

Reference: 20200267



26 August 2020

Dear [REDACTED]

Thank you for your Official Information Act request, received on 16 July 2020. You requested amongst others, the following report:

Number: 18 - from Treasury – 5 March – Land acquisitions for Marsden Point Line

This part of your request was transferred to The Treasury from Hon Phil Twyford. We extended your request by 10 working days on 4 August 2020.

Information being released

Please find enclosed the following documents:

Item	Date	Document Description	Decision
1.	5 March 2020	T2020/380: Land Acquisitions for Marsden Point Rail Line	Release in part
2.	5 March 2020	PGF - KiwiRail: Funding Agreement for Land Acquisitions for Marsden Point Rail Link	Release in part

- section 9(2)(g)(ii) – to maintain the effective conduct of public affairs through protecting ministers, members of government organisations, officers and employees from improper pressure or harassment,
- section 9(2)(g)(i) – to maintain the effective conduct of public affairs through the free and frank expression of opinions,
- section 9(2)(b)(ii) – to protect the commercial position of the person who supplied the information, or who is the subject of the information,
- section 9(2)(h) – to maintain legal professional privilege,
- section 9(2)(i) – to enable KiwiRail to carry out commercial activities without prejudice or disadvantage,

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<https://treasury.govt.nz>

- section 9(2)(j) – to enable KiwiRail to negotiate without disadvantage or prejudice,
- section 9(2)(k) – to prevent the disclosure of information for improper gain or improper advantage.

Direct dial phone numbers of officials have been redacted under section 9(2)(k) in order to reduce the possibility of staff being exposed to phishing and other scams. This is because information released under the OIA may end up in the public domain, for example, on websites including Treasury's website.

In making my decision, I have considered the public interest considerations in section 9(1) of the Official Information Act.

Please note that this letter (with your personal details removed) and enclosed documents may be published on the Treasury website.

This reply addresses the information you requested. You have the right to ask the Ombudsman to investigate and review my decision.

Yours sincerely



Juston Anderson
Acting Manager, Commercial Performance

OIA 20200267

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TE TAI ŌHANGA
THE TREASURY

Treasury Report: Land Acquisitions for Marsden Point Rail Line

Date:	5 March 2020	Report No:	T2020/380
		File Number:	SE-2-25-2

Action sought

	Action sought	Deadline
Minister for State Owned Enterprises (Rt Hon Winston Peters)	Sign the two attached copies of the draft Land Acquisitions for Marsden Point Rail Link funding agreement.	13 March 2020
Minister of Finance (Hon Grant Robertson)	Sign the two attached copies of the draft Land Acquisitions for Marsden Point Rail Link funding agreement. s9(2)(h)	13 March 2020
Minister of Transport (Hon Phil Twyford)	Note the contents of this report.	None
Minister for Regional Economic Development (Hon Shane Jones)	Note the contents of this report.	None

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact	
Ann Webster	Principal Advisor, Commercial Performance	s9(2)(k)	s9(2)(g)(ii)	✓
Maureena van der Lem	Manager, Commercial Performance			

Minister's Office actions (if required)

Return the signed report to Treasury.

If Ministers sign the draft agreement, **scan and send the two signed copies** of the agreement to KiwiRail for signing.

Note any feedback on the quality of the report

Enclosure: Annex One: Key features of the Draft Funding Agreement with KiwiRail Holdings Limited for Land Acquisitions for Marsden Point Rail Link

Draft Funding Agreement with KiwiRail Holdings Limited for Land Acquisitions for Marsden Point Rail Link

Treasury Report: Land Acquisitions for Marsden Point Rail Line

Executive Summary

This report proposes that shareholding Ministers sign a draft funding agreement (Annex One) with KiwiRail Holdings Limited (KiwiRail) for the purchase of land for the Marsden Point Line. It outlines how provisions of the Cabinet paper have been addressed in the agreement.

Cabinet agreed to provide \$40 million (m) of PGF funding (DEV-19-MIN-0339 refers) for Marsden Point Line land purchases ahead of decisions yet to be made on Northport. The decision to make land purchase funding available to KiwiRail in advance of the Northport decision was to ensure that land purchases can be made before prices rise significantly following announcements on Northport.

While the draft agreement reflects the provisions of the Cabinet paper in many respects, it has been difficult to gain KiwiRail's agreement on terms that give full effect to these provisions. These provisions appear to us to be premised on the expectation of a commercial project within a funding envelope and on terms that allow for recoupment of the \$40m in the event that the Northport proposal does not go ahead.

Treasury has been mindful during negotiations with KiwiRail of Cabinet's directive that funding for Marsden Point Line land purchases be put in place sooner rather than later. Our working assumption is that Ministers will wish the agreement to proceed in its current form. Therefore, while we recommend Ministers sign the agreement, we that there are risks as it is unlikely that the proposal is commercial.

