

KIWIRAIL HOLDINGS LIMITED
(KiwiRail)

CHRISTCHURCH CITY COUNCIL
(Grantee)

AGREEMENT TO GRANT PUBLIC LEVEL CROSSING
AT SCRUTTONS ROAD

New Level Crossing Agreement

GRANT NUMBER G91679/1

KiwiRail 

AGREEMENT dated 16 December 2022

BETWEEN

KIWIRAIL HOLDINGS LIMITED ("KiwiRail")

AND

CHRISTCHURCH CITY COUNCIL ("Grantee")

BACKGROUND

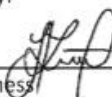
- A. The New Zealand Railways Corporation is a statutory corporation established under the New Zealand Railways Corporation Act 1981 ("NZRC Act"). KiwiRail is the Access Provider under the Railways Act 2005 ("Railways Act") for the Rail Network and is authorised by the Railways Act and the NZRC Act to enter into agreements with third parties for level crossings on the Rail Network.
- B. The Grantee is a road controlling authority under the Land Transport Act 1998 and administers the Local Road Network which crosses the Rail Network at the Level Crossing.
- C. The parties enter into this Agreement to record the terms on which the Grantee's Scruttons Road and Pathway has the right to cross the Rail Network at grade at the Level Crossing.

EXECUTED AS AN AGREEMENT

SIGNED by KIWIRAIL HOLDINGS LIMITED by:


Authorised Signatory

and witnessed by:


Signature of witness

Jennifer Forret
Name of witness

SIGNED by CHRISTCHURCH CITY COUNCIL as Grantee by:


Authorised Signatory

and witnessed by:


Signature of witness

Raymond Orr
Name of witness

Angus Smith
Property Consultancy Manager
Under delegated authority for
the Christchurch City Council

**SCHEDULE 1
REFERENCE SCHEDULE**

ITEM 1	Commencement Date:	1 November 2022
ITEM 2	Land:	The railway land located between the two red lines at Scruttons Road, 5.2km on the Main South Railway Line, as is identified on the attached plan.
ITEM 3	Grant Area	Means that part(s) of the Land shown in yellow outline on the attached plan.
ITEM 4	Grant Fee:	\$1 plus GST per annum, if demanded.
ITEM 5	Minimum Public Risk Cover:	\$10,000,000.00 or such reasonable amount as required from time to time by KiwiRail.
ITEM 6	Default Rate:	12 % pa.
ITEM 7	Term:	12 months and thereafter rolling further terms of 12 months, each commencing on the anniversary of the Commencement Date.
ITEM 8	Purpose:	The use of the Grant Area for a public Vehicular and/or Pedestrian Level Crossing at Scruttons Road to enable the public to pass and repass the Railway Line when it is clear of trains or other rail vehicles.

SPECIAL CONDITIONS

A Permit to Enter must be obtained and a Service Locate must be undertaken prior to any construction or works being conducted in the rail corridor.

The Grantee is not to do any maintenance work within 5 metres of the track centre.

The correct signage must be displayed for this Public Level Crossing; this information can be obtained from the area office.

Any work that needs to be undertaken within 5 metres from the track centre must be undertaken by KiwiRail or their contractors and any costs incurred will be passed onto the Grantee.

Annual inspection fees are to be recovered on a cost recovery basis. This will confirm any maintenance obligations for the user.

SCHEDULE 2

OPERATIVE PROVISIONS

1. INTERPRETATION

1.1 **Definitions:** In this Agreement unless the context indicates otherwise:

"**Access Provider**", "**Railway**", "**Railway Infrastructure**", and "**Railway Line**" means the definition given to those terms in the Railways Act 2005;

"**Authority**" means and includes every governmental, local, territorial and statutory authority having jurisdiction or authority over the Rail Network, the Grant Area or any part of it, or its use;

"**Building Act**" means the Building Act 2004;

"**Crown**" means Her Majesty the Queen in Right and New Zealand acting by and through her Ministers of Finance and State Owned Enterprises;

