

BEFORE INDEPENDENT COMMISSIONERS

AT PALMERSTON NORTH

UNDER THE Resource Management Act 1991 (“Act”)

AND

IN THE MATTER of an application by Kiwirail Holdings Limited (“Kiwirail”) under section 168 of the Act for a Notice of Requirement for the Palmerston North Regional Freight Hub

MEMORANDUM OF COUNSEL FOR DR WHITTLE AND DR FOX

8 July 2021

Oceanlaw New Zealand
Level 2, Montgomery House
190 Trafalgar Street, PO Box 921
Nelson
Tel: 03 548 4136
Solicitor acting: Justine Inns
Email: justine@oceanlaw.co.nz

Counsel: Pherne Tancock
Harbour Chambers
Level 2, Solnet House
70 The Terrace, PO Box 10242
Wellington
Tel: (04) 499 2684
Email: pherne.tancock@legalchambers.co.nz

MAY IT PLEASE THE PANEL:

1. KiwiRail Holdings Ltd has submitted a Notice of Requirement (“**NoR**”) for a new designation in the Palmerston North City Council District Plan for a new freight hub on land between Palmerston North and Bunnythorpe. The two-week hearing is to commence on 9 August 2021.
2. This memorandum is provided by counsel for submitters Dr Jo Whittle and Dr Aaron Fox to raise a jurisdictional issue that may render it inappropriate for the Panel to continue down the current flight path towards a hearing on 9 August 2021.
3. The jurisdictional issue is whether KiwiRail’s approval as a requiring authority under section 167 of the Resource Management Act 1991 (the Act) covers the full scope of the freight hub for which a designation is proposed.
4. KiwiRail is a “network utility operator” because it is a person who “constructs, operates or proposes to construct or operate a road or railway line” (s 166 of the Act).
5. KiwiRail’s status as a requiring authority was conferred by the Minister in a *Gazette* notice issued on 14 March 2013. KiwiRail is only a requiring authority for the purpose of the particular network utility operation set out in the *Gazette* notice, and on the terms and conditions specified in the *Gazette* notice (s 167(3) of the Act).
6. The *Gazette* notice states that KiwiRail’s approval is “for its network utility operation being the construction, operation, maintenance, replacement, upgrading and improvement and extension of its railway line”. It follows that KiwiRail may therefore only use the designation process for those approved purposes, which broadly relate to the management of railway lines.

7. The scope of the designation proposed in the NoR for the freight hub appears to extend far beyond the purposes of management of railway lines. The NoR includes extensive provision of land for industrial use and warehousing development that is not connected to the management of railway lines, for example freight forwarding facilities and a container terminal.
8. Counsel has raised these concerns with KiwiRail and Palmerston North City Council's counsel in a letter dated 6 July 2021. A copy of this letter is attached to this memorandum. KiwiRail and the Council have been asked to explain the basis on which the activities proposed in the NoR are within the scope of KiwiRail's approval a requiring authority.
9. If KiwiRail and/or the Council are not able to provide a satisfactory explanation of the legal basis for the proposed NoR, then the Panel may wish to consider whether it is appropriate to proceed with a two week hearing in August. At the very least, the Panel should satisfy itself that there is jurisdiction to confirm the NoR. Parties should not be put through a lengthy hearing if the legality of the NoR is in question.
10. Dr Whittle and Dr Fox, and other submitters, will also consider other steps if there is no satisfactory explanation for the legality of the NoR.

