

**KIWIRAIL LIMITED
(Kiwirail)**

**[INSERT GRANTEE NAME]
(Grantee)**

**AGREEMENT TO GRANT RIGHT TO
[DESCRIPTION OF PURPOSE OF GRANT]**

GRANT NUMBER (INSERT NUMBER)



AGREEMENT dated

20[]

BETWEEN

KIWIRAIL LIMITED ("KiwiRail")

AND

[] ("**Grantee**")

BACKGROUND

- A.** NZRC is a statutory corporation established under the New Zealand Railways Corporation Act 1981 ("**NZRC Act**").
- B.** Pursuant to the NZRC Act, NZRC may grant interests, easements, privileges, or concessions in relation to railway land.
- C.** By the Core Lease, the Crown and NZRC granted to New Zealand Rail Limited a lease of certain land owned by the Crown or owned, held, used, or occupied by NZRC. KiwiRail is now the lessee under the Core Lease.
- D.** The Grantee has requested KiwiRail grant certain rights to the Grantee in respect of the Land as set out in Schedule 1 hereto.
- E.** The parties enter into this Agreement to record the terms on which the above will occur.

EXECUTED AS AN AGREEMENT

SIGNED by **KIWIRAIL LIMITED** as
Grantor by:

/ Authorised Signatory

and witnessed by:

Signature of witness

Name of witness

Occupation

City/town of residence

SCHEDULE 1

REFERENCE SCHEDULE

ITEM 1	Land:	The railway land between the two red lines at [Insert Station Name] as is identified on the plan attached at Schedule 3.
ITEM 2	Grant Area:	Means that part (or those parts) of the Land more particularly shown in yellow on the plan attached at Schedule 3.
ITEM 3	Initial Term:	[12 months.]
ITEM 4	Commencement Date:	[]
ITEM 5	Grant Fee:	[\$[] plus GST per annum, subject to review in accordance with clause 5.
ITEM 6	Grant Fee payment frequency:	Annually in advance.
ITEM 7	Review Dates:	Each anniversary of the Commencement Date, a fixed increase of 2% added to the Grant Fee payable immediately prior to the Review Date.
ITEM 8	Default Interest Rate:	5% above Bank of New Zealand prime overdraft rate.
ITEM 9	Minimum Public Risk Cover:	\$2,000,000.00 or such greater amount as required from time to time by KiwiRail.
ITEM 10	Purpose:	description of right being granted e.g
ITEM 11	Grantee's Works:	description of works to be carried out by Grantee

SPECIAL CONDITIONS

A Service Locate must be undertaken prior to any construction or works being conducted in the rail corridor.

A Permit to Enter must be obtained before any work is carried out on this site.

SCHEDULE 2

OPERATIVE PROVISIONS

1. INTERPRETATION

In this Agreement unless the context indicates otherwise:

1.1 Definitions:

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

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

"**Commencement Date**" means the date set out in Schedule 1;

"**Core Lease**" means the Memorandum of Lease dated 20 December 1991 entered into between the Crown and NZRC (as lessor), and New Zealand Rail Limited as lessee, as varied from time to time before the date of this Agreement;

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

"**Default Interest Rate**" means the rate set out in Schedule 1;

: "**Fixed Review Date**" means the fixed review dates set out in Schedule 1;

"**Grant Area**" means the area specified in Schedule 1 and shown on the plan attached at Schedule 3;

"**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, partitions and fixtures and fittings installed by the Grantee in the Grant Area;

"**Grantee's Works**" means the works to be erected or constructed by the Grantee on or within the Grant Area as described in Schedule 1, such works being necessary or desirable for the Grantee's use and enjoyment of the Grant Area for the Purpose;

"**Grant Fee**" means the amount set out in Schedule 1;

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

"**Initial Term**" means the initial term of this Agreement as set out in Schedule 1;

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

"**Land**" means all that land described in Schedule 1;

"Market Review Date" means the date set out in Schedule 1;

"NZRC" means the New Zealand Railways Corporation;

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

"Purpose" means the purposes for which the Grantee shall be entitled to use the Grant Area specified in Schedule 1;

"Railway Infrastructure" means the definition given to that term in the Railways Act 2005;

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

"Review Dates" means the dates set out in Schedule 1;

"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;

"Working Day" means any day of the year other than Saturdays, Sundays, the provincial anniversary as observed in Auckland, Wellington and the province where the Land 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 **Building Act:** The terms "building code", "building consent", "building work" and "code compliance certificate" have the meanings given to those terms in the Building Act.
- 1.3 **Defined Expressions:** Expressions defined in the main body of this Agreement have the defined meaning in the whole of this Agreement including the background.
- 1.4 **Headings:** Section, clause and other headings are for ease of reference only and do not form any part of the context or affect this agreement's interpretation.
- 1.5 **Negative Obligations:** Any obligation not to do anything includes an obligation not to suffer, permit or cause that thing to be done.
- 1.6 **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.
- 1.7 **Plural and Singular:** Singular words include the plural and vice versa.
- 1.8 **Sections and Clauses:** References to sections and clauses are references to this Agreement's sections and clauses.
- 1.9 **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.