"**Grantee**" means the Grantee, its successors and permitted assigns, together with the Grantee's servants, agents, employees, workers, invitees and contractors with or without vehicles, machinery or equipment;

"**Grantee's Property**" means all equipment, chattels and fixtures and fittings installed by the Grantee in or on the Grant Area or the Land;

"**Grantee's Works**" means any works, approved by KiwiRail, that the Grantee wants erected or constructed on or within the Grant Area, such works being necessary for the Purpose and not inconsistent with the use of the Land as part of the Rail Network;

"**GST**" means tax levied under the Goods and Services Tax Act 1985 and includes any tax levied in substitution for that tax;

"**KiwiRail**" means KiwiRail Holdings Limited and includes KiwiRail's successors and assigns;

"**Level Crossing**" means that part of the Land comprising the Grant Area as is formed and used as an at grade level crossing over the Rail Network, together with all associated culverts, drainage channels, security gates, safety features, lighting, signage and landscaping;

"**Permit to Enter**" means an access permit granted pursuant to Section 75 of the Railways Act 2005;

"**Rail Network**" means the network of Railway Lines owned and managed by KiwiRail;

"**Resource Management Act**" means the Resource Management Act 1991;

"**Service Locate**" means the identification and marking of any underground services (whether operated by KiwiRail or any other person) prior to the commencement of any excavation that is undertaken as part of the Grantee's Works;

"**Structure**" means any structure constructed or erected on or within the Grant Area pursuant to the Grantee's Works including any supports incidental to such structure; and

"**Working Day**" means any day of the year other than Saturdays, Sundays, the provincial anniversary in Auckland, Wellington and where the Level Crossing is situated, Waitangi Day, Good Friday, Easter

Monday, Anzac Day, the Sovereign's birthday, Labour Day and any day in the period commencing 24 December and ending on 5 January the next year (both days' inclusive).

- 1.2 **Reference Schedule:** The terms "Commencement Date", "Land", "Grant Area", "Minimum Public Risk Cover", "Default Rate", "Term", and "Purpose" have the meaning given in the Reference Schedule.
- 1.3 **Definitions and Headings:** Expressions defined in the main body of this Agreement have the defined meaning in the whole of this Agreement, including the background. Headings are for ease of reference only and do not affect this Agreement's interpretation.
- 1.4 **Persons:** References to persons include references to individuals, companies, corporations, partnerships, firms, joint ventures, associations, trusts, organisations, governmental or other regulatory bodies or authorities or other entities in each case whether or not having separate legal personality.
- 1.5 **Statutes and Regulations:** References to a statute include references to regulations, orders, rules or notices made under that statute and references to a statute or regulation include references to all amendments to that statute or regulation whether by subsequent statute or otherwise.

2. RIGHTS

- 2.1 **Rights:** Pursuant to its rights and powers under the NZRC Act and as the Access Provider for the Rail Network under the Railways Act 2005, KiwiRail grants and the Grantee accepts the grant of the right to use the Grant Area and Level Crossing for the Purpose during the Term on the terms of this Agreement and the provisions of Section 35 of the NZRC Act, the Railways Act and in compliance with all other laws.
- 2.2 The parties also agree that this Agreement shall be a level crossing maintenance agreement for the purposes of Section 83 of the Railways Act.

3. TERM

- 3.1 The term of this Agreement shall commence on the Commencement Date and shall subject to clause 10 expire at midnight on the last day of the initial Term and such Agreement shall automatically renew in respect of the Grant Area for a further period of twelve months unless either party has given the other not less than twelve (12) months' written notice of termination. For the avoidance of doubt, in the event that a termination notice has been served but termination is not effective by the relevant renewal date, then the Agreement shall be renewed up until the termination date specified in the termination notice.

4. PAYMENTS

- 4.1 **Invoice:** KiwiRail shall issue an invoice for each amount payable to KiwiRail under this Agreement within 40 Working Days of completion of the relevant inspection, work or activity to which the invoice relates. Each invoice issued by KiwiRail shall be in the form of a valid tax invoice for GST purposes and shall be accompanied by information to enable the Grantee to verify the accuracy of the invoiced amount.
- 4.2 **Payment:** The Grantee shall pay the undisputed portion of an invoice by the 20th day of the month following the month of receipt of the valid invoice. Each undisputed invoiced amount to

be paid by the Grantee under this Agreement shall be paid to KiwiRail by direct bank payment or as KiwiRail may otherwise direct.