8 July 2021



P D Tancock

Counsel for Dr Whittle and Dr Fox



5 July 2021

KiwiRail Holdings Ltd
c/- counsel Ms Alison Arthur-Young
Partner
Russell McVeagh
Auckland

By email: allison.arthur-young@russellmcveagh.com

Palmerston North City Council
C/- Mr Nicholas Jessen
Cooper Rapley
Palmerston North

By email: njessen@crlaw.co.nz

Dear Ms Arthur-Young and Mr Jessen

RE: KIWIRAIL HOLDINGS LIMITED – NOTICE OF REQUIREMENT TO CONSTRUCT & OPERATE A NEW INTERMODAL RAIL & FREIGHT HUB ON LAND BETWEEN PALMERSTON NORTH & BUNNYTHORPE (FREIGHT HUB)

1. We act for Dr Jo Whittle and Dr Aaron Fox, submitters on the above application. Our clients have sought advice on whether KiwiRail Holdings Limited's (KiwiRail's) Notice of Requirement ("NoR") for the Freighthub at Bunnythorpe is within the scope of KiwiRail's approval as a requiring authority under s 167 of the Resource Management Act 1991 and the Minister's *Gazette* Notice.
2. Our preliminary view is that KiwiRail's application for a Notice of Requirement for the proposed Freighthub is outside the scope of KiwiRail's approved scope as a requiring authority. This means that KiwiRail cannot lawfully seek a NoR for the Freighthub project to the extent that it has. The purpose of this letter is to set out the basis for this view, to put KiwiRail and the Council on notice of our clients' concerns, and to seek an explanation from your clients as to why they consider there is a lawful basis for the NoR.

KiwiRail's approval as a requiring authority

3. KiwiRail's approval as a requiring authority is limited to its activities in managing its railway lines.

4. The Minister granted KiwiRail's Requiring Authority status via the Resource Management (Approval of KiwiRail Holdings Limited as Requiring Authority) Notice 2013. The Gazette notice states:¹

Approval as a requiring authority – KiwiRail Holdings Limited is hereby approved as a requiring authority under section 167 of the Resource Management Act 1991, for its network utility operation being the construction, operation, maintenance, replacement, upgrading and improvement and extension of its railway line.

5. KiwiRail is only a requiring authority for the purposes of the particular network utility operation set out in the *Gazette* notice, and on the terms and conditions specified in the Notice.
6. The scope of KiwiRail's recognition as a network utility operator is also circumscribed by s 166 of the RMA, which narrowly defines "network utility operator" as, relevantly, a person who:
- (f) *constructs, operates or proposes to construct or operate a road or railway line.*
7. On this basis, the scope of KiwiRail's activities as a network utility operator is limited to the narrow functions of 'constructing, operating, or proposing to construct or operate a railway line,' the same language is used in the *Gazette* notice, with the addition of functions to maintain, replace and improve and extend its railway lines.
8. The narrow scope of KiwiRail's requiring authority status is supported by the definition of the term 'railway line' for the purposes of the 2013 *Gazette* Notice and the definition of "network utility operator" in s 166 RMA. The term "railway line" is narrowly defined in s 4 of the Railways Act 2005:

railway line—

- (a) *means a single rail or set of rails, having a gauge of 550 mm or greater between them, laid for the purposes of transporting people or goods by rail; and*
- (b) *includes—*
- (i) *sleepers, associated formation and ballast, tunnels, and bridges; and*
- (ii) *in relation to a single rail or set of rails that are laid on a road for the purposes of 1 or more light rail vehicles —*
- (A) *any area between the rails; and*
- (B) *the area that extends 500 mm outside the extremity of any light rail vehicle being used on that single rail or set of rails; and*
- (iii) *a set of rails, having a gauge of less than 550 mm between them, that is designated as a railway line in regulations made under [section 59\(l\)](#); and*
- (iv) *except as provided in subparagraph (ii), any area within 5 m of a single rail or within 5 m of a line drawn midway between a set of rails; but*
- (c) *excludes—*
- (i) *a railway line that is part of a railway used as an amusement device:*

¹ This is referred to in KiwiRail's NoR AEE at 2.1 and contained in Appendix 1.

- (ii) a railway line excluded by regulations made under [section 59\(m\)](#);
- (iii) a railway line that exclusively serves private cable cars.