- 1.10 **Implied Terms excluded:** To the fullest extent permitted by law the implied provisions of the Property Law Act 2007, Land Transfer Act 1952 and the Land Transfer Regulations 2002 are expressly excluded from this Agreement.

2. GRANT OF RIGHT

- 2.1 **Grant of Right for Term:** KiwiRail grants to the Grantee the right to use the Grant Area for the Purpose during the term, upon payment of the Grant Fee and subject to the terms, covenants, conditions herein contained or implied and the provisions of section 35 of the New Zealand Railways Corporation Act 1981, and the Railways Act 2005. The Grantee accepts those rights and covenants with KiwiRail to observe and perform the terms and stipulations set out in this Agreement.

3. TERM

- 3.1 The term of this Agreement shall commence on the Commencement Date and, subject to clauses 3.2 and 14, shall expire at the end of the Initial Term.

- 3.2 Subject to clause 14, at the end of the Initial Term the Agreement shall automatically renew in respect of the Grant Area for a further period of twelve months unless the Grantee has given to KiwiRail not less than three months' written notice notifying KiwiRail that the Grantee does not wish to renew the Agreement. The renewed agreement shall be on the same terms and conditions as this Agreement including this clause 3.2. For the avoidance of doubt, in the event that a termination notice has been validly served pursuant to either clause 14.1 or 14.3 of this Agreement 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. PAYMENT OF GRANT FEE

- 4.1 **Payment:** The Grantee must, during the term, pay the Grant Fee to KiwiRail in the frequency specified in Schedule 1 commencing with a first payment on the Commencement Date and thereafter as follows:

- (a) if the payment frequency is annually, then on each anniversary of the Commencement Date; or
- (b) if the payment frequency is monthly, then by way of equal monthly instalments on the 1st day of each and every month during the term,

and such payments shall be in full without any deduction or set-off. The Grant Fee and any other payments to be made under this Agreement shall be paid to KiwiRail by direct bank payment or as KiwiRail may direct.

- 4.2 **Default Interest:** If the Grantee fails to pay any instalment of the Grant Fee or any other money payable under this Agreement for 10 Working Days after the due date for payment or the date of KiwiRail's demand, if there is no due date, then the Grantee must pay on demand interest at the Default Interest Rate on the money unpaid from the due date or the date of KiwiRail's demand (as the case may be) down to the date of payment.

5. GRANT FEE REVIEWS

- 5.1 **Review of Grant Fee:** The Grant Fee may be reviewed on any Review Date with such reviewed grant fee to be determined in accordance with the following formula:

$$A = B + (0.02 \times B)$$

Where:

A is the new Grant Fee.

B is the Grant Fee payable immediately prior to the Review Date,

and such new Grant Fee will be invoiced accordingly by KiwiRail for payment by the Grantee pursuant to clause 4.

- 5.2 **Cost review of Grant Fee:** Notwithstanding clause 5.1, if KiwiRail has reviewed and adjusted its standard fees, and the new standard fee applicable to this Grant ("**New Standard Fee**") is more than the new Grant Fee would be immediately following the next Review Date ("**Upcoming Review Date**"):

- (a) KiwiRail may notify the Grantee in writing at any time prior to the Upcoming Review Date that the new Grant Fee immediately following the Upcoming Review Date will be equal to KiwiRail's New Standard Fee; and
- (b) the Grant Fee will not be reviewed under clause 5.1 on the Upcoming Review Date.

Market Review of Grant Fee: The Grant Fee will be reviewed on the Market Review Date by KiwiRail giving written notice to the Grantee specifying the reviewed grant fee, determined by KiwiRail on its assessment of the current market rent of the Grant Area taking into account the highest and best use of the Grant Area as at the Market Review Date.

