall make available copies of such insurance policies to CanPower on request.
- 8.2 **CanPower:** CanPower shall obtain and keep current insurance throughout the Term, at its own expense, to cover the Hydro Works and all assets that comprise the Hydro Works and any public liability at such level and for such risks as recommended by CanPower's insurance brokers and/or insurers and as approved by Valetta provided that the insurance cover will not be less than the amounts specified and include terms as set out in **Schedule 6**
- 8.3 **Review of Hydro Works for insurance:** As soon as reasonably practicable after the date on which this Deed becomes unconditional, Valetta shall commission an independent civil engineering peer review of the Plans and the Hydro Works (or such part thereof as Valetta may determine) for insurance purposes, the cost and expenses of which shall be borne by CanPower. CanPower shall fully co-operate in such review. CanPower shall ensure that up to date copies of the Insurance Policies are provided to Valetta.
- 8.4 **Certificates of currency:** CanPower shall provide Valetta upon commencement of the Hydro Works and also on each subsequent policy renewal with certificates of currency evidencing that such insurance is in force. All policies of insurance obtained by CanPower will be in a form, upon terms and with insurers acceptable to Valetta.
- 8.5 **Public liability insurance:** CanPower's public liability insurance policy must name Valetta as an additional insured, contain a cross liability condition and be primary and without any right of contribution from Valetta or any insurance effected by Valetta.
- 8.6 **Failure to obtain Insurance:** A failure by CanPower to obtain and maintain the Insurance Policies shall be a Fundamental Default under this Deed.
- 9 Consents**
-
- 9.1 **Consent to use water to generate electricity:** Water is taken from the RDR and used by Valetta subject to RDRML Resource Consents which provide for the use of water for irrigation. Valetta makes no representations, either express or implied, as to the need for Consents to use water to generate and/or supply electricity.
- 9.2 **Responsibility for Consents:** Subject always to ensuring that no aspect of the Fundamental Principles are breached or otherwise infringed CanPower is responsible in all respects for obtaining any and all Consents necessary to use the water to generate electricity, supply electricity and to undertake the Hydro Works or any part thereof.
- 9.3 **Failure to obtain Consent:** If, for any reason, CanPower fails to obtain any Consent or operates in breach of any Consent, access to the Scheme and use of water may be suspended in accordance with clause 19 until such time as the necessary Consents have been obtained or breaches have been remedied and Valetta shall not be liable for any costs, losses or damages or any other compensation associated with the need for such Consents.
- 9.4 For the avoidance of doubt CanPower shall be deemed to have failed to obtain Consent or be in breach of any Consent as determined by the relevant Authority.

GB

JG AM KR

- 9.5 **Application for Consents:** If CanPower or Valetta wish to apply for a Consent, variation, extension or renewal of any Consent which may affect the other party or any rights of the other party then that party shall:
- 9.5.1 Give notice to the other of that intent together with full details of the proposed application;
 - 9.5.2 Consult with the other party in respect of that application taking into account any reasonable objection to or comments on the application by the other party; and
 - 9.5.3 Act in good faith to resolve any issues arising from the proposed application.
- 9.6 **Opposition to Consents:** CanPower and Valetta shall have the right to oppose any additional Consent, variation, renewal or replacement of any Consent as provided for in clause 9.5 where, in the opinion of the opposing party the rights or future options of that party are or may be detrimentally affected or any Fundamental Principle may be infringed.
- 9.7
- 9.8 **No rights in respect of the Scheme or Valetta's Rights:** Each party acknowledges and agrees that in respect of any Consent applied for by any party affecting the Scheme that no Consent shall be applied for or obtained which will give CanPower the right to take any action in relation to the Scheme or result in a breach of any Fundamental Principle without the prior written agreement of Valetta.
- 9.9 **Support for Consents:** Each party will (at the cost of the other party) use all reasonable endeavours to assist the other in obtaining any Consents and/or variations, extensions and renewals of any Consents subject to and provided that such process will not:
- 9.9.1 Detrimently affect the other party's Consents or opportunity to renew those Consents.
 - 9.9.2 Require the other party to act in a way that could be detrimental to or prejudice the future rights to renew those Consents.
- 9.10 **Basis of support:** Each party will support any Applications made in accordance with this Deed and which will, if given effect to, comply with all the terms of this Deed, including all aspects of the Fundamental Principles. In addition to its other remedies in this Deed, that party will have the right to oppose any Application or any part of any Application (including on any appeal) and shall have the right to appeal any decision in respect of an Application and make submissions on any Application, if in the reasonable opinion of that party there is any risk of a breach of the Fundamental Principles.
- 9.11 **Transfer of Consents to a third party:** CanPower covenants that it will not transfer any Consents relating to the Hydro Works or use of water to generate electricity to a third party without the prior written consent of Valetta, such consent is not to be unreasonably withheld. Without limiting the rights of Valetta, Valetta will be entitled to withhold its consent to the transfer if that third party does not agree to be bound by the provisions of this Deed in relation to the rights and obligations of CanPower.
- 9.12 **Transfer of Consents on expiry:** Subject to clause 7.3, CanPower shall transfer all Consents relating to the Hydro Works and use of the water in the Scheme to generate electricity to Valetta on the termination, cancellation or expiry of this Deed.

GB

JL AM /ke

10 Operation, maintenance and control of the Hydro Works

- 10.1 **Management Services:** CanPower shall provide to Valetta the following management services:
- 10.1.1 Providing to Valetta a report from time to time on any matters of which CanPower is aware and which in its opinion are relevant to the delivery of water through the Scheme, and meeting with Valetta quarterly or at such other intervals as may be agreed by the parties to discuss any such reports; and
 - 10.1.2 Managing the flow of water through the Hydro Works and providing such data and information on the flow of water in the Scheme as the parties may agree.
 - 10.1.3 Reporting to Valetta annually setting out the maintenance undertaken on the Hydro Works, through put and electricity generated over the past 12 months and the maintenance programme for the following 12 months.