- 4.3 **Disputed invoice:** If the Grantee disputes the accuracy of any invoice, the Grantee may withhold payment of the portion disputed, provided that, within 10 Working Days following receipt of such invoice, the Grantee gives notice of that fact to KiwiRail. That notice shall state the basis of the dispute and provide the relevant supporting details necessary for KiwiRail to understand the nature and extent of the issue. Where the Grantee does not issue any notice within 10 Working Days, the Grantee shall be deemed to have confirmed the accuracy of the invoice.
- 4.4 **Default Interest:** Unless the Grantee has served notice to KiwiRail in accordance with clause 4.3, the Grantee shall pay interest at the Default Rate on any overdue accounts from the due date or the date of KiwiRail's demand if there is no due date until the date of payment.
- 4.5 **Responsibility for rates:** The Grantee shall be responsible for the payment of all rates, charges, duties, taxes and assessments, together with any GST which are or may be charged, levied assessed or imposed upon KiwiRail relating to the Grant Area, and KiwiRail shall be entitled to recover those sums from the Grantee where these are levied on KiwiRail as a result of or related in any way to this Agreement.

5. GRANTEE'S WORKS

- 5.1 **No Works in the Railway Corridor:** Notwithstanding the remaining provisions of this Agreement, no maintenance, repair, construction or building works may be undertaken by the Grantee within 5 metres of the centre of the Railway Line, without first obtaining from KiwiRail a Permit to Enter and in strict compliance with the terms of any Permit to Enter, and KiwiRail may in its absolute discretion:
- (a) approve the application for a Permit to Enter within a reasonable time frame on such terms as it sees fit, including as to KiwiRail supervision, train control and recovery of costs;
 - (b) approve the application for a Permit to Enter, but require the relevant work to be undertaken by KiwiRail or a contractor approved by KiwiRail with all costs to be borne by the Grantee; or
 - (c) decline approval.
- 5.2 **Construction:** The Grantee shall not proceed with construction or erection of the Grantee's Works, including any Structure, until and unless:
- (a) the Grantee has submitted to KiwiRail for its approval detailed plans and specifications of the Grantee's Works, including any Structure (including plans and specifications for any temporary Structure) which are duly certified by a suitably qualified engineer;
 - (b) a Service Locate has been undertaken;
 - (c) KiwiRail has provided written approval (such approval to be provided within a reasonable time and which may be subject to such conditions KiwiRail imposes) for such construction or erection of the Grantee's Works, including (where relevant):
 - (i) the plans and specifications referred to in clause 5.2(a);
 - (ii) the location of any Structure; and