- 5.3 **Grantee may dispute reviewed fee:** If the Grantee disputes the proposed new fee, it must advise KiwiRail of this within 20 Working Days of receipt of the Review Notice by way of written notice ("**Dispute Notice**") which must also state the Grantee's assessment of the current market rent of the Grant Area (time being of the essence). If the Grantee does not serve the Dispute Notice within the specified timeframe, then the Grantee will be deemed to have accepted the new fee contained in the Review Notice. The new Grant Fee payable immediately following a Fixed Review Date shall be deemed correct and conclusive evidence of the new fee save in the case of manifest error.
- 5.4 **Resolution if reviewed fee disputed:** If the Grantee does serve the Dispute Notice within the timeframe set out in clause 5.3, then the parties must negotiate in good faith in order to agree the new fee. If the parties cannot agree the new fee within 10 Working Days of receipt of the Dispute Notice, then either party may elect to refer the dispute to arbitration in Wellington by serving written notice on the other party.
- 5.5 **Conduct of arbitration:** If the dispute is referred to arbitration, then the following provisions shall apply:
- (a) the arbitration shall be submitted to a single arbitrator if one can be agreed upon by the parties, or otherwise to two arbitrators (one to be appointed by each party) within 20 Working Days of either party referring the dispute to arbitration;

- (b) the arbitrators shall agree upon the appointment of an umpire and obtain the umpire's written acceptance of the appointment within 10 Working Days of the date of their appointment;
- (c) if the arbitrators cannot agree on an umpire within the time period set out in clause (b), then KiwiRail or the Grantee may request the President for the time being of the New Zealand Institute of Valuers to appoint an umpire and obtain the umpire's written acceptance of appointment;
- (d) the arbitrators and the umpire are to be members of the New Zealand Institute of Valuers and must have at least five years' current and continuous standing in the valuation profession;
- (e) the arbitration is to be carried out in accordance with the provisions of the Arbitration Act 1996 as amended and replaced from time to time;
- (f) the arbitrators must jointly determine the current market rent of the Grant Area within 30 Working Days of their appointment;
- (g) if the arbitrators cannot agree the current market rent within the 30 Working Day period, then the current market rent shall be determined by the umpire;
- (h) in determining the current market rent of the Grant Area, the arbitrators or umpire (as the case may be) shall:
 - (i) have regard to:
 - (aa) the current market rent payable for comparable premises at the Market Review Date;
 - (bb) any abnormal use by the Grantee of the Grant Area;
 - (cc) subject to clause (ii)(cc), the provisions of this Agreement and, in particular, to any liability on the part of the Grantee under this Agreement to pay any additional charges; and
 - (dd) any other use to which the Grant Area may be lawfully put;
 - (ii) disregard:
 - (aa) any deleterious condition of the Grant Area, if such condition results from any breach of this Agreement by the Grantee;
 - (bb) that portion of the term which has expired, and determine the current market rent of the Grant Area at the Market Review Date as if the term commenced on such date;
 - (cc) the provisions of this Agreement, insofar as they place any restrictions upon the right of the Grantee to assign or transfer the Grantee's estate or interest in this Agreement or sublet the Grant Area;
 - (dd) any restriction on the use of the Grant Area imposed by this Agreement; and
 - (ee) the value of any goodwill attributable to the business of the Grantee and the value of the fixtures and fittings on the Grant Area belonging to the Grantee;

- (i) all costs of any arbitration under this clause 5.3 shall be borne equally by the parties unless:
 - (i) the current market rent of the Grant Area as determined by the arbitrator(s) or umpire is either equal to or greater than the fee specified in the Review Notice, in which event all costs shall be borne by the Grantee; or
 - (ii) it is decided by the arbitrator(s) or umpire that because of some impropriety or lack of cooperation or unreasonableness on the part of one of the parties that such party shall bear the whole or some fraction of the costs in excess of one half in which case that party shall bear the proportion of costs determined by the arbitrator(s) or umpire.

5.6 **Grantee to pay reviewed fee pending resolution:** If the Grantee validly serves the Dispute Notice, pending determination of the new fee in accordance with clause 5.3, the Grantee shall pay the new fee for the Grant Area as set out in the Review Notice from the Market Review Date. If the fee paid is more or less than the new fee payable following determination pursuant to clause 5.3, then an adjustment shall be made so that the correct fee has been paid.

5.7 **Grant Fee not to be reduced:** Notwithstanding the foregoing provisions, the Grant Fee payable by the Grantee as a result of the review of the Grant Fee shall not be less than the Grant Fee payable by the Grantee immediately prior to the Market Review Date.

6. GRANTEE'S WORKS

6.1 **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 of the applicable engineering practice area given the nature of the Grantee's Works with at least 5 years' current and continuous standing in the engineering profession;
- (b) KiwiRail has provided written approval (which may be subject to any 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 6.1(a);
 - (ii) the location of any Structure; and
 - (iii) the required clearances from railway lines and other Railway Infrastructure; and
- (c) the Grantee has made payment to KiwiRail of KiwiRail's reasonable costs for appraising and approving such plans and specifications.