11 RDRML exclusion of liability

- 11.1 CanPower agrees and covenants that RDRML shall have no liability or any 'duty of care' to CanPower whatsoever and CanPower waives all liability and rights of action against RDRML.

12 Use of water

- 12.1 CanPower must only use water from the Scheme to generate electricity and thereafter shall be returned to the Scheme for use by Valetta for irrigation in accordance with clause Error! Reference source not found. 1.1.

13 Right of first refusal to Trust Power

- 13.1 CanPower shall first offer to Trust Power Limited ('Trust Power') any electricity generated by CanPower from the Hydro Section.
- 13.2 CanPower shall give written notice to Trust Power setting out the terms on which it proposes to sell electricity to Trust Power or the terms of any offer received.
- 13.3 Trust Power shall have ten (10) working days following receipt of CanPower's notice in which to exercise its right to purchase electricity by serving written notice on CanPower accepting the offer contained in the notice.
- 13.4 If Trust power does not serve notice on CanPower accepting the offer, CanPower may sell electricity to another party on the same terms or terms no more favourable than offered to Trust Power.
- 13.5 In the event that CanPower reaches agreement to sell electricity to another party on terms more favourable then it must give notice under sub-clause 13.2 with the result that clause 13 shall apply to such new offer with such changes as the context requires.
- 13.6 **Benefit:** The parties acknowledge and agree that this clause 13 confers benefits on Trust Power in respect of electricity generated from the Hydro Section only.

GB AM yls PRO

14 Licences

- 14.1 **Easements:** Valetta shall hold all easements necessary for Valetta to carry out Valetta's Works and CanPower to carry out the Hydro Works ('Easements').
- 14.2 **Licence to use Easements:** Valetta grants to CanPower a non-exclusive licence to use the Easements to access and use the Scheme for the Term upon the terms and conditions of the Easements and for generating and supplying electricity, and covenants that no action shall be taken and no omission made that might or could detrimentally affect the Easements at any time.
- 14.3 **Land for the Hydro Works:** Valetta shall purchase or lease land as set out in **Schedule 7** ('the Land') for Valetta's Works (or any part thereof) and the Hydro Works.
- 14.4 **Licence to occupy the Land:** Valetta grants to CanPower a non-exclusive licence to occupy the Land for the Term for the Hydro Works and for generating and supplying electricity. CanPower shall ensure that its agents, contractors, employees, and/or invitees, and/or other persons lawfully permitted to access the Land, comply with the obligations of CanPower pursuant to this Deed. Valetta reserves the right to access and use the land for the conveyance and storage of water for irrigation, and the operation of the Scheme.
- 14.5 **Leased land:** CanPower covenants that no action will be taken and no omission made that might or could detrimentally affect the rights of Valetta under any lease in respect of the Land or any part of the Land and agrees to comply with the terms of any lease as if CanPower were the Lessee under the lease. Valetta shall provide CanPower with a copy of any lease on confirmation of this Deed.
- 14.6 **Security:** CanPower must comply with all security procedures when accessing the Land as directed by Valetta from time to time including, without limitation, ensuring gates and access ways to the Land are kept shut and secure at all times. CanPower shall be responsible for the security of the Land, and any property or equipment brought onto or left on the Land.
- 14.7 **Use of the Land:** CanPower shall not:
- 14.7.1 Use the Land other than for the purpose of generating and supplying electricity in accordance with the terms of this Deed;
- 14.7.2 Use any fixtures or fittings on the Land other than for their designed purpose;
- 14.7.3 Do on the Land anything which in the opinion of Valetta may become a nuisance, disturbance or obstruction or cause damage whether to Valetta or to other users of the Land;
- 14.7.4 Obstruct or interfere with any of the entrances or common areas of the Land;
- 14.7.5 Permit any television or radio antenna, sign, advertisement, name or notice to be placed on any part of the Land without the prior written consent of Valetta; or
- 14.7.6 Use the Land in any noisy, noxious, illegal or offensive manner or for any illegal purpose.

CB

AM

JGK

14.8 **Licence not Assignable:** CanPower shall not assign, sublicense or otherwise use or deal in any manner with the licences granted under this Deed except as set out in this Deed.

14.9 **No Lease:** The licences granted under this Deed do not create any lease, tenancy or interest in the Land.

15 Term of this Deed

15.1 **Term:** This Deed shall commence on execution and shall continue for a term of 15 years from the date CanPower commences generating electricity or 1 September 2013, whichever is the earlier (unless terminated or cancelled earlier in accordance with any other provision of this Deed) ('Term').

15.2 **Ownership and risk in the Hydro Works on termination:** The parties agree that ownership and all risk in the assets that comprise the Hydro Works shall remain with CanPower until termination, cancellation or expiry of this Deed. The parties agree that ownership and all risk in the assets that comprise the Hydro Section shall become Valetta's immediately following termination, cancellation or expiry of this Deed unless the Hydro Works are destroyed or so damaged so as to make the continued operation of the Hydro Works uneconomic as determined by Valetta in which case CanPower shall replace or reinstate the Hydro Works.

15.3 **CanPower's entitlement to cancel prior to expiry of Term:** Canpower may cancel this Deed at any time by giving Valetta not less than 20 Business Days notice in writing. The cancellation of this Deed in accordance with this clause 15.3 shall not affect a party's accrued rights or obligations at the date of cancellation.

