

BEFORE THE INDEPENDENT COMMISSIONERS

UNDER of the Resource Management Act 1991 ("**RMA**")

AND

IN THE MATTER of the Proposed Waimakariri District Plan
 ("**Proposed Plan**")

**HEARING STREAM 9A:
MEMORANDUM OF COUNSEL ON BEHALF OF KIWIRAIL HOLDINGS LIMITED**

8 APRIL 2024

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MAY IT PLEASE THE PANEL:

1. This memorandum relates to Hearing Stream 9A of the Proposed Plan.
2. KiwiRail filed corporate and planning evidence, which addressed the need for setbacks from the rail corridor in the Industrial Zones of the Waimakariri District,¹ and which accepted the Council Officer's recommendations of a 4 metre setback from the rail corridor in the Industrial Zones.
3. KiwiRail provided legal submissions and presented on the need for setbacks from the rail corridor at Hearing Stream 6 of the Proposed Plan on 10 October 2023 (which related to the Rural and Open Space Zones) and also provided evidence for Hearing Stream 9 (which related to the Commercial and Mixed Use Zones) in January 2024 which addressed the same issues as those in Hearing Stream 6.
4. As the same issues are being addressed in the current hearing stream, in the interests of efficiency and avoiding duplication, KiwiRail does not propose to appear at Hearing Stream 9A or to file separate legal submissions for Hearing Stream 9A and instead refers to its legal submissions filed for Hearing Stream 6 (**attached** to this memorandum).
5. However, KiwiRail does make the following brief submissions with respect to Hearing Stream 9A based on questions from the Panel in relation to Hearing Stream 9. KiwiRail would be happy to answer any further questions from the Panel.

Need for a rail safety setback

6. Fundamentally, the RMA based setback provision is sought to appropriately manage health and safety of communities and protect the ongoing operation of the national railway. As set out in Ms Grinlinton-Hancock's evidence, the rail corridor has a very different risk profile compared to other sites or land uses.²
7. Health and safety issues are clearly required to be addressed in plan-making under the RMA. Territorial authorities must prepare and change district plans in accordance with the provisions of Part 2 of the RMA. This includes

¹ Evidence of Michelle Grinlinton-Hancock and Evidence of Catherine Heppelthwaite both dated 28 March 2024.

² Evidence of Michelle Grinlinton-Hancock dated 28 March 2024 at [4.8].

changing district plans in accordance with the purpose of the RMA which provides for sustainable management of resources "in a way...which enables people and communities to provide for their social, economic, and cultural well-being, and for their health and safety...".

8. A District Plan framework which enables developments as permitted activities that cannot be built or maintained safely and lawfully adjacent to the rail corridor is not in accordance with the purpose of the RMA (to enable people and communities to provide for their social, economic, and cultural well-being and their health and safety). Such an approach breaches Council's obligations under s 74(1)(b) of the RMA.
9. The reference to KiwiRail's experience with the process to request permission to enter railway land in paragraph 4.11 of Ms Grinlinton-Hancock's evidence provides some real-world context to the health and safety effect that the setback standard seeks to address. In our submission, it would be a poor planning outcome if the options for landowners, who need to access their buildings for maintenance, is either to seek permission to encroach onto the rail corridor or trespass on the rail corridor.
10. The better planning outcome is to provide an adequate plan-based setback adjacent to the corridor to enable landowners to safely access their properties (and avoid significant safety risks).
11. There are many other examples of development being managed in an RMA context to ensure that safety effects can be addressed. One example is the Transpower national grid corridor overlay included in a range of district plans, which restricts activities within a specified spatial extent of its network. Airports and ports are also another common infrastructure type which seek to restrict activities on surrounding private land through RMA tools. We do not consider this novel and it is entirely consistent with the RMA framework. The High Court has affirmed the RMA and Property Law Act 2007 are different jurisdictions and have their own statutory objectives³, with the RMA's objective being to promote the concept of sustainable management (including health and safety) in Part 2 (rather than to have regard to private property rights).
12. Although KiwiRail generally seeks a 5 metre setback for new buildings, or alterations to existing ones, adjacent to the network, KiwiRail is willing to

³ *New Zealand Suncern Construction Limited v Auckland City Council* (1997) 3 ELRNZ 230.

accept a 4 metre setback for the Industrial Zones for the reasons provided in Ms Grinlinton-Hancock's evidence.⁴

Conclusion

13. KiwiRail continues to maintain its support of the Council Officer's recommendation of the inclusion of a 4 metre setback control as appropriate and necessary for the safe and efficient operation of the rail network in Waimakariri District.