The draft agreement accompanying this report allocates risks so that they are retained substantively by the Crown, which is inconsistent with a balancing of risks and responsibilities that would be normally reflected in a "commercial" agreement. Our conclusion that the proposal is unlikely to be commercial is reflected in the treatment of two further conditions set in the Cabinet paper, which provides that:

- KiwiRail will use its reasonable endeavours to acquire as many of the required properties as it can within the \$40m funding, rather than the funding being in exchange for the full acquisition of the required properties as envisaged by the Cabinet paper.
- if KiwiRail disposes of any of the land acquired, it will return the sale proceeds to the Crown. The Cabinet paper envisages that the Crown can retain its ability to sell any of the land acquired to recover the funding committed at a later date should Northport not proceed. However, the Crown does not have the power to instruct KiwiRail or the New Zealand Railways Corporation (which exists to own public rail land) as State-owned enterprises to make or carry out any specific decision, including to sell land.

s9(2)(g)(i)

s9(2)(h)

If Ministers agree to sign the agreement, it will be sent to KiwiRail for signing, following which arrangements will be made to pay an equity injection to enable KiwiRail to proceed with land purchases.

Recommended Action

We recommend that shareholding Ministers:

- a **sign** the two attached copies of draft Land Acquisitions for Marsden Point Rail Link funding agreement, noting that this draft:
- contains terms more appropriate for grant funding than for a commercial investment;
 - provides that KiwiRail Holdings Ltd (KiwiRail) will use reasonable endeavours to acquire as many of the identified properties as it can within the \$40 million funding; and
 - provides that if KiwiRail disposes of any of the land acquired, it will return the sale proceeds to the Crown.

Agree / disagree.
Minister for State Owned Enterprises

Agree / disagree.
Minister of Finance

s9(2)(h)

Agree / disagree.
Minister of Finance

or

- c **discuss** any concerns you may have about the draft Land Acquisitions for Marsden Point Rail Link funding agreement with officials.

Agree / disagree.
Minister for State Owned Enterprises

Agree / disagree.
Minister of Finance

Maureena van der Lem
Manager, Commercial Performance

Rt Hon Winston Peters
Minister for State Owned Enterprises

Hon Grant Robertson
Minister of Finance

Treasury Report: Land Acquisitions for Marsden Point Rail Line

Purpose of Report

1. This report proposes that shareholding Ministers sign a draft funding agreement (Annex One) with KiwiRail Holdings Limited (KiwiRail) for the purchase of land for the Marsden Point Line.
2. The report also outlines how provisions of the Cabinet paper have been addressed in the draft agreement and (in Annex One to this report) provides an overview of the agreement's terms.
3. s9(2)(h)

Analysis

Background

4. Cabinet agreed to provide \$40 million (m) of Provincial Growth Fund (PGF) funding (DEV-19-MIN-0339 refers) for Marsden Point Line land purchases ^{9(2)(b)(ii)}
5. Cabinet also agreed that:
 - a funds would be transferred from Vote Business, Science and Innovation to Vote Transport Multi-Category Expenses and Capital Expenditure: Tuawhenua Provincial Growth Fund – Transport Projects to finance Marsden Spur land purchases and track developments (along with funding for North Auckland line improvements);
 - b the Ministry of Transport would be responsible for funding by way of an operational grant and that Treasury would be responsible for agreeing the terms for funding land purchases by way of equity injection (being investments that are stated to be expected to make a commercial return);
 - c the investment in the land purchases was to be made on the condition of retaining the Crown's ability to sell the land in the future and to return those funds to the PGF for regional economic purposes.
6. The Cabinet paper also noted that KiwiRail estimated that the acquisition would cost \$40m. Provision was, therefore, made in the Cabinet Paper for funding of \$40m for the Marsden Point Line land purchases.

¹ The agreement says that funding will be provided over four years with: ^{9(2)(b)(ii)}
^{9(2)(b)(ii)} Authority will be sought from the Ministers delegated by Cabinet to adjust the phasing of the funding at a later date.
 T2020/380: Land Acquisitions for Marsden Point Rail Line

7. A draft funding agreement was prepared by KiwiRail based on the agreement used for the Central North Island Hub PGF project, (an agreement that was approved by Regional Economic Development Ministers under authority from Cabinet (DEV-18-MIN-0235 refers) in November 2018) and has since been subject to negotiation with the Treasury.
8. Treasury has been mindful during the course of these negotiations of Cabinet's directive that funding for Marsden Point Line land purchases be put in place sooner rather than later for the reasons canvassed in paragraph four of this report. However, while the draft agreement reflects the provisions of the Cabinet paper in many respects, it has been difficult to gain KiwiRail's agreement on terms that give full effect to these provisions. These provisions appear to us to be premised on the expectation of a commercial project within a funding envelope and on terms that allow for recoupment of the \$40m in the event that the Northport proposal does not go ahead.
9. The rest of this paper discusses these issues in more detail. Our working assumption is that Ministers will wish the agreement to proceed in its current form. Accordingly, we have advised KiwiRail to proceed with preparing for a share subscription request to the Crown for the 2019/20 equity injection funding agreed by Cabinet. Therefore, while we recommend Ministers sign the agreement, we that there are risks as it is unlikely that the proposal is commercial.