16 Representations

16.1 **Mutual representations and warranties:** Each party represents and warrants to the other parties that it:

16.1.1 Is of full legal capacity and, where applicable, is duly incorporated under the laws of New Zealand;

16.1.2 Has obtained all necessary corporate resolutions and approvals required for it to enter into this Deed and perform its obligations under this Deed;

16.1.3 Is able to perform its duties and discharge its responsibilities under this Deed; and

16.1.4 It is not aware of anything which will, or might reasonably be expected to, prevent or impair it from performing all of its obligations under this Deed, in the manner and at the times contemplated by this Deed.

16.2 **Reliance:** The parties acknowledge to the others that the representations contained in this clause 16 are made in circumstances such that they are intended to be relied on by the persons to whom they are made.

17 Risk

CB AM JLY RD

- 17.1 **Risk:** Any actions taken by CanPower in undertaking any of the Hydro Works, including design and any physical works, and in generating and supplying electricity shall be at the sole risk of CanPower.
- 17.2 **No warranty:** CanPower acknowledges that the proposal to generate electricity from the Scheme is its own initiative and that it has undertaken its own due diligence and satisfied itself as to the feasibility of hydro generation from the Scheme without reliance on Valetta. Valetta does not in any way warrant the performance of the Hydro Works or use of the Scheme to generate electricity.

18 Force Majeure

- 18.1 **Notice of Force Majeure Event:** If either of the parties are affected by a Force majeure Event, then within five (5) days after the occurrence of the Force Majeure Event the relevant party must notify the other of the Force Majeure Event and provide details of:
- 18.1.1 The obligations affected;
 - 18.1.2 The action that the affected party has taken and proposes to take to remedy the situation;
 - 18.1.3 The affected party's estimate of the time during which it will be unable to carry out the affected obligations due to the Force Majeure Event;
 - 18.1.4 The affected party's estimate of the costs it will incur to remedy the situation; and
 - 18.1.5 All insurance policies upon which the affected party will be able to rely in making good damage cause by the Force Majeure Event.
- 18.2 **Suspension of Obligations:** Following a Force Majeure Event, the affected party's obligations under this Deed will be suspended but only to the extent and for so long as the period that such obligations are genuinely affected by the Force Majeure Event.
- 18.3 **Affected Party's Obligations:** Despite clause 18.2, the party affected by the Force Majeure Event must:
- 18.3.1 Use reasonable efforts (including the expenditure of reasonable sums of money) to mitigate the effect upon its performance of this Deed and to fulfil its obligations under this Deed (but without prejudice to the other party's right to terminate this Deed) but nothing in this clause 18.3 obliges a party to settle a strike, lock out, boycott or other industrial dispute on terms it considers, acting reasonably, to be unacceptable;
 - 18.3.2 Keep the other party informed (not less than weekly) of the steps being taken to mitigate the effect upon its performance of this Deed, and an estimate of the continued duration of the delay;
 - 18.3.3 When the period for which its obligations are affected by a Force Majeure Event ceases, recommence performance of all of its affected obligations under this Deed the subject of its original notice under clause 18.1; and

GB AM JY RO

- 18.3.4 Upon recommencement of the performance of the affected obligations, not again invoke the provisions of this clause 18 in regard to the same Force Majeure Event unless the further effect of that Force Majeure Event could not reasonably have been foreseen.
- 18.4 **No Default:** Where a party has validly issued a notice under clause 18.1, that party will not be in default of its obligations under this Deed to the extent that any failure or delay in the observance or performance of those obligations by that party is caused by the relevant Force Majeure Event specified in such a notice.
- 18.5 **Exclusion for breach of Fundamental Principle:** The provisions of clause 18 and clause 20 shall not apply to excuse CanPower from any breach of a Fundamental Principle or complying with clause 19.2 of this Deed and Valetta may exercise all its rights in respect of such breach or non-compliance.

19 Suspension

- 19.1 **Suspension:** Valetta reserves the right to suspend access to and use of the Scheme, including diverting water away from the Hydro Works, such suspension to be only on the terms set out in clause 19.2.
- 19.2 **Notice of Suspension Event:** If at any time during the term of this Deed Valetta considers that:
- 19.2.1 CanPower has committed a Fundamental Default under this Deed; or
- 19.2.2 CanPower acts, or fails to act, in breach of any rules, regulations or other statutory requirement in respect of the Hydro Works and/or use of the Scheme to generate electricity; or
- 19.2.3 Valetta reasonably considers that any aspect of the Fundamental Principles is, or is likely to be, infringed.
- Valetta may provide written notice of this to CanPower ('Suspension Event Notice'), such notice incorporating an accurate and full description of the reasons ("Reasons") for the notice:
- 19.2.4 In the case of an actual breach by CanPower of the Fundamental Principles under clause 19.2.1, will be of immediate effect; or
- 19.2.5 In any other case will include a 14 day "Warning Period".
- 19.3 **Suspension Event Notice:** Immediately upon CanPower receiving a Suspension Event Notice that is of immediate effect under clause 19.2.4 or, in the case of a Suspension Event Notice that includes a Warning Period, upon the expiry of that Warning Period without the sooner proper resolution of the Reasons:
- 19.3.1 CanPower must:
- 19.3.1.1 Not proceed with any of the matters contemplated in the Suspension Event Notice;