6.2 **Building Work:** In addition to the provisions of clause 6.1, the Grantee must:

- (a) not carry out any building work on the Grant Area without first obtaining all building consents and resource consents required to enable that building work to be lawfully carried out. 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 6.1(a);

- (b) carry out all building work strictly following the building code and the building consents issued for that building work (including conditions of those consents), and only while the building consents for that building work are current and otherwise in strict compliance with all conditions and requirements imposed by KiwiRail as part of providing its approval under clause 6.1(a);
- (c) take all necessary steps to ensure that the Grantee's Works are carried out safely and do not disrupt rail services and KiwiRail's operation and use of the Land;
- (d) comply immediately with all notices issued by any Authority (including, without limitation, KiwiRail) relating to any building work carried out by the Grantee;
- (e) obtain a code compliance certificate for any building work carried out by the Grantee on the Grant Area immediately on completion of that building work; and
- (f) not do or allow anything to be done (including any building work) which would be a breach of any obligation under the Building Act, or which would constitute an offence under the Building Act.

6.3 **Indemnity** 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:

- (a) imposing a liability on KiwiRail;
- (b) suffered or incurred by KiwiRail; or
- (c) 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.

6.4 **Responsibility:** Notwithstanding the provisions of clause 6.1, the Grantee acknowledges that the Grantee shall 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.

6.5 **Supervision of works:** Following satisfaction of the requirements in clause 6.1, the Grantee shall complete the Grantee's Works in accordance with the plans approved by KiwiRail pursuant to clause 6.1(b) at the Grantee's sole cost in accordance with the provisions of clause 6.2 (where relevant) and to the entire satisfaction of KiwiRail. 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 costs of such supervision shall be paid by the Grantee.

6.6 **Commencement of works:** Notwithstanding anything contained in this clause 6, construction or erection of the Grantee's Works shall not commence until such time as the Grantee has obtained a Permit to Enter from KiwiRail to access the Grant Area for such purpose. For the avoidance of doubt, KiwiRail will not be obliged to provide a Permit to Enter authorising the Grantee to access the Grant Area until the Grantee has satisfied its obligations under clauses 6.1 or 6.2(a).

- 6.7 **Variations to plans:** If the Grantee wishes to vary the plans approved by KiwiRail in accordance with clause 6.1, the Grantee shall submit to KiwiRail revised plans for approval ("**Revised Plans**"). KiwiRail shall advise the Grantee within 20 Working Days of receipt whether:
- (a) the Revised Plans are approved;
 - (b) it requires further changes to be made to the Revised Plans; or
 - (c) the Revised Plans are rejected.
- 6.8 **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 Grant Area or the Land 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 or the Grant Area as nearly as possible to its former state and condition at the Grantee's sole cost and expense.
- 6.9 **KiwiRail not liable for damage:** The Grantee shall not hold KiwiRail liable for any accident or damage to the Grantee's Works howsoever caused and must pay to KiwiRail the 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 on the Land.
- 6.10 **Grantee liable for damage:** The Grantee shall pay KiwiRail the 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.
- 6.11 **Grantee liable for additional expenditure:** The Grantee shall pay to KiwiRail the costs KiwiRail incurs in respect of the installation, maintenance, alteration or relocation of its own infrastructure necessitated by any alteration, addition or development to the Land including any Railway Infrastructure that it would not otherwise have incurred but for the existence or use of the Grantee's Works including any Structure.

7. LIMITATION ON RIGHTS

- 7.1 **Security Interest:** The Grantee must not grant or agree to grant any security interest (as defined in the Personal Property Securities Act 1999) in or over its interest this Agreement.
- 7.2 **No Registration / Caveat:** The Grantee acknowledges that this Agreement does not create a registrable interest in the Grant Area or the Land and that the Grantee must not register a caveat over the title(s) to the Land relating to the Grantee's interest under this Agreement.

8. ASSIGNMENT

- 8.1 **No assignment:** The Grantee acknowledges that the rights provided by this Agreement are in personam rights only 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 Grant Area or otherwise confer on the Grantee any rights of exclusive possession.

8.2 **Change in shareholding:** For the purposes of clause 8.1, where the Grantee is a company which is not listed on the main board of a public stock exchange, any change or re-arrangement of the beneficial ownership of the principal shareholding of the Grantee or the Grantee's holding company, and any change in the Grantee's shareholding altering the effective control of the Grantee will be treated as an assignment of this Agreement in breach of clause 8.1.

9. GENERAL PROVISIONS RELATING TO GRANT

9.1 **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 1991, or any other statutory provisions relating to resource management.