Provisions of the Provincial Growth Fund: UNISCS and Northland Rail Investment Cabinet paper

Whether the undertaking is commercial

10. Cabinet agreed that the land acquisitions would be funded by equity injection with paragraph 46 of the Cabinet paper setting out principles for the PGF funding of Kiwirail projects. The first bullet of these principles is that:

"Investments expected to make a commercial return would be funded by equity injection or debt."
11. Accordingly, our understanding, based on the selection of this funding mechanism, was that both parties should be approaching the agreement with a "commercial" lens (in contrast to the approach that would be adopted if the funding was to be made available by way of grant).
12. We accordingly sought to negotiate commercial terms within the draft agreement to provide a balancing of risks and responsibilities between the Crown and KiwiRail. For instance we noted that the form of agreement proposed only provided for recoupment of the funding made available to KiwiRail in circumstances where the funding was used otherwise than in connection with the land acquisitions or if KiwiRail abandoned the project. This kind of provision appears to be more characteristic of an agreement for funding by way of grant. Whereas, a commercial agreement which would normally provide for repayment of the funding in the event that KiwiRail was in material breach of the agreement or some other early termination event had occurred.
13. This commercial approach has not been acceptable to KiwiRail. KiwiRail has advised that it cannot approach the acquisition of the land as a commercial agreement because it has no certainty whether the Crown will support further investment in the development of Northport or the Marsden rail spur. We note that as an SOE, KiwiRail has a principal objective of operating as a successful business and could decline to sign should it deem the agreement as inconsistent with its principal objective.

- 14. We have also made enquiries with the Provincial Development Unit (PDU) about the process by and basis on which the project was developed. The PDU advises that it was not specifically established whether the project was wholly, partially, or not at all commercial. Furthermore the PDU did not receive a formal application from KiwiRail for PGF funding (as was the case with the Central North Island Hub PGF project). KiwiRail did supply information to the PDU, which was used to prepare the Cabinet paper.
- 15. Our conclusion is that it is unlikely that the proposal is commercial, given:
 - a the purposes of the PGF;
 - b the process by which the proposal was developed and submitted to Cabinet;
 - c the draft agreement prepared by KiwiRail, which is more similar to grant funding agreements; and
 - d KiwiRail's concern about the inclusion of commercial terms in the agreement, which reflect its overall willingness and current ability to accept commercial risk.
- 16. Accordingly, the draft agreement accompanying this report allocates risks so that they are retained substantively by the Crown, being an allocation that is inconsistent with a balancing of risks and responsibilities that would be normally reflected in a "commercial" agreement. The conclusion that the proposal is unlikely to be commercial is also reflected in the treatment in the draft agreement of the two further conditions set in the Cabinet paper.

Services to be performed

- 17. As noted above the Cabinet Paper only authorises funding for \$40m for the land acquisition. In addition the Cabinet Paper advises at paragraph 48 that:
"KiwiRail do not expect to incur further costs as a result of this investment [that is the investment in the land purchase] that would require additional funding from the Crown."

18. s9(2)(g)(i)

19.

20.

Retaining the Crown's ability to sell the land

- 21. Paragraph 47 of the Cabinet paper required that:
"Investment in land purchase will be made on condition of retaining the Crown's ability to sell the land in the future and return funds to the PGF for regional economic development purposes."
- 22. The underlying intent of this paragraph was to address the risk that, in the event of the Northport development not proceeding, the funds committed to the land acquisitions could be returned to the Crown. There is also the statement in the Cabinet paper at paragraph 40:

“...patronage levels are likely to be significantly lower without a Northport connection. We are comfortable that the proposed level of investment is acceptable in relation to this risk, particularly as the \$40m investment associated with the purchase of Marsden Point land can be regained if Northport does not proceed”.

- 23. KiwiRail has helpfully included terms in the draft agreement, to effect acquisition of the land through New Zealand Railways Corporation. Under the New Zealand Railways Corporation any land compulsorily acquired will have to be done through the agency of the Minister of Transport.
- 24. However, any land that is acquired by agreement with the vendor of the land will vest in New Zealand Railways Corporation not the Crown. KiwiRail has included an undertaking promising to make provision for return of the sale proceeds of any disposal of the land (less costs of sale) but there is no right on the part of the Crown to require repayment of the funding if KiwiRail should fail to comply with this obligation.² Furthermore the Crown does not have the power to instruct KiwiRail or the New Zealand Railways Corporation (which exists to own public rail land) as State-owned enterprises to make or carry out any specific decision, including the sale of land or the remittance of the proceeds.

25. s9(2)(g)(i), s9(2)(j) and s9(2)(i)



s9(2)(h)



page 8 withheld - s9(2)(h)

² There is a provision in the draft agreement that return of the sale proceeds may be by way of off-set against future funding costs or KiwiRail’s future capital requirements for the purposes of the project. However, the Crown is not obliged to agree to these indirect mechanisms for the remittance of value.