GB AM YG KO

- 19.3.1.2 Where it has commenced use of the Scheme, immediately cease all such use; and
- 19.3.2 Valetta may suspend CanPower's rights to access and use of the Scheme including diverting water away from or by-passing the Hydro Works unless, and to the extent that, Valetta advises CanPower otherwise ('the Suspension') and may enter onto the Land occupied by CanPower and assume control of the Hydro Works as necessary to give effect to the Suspension.
- 19.4 **Consultation:** Except in respect of a Suspension Event Notice issued by Valetta under clause 19.2.1, in which case clause 23.2 shall apply, the parties shall meet within five (5) Business Days of the date of the Suspension Event Notice to discuss the suspension and seek to agree how to proceed. If the parties cannot reach agreement within ten (10) Business Days of the date of the Suspension Event Notice, the suspension will continue and clause 21 shall apply.
- 19.5 **Right to access following suspension:** Valetta may access the Hydro Works and any land occupied by CanPower in order to give effect to the Suspension.
- 19.6 **No liability for suspension:** Valetta shall not be liable for any Losses suffered by CanPower as a consequence of the Suspension and CanPower shall remain liable to Valetta under this Deed as if access had not been suspended, except to the extent that the Suspension Event Notice is not issued in accordance with clause 19.2 or CanPower is prevented from compliance by the Suspension Event Notice by Valetta's, the Farmers or RDRML's actions or inactions.
- 19.7 **Fundamental Default:** A failure by CanPower to comply with clause 19.3 shall be a Fundamental Default under this Deed.
- 20 Failure to pay money or lack of finance**
-
- 20.1 A party may not rely upon a Force Majeure Event to excuse or suspend any obligation that it has or may have to pay money under this Deed. A lack of finance can never be a Force Majeure Event.
- 21 Dispute resolution**
-
- 21.1 **Disputes generally:** Any dispute, controversy or claim arising out of or relating to this Deed or the breach, termination or claimed invalidity of this Deed ('Dispute') must be dealt with in the following manner:
- The party claiming the Dispute must:
- 21.1.1 Give a written notice of the Dispute to the other party; and
- 21.1.2 Seek to convene a meeting of representatives of the parties to discuss the Dispute with the aim of resolving it within ten (10) Business Days of the written notice of the Dispute having been received; and
- 21.1.3 If such meeting does not take place or fails to resolve the Dispute, the parties must attempt to resolve the Dispute by negotiation between the Chief Executive Officers (or equivalent) of each party, who shall seek to resolve the Dispute within ten (10) Business Days of the Dispute being referred to them. The failure to

CB AM JMS RD

resolve a Dispute referred to the Chief Executive Officers shall not prejudice or derogate any other right or remedy available to a party for a breach of this Deed and each party shall be entitled to pursue to any remedies that may be available to it in respect of the Dispute.

- 21.1.4 If the Dispute is not resolved in accordance with clause 21.1.3, the parties must refer the Dispute to mediation and a mediator shall be appointed jointly by the parties, or where the parties cannot agree on a mediator within five (5) business days, appointed by the Chairperson of LEADR New Zealand Incorporated or the Chairperson's nominee. The mediation shall be conducted in accordance with those guidelines set by the mediator unless otherwise agreed by the parties.
- 21.1.5 If the Dispute is not resolved by the parties in accordance with clause 21.1.4 within a further 20 business days then either party may, in its discretion, initiate court proceedings.
- 21.2 **Interlocutory or urgent relief:** This clause 21 does not prevent any party from seeking urgent interlocutory or declaratory relief from a court of competent jurisdiction where, in that party's reasonable opinion, that action is necessary to protect that party's rights.
- 21.3 **Continuing obligations:** The parties agree that whilst any Dispute is continuing they will continue to perform their obligations under this Deed.
- 21.4 **News media:** The parties agree that pending final resolution of any Dispute neither of them will make any press release, public announcement or statement concerning the subject matter of the same to any person (save as expressly authorised herein or as required by law).

22 Default

- 22.1 A party shall be in default under this Deed if one or more of the following events occur:
- 22.1.1 a party fails to make a payment due to the other party under this Deed;
- 22.1.2 a party fails to contest within two weeks of service any application for bankruptcy or liquidation (or similar proceeding);
- 22.1.3 any execution, levies or distresses is levied against the party or the assets of the party;
- 22.1.4 any receiver, manager or other custodian (temporary or permanent) is appointed over all or part of the assets and undertakings of a party;
- 22.1.5 a party purports to assign or charge its rights or interests under this Deed without complying with the provisions of this Deed;
- 22.1.6 a party makes a compromise with or enters into any agreement with its creditors;
- 22.1.7 a party fails to comply with any condition, provision or covenant of this Deed and the default remains un-remedied for a period of seven (7) days from the date of receiving notice from the other party in writing recording the default and requiring the defaulting party to remedy the same.

GB AM JLY RO

23 Default consequences

- 23.1 **Default Procedures:** If there is a default in the performance of any obligations pursuant to this Deed (other than a Fundamental Default) then the following provisions shall apply:
- 23.1.1 Details of that default, including whether such default is considered by the non-defaulting party to be capable of remedy, shall be provided by the non-defaulting party to the defaulting party (*Default Notice*);
- 23.1.2 The parties shall meet within 10 Business Days of the date of the Default Notice to discuss and seek to agree the amount of compensation to be paid by the defaulting party and the period for such payment and, if the default is capable of remedy, how the default is to be remedied, and the period within which such default must be remedied.
- 23.1.3 If the parties cannot reach agreement on the terms and conditions of compensation (and, if applicable, remedy) within ten Business Days of the meeting referred to in clause 23.1.2, then, provided Valetta is the non-defaulting party, Valetta may issue a Suspension Event Notice, in which case clause 19.2 shall apply. In all other events a party will then be entitled to pursue such remedies as are then available to it.
- 23.2 **Fundamental Default:** If there is a Fundamental Default under this Deed, then details of that default, including whether such default is considered by the non-defaulting party to be capable to remedy, shall be provided by the non-defaulting party to the defaulting party (*Fundamental Default Notice*):
- 23.2.1 The parties shall meet within five (5) Business Days of the date of the Fundamental Default Notice to discuss and seek to agree the amount of compensation to be paid by the defaulting party and the period for such payment and, if the Fundamental Default is capable of remedy, how the Fundamental Default is to be remedied and the period within which such Fundamental Default must be remedied;
- 23.2.2 If the parties cannot reach agreement on the terms and conditions of compensation (and, if applicable, remedy) within five (5) Business Days of the meeting referred to in clause 23.2.1, the non-defaulting party may by notice to the defaulting party, terminate this Deed with immediate effect; and
- 23.2.3 If the terms and conditions of compensation (and, if applicable, a remedy) are agreed by the parties pursuant to clause 23.2.1 and the defaulting party fails to comply with those terms and conditions, the non-defaulting party may by notice to the defaulting party terminate this Deed with immediate effect.
- 23.3 **Acknowledgement:** Valetta acknowledges that it will not act maliciously or capriciously in exercising any termination right it may have under this Deed.