- (iii) the required clearances from Railway Lines and other Railway Infrastructure;
 - (d) the Grantee has made payment to KiwiRail of KiwiRail's reasonable costs for appraising and approving such plans and specifications (for the avoidance of doubt, the approval and signing of this Agreement does not represent the approval to any plans or specifications submitted by the Grantee); and
 - (e) a Permit to Enter has been obtained from KiwiRail.
- 5.3 **Building Work:** In addition to the provisions of clause 5.2, the Grantee must:
- (a) not carry out any building work on the Land without first obtaining all building consents and resource consents required for that building work. If KiwiRail is as owner of the Land required to provide its consent to the relevant Authority to enable such building consent to be obtained, then such consent shall, if provided, be solely for the purposes of enabling the building consent to be obtained and shall not be taken as being approval pursuant to clause 5.2(a);
 - (b) carry out all building work strictly following the building code and the building consents issued for that work (including conditions of those consents), and only while the building consents are current;
 - (c) take all necessary steps to ensure that the Grantee's Works are carried out safely and do not disrupt rail services;
 - (d) carry out the Grantee's Works in strict compliance with the relevant Permit to Enter;
 - (e) comply immediately with all notices issued by any Authority (including, without limitation, KiwiRail) relating to the Grantee's Works ;
 - (f) obtain any required code compliance certificate(s) for the Grantee's Works immediately on completion of such work; and
 - (g) not do or allow anything to be done which would be a breach of any obligation or constitute an offence under the Building Act.
- 5.4 **Indemnity:** To the extent it is not limited from doing so by any laws of New Zealand, the Grantee indemnifies KiwiRail against all notices, calls, orders, liabilities, actions, claims, demands, losses, proceedings, damages, costs (including legal costs) and expenses of any kind imposing a liability on KiwiRail, suffered or incurred by KiwiRail, or for which KiwiRail is or may become liable arising from a breach by the Grantee or any person for whom the Grantee is responsible, of any obligations under the Building Act or the Resource Management Act.
- 5.5 **Responsibility:** Notwithstanding the provisions of clause 5.2, the Grantee acknowledges that the Grantee shall, unless otherwise agreed and always subject to the terms and conditions in the Permit to Enter, be solely responsible for the erection, construction and materials comprised in the Grantee's Works and for the design and safety of the Grantee's Works and any associated temporary works.
- 5.6 **Supervision of works:** Following satisfaction of the requirements in clause 5.2, the Grantee shall complete the Grantee's Works in accordance with the plans approved by KiwiRail at the Grantee's cost and to KiwiRail's satisfaction. KiwiRail shall be entitled to require that completion

of the Grantee's Works shall either in whole or part be supervised by KiwiRail's appointed railway personnel in which case, the reasonable costs of such supervision shall be paid by the Grantee.

- 5.7 **Variations to plans:** If the Grantee wishes to vary the plans approved by KiwiRail in accordance with clause 5.2, the Grantee shall submit to KiwiRail revised plans for approval ("**Revised Plans**"). KiwiRail shall advise the Grantee within 20 Working Days of receipt whether, the Revised Plans are approved, it requires further changes to be made to the Revised Plans, or the Revised Plans are rejected.
- 5.8 **No nuisance:** In the course of construction or maintenance of the Grantee's Works, the Grantee shall not unduly interfere with or obstruct any other lawful user of the Railway and shall carry out all work expeditiously and on completion of the work shall immediately restore the surface of any affected part of the Land as nearly as possible to its former state and condition at the Grantee's cost.
- 5.9 **KiwiRail not liable for damage:** The Grantee shall not hold KiwiRail liable for any accident or damage to the Grantee's Works howsoever caused (except where such damage is caused by a negligent act by KiwiRail) and must pay to KiwiRail the full cost of removing or making any alteration to the position of any part of the Grantee's Works necessitated by any alteration or addition to the Railway on the Land, including all infrastructure, structural and other features comprised in the current or future operations of the Railway.
- 5.10 **Grantee liable for damage:** The Grantee shall pay KiwiRail the full cost of repairing any damage which may occur directly or indirectly to the Railway, the Land or the Grant Area by the use of the Grant Area for the Purpose or caused as a result of any breakage, leakage or the existence or use of the Grantee's Works, including any Structure.
- 5.11 **Grantee's Works - Upgrade or Alterations to Level Crossing:** Where the Grantee wants to undertake Grantee's Works to upgrade or widen any existing road or footpath, or form any unformed road or footpath forming part of the Level Crossing within the Land or within 5 metres of the centre of the Railway Line, the Grantee must comply with the provisions of this clause 5. Where the Grantee proposes to undertake any upgrades or realignments which would result in any part of the Level Crossing extending outside of the Grant Area onto other KiwiRail owned Railway land, then the Grantee must obtain KiwiRail's prior written approval and a Permit to Enter in accordance with this clause 5. As a condition to its approval, KiwiRail shall have the right to require that:
- (a) this Agreement be terminated and a replacement agreement entered into by the parties on the terms and conditions of the then current KiwiRail and Road Controlling Authority standard form road over rail level crossing agreement for the upgraded, extended, realigned or repositioned crossing; and
 - (b) that all costs associated with such Grantee's Works will be paid for by the Grantee.