Risks

37. The main risks to the Crown from signing this draft agreement are, in the event that the Northport development:

s9(2)(g)(i), s9(2)(j) and s9(2)(i)

38. We note that, although unlikely to have been intended, the Public Finance Act 1989 does not provide authority for the administering Department (Ministry of Transport) to delegate the administration of a multi-category appropriation. We will work with the Ministry of Transport to ensure that the agreement is administered in accordance with the Public Finance Act. We will report separately on this matter in the next few weeks as part of canvassing roles and responsibilities arising from the Ministry of Transport's Future of Rail review.

Next Steps

39. If shareholding Ministers agree to sign the agreement, it will be sent to KiwiRail for signing.
40. When the signed agreement has been returned by KiwiRail, arrangements will be made for the issuing of shares and payment of the 2019/20 appropriated equity injection to enable KiwiRail to proceed with land purchases.

Annex One: Key Features of the Draft Agreement with KiwiRail Holdings Limited for Land Acquisitions for Marsden Point Rail Link

KiwiRail's Key Commitments: to acquire as many of the properties identified in the Acquisition Strategy document as can be acquired within the Total Maximum Amount Payable and to use reasonable endeavours to complete the Project in accordance with the milestone dates set out in the Acquisition Strategy.³

Total Maximum Amount Payable (the available facility): Forty million dollars to fund payment of KiwiRail's Eligible Costs.

Eligible Costs: includes costs by KiwiRail incurred (as from 1 February 2020) or to be incurred:

- a) for the purposes of purchasing land required for the Project;
- b) for the purposes of otherwise carrying out the Project or for purposes incidental to the Project (including all internal costs, disbursements and expenses incurred by the KiwiRail for such purposes); and
- c) to a third party as a result of a breach of the Crown's obligations to pay the funding in accordance with this Agreement and the consequent inability of the KiwiRail to meet a purchase or payment obligation to that third party.

Term: the agreement is for a term ending on 31 December 2023, or on the completion of all land acquisition (whichever occurs first).

Funding Delivery Mechanism: by way of Crown subscription for shares in KiwiRail initiated by submission of a Payment Request.

Payment Request: KiwiRail may draw on the facility three times a year by the submission of a Payment Request. KiwiRail will provide (among other things) a breakdown of Eligible Costs incurred or forecast to be incurred, with other relevant information being provided by way of monthly and quarterly reporting.

Reporting: reporting is to be provided by the 20th business day following the end of the relevant period with the quarterly report providing (among other things) details regarding progress of the Project against milestones, details of material risks and particulars of material changes to/departures from the Acquisition Strategy. The reporting is not however calibrated with and is likely to come after funding is made available in response to a Payment Request.

Other information: the Crown (acting reasonably) may request any information about the Project and KiwiRail must comply with that request. KiwiRail is also obliged to notify the Crown if it is in breach of the agreement, if it becomes aware of a matter that is expected to materially and adversely affect the Project or if an (early) Termination Event has occurred.

s9(2)(g)(i) and s9(2)(b)(ii)

Termination Events: the Crown may stop funding the Project if a Termination Event occurs, although the Crown will still be obliged to fund unavoidable Eligible Costs (that is costs reasonably incurred prior to the date of termination in expectation of completion of the Project or costs committed as a result of binding purchase commitments having been made by KiwiRail prior to the date of termination). The Termination Events include abandonment, KiwiRail's breach of any material obligation or a warranty, material misrepresentation, and reckless conduct on the part of KiwiRail (that the Crown reasonably considers is damaging to the Crown's reputation). Grace periods for the remedying breaches are provided for.

Recovery: as noted in the body of the report (paragraph 12) the Crown's only express right of recovery of its investment contemplated by the agreement is in circumstances where the funding is used otherwise than in connection with the land acquisitions or if KiwiRail has abandoned the Project or is proposing to do so.⁴ There is no express right of recovery provided for in relation to the occurrence of other Termination Events.

Disputes: these are to be first attempted to be resolved between the parties, and if that is not possible (within 14 days), the dispute is to be escalated for discussion and resolution between the KiwiRail Chair and Ministers. It is only if the dispute can still not be resolved (within 21 days) that the parties will be in a position to issue legal proceedings.

Publicity: public announcements by KiwiRail regarding the agreement or the Crown's funding participation in the Project, must first be approved by the Crown.

⁴ Recovery in this context would be by way of KiwiRail's repurchase of the shares the Crown has subscribed for, for the purposes of the Project.