24 Indemnity

- 24.1 **Indemnity by CanPower:** Without limiting any other rights of Valetta under this Deed, CanPower shall indemnify and keep indemnified Valetta, RDRML and the Farmers and their employees, agents, contractors against all Losses which they may at any time incur or sustain, in connection with, or arising in any way from, directly or indirectly:

GB AM JLS RD

- 24.1.1 Any breach or non-compliance with this Deed by CanPower; or
- 24.1.2 Any aspect of the Fundamental Principles being infringed by CanPower; or
- 24.1.3 The operation or maintenance of the Hydro Works or any other aspect of the Hydro Works by CanPower or anyone acting under CanPower's authority; or
- 24.1.4 The occupation of the Land by CanPower; or
- 24.1.5 The use of the Easements by CanPower; or
- 24.1.6 The ongoing operation of the Hydro Works by CanPower; or
- 24.1.7 Notwithstanding clause 25.3, any direct loss or damage suffered by RDRML for which Valetta is liable to RDRML for in circumstances where such loss or damage is as a direct result of a default by CanPower.

If any action, claim or proceedings is or are taken by any person against Valetta and the Farmers and their employees, agents, contractors, arising out of any breach of this Deed by CanPower, CanPower shall at Valetta's request and at the expense of CanPower, provide any and all reasonable assistance in resisting, defending or settling such action, claim or proceedings.

24.2 **Indemnity by Valetta:** Without limiting any other rights of CanPower under this Deed, Valetta shall indemnify and keep indemnified CanPower, and their employees, agents, contractors against all Losses which they may at any time incur or sustain, in connection with, or arising in any way from, directly or indirectly:

- 24.2.1 Any breach or non-compliance with this Deed by Valetta; or
- 24.2.2 Any aspect of the Fundamental Principles being infringed by Valetta; or
- 24.2.3 Any inability of CanPower (or anyone acting under CanPower's authority) to:
 - 24.2.3.1 operate or maintain the Hydro Works or any other aspect of the Hydro Works; or
 - 24.2.3.2 occupy the Land; or
 - 24.2.3.3 use the Easements

that is due directly to the default of Valetta, or the Farmers; or

24.2.4 Notwithstanding clause 25.8, any direct loss or damage suffered by RDRML for which CanPower is liable to RDRML for in circumstances where such loss or damage is as a direct result of a default by Valetta.

If any action, claim or proceedings is or are taken by any person against CanPower, Bosch or their employees, agents, contractors, arising out of any breach of this Deed by Valetta, Valetta shall at CanPower's request and at the expense of Valetta, provide any and all reasonable assistance in resisting, defending or settling such action, claim or proceedings.

GB AM JG AB

- 24.3 **Benefit:** The benefit of clause 24.2 shall extend to Bosch and the directors, officers, employees and agents of CanPower and Bosch.
- 24.4 **Benefit:** The benefit of clause 24.1 shall extend to RDRML and the Farmers and the directors, officers, employees and agents of Valetta, RDRML and the Farmers.

25 Limitation of liability

- 25.1 **No duty of care by Valetta:** Other than as expressly provided for in this Deed or in the case of Valetta's, RDRML's or the Farmers gross negligence or wilful default, Valetta, RDRML and the Farmers shall not have any 'duty of care' to CanPower nor shall either Valetta or RDRML be liable to CanPower for any event or circumstance that may impact upon the Hydro Works, including without limitation:
- 25.1.1 A failure of any of RDRML or Valetta's civil or mechanical structures;
 - 25.1.2 Valetta's normal operation and maintenance of the Scheme;
 - 25.1.3 Any suspension of use of the Scheme, pursuant to clause 19.2; or
 - 25.1.4 Any suspension of operation of the Scheme in connection with a Force Majeure Event or where Valetta reasonably considers such suspension is required to avoid breaching any applicable law; or
 - 25.1.5 Any interruptions to access pursuant to clause 3.6.
- 25.2 **Limitation of Valetta's Liability:** Valetta, RDRML and/or the Farmers shall not be liable to CanPower for any Losses which may be sustained or incurred by CanPower unless such Losses were due to Valetta's breach of this Deed arising from Valetta, RDRML or the Farmers gross negligence or wilful default, in which case Valetta's liability shall be limited as set out in clauses 25.3 and 25.4.
- 25.3 **Consequential loss by CanPower:** Other than as expressly provided for in this Deed, neither Valetta, RDRML nor the Farmers nor any of their directors, officers, employees or agents shall in any circumstances whatsoever be liable, in contract or tort (including for negligence), for:
- 25.3.1 Any indirect loss, consequential loss, loss of profit, loss of revenue, loss of use, loss of contract or loss of goodwill; or
 - 25.3.2 Any loss resulting from the liability of CanPower to any person.
- 25.4 **Further limitation on Valetta's liability:** Any claims for Losses arising from breach of this Deed by Valetta must be lodged with Valetta within six (6) months of an event's occurrence. Other than as expressly provided for in this Deed, the maximum total liability of Valetta to CanPower under this Deed in respect of all events or circumstances of a breach occurring during the term of this Deed shall not exceed [*\$ limitation of liability*]. A series of breaches arising from the same event or circumstance shall be accepted by Canpower as being a single event or circumstance of breach.