9. The term “railway line” in the *Gazette* notice and the RMA must be interpreted consistently with the definition of ‘railway line’ in the Railways Act 2005, given that Act and the RMA are interfacing pieces of legislation.
10. Section 168(2) of the RMA restricts a requiring authority’s use of the designation process. A requiring authority “*for the purposes approved under s 167*”, may at any time give notice to a territorial authority of its requirement for a designation. Based on our reading of the RMA and 2013 Gazette Notice as set out above, KiwiRail’s power to require a designation is limited to ‘*the construction, operation, maintenance, replacement, upgrading and improvement and extension of its railway line*’ — that is, in a broad sense, the management of its railway lines.
11. There is no lawful basis for KiwiRail to extend its requiring authority status beyond the management of its railway lines. Section 168(2)(b) permits a narrow expansion for a notice of requirement to include land ‘*reasonably required for the safe and efficient functioning of the work.*’ This cannot broaden the scope of the *Gazette* notice or empower KiwiRail to issue a notice of requirement for “work” that is outside the scope of the management of its railway lines.
12. With that legal framework in mind, we turn to KiwiRail’s NoR for the Freighthub. The proposal encompasses a wide range of activities, which appear to exceed the scope of the approval in the *Gazette* notice. The NoR includes extensive provision of land for industrial use and warehousing development unconnected to the railway lines. For example, at first glance, the Container Terminal, Freight Forwarding Facilities, Log Handling, Operation and Administration Office Areas, Staff Facilities and Parking, Access Roads, Stormwater Management Areas with associated planting, Noise Management Areas, and other activities ancillary to the freight hub all appear to fall outside the scope of KiwiRail’s requiring authority power. In short, these activities are well outside what can legitimately be considered as the management of railway lines.
13. We can see no lawful basis in the *Gazette* notice or RMA for the broad scope of the requiring authority status that KiwiRail has assumed in its NoR. If that is correct, then the NoR is ultra vires and of no lawful effect.
14. While our narrow reading of the *Gazette* notice and RMA provisions may be inconvenient to KiwiRail, convenience cannot override the legal restrictions that Parliament has imposed on how requiring authorities can use the designations process. There is very good reason why Parliament has tightly restricted the power to issue requirements for designations, given that a NoR is a pre-requisite for the exercise of the draconian power to compulsorily acquire private land for public works. The terms on which these powers can be exercised are narrowly construed, and there must be a clear lawful basis for any action that has the potential to unlock the powers of compulsory acquisition. Those who have been vested with such powers must exercise them with caution.
15. This raises a serious question as to whether the Council, as the territorial authority to whom the notice of requirement was given, has acted properly in deciding to process the NoR and appoint a Panel to hear it. The Council cannot exercise these powers if the NoR is legally invalid.

Refusal to explain lawful basis for authority

16. Our clients are troubled by the refusal by KiwiRail to address and explain the lawful scope of the NoR.
17. We understand that the Council is aware of the potential scope issue with the NoR. Council officer Mr Murphy wrote to KiwiRail's General Manager of Investment and Capital Transactions on 30 April 2020 raising this issue:

You have also mentioned in the past that you have a legal opinion that supports the use of the designation process for rail operations and supporting industrial development and warehousing space. In the interests of managing the risks posed by other landowners and stakeholders, would you consider sharing this legal opinion with PNCC at this time.

18. Our client Dr Fox wrote to KiwiRail requesting a copy of this opinion under the Official Information Act 1982. This request was declined on the basis of legal privilege. The response also noted that KiwiRail had declined to provide the legal opinion to Council on the same basis. This correspondence is **attached** to this letter.
19. The jurisdictional issue as to the scope of KiwiRail's authority has also been raised by a number of submitters. The Council Officer's s 42A Report noted this was a 'legal issue' that would be addressed at the hearing.
20. This appears to show that KiwiRail is aware of an issue with the overbroad scope of the NoR and that the Council may not be able to satisfy itself that the NoR is within the scope of KiwiRail's powers as a requiring authority. The Council should have satisfied itself that there was jurisdiction to issue the designation prior to accepting and processing the requiring authority's NoR.
21. Furthermore, we note that KiwiRail's power of compulsory acquisition under s 186 RMA and subsequent exercise under Part 2 Public Works Act power to acquire properties depends on the NoR being valid and within scope of KiwiRail's power as a requiring authority and that those with legal powers are exercising them in the constrained manner required by the RMA.