FUNDING AGREEMENT

BETWEEN

**THE SOVEREIGN ACTING BY AND THROUGH THE
MINISTER OF FINANCE AND THE MINISTER FOR
STATE OWNED ENTERPRISES**

AND

KIWIRAIL HOLDINGS LIMITED

FOR

**LAND ACQUISITIONS FOR MARSDEN POINT
RAIL LINK**

PART 1: KEY DETAILS

1 Parties	<p>THE CROWN The Sovereign in right of New Zealand, acting by and through the Minister of Finance and the Minister for State-owned Enterprises (Crown); and</p> <p>RECIPIENT KiwiRail Holdings Limited company number 4045602, having its registered offices at Level 3, 8 – 14 Stanley Street, Parnell, Auckland 1010, New Zealand (Recipient).</p>
2 Eligible Costs Start Date	1 February 2020
3 End Date	<p>The earlier of:</p> <ul style="list-style-type: none"> (a) The date of completion of all land acquisitions required in respect of the Project; and (b) 31 December 2023
4 Background	<p>The Recipient is a State enterprise under the State-Owned Enterprises Act 1986. It is responsible for railway operations in New Zealand.</p> <p>The Recipient holds a designation and resource consent for construction and operation of the Marsden Point Rail Link, connecting the North Auckland Line to Northport at Marsden Point (Designation).</p> <p>The Recipient wishes to purchase the properties that are directly affected by the Designation for the future construction of the Marsden Point Rail Link and associated rail purposes (the Project).</p> <p>With the assistance of its expert consultants the Recipient has prepared a Preliminary Acquisition Strategy for the Project inclusive of revisions (Revision 0.1 to 0.5) dated 20 December 2018 (Acquisition Strategy).</p> <p>The Acquisition Strategy includes a cost estimate for the Project.</p> <p>The Recipient has through the Provincial Development Unit of the Ministry of Business, Innovation & Employment (MBIE) sought a funding contribution from the Provincial Growth Fund (PGF) for the purposes of the Project described below.</p> <p>MBIE has transferred Provincial Growth Fund (PGF) funding to Vote Transport, and the full funding contribution for this Project will be provided by the Ministry of Transport from this funding.</p> <p>However, the Treasury will act as the administering party under this Agreement, but not to the exclusion of MBIE's role as administrator of the PGF or the Ministry of Transport's role in administering Vote Transport funding.</p> <p>Key details of this Agreement are set out in this Part 1. The full terms and conditions are set out in Part 2. Defined terms and rules of interpretation are set out in Part 3.</p>
5 Project	<p>The Project for which funding is to be provided under this Agreement comprises:</p> <ul style="list-style-type: none"> (a) the acquisition of as many of the properties (both land and any

	<p>improvements) identified in the Acquisition Strategy as directly affected by the Designation as can be acquired within the Total Maximum Amount Payable, with acquisition through either negotiated settlement or the exercise of statutory rights and obligations of compulsory acquisition;</p> <p>(b) the conduct of such other activities described in the Acquisition Strategy as reasonably necessary to complete those acquisitions.</p> <p>For the avoidance of doubt the Project does not include any provision at this time for the design or construction of the rail infrastructure for the Marsden Point Rail Link or any associated infrastructure, freight yards, buildings or services.</p>
6 Project Milestones	<p>The Recipient is to use its reasonable endeavours to complete the Project in accordance with the milestone dates set out in the Acquisition Gant Chart at Appendix 4 of the Acquisition Strategy (read as if the Project commenced at the Funding Start date, rather than 1 June) (Milestones).</p> <p>Achievement of Milestones will be reported against and updated as part of the Recipient's reporting under clause 4 of this Agreement.</p>
7 Funding	<p>The total Funding available under this Agreement is up to NZ\$40,000,000 excluding GST (if any). This is the Total Maximum Amount Payable.</p>
8 Reporting	<p>The Recipient will provide the Crown (via the Treasury) with the following reports:</p> <ol style="list-style-type: none"> 1 A monthly report by the 20th Business Day following the end of each month. 2 A quarterly report by the 20th Business Day following the end of each quarter (quarters ending in March, June, September and December). 3 A Post-Investment Review submitted within 20 Business Days following the End Date. <p>Each monthly report must include the following information:</p> <ol style="list-style-type: none"> 1 The spend to date; 2 The funding drawdown to date; 3 Upcoming milestones. <p>Each quarterly report must include the following information:</p> <ol style="list-style-type: none"> 1 Description and analysis of actual progress of the Project against planned progress including an updated project timetable, Milestone dates and (except for the penultimate report prior to completion of the Project) the proposed funding required by equity injection for the subsequent Funding Period; 2 Progress and achievement of any of the Milestones; 3 A statement of the Funding received, spent, projected to be spent and remaining;