6. REPAIR AND MAINTENANCE

- 6.1 **Inspection and Maintenance:** KiwiRail will (at the Grantee's cost) conduct an annual inspection of the Grant Area and the Level Crossing. KiwiRail will (at the Grantee's cost) carry out repairs and maintenance to the Grantee's Property and the Grantee's Works that are on the Grant Area and shall (at the Grantee's cost) keep and maintain the Grant Area, the Grantee's Property and the Grantee's Works in and on the Grant Area in a good operating condition, including making good any damage however caused so as to ensure no loss, cost or damage shall be caused to or suffered by KiwiRail by the presence of the Grantee's Property and Grantee's Works on the Land.

- 6.2 **Supporting Infrastructure:** KiwiRail will (at the Grantee's cost) carry out all works, maintenance and repairs for forming, draining, metalling and sealing the carriageways and of forming, kerbing and channelling footpaths that are on the Grant Area and thereafter maintaining the same where such are located within 5 metres of the centre of the Railway Line at the Level Crossing.
- 6.3 **Approaches:** The Grantee will at the Grantee's cost carry out all works, maintenance, and repairs for forming, metalling and sealing and ensuring adequate drainage of the approaches to the Level Crossing outside of the Grant Area at all times in compliance with the NZTA Traffic Control Devices Manual – Part 9 Level Crossing Requirements or any updated or replacement manual or standard.
- 6.4 **Safety Infrastructure:** If at any time in order to facilitate or assist with the safe usage and operation of the Level Crossing and to ensure compliance with the NZTA Traffic Control Devices Manual – Part 9 Level Crossing Requirements or any updated or replacement manual or standard, KiwiRail considers it necessary or advisable, KiwiRail may direct the Grantee to provide gates, bells, signals or other safety appliances or, to move the Level Crossing to another site. The Grantee shall be responsible for all costs associated with the installations and/or moving the Level Crossing to another site specified by KiwiRail. If the Grantee fails to comply with its obligations under this clause 6.4 within 6 months of receiving notice of such requirement from KiwiRail, KiwiRail may terminate this Agreement in accordance with the provisions of clause 10.1.
- 6.5 **Signage:** The Grantee shall ensure that the correct signage is displayed at all times for this Level Crossing in compliance with the NZTA Traffic Control Devices Manual – Part 9 Level Crossings or any updated or replacement manual or standard. Information regarding these requirements can be obtained from the relevant KiwiRail area office.
- 6.6 **Fencing:** The Grantee will pay for the costs of fencing the Level Crossing (including fences to restrict public access over the Railway Line to the approved crossing location) to the entire satisfaction of KiwiRail.
- 6.7 **Sight Lines and Vegetation:** The Grantee will do all such works to the Grantee's land immediately adjacent to the Level Crossing as KiwiRail may require at the Grantee's cost to protect or improve the view of the Railway Line from the Level Crossing and to ensure such improved view is maintained at all times during the Term in compliance with the NZTA Traffic Control Devices Manual – Part 9 Level Crossing Requirements or any updated or replacement manual or standard.
- 6.8 **KiwiRail may undertake repairs:** KiwiRail may give notice in writing to the Grantee requiring the Grantee within a reasonable time to repair, maintain or clean the approaches for the Level Crossing that are outside of the Grant Area or to protect or improve the view of the Railway Line, in accordance with the Grantee's obligations under clauses 6.3 and 6.7 of this Agreement. If the Grantee fails to carry out any work or make good any damage in accordance with any such notice within the time specified, KiwiRail may at all reasonable times enter onto the approaches, and the Grantee's land, bringing all necessary equipment and materials and execute all or any of the required work or repairs as KiwiRail shall think fit.
- 6.9 **Recovery of Costs:** In addition to KiwiRail's other remedies, KiwiRail shall be entitled to recover from the Grantee all costs of such work or repairs pursuant to clause 6.8, the issue of the notice and all sums of money paid on account of any insurance or indemnities or otherwise with respect to such work or repairs, together with interest at the Default Rate.