9.2 **Structural alterations:** The Grantee may not make any alterations to the Grantee's Works (including any Structure forming part of the Grantee's Works), or construct any building, undertake any excavation or earthmoving on the Grant Area without the written consent of KiwiRail which may be granted or withheld in KiwiRail's absolute discretion. Any consent granted by KiwiRail pursuant to this clause 9.2 shall, if KiwiRail determines necessary, be subject to the provisions of clause 6.

9.3 **Compliance:** The Grantee must at all times and at its own cost comply with:

- (a) all statutes, ordinances, regulations, by-laws or other enactments affecting or relating to the use of the Grant Area and with all requirements which may be given by any Authority and all obligations and requirements exercised under statute or regulation from time to time, including in compliance with the requirements of all railway legislation;
- (b) all statutes, ordinances, regulations, by-laws or other enactments governing the design, erection, maintenance, use and construction of the Grantee's Works including any Structures and to submit to KiwiRail proof that any necessary consent or approval required from the relevant Authority has been obtained and continues to be held current including, but not limited to, consent and compliance certificates as required pursuant to the Building Act 2004; and
- (c) any rules or building regulations imposed by KiwiRail which apply to the control, safe use, security and protection of, access to, use and occupation of, improvements to and the operation of any equipment installed in the Grant Area and the Land.

9.4 **Structures:**

- (a) The Grantee shall at its own cost comply with all written requests by KiwiRail for the removal, alteration (including additions to) or relocation of any structures on the Grant Area, together with making good any damage caused thereby, owned by either KiwiRail, the Grantee or any other third party where such removal, alteration or relocation is:
 - (i) necessary for KiwiRail's use of the Land; or
 - (ii) required in order for the Grantee to comply with clause 9.3.
- (b) If the Grantee fails to carry out any work or make good any damage in accordance with any notice issued by KiwiRail in relation to clause 9.4(a) within the time specified, KiwiRail may at all reasonable times enter the Grant Area and (if applicable) the structures on the Grant Area bringing all necessary

equipment and materials and execute all or any of the required work or repairs as KiwiRail shall think fit.

- (c) 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 9.4(b), including all fees and expenses for inspecting the Grant Area and (if applicable) any structure, 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 Interest Rate as if the same (including interest) were rent in arrears.

9.5 **Compliance with easements:** The Grantee shall perform and observe the obligations of KiwiRail in connection with any easement or 3rd party interest of any kind in the Land for the time being affecting the Grant Area.

9.6 **Access by Grantee:** The Grantee shall only access the Grant Area in the manner pre-approved by KiwiRail with such access being reasonable given the nature of the Purpose for which the Grantee has been granted rights in respect of the Grant Area.

9.7 **Access by KiwiRail:** KiwiRail reserves the right for KiwiRail together with KiwiRail's employees, agents, contractors and invitees to at all times:

- (a) pass and re-pass with or without vehicles, materials or implements of any kind over the Grant Area for the purpose of carrying out any works or inspections to the railway or the Grant Area; and
- (b) erect, construct and maintain advertising hoardings and/or drainage pipes and other works including telecommunications, electric power lines or cables on, over or within the Grant Area together with any necessary supports, and the Grantee will make no claim against KiwiRail on account of any such works; and

KiwiRail will use all reasonable endeavours to ensure that such works or access do not in KiwiRail's opinion materially adversely inhibit the Grantee's use of the Grant Area pursuant to this Agreement.

9.8 **No Interruption to KiwiRail's Activities:** The Grantee must not do or permit to be done in the Grant Area anything which may become a nuisance, disturbance or obstruction to KiwiRail.

9.9 **Core Lease:** The Grantee will comply with all of KiwiRail's obligations in the Core Lease insofar as they relate to the Grant Area (other than the covenants for payment of rent and other money under the Core Lease) as if all those obligations were set out in this Agreement as obligations on the Grantee.

9.10 **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 or any equipment, fixtures, fittings and chattels installed or located in the Grant Area; and
- (b) the theft or loss of any of the Grantee's equipment, fixtures, fittings or chattels.

9.11 **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 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 Grant.

10. SPECIFIC PROVISIONS RELATING TO GRANTEE'S WORKS

10.1 **Application:** The following additional provisions in clauses 10.2 to 10.4 shall apply where the Grantee's Works are specified to include such works.

10.2 Above Ground Structures

- (a) **Clearances:** The Grantee shall ensure that the Structure, the approaches thereto and anything connected therewith shall be constructed so as to afford clearances of not less than those approved under the provisions of clause 6.1 hereof.
- (b) **Rubbish Removal:** The Grantee shall ensure that any rubbish deposited or accumulated on the Grant Area or dropped by users as a consequence of the placement of any Structure on the Grant Area is promptly and regularly removed. Should KiwiRail be required to remove any such rubbish, all costs incurred will be paid by the Grantee to KiwiRail upon demand.