	<p>4 A costs update (including actual to date and an update of the number and location of properties expected to be acquired within the Total Maximum Amount Payable and before the End Date);</p> <p>5 Plans for the next Funding Period (not required in the final report following completion of the Project) to be agreed with the Crown.</p> <p>6 A copy of the then current risk register for the Project;</p> <p>7 A report on any changes or anticipated changes to be made to the Acquisition Strategy; and</p> <p>8 Any occurrence of, or major change in the risk rating of, a material risk associated with the Project.</p> <p>The Post Investment Review will include the following information:</p> <p>(a) an analysis of how the Funding has enabled the Recipient to deliver the Project;</p> <p>(b) details of Funding received and a summary of actual expenditure against budget;</p> <p>(c) a description of the Recipient's proposed next steps to design and construct the Marsden Point Rail Link on the land acquired as part of the Project; and</p> <p>(d) any other information that is notified by the Crown in writing to the Recipient.</p>	
9 Special Terms	N/A	
10 Contact Person	<p>The Crown's Contact Person c/of The Treasury:</p> <p>Name: Ann Webster</p> <p>Email: ann.webster@treasury.govt.nz</p>	<p>Recipient's Contact Person:</p> <p>Name: Helen Rogers</p> <p>Email: helen.rogers@kiwirail.co.nz</p>
11 Address for Notices	<p>To the Crown c/of The Treasury:</p> <p>Attention: Ann Webster</p> <p>Email: ann.webster@treasury.govt.nz</p>	<p>To the Recipient:</p> <p>KiwiRail Holdings Limited</p> <p>Level 3, 8-14 Stanley St, Parnell, Auckland 1010 (Mailing Address: Private Bag 92138, Victoria Street West, Auckland Mail Centre 1142)</p> <p>Attention: David Gordon, GGM Investment, Planning & Risk</p>

		Email: David.Gordon@kiwirail.co.nz
SIGNATURES	SIGNED by the Hon Grant Robertson, Minister of Finance _____	SIGNED by the Rt Hon Winston Peters, Minister for State Owned Enterprises _____
	Date:	Date:
	SIGNED for and on behalf of KIWIRAIL HOLDINGS LIMITED by the person named below, being a person duly authorised to enter into obligations on behalf of the Recipient: _____	
	Name: Greg Miller Position: Group Chief Executive Date:	

END OF PART 1

RELEASED UNDER THE OFFICIAL INFORMATION ACT

FUNDING AGREEMENT – PROVINCIAL GROWTH FUND

PART 2: GENERAL TERMS**1 FUNDING**

- 1.1 The Crown will, subject to the terms of this Agreement, make the Funding (up to the “Total Maximum Amount Payable” specified in the Key Details) available to the Recipient as a capital contribution by way of subscription for fully paid ordinary shares in the Recipient on the terms of the established share subscription and entitled persons agreement between the Recipient and the Recipient’s Shareholding Ministers on behalf of the Crown and otherwise subject to the terms of this Agreement.
- 1.2 Share subscriptions and associated allocations of Funding are expected to be made each Funding Period in accordance with the procedure set out in clause 1.4, against the following indicative annual appropriations for the Project:

9(2)(b)(ii)



- 1.3 The Recipient must use the Funding for, or ensure the Funding is applied towards, the purposes of the Project as set out in the Key Details. The Recipient can only request payment of the Funding in accordance with this Agreement and to the extent necessary to cover Eligible Costs.
- 1.4 Funding for forecast and actual Eligible Costs will be claimed by the Recipient and paid by the Crown to the Recipient as follows:
- (a) The Recipient will submit a payment request to the Crown for the forecast and actual Eligible Costs for the first or the next Funding Period (**Payment Request**) no later than 14 Business Days prior to the first Business Day of that Funding Period. The Payment Request will include (if applicable) any adjustment required as a result of the forecast expenditure paid for the previous Funding Period being more or less than the actual expenditure for Eligible Costs (**Wash Up**). The Recipient shall calculate the amount of any Wash Up and provide details (including evidence of the actual expenditure incurred) to the Crown as part of the Payment Request for the following Funding Period.
 - (b) The first Payment Request will include Eligible Costs incurred on and from the Funding Start Date as well as forecast and actual Eligible Costs for the following Funding Period.
 - (c) For each Payment Request, an accounting of the equity injections made to date and those forecast for the next and following Funding Periods against the Total Maximum Amount Payable shall be made, with the purpose of ensuring that the total Eligible Costs do not and will not exceed the Total Maximum Amount Payable.
 - (d) Funding of Eligible Costs under this Agreement is to be only made by way of subscription and payment for ordinary shares in the Recipient to an aggregate subscription value equal to the amount of the Eligible Costs requested for a Funding Period at \$1.00 per ordinary share. Only one funding amount may be requested in each Funding Request.
 - (e) Subscription and payment shall be made by not later than the 19th calendar day of the next Funding Period and if such day is not a Business Day, on the following Business Day to enable

FUNDING AGREEMENT – PROVINCIAL GROWTH FUND

the Recipient to pay expenditure incurred in carrying out the Project during that Funding Period as it falls due.