GB AM JG RD

- 25.5 **Benefit for RDML etc:** The benefit of clauses 25.1 to 25.4 shall extend to RDRML and the Farmers and the directors, officers, employees and agents of Valetta, RDRML and the Farmers.
- 25.6 **No duty of care by CanPower:** Other than as expressly provided for in this Deed or in the case of CanPower's gross negligence or wilful default, CanPower, shall not have any 'duty of care' to Valetta nor shall CanPower be liable to Valetta for any event or circumstance that may impact upon the Hydro Works, including without limitation:
- 25.6.1 A failure of the the Scheme or the Hydro Works;
- 25.6.2 CanPower's normal operation and maintenance of the Hydro Works;
- 25.6.3 Any suspension of operation of the Scheme or the Hydro Works in connection with a Force Majeure Event or where CanPower reasonably considers such suspension is required to avoid breaching any applicable law.
- 25.7 **Limitation of CanPower's Liability:** Other than as expressly provided for in this Deed, CanPower shall not be liable to Valetta for any Losses which may be sustained or incurred by Valetta unless such Losses were due to CanPower's breach of this Deed arising from CanPower gross negligence or wilful default, in which case CanPower's liability shall be limited as set out in clauses 25.8 and 25.9.
- 25.8 **Consequential loss by Valetta:** Other than as expressly provided for in this Deed, neither CanPower nor any of their directors, officers, employees or agents shall in any circumstances whatsoever be liable, in contract or tort (including for negligence), for:
- 25.8.1 Any indirect loss, consequential loss, loss of profit, loss of revenue, loss of use, loss of contract or loss of goodwill; or
- 25.8.2 Any loss resulting from the liability of Valetta to any person.
- 25.9 **Further limitation on CanPower's liability:** Any claims for Losses arising from breach of this Deed by CanPower must be lodged with CanPower within six (6) months of an event's occurrence. Other than as expressly provided for in this Deed, the maximum total liability of CanPower to Valetta under this Deed in respect of all events or circumstances of a breach occurring during the term of this Deed shall not exceed [*\$ limitation of liability*]. A series of breaches arising from the same event or circumstance shall be accepted by Valetta as being a single event or circumstance of breach.
- 25.10 **Benefit for Bosch:** The benefit of clauses 25.6 to 25.9 shall extend to Bosch and the directors, officers, employees and agents of CanPower and Bosch.
- 26 Assignment**
-
- 26.1 **Binding agreement:** This Deed is binding on, and is for the benefit of, the parties and their respective successors, permitted assigns and transferees.
- 26.2 **No assignment by CanPower:** CanPower may not assign nor transfer any of their rights or obligations under this Deed without the prior written consent of Valetta which consent shall not be unreasonably withheld.

CB AM JH 10

26.3 **Assignment by Valetta:** Valetta may assign or transfer this Deed to any person who may acquire the Scheme.

27 No partnership or agency

27.1 **No partnership:** Nothing in this Deed (or any of the arrangements contemplated hereby) shall be deemed to constitute a partnership between the parties nor, save any may be expressly set out herein, constitute either party the agent of the other party for any purpose.

27.2 **No Agency or Authority:** No party shall have any authority or power to bind, commit, act for, or represent or hold itself out as having authority to act as agent for, or in any way bind or commit or act for, the other party.

28 Notices

28.1 **Form:** Any notice, election, consent, approval, determination, waiver or other communication to be given under this Deed must be in writing addressed to the recipient at the address or facsimile number from time to time notified by that party in writing to the other party. Until a change is so notified, the address or facsimile number of each party are those set out under the name of that party below:

Valetta
 Leech & Partners Ltd
 248 East Street
 PO Box 180
 ASHBURTON

Facsimile: 03 308 1203
 Attention: Neil Donaldson

CanPower
 PKF Goldsmith Fox
 Level 1, 250 Oxford Terrace
 Charles Luney House
 P O Box 13-141
 CHRISTCHURCH 8141

Facsimile: 03 366 0265
 Attention: Trevor Bayliss

28.2 **Delivery:** Delivery may be effected by hand or by facsimile. A notice or other communication will be deemed to have been received:

28.2.1 In the case of hand delivery, at the time of actual delivery to the recipient's address; and

28.2.2 In the case of delivery by facsimile, at the time of transmission specified in a transmission report from the sending machine which indicates that the facsimile was sent in its entirety to the facsimile number of the recipient.

28.2.3 If a notice or other communication is received or deemed to have been received after 5 pm on a Business Day, or on a day which is not a Business Day in that

CB AM

MS 1/00

place, it will be deemed not to have been received until 9 am on the next Business Day in that place.