10.3 Below Ground Structures

- (a) **Markers:** The Grantee shall erect and maintain to the entire satisfaction of KiwiRail, sufficient markers or signs on the Grant Area to indicate the location and nature of the Structure together with any warning or safe working information.

10.4 {**SELECT** one of the following options:

OPTION 1: #<Level Crossing and Right of Way

The provisions of this clause 10.4 shall only apply to any grant for the construction or installation of a level crossing and associated use as a right of way.

- (a) **Supporting Infrastructure:** *Subject to clause 10.4(h), the Grantee will at the cost of the Grantee and to the entire satisfaction of KiwiRail, provide cattle stops, fencing and drain pipes at the right of way and level crossing and the Grantee will also bear the cost of forming, draining, metalling and sealing the carriageways and of forming, kerbing and channelling footpaths where such are required on the Grant Area within 10 metres of a line drawn midway between a set of rails. The said cattle stops, fencing and drains, kerbing, carriageways and footpaths within the limits of the said 10 metres will thereafter be maintained by and at the cost of the Grantee.*
- (b) **Approaches:** *Subject to clause 10.4(h), the Grantee will at the cost of the Grantee and to the entire satisfaction of KiwiRail, fence, form, metal, seal, reinstate and maintain the approaches to the right of way and level crossing.*
- (c) **Fencing:** *Subject to clause 10.4(h), the Grantee will at the cost of the Grantee and to the entire satisfaction of KiwiRail, fence the right of way and level crossing (including fences to restrict public access over the railway line to the approved crossing location).*
- (d) **Sight Lines and Vegetation:** *Subject to clause 10.4(h), the Grantee will do all such works as KiwiRail may require at the cost of the Grantee to protect or improve the view of the railway from the right of way and level crossing and to ensure such improved view is maintained at all times during the term of this Agreement. Any works undertaken pursuant to this clause 10.4(d) shall be subject to the provisions of clause 6.5 in relation to supervision.*

- (e) **Safety:** *If at any time in order to facilitate or assist with the safe usage and operation of a right of way and level crossing, KiwiRail or any railway personnel acting on KiwiRail's behalf considers it necessary or advisable, KiwiRail may direct the Grantee to provide crossing keepers, pedestrian crib fences, gates, bells, signals, notice boards or other safety appliances or, to move the right of way and level crossing to another site. The Grantee shall be responsible for all costs associated with the installations and/or the moving of the right of way and level crossing to another site specified by KiwiRail. If the Grantee fails to comply with its obligations under this clause 10.4(e) within 1 month of receiving notice of such requirement from KiwiRail, KiwiRail may terminate this Agreement in accordance with the provisions of clause 14.1.*
- (f) **Guard Rails:** *Subject to clause 10.4(h), the Grantee will, if at any time KiwiRail or any rail personnel on behalf of KiwiRail deems it necessary, install guard rails at the right of way and level crossing. The Grantee shall be responsible for the cost of provision, erection and maintenance of the guard rails.*
- (g) **Warning Devices:** *Subject to clause 10.4(h), the Grantee will, at its cost, maintain the right of way and level crossing and any warning devices provided for the protection of public safety.*
- (h) **KiwiRail maintenance:** *KiwiRail will, at the Grantee's cost, coordinate all maintenance of the types envisaged by this clause 10.4 where such are required on the Grant Area within 5 metres of a line drawn midway between a set of rails.*

>#OPTION 2: #<Right of Way

The provisions of this clause 10.4 shall only apply to any grant of right of way which does not include a level crossing.

- (i) **Supporting Infrastructure:** *The Grantee will at the cost of the Grantee and to the entire satisfaction of KiwiRail form, metal and seal the right of way including where necessary the installation of any drainage and the forming, kerbing and channelling or footpaths on the Grant Area.*
- (j) **Approaches:** *The Grantee will at the cost of the Grantee and to the entire satisfaction of KiwiRail, fence, form, metal, seal, reinstate and maintain the approaches to the right of way.*
- (k) **Fencing:** *The Grantee will fence the right of way at the cost of the Grantee and to the entire satisfaction of KiwiRail.*
- (l) **Safety:** *If at any time in order to facilitate or assist with the safe usage and operation of the right of way, KiwiRail or any railway personnel acting on KiwiRail's behalf considers it necessary or advisable, KiwiRail may direct the Grantee to move the right of way to another site. The Grantee shall be responsible for all costs associated with the installations and/or the moving of the right of way to another site specified by KiwiRail. If the Grantee fails to comply with its obligations under this clause 10.4(l) within 1 month of receiving notice of such requirement from KiwiRail, KiwiRail may terminate this Agreement in accordance with the provisions of clause 14.2. >#}*