- 1.5 Each Payment Request is to be signed by an authorised signatory of the Recipient and must be in the form set out in the Schedule and must include:
- (a) the amount of Funding requested;
 - (b) a breakdown of total Eligible Costs forecast and incurred by the Recipient and which the requested Funding is to meet and written confirmation that such costs are Eligible Costs for the purposes of the Project (as described in the Key Details) and are currently due and payable or are reasonably expected to become payable within the relevant Funding Period;
 - (c) an update of any departures or anticipated departures from the Acquisition Strategy not previously reported in the quarterly reports;
 - (d) copies of the share subscription and entitled persons agreement for the share subscription the subject of the Payment Request;
 - (e) if the Payment Request includes a GST component, contain a valid GST invoice complying with the Goods and Services Tax Act 1985; and
 - (f) contain any other information reasonably required by the Crown.
- 1.6 The Crown is not required to pay any Funding in respect of a Payment Request:
- (a) to the extent that payment will result in the Funding exceeding the Total Maximum Amount Payable specified in the Key Details;
 - (b) if the information that is contained within, or provided in connection with, the Payment Request does not include the information required under this Agreement (noting that in the context of the Payment Request the Crown will use reasonable efforts to delineate and pay the Recipient any undisputed Eligible Costs that are the subject of the Payment Request but may withhold payment for other Eligible Costs that the Crown disputes);
 - (c) while there are one or more Termination Event(s);
 - (d) if this Agreement has expired or been terminated;
 - (e) where the Recipient has abandoned the Project, subject to clause 6.4; and/or
 - (f) while the Recipient is in material breach of this Agreement.
- 1.7 Subject to the terms of this Agreement, the Crown will pay the undisputed portion of each valid Payment Request in accordance with this Agreement. If the Crown disputes any Eligible Costs the subject of the Payment Request the Crown shall notify the Recipient promptly of that dispute and the reasons for it, but no later than 10 Business Days after receipt of the Payment Request.
- 1.8 Within 20 Business Days following the end of the final Funding Period, the Recipient will provide the Crown with a Wash Up detailing any final adjustment required as a result of the Funding drawn being more or less than the total actual expenditure for Eligible Costs during the term of this Agreement. Following receipt of the Wash Up:

FUNDING AGREEMENT – PROVINCIAL GROWTH FUND

- (a) Where the Funding distributed to date is less than the total Eligible Costs, the Recipient shall submit a final Payment Request to the Crown which will be paid in accordance with clause 1.4; or
 - (b) Where the Funding distributed to date is greater than the total Eligible Costs, any overpayment will be returned to the Crown. The parties will consult as to the best way to return the overpayment which may include, without limitation:
 - (i) by way of offset against the Recipient's future capital requirements; or
 - (ii) repurchase and cancellation of shares by the Recipient.
- 1.9 The Funding does not include GST. Where GST is payable on the Funding it will be paid by the Crown in addition to the Funding following presentation of a valid GST tax invoice for the relevant sum.

2 LAND PURCHASING

- 2.1 The Recipient will exercise its rights under the Core Lease to elect that the New Zealand Railways Corporation will act as purchaser of the land required for the Project and that such land will be added to the Core Lease. The Recipient will handle payment of the relevant purchase price to the vendor and the Recipient shall procure that the title to the land is acquired from the vendor in the name of the New Zealand Railways Corporation.
- 2.2 The Recipient agrees that any land acquired using the Funding shall be held and used only for the Marsden Point Rail Link and associated rail purposes. As a continuing obligation that survives the expiry or termination of this Agreement, if the Recipient disposes of any land acquired using the Funding then unless otherwise agreed, the Recipient will return the proceeds of disposal (less costs to sell) to the Crown. The parties will consult as to the best mechanism to return the proceeds to the Crown which may include, without limitation, by way of off-set against Eligible Costs or the Recipient's future capital requirements for the purposes of this Project, or by way of repurchase and cancellation of shares.
- 2.3 The parties agree that if any parcel of land required for the Project cannot be purchased under a negotiated agreement with the land owner then it will be purchased using standard legislated procurement processes for compulsory acquisition and payment of related compensation. Recipient's responsibilities.

3 RECIPIENT'S RESPONSIBILITIES**Standards and compliance with laws**

- 3.1 The Recipient will use all reasonable endeavours to undertake the Project as described in this Agreement.
- 3.2 In undertaking the Project, the Recipient will comply with all applicable laws, regulations, rules and professional codes of conduct or practice.
- 3.3 The Recipient will ensure that the information in the reports is capable of being disclosed to MBIE.

Milestones, Contractors and the Project

- 3.4 The Recipient will use its reasonable endeavours to meet the Milestones and carry out the Project:

FUNDING AGREEMENT – PROVINCIAL GROWTH FUND

- (a) with due diligence, care and skill, and in a manner that meets or exceeds Best Industry Practice; and
 - (b) utilising appropriately trained, qualified, experienced and supervised persons.
- 3.5 The Recipient will use reasonable endeavours to achieve the Milestones by the relevant dates specified in the Key Details, as updated in accordance with the provisions of this Agreement, and otherwise complete the Project by the End Date.
- 3.6 The Recipient is responsible for the acts and omissions of any of the Recipient's contractors in performance of the Project.
- 3.7 The Recipient will ensure (and will procure that any head contractor when engaging with any other contractor ensures) that all agreements it enters into with contractors or any other party in connection with the Project are on an "arm's length" basis, provide value-for-money and do not give rise to any Conflict of Interest. The Recipient must provide MBIE and/or the Crown with reasonable evidence of compliance with this clause 3.7 in response to any request from MBIE and/or the Crown from time to time.