DATED: 8 APRIL 2024



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Counsel for KiwiRail Holdings Limited

⁴ Evidence of Michelle Grinlinton-Hancock dated 28 March 2024 at [4.16].

Attachment 1

BEFORE THE INDEPENDENT COMMISSIONERS

IN THE MATTER

of the Resource Management Act 1991 ("**RMA**")

AND

IN THE MATTER

on the Proposed Waimakariri District Plan
 ("**Proposed Plan**")

**HEARING STREAM 6 - LEGAL SUBMISSIONS ON BEHALF OF
KIWIRAIL HOLDINGS LIMITED**

2 OCTOBER 2023

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1. BACKGROUND AND SUMMARY

- 1.1 KiwiRail is a State-Owned Enterprise responsible for the construction, maintenance and operation of New Zealand's rail network. KiwiRail is also a requiring authority under the RMA and holds railway purpose designations throughout New Zealand, including for the Main North Line ("**MNL**") which passes through the Waimakariri District.
- 1.2 KiwiRail's rail network is an asset of national and regional significance. The rail network is critical to the safe and efficient movement of freight and passengers throughout New Zealand and forms an essential part of the national transportation network and wider supply chain.
- 1.3 KiwiRail supports urban development around transport nodes and recognises the benefits of co-locating housing near transport corridors. However, such development must be planned with the safety and wellbeing of people and the success of the rail network in mind.
- 1.4 KiwiRail submitted on the Proposed Plan to ensure the safe and efficient operation of the rail network by ensuring that development near the rail corridor is appropriately managed to minimise adverse effects on the health, safety and amenity of adjoining landowners and effects on KiwiRail's operations.
- 1.5 KiwiRail's submission sought a 5 metre setback be included in the Proposed Plan for all new buildings and structures adjoining the rail corridor and associated matters of discretion. The Council's Reporting Planners recommended a 5 metre setback for the Natural Open Space and Open Space Zones and a 4 metre setback for the Rural Zones. This is acceptable to KiwiRail.
- 1.6 These setback controls directly address an important health and safety effect. They will have benefits for the users of the land adjoining the rail corridor as well as users of the rail corridor. There are also important efficiency benefits for rail operations, by mitigating against the risk of train services being interrupted by unauthorised persons or objects entering the rail corridor. They are not the same as yard buffers or setbacks from other properties, given there are significant and potentially severe consequences that can arise from encroachment into the rail corridor. With respect, there are obvious safety issues arising from people interfering with a rail corridor.

- 1.7 Setback controls do not blight the land – other uses are enabled in the safety buffer area and resource consent is able to be granted where safety matters are adequately addressed.
- 1.8 Such setback controls are not novel. They are in many district plans around the country and have been recently approved by the Environment Court in other districts across a range of zones.
- 1.9 The relief sought by KiwiRail (and accepted by the Reporting Planners) is the most appropriate way to achieve the sustainable management purpose of the RMA, protect the health and safety of residents within proximity to the rail corridor, and ensure the ongoing safe and efficient use of nationally significant infrastructure in the Waimakariri District.