6.10 **Notification of damage or risk:** The Grantee shall promptly notify KiwiRail of any matter observed by the Grantee in relation to the Land which may or is likely to cause risk to persons or property, including damage to the Level Crossing, the Grant Area or other improvements that form part of the Railway Infrastructure.

7. INSURANCE

7.1 **Public Risk Insurance:** The Grantee must take out and keep current at all times during the term of this Agreement a public liability insurance policy for a sum not less than the Minimum Public Risk Cover for any one claim or series of claims arising out of one event (such policy to treat KiwiRail property as third party property) specified in Schedule 1 or such greater amount as is required by KiwiRail from time to time.

7.2 **Disclosure to KiwiRail:** The Grantee will provide to KiwiRail promptly at the written request of KiwiRail details (including certificates of currency, schedules to policies, and policy wording) of all insurance effected by the Grantee from time to time as required under the terms of this Agreement and by all relevant legislation.

7.3 **Grantee not to Invalidate Insurance:** The Grantee agrees it shall not, by act or omission, invalidate or increase the cost of any insurance effected by KiwiRail for its own business assets and business operations from time to time.

8. ASSIGNMENT

8.1 **No assignment:** The Grantee acknowledges that the rights provided by this Agreement are personal to the Grantee and may not be assigned or transferred and the granting of the rights pursuant to this Agreement does not create a lease or an interest in land relating to the Land or otherwise confer on the Grantee any rights of exclusive possession.

9. SUITABILITY OF LAND

9.1 **Rail Use:** KiwiRail does not make any warranty or representation, express or implied, that the Land, or the Grant Area is or will remain suitable or adequate for the Purpose. All warranties as to suitability and adequacy implied by law are expressly excluded to the fullest extent permitted by law. The Grantee acknowledges that trains may pass without warning at any time during the day or night and use of the Grant Area (including all persons using the Grant Area pursuant to the Grantee's rights under this Agreement) shall be at the sole risk of the Grantee.

10. TERMINATION

10.1 **Termination for breach by Grantee:** If:

- (a) the Grantee fails to pay any undisputed money payable under this Agreement to KiwiRail for 15 Working Days after either the due date for payment, or the date of KiwiRail's demand (if there is no due date) and the Grantee has failed to remedy that breach within 15 Working Days;
- (b) the Grantee fails to perform or observe any of the Grantee's other obligations under this Agreement for a reasonable period of time taking into account the nature of the breach and the process required to remedy such breach; or
- (c) the Grantee assigns or attempts to assign the Grantee's rights under this Agreement, either in whole or part,

then KiwiRail may terminate this Agreement by notice in writing served on the Grantee either immediately or at any later time and no compensation shall be payable to the Grantee.

11. REMOVAL OF GRANTEE'S WORKS ON EXPIRY OR TERMINATION

11.1 **Removal on Expiry or Termination:** The Grantee must, if required by KiwiRail, remove all the Grantee's Works and the Grantee's Property (including any Structures), and repair any damage caused by that removal within 10 Working Days of the expiry of the term or termination of this Agreement.

11.2 **Failure to Comply:** If the Grantee fails to comply with clause 11.1 KiwiRail may remove the Grantee's Works (including any Structures) and the Grantee must pay to KiwiRail on demand all costs incurred by KiwiRail in doing so.

11.3 **Removal by Grantee:** Notwithstanding the provisions of clause 11.2, KiwiRail may choose not to remove the Grantee's Works and the Grantee's Property, and then the Grantee's Works and the Grantee's Property will become KiwiRail's property and KiwiRail will not have to pay the Grantee any compensation.