29 Power of attorney

- 29.1 For the purpose only of better securing the performance of CanPower's obligations in clauses 7.3.2, 9.12 and 15.2, CanPower irrevocably appoints Valetta (and any duly authorised officer or attorney of Valetta severally) to be CanPower's attorney ('Attorney') (with full power to appoint a substitute and sub-delegate). The Attorney may (subject to CanPower having failed to do so on 14 days written notice, but otherwise without limitation):
- 29.1.1 Sign, execute, complete and deliver any and all deeds, documents, agreements and instruments; and
- 29.1.2 Do any and all acts or things as the Attorney, in the Attorney's absolute discretion, shall consider necessary or desirable,
- directly in connection with or directly for the purposes of meeting any of CanPower's obligations properly due under this Deed to transfer the Hydro Works and assets which comprise the Hydro Works including any Consents.
- 29.2 CanPower declares that no person or corporation dealing with the Attorney shall be concerned to see or enquire as to the propriety or expedience of any act or thing which may be done or effected by the Attorney in or about the exercise of the powers granted by this power of attorney.
- 29.3 CanPower ratifies and confirms and agrees to ratify and confirm each and every act or thing which may be properly done or effected by the Attorney in or about the exercise of the powers granted by this power of attorney.
- 29.4 CanPower shall indemnify the Attorney and keep the Attorney indemnified from and against any and all losses, claims, damages, costs, charges, expenses, liabilities, demands, proceedings and actions which the Attorney may sustain or incur as a result of or in connection with any act or things lawfully done by virtue of this power of attorney.
- ## 30 General
-
- 30.1 **Consequences of termination:** The termination of this Deed shall not affect a party's accrued rights or obligations at the date of termination. If this Deed is cancelled or expires, the following clauses shall survive such cancellation or expiry:
- 30.1.1 Clauses 2, 5, 7.3.2, 9.12, 15.2, 24, 25, 28, 29, 30.1, 30.10, 30.14 and 30.15; and
- 30.1.2 Those other provisions of this Deed which are incidental to and required in order to give effect to the clauses referred to in clause 30.1.1.
- 30.2 **Entire Agreement:** This Deed shall constitute the entire understanding and agreement of the parties relating to the matters specified herein and supersede and extinguish all earlier negotiations, representations, warranties, understandings and agreements, whether written or oral, between the parties relating to those matters.

GB AM 

- 30.3 **Further Assurance:** Each party to this Deed shall sign, execute and do all deeds, schedules, acts, documents and things as may reasonably be required by the other party to effectively carry out and give effect to the terms and intentions of this Deed.
- 30.4 **Delay and Waiver:** No delay, grant of time, release, compromise, forbearance (whether partial or otherwise) or other indulgence by one party in respect of any breach of any other party's obligations under this Deed is to:
- 30.4.1 Operate as a waiver of or prevent the subsequent enforcement of that obligation; or
- 30.4.2 Be deemed a delay, grant of time, release, compromise, forbearance (whether partial or otherwise) or other indulgence in respect of, or a waiver of, any subsequent or other breach.
- 30.5 **Invalidity and Severance:** If any of the provisions of this Deed is or becomes invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired. The parties shall nevertheless negotiate in good faith in order to agree the terms of a mutually satisfactory provision, achieving so nearly as possible the same commercial effect, to be substituted for the provision so found to be void or unenforceable.
- 30.6 **Costs:** Each party shall bear its own costs in relation to this Deed.
- 30.7 **Costs of enforcement:** The defaulting party under this Deed shall pay to the non-defaulting party upon demand any costs and expenses which the non-defaulting party incurs, sustains or becomes liable to pay in connection with the exercise or attempted exercise of its rights, powers or remedies under or in relation to this Deed including all reasonable expenses on a solicitor/client basis and including a fair allowance at the rate of \$??0 per hour for the time worked by an employee of the non-defaulting party in connection with the exercise or attempted exercise of any such rights powers or remedies.
- 30.8 **Amendment:** No amendment to or variation of this Deed will be effective unless it is in writing and signed by all parties.
- 30.9 **Two or more Counterparts:** This Deed may be executed in two or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.
- 30.10 **Announcements:** Neither party shall make any public announcement or statement purporting to represent the joint position of the parties, the other party's position, without the prior written consent of the other party. Each party is, however, free to make any announcements in respect of its own position. Nothing in this Deed shall prevent the disclosure of this Deed or its terms where such disclosure is required by law including any disclosure made in a prospectus or investment statement in accordance with the Securities Act 1978.
- 30.11 **Act in Good Faith:** The parties shall each act in good faith to perform their respective obligations under this Deed. CanPower acknowledges that Valetta will not be acting in bad faith should it not agree or consent to any matter pursuant to this Deed if it believes (in its absolute discretion) that such matter may detrimentally affect the Scheme or Valetta's Rights, or infringe or otherwise be inconsistent with any aspect of the Fundamental Principles, either presently or at some future time.

CB AM

J.S. MR

- 30.12 **Intellectual Property:** All intellectual property owned or developed by a party shall remain the property of that party.
- 30.13 **Third Parties:** This Deed gives rights to RDRML, the Farmers, Trust Power and the directors, officers, employees and agents of Valetta, and may be enforced by each of them under the Contracts (Privity) Act 1982 but otherwise shall not give any rights to any third party or impose on any party any obligations to any third party.
- 30.14 **New Zealand Law:** This Deed is to be governed by and construed in accordance with the laws of New Zealand.
- 30.15 **Submission to Jurisdiction:** Each of the parties irrevocably and unconditionally submits to the exclusive jurisdiction of the Courts of New Zealand, and the courts competent to determine appeals from those courts, with respect to any proceedings which may be brought at any time relating to this Deed.
- 30.16 **GST excluded:** All sum payable under this Deed are exclusive of GST. If GST is applicable to any sum payable under this Deed, GST shall be added to such sum, and shall be payable by the party that is obliged to pay such sum contemporaneously with payment of such sum.