2. SETBACKS

- 2.1 The boundary setback control sought by KiwiRail seeks to avoid health and safety issues caused by people entering the rail corridor because they do not have enough space on their own properties. A boundary setback requires a physical distance between a building and the property boundary with the railway corridor. Without a sufficient rail setback, people painting their buildings, removing graffiti, clearing gutters or doing works on their roof will need to enter the rail corridor.
- 2.2 The risks associated with conflict with the **rail corridor** are very different and have much more significant consequences than property used for residential or other uses.¹ Heavy freight trains run on the MNL through Waimakariri. If a person or object encroaches onto the rail corridor, there is a substantial risk of injury or death for the person entering the rail corridor. There are not the same risks or consequences for other adjoining land.
- 2.3 The purpose of a setback is to **prevent** people from being seriously or fatally injured from encroaching onto the rail corridor. It would be perverse for KiwiRail to have demonstrate injuries or deaths in order to support the inclusion of setback controls in the Proposed Plan.
- 2.4 The lack of a sufficient setback control also generates a range of effects on railway operations and KiwiRail workers, from the stopping of trains affecting freight schedules to creating a health and safety hazard for train operators and KiwiRail workers operating within the rail corridor.

¹ Statement of Evidence of Michelle Grinlinton-Hancock dated 25 September 2023 at [4.7].

- 2.5 Without a setback, landowners will need to seek permission to enter the operational rail corridor (or if they fail to obtain permission, to trespass) in order to undertake necessary building maintenance. This is a poor planning outcome. Clearly, a much better planning outcome is to ensure the Proposed Plan accommodates sufficient space for standard building maintenance activities within the property itself, in a safe and efficient way.
- 2.6 Encouraging people to seek permission to enter an operational freight corridor to maintain their buildings is not supported by KiwiRail. However, the reality is adjoining landowners often do not request KiwiRail's permission to enter the rail corridor to undertake such activities – they just do it. This is clearly a very poor outcome and one which poses a significant adverse health and safety risk. It also puts the responsibility on KiwiRail to prosecute for trespassing when the Proposed Plan should properly provide for such an important land use matter.
- 2.7 Activities that comply with the setback control would be permitted, while activities that do not comply would require resource consent as a restricted discretionary activity. KiwiRail has sought the inclusion of matters of discretion relating to setbacks to ensure the Proposed Plan provisions provide direction to Council planners when considering an application for a reduction in the setback distance.
- 2.8 The proposed setback controls do not create a "no build zone", but rather provide a reasonable and thoughtful approach to development immediately adjacent to (eg within 4 to 5 metres of) the rail corridor.

Setback distance

- 2.9 In its submission, KiwiRail sought a 5 metre setback from the rail corridor boundary in all zones adjoining the rail corridor. The Reporting Planner accepted a 5 metre setback for the Natural Open Space and Open Space Zones, but the Reporting Planner for the Rural Zones recommended a 4 metre setback.²
- 2.10 KiwiRail supports the Reporting Planner's sensible approach to ensure safety through the inclusion of a 5 metre setback in the Natural Open Space and Open Space Zones. In the context of the Rural Zones provisions, although KiwiRail maintains the position that 5 metres is appropriate, KiwiRail is willing

² Officer's Report: Whatitua Tākaro – Open Space and Recreation Zones at [266] and Officer's Report: Whatitua Taiwhenua – Rural Zones at [746].

to accept a 4 metre setback here given the context of the Rural Zones provisions.³

- 2.11 Ms Heppelthwaite also considers that the setback is the most efficient outcome from a planning perspective and sets out a section 32AA analysis in her evidence.⁴ The 5 metre setback proposed by KiwiRail protects people from the potential safety risks of developing near the railway corridor and allows for the continued safe and efficient operation of nationally significant infrastructure. Adopting the Reporting Planner's recommendations also enables the Council to comply with its obligations under section 74(1)(b) of the RMA to enable people and communities to provide for their social, economic, and cultural well-being and their health and safety.

DATED: 2 October 2023

A A Arthur-Young / K L Gunnell
Counsel for KiwiRail Holdings Limited

³ Statement of Evidence of Michelle Grinlinton-Hancock dated 25 September 2023 at [4.15].

⁴ Statement of Evidence of Catherine Heppelthwaite dated 25 September 2023 at [7.5] and Attachment A.