11. REPAIR AND MAINTENANCE

- 11.1 **Maintenance:** The Grantee shall be solely responsible for the cost of repairs and maintenance to the Grantee's Works and shall, subject to the provisions of clause 11.2, at all times keep and maintain the Grant Area and the Grantee's Works in and on the Grant Area in good and substantial repair, including making good any damage however caused to the Grant Area or the Grantee's Works, so as to ensure no loss, cost or damage shall be caused to or suffered by KiwiRail as a result of any failure by the Grantee to keep the Grantee's Works in such condition. For the purposes of ensuring the Grantee complies with its repair and maintenance obligations, the Grantee shall be entitled subject to the provisions of clause 11.2 to conduct an engineering inspection of the Grantee's Works, including any Structure in the Grant Area not less frequently than annually and following such inspection(s) being completed will provide the Grantee with a copy of the finalised engineering report once available.
- 11.2 **Access for maintenance and repairs:** Prior to entering the Grant Area for the purposes of carrying out any repairs or maintenance to the Grantee's Works, the Grantee shall first obtain a Permit to Enter the Grant Area from KiwiRail. Any permit granted by KiwiRail pursuant to this clause 11.2 shall be subject to the provisions of clause 6.5 in relation to supervision.
- 11.3 **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 Grant Area, in accordance with the Grantee's liability under 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 the Grant Area and (if applicable) the structures on the Grant Area bringing all necessary equipment and materials and execute all or any of the required work or repairs as KiwiRail shall think fit.
- 11.4 **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 11.3, including all fees and expenses for inspecting the Grant Area and (if applicable) any Structure, 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 Interest Rate as if the same (including interest) were rent in arrears.

12. INSURANCE

- 12.1 **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.
- 12.2 **Disclosure to KiwiRail:** The Grantee agrees to 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.
- 12.3 **KiwiRail to be Noted as Interested Party:** The Grantee agrees to procure that KiwiRail be noted as an interested party on all policies of insurance required under the terms of this Agreement and by all relevant legislation.

- 12.4 **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.

13. SUITABILITY OF GRANT AREA

- 13.1 **Rail Use:** KiwiRail does not make any warranty or representation, express or implied, that 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 shall be at the sole risk of the Grantee. Where the Purpose specified in this Agreement includes use of the Grant Area as a right of way with or without a level crossing, such risk shall extend to all persons using the Grant Area pursuant to the Grantee's rights under this Agreement. The Grantee acknowledges that KiwiRail may not own or lease the Land and the Grant Area, and that third parties may have an interest in the Land, being, without limitation, an ownership or leasehold interest. KiwiRail makes no warranty or representation that third parties having an interest in the Land (if any) have consented to, or approved of, this Grant. The Grantee will conduct its own investigations in this regard and will obtain all necessary consents, permissions, or approvals to the entry into this Agreement.
- 13.2 **Safety Measures:** KiwiRail is not responsible for providing any safety measures to protect the Grantee's Works including any Structure from water damage, fire, explosion, storm, earthquake, hazard or potential hazard whether coming from inside the Grant Area (including equipment installed in the Grant Area) or from outside.

14. TERMINATION

- 14.1 **Termination by either party:** Either party may terminate this Agreement for any reason whatsoever at any time by giving the other party twelve (12) calendar months' written notice of such termination.
- 14.2 **Termination for breach by Grantee:** If:
- (a) the Grantee fails to pay the Grant Fee or any other money payable under this Agreement to KiwiRail for 10 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 10 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;
 - (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.

- 14.3 **Termination by KiwiRail – Railways Use:** The Grantee acknowledges that KiwiRail may terminate this Agreement upon 3 months' notice, where the Grant Area is required for railways use.
- 14.4 **No Compensation:** In the event of termination of this Agreement under clauses 14.1, 14.2 or 14.3 from whatsoever cause, no compensation shall be payable to the Grantee.

15. INDEMNITY

15.1 **Indemnity by Grantee:** The Grantee indemnifies KiwiRail, the Minister of Railways and the Government of New Zealand from and against:

- (a) any accident or injury to any person or for damage to any property arising out of or caused or contributed to either directly or indirectly by the use or existence of the Structure or anything connected therewith or by any defect in the construction or maintenance of the Structure.
- (b) all costs (including legal costs) and expenses incurred by KiwiRail in taking action to demand and/or recover any part of the Grant Fee or other money payable by the Grantee under this Agreement; and
- (c) 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 Grant Area (including any Structure forming part of the Grantee's Works on the Grant Area) or the use or operation of any equipment installed in the Grant Area;
 - (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 3rd party's interests in the Land; or
 - (iv) damage to the Land or improvements on the Land where the damage causes any 3rd party having an interest in the Land or improvements thereon to suffer a loss.