12. LIABILITY FOR BREACH

12.1 **Grantee's Liability:** Without limiting the scope of the indemnity provisions in clauses 5.5 and 12.2, the Grantee shall at all times be liable to KiwiRail for:

- (a) any accident or injury to any person or for damage to any property arising out of or caused or contributed to directly by the use or existence of the Structure or anything connected therewith or by any defect in the design, construction or maintenance of the Structure;
- (b) all actions, proceedings, calls, costs (including legal costs), expenses, claims, demands, damages, losses or liabilities of any kind suffered or incurred by KiwiRail as a result of:
 - (i) the act or neglect of the Grantee or of any person for whom the Grantee is responsible relating to the use of the Land (including any Structure forming part of the Grantee's Works on the Land) or the use or operation of any equipment installed in the Land;
 - (ii) the Grantee's breach of, or failure to comply with, the Grantee's obligations under this Agreement;
 - (iii) the Grantee's breach of, or failure to recognise, any third party's interests in the Land provided that details of those interests have been provided to the Grantee prior to the breach or failure; or
 - (iv) damage to the Land or improvements on the Land where the damage causes any third party having an interest in the Land or improvements thereon to suffer a loss, provided that details of those interests have been provided to the Grantee prior to the damage.

12.2 **Grantee's Indemnity if Applicable:** Further and without derogating from the Grantee's liability under clause 12.1, the Grantee indemnifies KiwiRail to the fullest extent permitted under the laws of New Zealand in respect of all events, matters, costs (including legal costs), expenses, actions, proceedings, claims, demands, damages, losses or liabilities of any kind that arise under clause 12.1.

- 12.3 **Payment by Grantee:** The Grantee must pay on demand all undisputed amounts owing to KiwiRail as a result of the Grantee's liabilities contained in clauses 12.1 and 12.2, together with interest on those amounts at the Default Rate calculated on a daily basis from the date KiwiRail incurs that liability until the Grantee pays the relevant amount.

13. GENERAL PROVISIONS

- 13.1 **Use of the Grant Area:** The Grantee shall use the Grant Area only for the Purpose and such use shall comply with the requirements of the Resource Management Act.
- 13.2 **Compliance with easements:** The Grantee shall perform and observe the obligations of KiwiRail in connection with any easement or third party interest of any kind in the Land from time to time affecting the Grant Area, provided that details of those easements or interests have been provided to the Grantee.
- 13.3 **Responsibility for Loss or Damage:** KiwiRail is not responsible for or liable to the Grantee for:
- (a) any loss or damage caused or sustained in any way to the Grant Area, the Level Crossing or the Grantee's Property; and
 - (b) the theft or loss of any of the Grantee's Property.

14. COSTS

- 14.1 **Costs:** The Grantee must pay KiwiRail's reasonable costs of preparing this Agreement and any variation and all costs, charges and expenses for which KiwiRail becomes liable (including legal costs) as a result of, or in connection with the Grantee's breach of this Agreement, together with any costs incurred regarding the consideration and approval of any proposals, including Permits to Enter, made to KiwiRail by the Grantee regarding any matter contemplated by this Agreement.

15. RESOLUTION OF DISPUTES

- 15.1 **Disputes:** If any dispute arises between the parties about:
- (a) the interpretation of this Agreement;
 - (b) anything contained in or arising out of this Agreement;
 - (c) the rights, liabilities or duties of KiwiRail or the Grantee; or
 - (d) anything else relating to the relationship of KiwiRail and the Grantee under this Agreement (including claims in tort as well as in contract);

the parties may refer that dispute to informal mediation, if both parties agree, having regard to the nature of the dispute or difference between them and the potential delays and costs which might arise if that matter is referred to arbitration.

- 15.2 **Appointment of Mediator:** The parties must try to agree on the mediator, who must be a senior solicitor or barrister practising in the district in which the Land is situated. If they cannot agree, the president or any vice-president of the New Zealand Law Society (or his or her nominee) will nominate the mediator on either party's application.

15.3 Arbitration: If:

- (a) the parties do not agree to refer the dispute to mediation under clause 15.1 within 10 Working Days of a party first notifying that dispute to the other party; or
- (b) the dispute remains unresolved after the date that is 30 Working Days of a party first notifying that dispute to the other party;

then either party may refer that dispute to the arbitration of a single arbitrator under the Arbitration Act 1996.

15.4 Arbitrator: The parties must try to agree on the arbitrator. If they cannot agree within 15 Working Days of the matter being referred to arbitration then the president or any vice-president for the time being of the New Zealand Law Society (or his or her nominee) will nominate the arbitrator on either party's application.