31 Definitions and interpretation

- 31.1 **Definitions:** In this Deed, unless the context requires otherwise:

Application means an application for a Resource Consent in connection with this Deed;

Authority means the government, any department or agency of the government, any statutory or regulatory agency or authority, and any local government entity;

The Scheme shall mean Valetta's Irrigation Scheme all improvements and works used, or proposed to be used, for or in association with taking water from the RDR and supplying that water to the Farmers for irrigation and shall exclude the Hydro Works;

RDR means the Rangitata Diversion Race and;

Valetta's Rights means the rights held by Valetta in relation to the taking, use and supply of water as varied, added to, renewed and replaced from time to time;

Best Practice means the most effective, economical and safe methods and practices customarily used in activities similar to the activities being undertaken as part of the relevant operation and acknowledged to be best practice and that degree of diligence and prudence reasonably and ordinarily exercised by experienced operators engaged in a similar operation or activity under similar circumstances and conditions in New Zealand;

Business Day means a day on which registered banks are open for business in Christchurch, excluding Saturdays, Sundays and public holidays;

Consent means, in relation to any activity, any designation, plan change or variation, rule, approval, Resource Consent or other consent, licence, permit or other authorisation that the party undertaking, or proposing to undertake, the activity determines to obtain from any Authority in relation to that activity;

Consequential Loss means any indirect loss, consequential loss, loss of profit, loss of revenue, loss of use, loss of contract or loss of goodwill;

Day means a period of 24 hours commencing at midnight of the previous day;

GB AM JG RO

Default Notice has the meaning given in clause 23.1;

Farmers means the shareholders of Valetta, from time to time, who are supplied water from the Scheme;

Force Majeure Event means any event or circumstance, or combination of events and circumstances:

- (a) That causes or results in preventing or delaying a party from performing any of its obligations in this Deed; and
- (b) Which is beyond the reasonable control of that party and could not, or the effect of that event or circumstance, or that combination of events or circumstances, could not have been prevented or delayed, overcome or remedied by the exercise by the party of a standard of care and diligence consistent with Best Practice, which occurs after the date of this Deed and, provided that the event or circumstance or combination of events or circumstances meets the foregoing criteria, includes:
 - (a) An act of God;
 - (b) Strike or lockout, act of public enemy, war (whether declared or undeclared), blockade, revolution, riot, insurrection, malicious damage, or civil commotion;
 - (c) Lightning, landslide, cyclone, storm, flood, fire, earthquake, explosion, tidal wave, epidemic;
 - (d) Action, inaction, demand, restraint, restriction, requirement, prevention, frustration or hindrance by any Authority;
 - (e) Order of the Court;
 - (f) Embargo, unavailability or shortage of essential equipment, or other materials, goods, labour or services, lack of transportation or communication;
 - (g) Any breakage of equipment, machinery, lines or pipes, freezing, or delivery equipment, catering, washout subsidence or cave in; or
 - (h) Restraint on access to property.

Fundamental Default means a breach of any of clauses 2.1, 2.2, and any other matters that have a significant impact on Valetta's Rights;

Fundamental Default Notice has the meaning given in clause 23.2;

Fundamental Principles means the principles set out in clause 2.1;

Hydro Works means the works set out in **Schedule 5** ('the Hydro Works');

Hydro Section means that section of the Scheme between the 260 m contour and RDR turn out as set out on the diagram attached to **Schedule 4**;

Insurance Policies means the insurance policies referred to in clause 8;

Irrigation Season means the period of time starting at 00:00:01 on 10 September in any year and ending on 11:59:59 on 9 May of the following year;

Losses means all costs, losses, liabilities (including legal or other professional expenses on a full indemnity basis and GST and similar taxes), claims, demands, damages, fines and penalties;

GB AM 

Parties means any of the Parties to the Deed;

RDRML Resource Consents should mean those Resource Consents set out in Schedule 1;

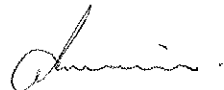
Valetta's Works means the works set out in Schedule 4.

31.2 **Interpretation:** In the construction of this Deed, unless the context requires otherwise:

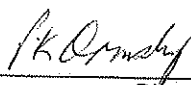
- (a) *Clauses:* reference to a Part, section, clause, sub-clause, Schedule or a party is a reference to that part, section, clause, sub-clause, schedule or party to this Deed unless stated otherwise;
- (b) *Headings:* headings appear as a matter of convenience and do not affect the construction of this Deed;
- (c) *Inclusion:* referring to anything after the word "including" does not limit what else might be included and any such reference is without limitation to what else might be included;
- (d) *Joint and several:* any covenant or Deed on the part of two or more persons shall bind those persons jointly and severally;
- (e) *Legislation:* a reference to any legislation or to any provision of any legislation (including regulations and orders) includes that legislation or provision as from time to time amended, re-enacted or substituted and any statutory instruments, regulations and orders issued under any such legislation or provision;
- (f) *Negative Obligations:* a reference to a prohibition against doing anything includes a reference to not permitting, suffering or causing that thing to be done;
- (g) *No Contra Proferentem Construction:* the rule of construction known as the contra proferentem rule does not apply to this Deed;
- (h) *Parties:* a reference to a party to this Deed or any other document includes that party's successors and permitted assigns;
- (i) *Person:* a reference to a person includes a corporation sole and also a body of persons, whether corporate or unincorporated;
- (j) *Related Terms:* where a word or expression is defined in this Deed other parts of speech and grammatical forms of that word or expression have corresponding meanings;
- (k) *Schedules:* the schedule to this Deed form part of this Deed; and
- (l) *Singular, plural and gender:* the singular includes the plural and vice versa, and words importing one gender include the other genders.

EXECUTED AS A DEED

Signed by VALETTA IRRIGATION LIMITED by
its Directors



Director



Director

Signed by CANPOWER LIMITED by its Directors



Director

Director

DRAFT

GB AM JLS 140

SCHEDULE 1

RDRML Resource Consents

SCHEDULE 2

Water Supply Agreement

SCHEDULE 3

Access points

SCHEDULE 4

Valetta's Works

SCHEDULE 5

Hydro Works

SCHEDULE 6

Insurance

SCHEDULE 7

Land for Hydro Works

SCHEDULE 8

Licence to occupy land

CB *AG* *AM/BC*