15.2 **Payment by Grantee:** The Grantee must pay on demand all amounts owing to KiwiRail as a result of the indemnity contained in clause 15.1, together with interest on those amounts at the Default Interest Rate calculated on a daily basis from the date KiwiRail incurs that liability until the Grantee pays the relevant amount.

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

16.1 **Removal on Expiry or Termination:** The Grantee must remove all the Grantee's Works and the Grantee's Property (including any Structures forming part of the Grantee's Works and any other alterations or additions made to the Grant Area pursuant to clause 6), and repair any damage caused by that removal within 10 Working Days of the expiry of the term or termination of this Agreement.

16.2 **Failure to Comply:** If the Grantee fails to comply with clause 16.1 KiwiRail may remove the Grantee's Works (including Structures forming part of the Grantee's Works and any other alterations or additions made to the Grant Area pursuant to clause 6), the Grantee's Property and repair any damage caused by that removal and the Grantee must pay to KiwiRail on demand all costs incurred by KiwiRail in doing so.

16.3 **Removal by Grantee:** Notwithstanding the provisions of clause 16.2, 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 compensation for the Grantee's Works or the Grantee's Property to the Grantee.

17. COSTS

- 17.1 **Costs:** The Grantee must pay to KiwiRail on demand all reasonable costs (including legal costs), charges and other expenses which KiwiRail may incur or for which KiwiRail may become liable relating to:
- (a) **Preparation of Agreement:** the negotiation, preparation and execution of this Agreement and of any variation of this Agreement;
 - (b) **Grantee Fee Review:** any documents evidencing a review of the Grant Fee;
 - (c) **Renewal of Term:** any documents evidencing a renewal or extension of the term;
 - (d) **Remedying Breach:** KiwiRail remedying the Grantee's breach of any term of this Agreement;
 - (e) **Exercise of Powers:** KiwiRail's exercise or attempted exercise or enforcement of any power, right or remedy conferred on KiwiRail by this Agreement; and
 - (f) **Proposals:** the consideration and approval (if given) of any proposals made to KiwiRail by the Grantee in respect of any matter contemplated by this Agreement (including costs incurred in employing consultants).

18. RESOLUTION OF DISPUTES

- 18.1 **Disputes:** If any dispute, difference or question 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 matter 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.

- 18.2 **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 for the time being of the district law society for the place where the Land is situated (or his or her nominee) will nominate the mediator on either party's application. The mediator's decision will be final and binding on both parties.
- 18.3 **Arbitration:** If the parties do not agree to refer the dispute, difference or question to mediation under clause 18.1 within 10 Working Days of that dispute, difference or question arising, then it will be referred to the arbitration of a single arbitrator under the Arbitration Act 1996.
- 18.4 **Arbitrator:** The parties must try to agree on the arbitrator. If they cannot agree, the president or any vice-president for the time being of the district law society for the place where the Land is situated (or his or her nominee) will nominate the arbitrator on either party's application.

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

19. NOTICES

19.1 **Service of Notices:** Any notice to be given by KiwiRail under this Agreement shall be sufficient if the notice is signed in accordance with clause 19.2 and shall be validly given if sent by letter or facsimile addressed to the Grantee at the Grantee's last known residential or business address.

19.2 **Signature of Notices:** Any notice or document to be delivered or served under this Agreement must be in writing and may be signed by:

- (a) the party giving or serving the notice;
- (b) any attorney, officer, employee or solicitor for the party serving or giving the notice; or
- (c) the solicitor or any director, officer, employee or any other person authorised by that party to give or serve the notice.

19.3 **Time of Service:** Any notice or other document will be treated as delivered or served and received by the other party:

- (a) on personal delivery;
- (b) three Working Days after being posted by prepaid registered post to the addressee's last known residential or business address in New Zealand; or
- (c) on completion of an error free transmission, when sent by facsimile.

20. FIBRE OPTIC CABLE

20.1 **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 the Land by virtue of an agreement dated 28 September 1990 ("**Fibre Optic Cable Agreement**"). Where 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.

20.2 **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 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 the Contracts (Privity) Act 1982, Vodafone and KiwiRail are each designated to benefit under this Agreement in respect of their respective rights under the Fibre Optic Cable Agreement.

20.3 **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.

Precedent Document

SCHEDULE 3
PLAN OF GRANT AREA

Precedent Document