Confirmation as to legal basis for NoR is sought

22. The fundamental jurisdictional issue of whether KiwiRail's NoR was lawfully issued must be determined in advance of the Panel's hearing, currently scheduled for August.
23. In the event that KiwiRail is seeking a designation for activities that exceed its requiring authority power, then the Council should not be processing the NoR. The Council and its Hearing Panel does not have jurisdiction to evaluate a NoR that exceeds the scope of KiwiRail's requiring authority status.
24. In order to avoid the Council and the affected Bunnythorpe community being put to the stress, effort and expense of a hearing on a NoR that appears to be unlawful, it is in our view only reasonable that KiwiRail responds to the matters raised in this letter and sets out the legal basis upon which it claims that the activities proposed in the NoR are within scope of its status as a network utility operator and power as a requiring authority.

25. Equally, the Council should provide the basis on which it considers that the activities proposed in the NoR are within the scope of KiwiRail's approval, and the analysis that it has undertaken to satisfy itself that it should be processing the NoR and convening a hearing.
26. The purpose of this letter is to put KiwiRail and the Council on notice as to these concerns, and to request that KiwiRail and the Council each provide a written response that sets out the basis for its view as to the validity of the NoR for the Freighthub. Our clients would be grateful for a response no later than 12 July 2021 in order to allow them to consider the response and whether any further steps are necessary before the Panel hearing.

Yours faithfully
OCEANLAW NEW ZEALAND



Justine Inns BA LLB
Partner

EMAIL: justine@oceanlaw.co.nz

Copy to:

Drs. Whittle & Fox
Ms. Pherne Tancock, Barrister, Harbour Chambers

30 April 2020

[REDACTED]
General Manager Investment and Capital Transactions
KiwiRail
Private Bag 92138
Auckland 1142
[REDACTED]

Dear [REDACTED]

Re: Proposed Central North Island Freight Hub: RMA 1991 Notice of Requirement

The proposed Central North Island Freight Hub (CNIFH) is a strategically significant project for Palmerston North and New Zealand. Consistent with the agreement between Palmerston North City Council (PNCC), KiwiRail and NZTA, I want to ensure PNCC is doing everything it can to support KiwiRail with the designation and subsequent development of the Freight Hub. Despite the recent challenges with Covid-19, I have appreciated the regular communication between you and your team on this project.

The designation of land in the Railway Road / Bunnythorpe area is consistent with the long term strategic planning undertaken by PNCC. This is best represented in the spatial plan titled "Our Integrated Plan". This location was identified given its co-location alongside the existing North East Industrial Zone, the Palmerston North Airport, easy connections to the proposed Regional Freight Ring Road and the limited amount of existing residential or rural-residential development in the area allowing 24-7 operations.

As communicated on a number of occasions, PNCC is keen to better understand KiwiRail's intentions and ability to integrate with surrounding land-uses, particularly the North East Industrial Zone and Palmerston North Airport, where a significant amount of freight and distribution activities are located and planned. In terms of the Notice of Requirement process, I anticipate that it will be important for KiwiRail to demonstrate how these freight and distribution activities could benefit from the project or work.

I am aware of KiwiRail's intention of providing warehousing space as part of the CNIFH proposal. I consider there may be some risk to the designation process if KiwiRail does not or cannot demonstrate how the broader project or work will integrate with and enhance surrounding freight and distribution activities and anticipated land uses in the North East Industrial Zone. Presumably the potential benefits of the Railway Road / Bunnythorpe area extend beyond just co-location and could achieve a fully integrated multi-modal freight hub. As you are aware, local landowners and stakeholders in the area are asking these questions of PNCC which means they are likely to be raised during the submission process, unless adequately addressed beforehand.

During our most recent video-conference, my impression was that KiwiRail accepted the need to plan for a well-connected road network, but had not necessarily considered or identified how freight could move efficiently and effectively between the North East Industrial Zone, the Palmerston North Airport and the proposed CNIFH.