15.5 Action at Law: The parties must go to arbitration under this clause 15 before they can begin any action at law (other than an application for injunctive relief or debt collection).

16. MISCELLANEOUS

16.1 Service of Notices: Any notice or document required or authorised to be delivered or served under this Agreement shall be sufficient in writing sent to the other party at the address from the time to time specified by the other party in writing.

16.2 Time of Service: Any notice or other document will be treated as delivered or served and received by the other party, on personal delivery, three (3) Working Days after being posted by prepaid registered post or on completion of an error free transmission, when sent by email.

16.3 No waiver: No failure or delay on the part of a party in exercising any of its rights under this Agreement shall be construed as constituting a waiver of any such rights. A waiver of any breach of any provision of this Agreement shall not be effective unless that waiver is in writing and is signed by the party against whom that waiver is claimed. A waiver of any breach shall not be, or be deemed to be, a waiver of any other or subsequent breach.

16.4 Entire Agreement and variations: This Agreement is the entire agreement between the parties in respect of the Level Crossing and the Land and replaces in full any previous agreement, arrangement or understanding between the parties in respect of the Level Crossing and the Land. A variation to this Agreement will be binding only if it is in writing and signed by an authorised representative of each party.

17. FIBRE OPTIC CABLE

17.1 Cable located on Land: Vodafone New Zealand Limited ("**Vodafone**") and KiwiRail have certain ownership, access and other rights in respect of a fibre optic system ("**System**") located on land owned by KiwiRail by virtue of an agreement dated 28 September 1990 ("**Fibre Optic Cable Agreement**"). Where the System or any future extensions to the System are constructed on or under the Land, Vodafone's and KiwiRail's rights under the Fibre Optic Cable Agreement shall take precedence over the Grantee's rights under this Agreement to the extent of any conflict, and the Grantee acknowledges that this Agreement shall be subordinate to, and shall not derogate from, those rights.

17.2 Grantee's covenants in respect of the cable: The Grantee covenants and agrees:

- (a) not to interfere with or disturb the System;
- (b) not to do anything which might cause increased maintenance or operating expenses of the System, or reduce the System's efficacy;
- (c) to the extent permitted by law indemnify Vodafone and KiwiRail for any liability, claim, damage or loss arising out of installation maintenance or use by the Grantee of its facilities or interference with the use, operation or maintenance of the System or failure to comply with this clause of the Agreement;
- (d) to reimburse Vodafone and KiwiRail for the costs of any relocation which Vodafone or KiwiRail carries out to meet the Grantee's requirements;
- (e) that either Vodafone or KiwiRail shall be entitled to seek injunctive relief restraining any actual or threatened breach of this Agreement by the Grantee causing interference with or disturbance to the System; and
- (f) that for the purpose of Subpart 1 of the Contract and Commercial Law Act 2017, Vodafone and KiwiRail are each designated to benefit under this Agreement in respect of their respective rights under the Fibre Optic Cable Agreement.

17.3 **Limitation of access:** In respect of the two metre strip centred on the fibre optic cable of the System, the Grantee shall have no right of entry (except for normal use in passing over the strip (without obstructing it)) or excavation or subterranean activities, without notifying and obtaining the prior written consent of KiwiRail and Vodafone.

18. **THE GRANTEE ACTING AS TERRITORIAL AUTHORITY:** KiwiRail acknowledges that:

- (a) The Grantee, in its capacity as territorial authority, is required to carry out its statutory consent functions under the Resource Management Act, the Building Act in accordance with the provisions of those statutes.
- (b) The granting by the Grantee of any consent or approval by the Grantee as territorial authority under either of those Acts will not of itself be deemed to be a consent or approval by the Grantee (in its capacity as grantee) under this Agreement.
- (c) The Grantee is bound by statutory obligations to exercise its powers, including discretionary powers and duties under either of those Acts without regard to any relationship it may have with KiwiRail under this Agreement.
- (d) The Grantee will not be liable to KiwiRail or any other party if, in its regulatory capacity, the Grantee declines or imposes conditions on any consent or permission that KiwiRail or any other party seeks for any purpose associated with this Agreement.