At this stage PNCC has not sought its own freight hub planning, design and engineering expertise to look at how this integration could occur. Is this something you anticipate Stantec investigating on your behalf prior to lodgement of the Notice of Requirement? PNCC has commissioned Ray Mudgway of RMC2 to speak to key freight and distribution operators to help build a logistics strategy for Palmerston North. This process is

likely to improve our understanding of the challenges and opportunities that exist to achieve a fully integrated multi-modal freight hub.

Consistent with the intent of our agreement, PNCC are keen to explore these matters further with you prior to the lodgement of the Notice of Requirement to ensure we are adequately managing key risks and opportunities.

I understand that there may be unique parts of your proposal that we do not have a complete picture of at this stage that may alleviate the potential risks identified. I would welcome any further elaboration or correction if you consider we are misunderstanding the situation. You have also mentioned in the past that you have a legal opinion that supports the use of the designation process for rail operations and supporting industrial development and warehousing space. In the interests of managing the risks posed by other landowners and stakeholders, would you consider sharing this legal opinion with PNCC at this time?

I look forward to continuing to work with you and your team to ensure we process the Notice of Requirement in a timely manner. I also look forward to collaborating with KiwiRail on other workstreams such as Government advocacy to secure long term funding for the development of the CNIFH.

Ngā mihi

A handwritten signature in black ink, appearing to be 'DRA' followed by a stylized flourish.

Annie Martin | Ocean Law

From: Annie Martin | Ocean Law on behalf of Justine Inns
Sent: Monday, 5 July 2021 5:26 PM
To: Annie Martin | Ocean Law

----- Original Message -----

From: Dave Allard <Dave.Allard@kiwirail.co.nz>
To: "aaron.fox@xtra.co.nz" <aaron.fox@xtra.co.nz>
Date: 28 May 2021 at 16:59
Subject: RE: KiwiRail freight hub proposal

Good afternoon Dr Fox

I am responding on behalf of KiwiRail on your recent request for the *legal opinion obtained by KiwiRail, and mentioned by David Murphy in his letter to you dated 30 April 2020.*

We have considered your request under the Official Information Act, and will be declining to provide the document requested under section 9(2)(h) – Legal privilege.

Please note, as fyi, we did not provide the opinion in question to the Palmerston North City Council either to maintain legal professional privilege.

As this decision has been made under the OIA, you have the right to seek an investigation and review by the Ombudsman of this decision. Information about how to make a complaint is available at www.ombudsman.parliament.nz or freephone 0800 802 602.

Any questions, please feel free to get in touch.

Kind regards

Dave

Dave Allard / Government Relations Advisor

DDI: +64 4 498 3218

Level 4, Wellington Railway Station, Bunny Street, Wellington 6011 | PO Box 593, Wellington 6140, New Zealand



www.kiwirail.co.nz

From: Aaron Fox <aaron.fox@xtra.co.nz>
Sent: Thursday, 20 May 2021 10:14 am
To: Olivia Poulsen <Olivia.Poulsen@kiwirail.co.nz>
Cc: Greg Miller <Greg.Miller@kiwirail.co.nz>
Subject: RE: KiwiRail freight hub proposal

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Dear Ms Poulsen

I am happy to have had the opportunity to convey to both Mr Miller and yourself my ongoing concerns with the freight hub project. If you have taken the time to consider my concerns, then I do not feel that a meeting next month is necessary, but I thank you sincerely for the opportunity.

I am, however, interested in the legal opinion obtained by KiwiRail, and mentioned by David Murphy in his letter to you dated 30 April 2020 (attached - released to me with redactions by the Palmerston North City Council yesterday). Mr Murphy expresses his interest in 'a legal opinion that supports the use of the designation process for rail operations and supporting industrial development and warehousing space'.

I therefore request a copy of KiwiRail's legal opinion, as specified by Mr Murphy, pursuant to the Official Information Act 1982.

Yours sincerely

Aaron Fox (Dr)

10 Kairanga-Bunnythorpe Road

Bunnythorpe

RD8

Palmerston North 4478