Information Undertakings

- 3.8 The Recipient will provide the Crown with the reports (if any) specified in the Key Details, in accordance with the timeframes and reporting requirements set out in the Key Details.
- 3.9 In addition to the information to be provided to the Crown as part of the Payment Request procedure, the Recipient will provide the Crown with any other information about the Project requested by the Crown (acting reasonably) within the timeframe set out in the request.
- 3.10 The Recipient shall promptly notify the Crown if:
- (a) the Recipient (or any of its personnel or contractors) becomes aware of, or subject to, a Conflict of Interest;
 - (b) the Recipient becomes aware of any matter that could reasonably be expected to have a material adverse effect on the Project, or result in a Termination Event or a breach of any term of this Agreement by the Recipient.
- 3.11 The Recipient will not at any time do anything in respect of the Project that could reasonably be expected to have a material adverse effect on the reputation, good standing or goodwill of the Crown. The Recipient will keep the Crown informed of any matter known to the Recipient which could reasonably be expected to have such an effect.

Funding, records and auditors

- 3.12 The Recipient will receive and manage all Funding in accordance with good financial management and accounting practices and to a high standard that demonstrates appropriate use of public funds.
- 3.13 The Recipient must keep full and accurate records (including accounting records) of the Project, and retain them for at least 7 years after the last payment of Funding under this Agreement. The Recipient must permit the Crown (or any auditor nominated by the Crown) to inspect all records relating to the Project and will allow the Crown and/or the auditor access to the Recipient's premises, systems and personnel for the purposes of this inspection.

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4 PROJECT GOVERNANCE

- 4.1 At the request of the Crown, representatives of the parties will meet quarterly to discuss:
- (a) the contents of the relevant reports and any matters arising from those reports; and
 - (b) any material matters which have arisen in respect of the Project since the delivery of the relevant reports;
 - (c) the key tasks, actions and decisions anticipated for the following quarter; and
 - (d) any other material issues in respect of the Project.
- 4.2 Representatives of the parties will meet within 10 Business Days prior to the end of each Funding Period to review and discuss:
- (a) actual expenditure of Funding during that Funding Period;
 - (b) the Funding Request for the immediately following Funding Period; and
 - (c) progress to date against the Milestones.

For the avoidance of doubt such meetings may be held concurrently with any meetings requested by the Crown and/or MBIE under clause 4.1.

5 INTELLECTUAL PROPERTY

- 5.1 The Crown acknowledges that the Recipient and its licensors will retain ownership of all pre-existing intellectual property which they contribute to the Project, and all new intellectual property which they create in the course of the Project.

6 TERM AND TERMINATION

- 6.1 This Agreement will be effective on and from the Commencement Date and will remain in force until the End Date, unless terminated earlier in accordance with this Agreement (the **Term**).
- 6.2 The Crown can terminate this Agreement with immediate effect, by giving notice to the Recipient, at any time while:
- (a) the Recipient is insolvent or bankrupt;
 - (b) the Recipient is subject to the appointment of, or a proposal to appoint, a liquidator, receiver, manager, statutory manager or similar person in respect of any material part of its assets;
 - (c) the Recipient has ceased to carry on its operations or business (or a material part of them) in New Zealand;
 - (d) the entirety of the Recipient's ordinary shares cease to be exclusively owned or controlled by the Crown; or
 - (e) any one or more of the follow events or circumstances remains unremedied:

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- (i) the Recipient is in breach of any material obligation, or a condition or warranty, under this Agreement;
- (ii) the Recipient has abandoned the Project;
- (iii) the Recipient is involved in any intentional or reckless conduct in connection with the Project which, in the reasonable opinion of the Crown, has materially damaged or could materially damage the reputation, good standing or goodwill of the Crown, another government department or the Crown generally, or is involved in any intentional and material misrepresentation or any fraud in connection with the Project;
- (iv) the Recipient (or any of its personnel or contractors) is subject to a Conflict of Interest which cannot be managed to the Crown's satisfaction; or
- (v) the Recipient is unable to comply with a material obligation under this Agreement as a result of a Force Majeure Event and that inability to comply continues for more than 40 consecutive Business Days.

6.3 However, where a Termination Event set out in clause 6.2(e) applies, the Crown will give notice to the Recipient requesting a remedy, and will not exercise its right of termination unless the relevant event remains unremedied for at least 30 Business Days (or any longer period agreed with the Recipient) after that notice has been provided by the Crown.

6.4 The Crown may recover Funding from the Recipient as follows:

- (a) **Misspent Funding.** At any time the Crown may recover the amount of any Funding that has been spent or used other than in accordance with this Agreement, together with interest on all such amounts calculated at 10% per annum from the date of the misspending to the date the money is repaid.
- (b) **Project abandoned.** If the Recipient has abandoned the Project or stated an intention to abandon the Project, and does not within 10 Business Days of being requested to do so by the Crown demonstrate to the Crown's satisfaction that the Recipient will proceed with the Project, the Crown may recover an amount up to the total value of the Funding provided to the Recipient, provided the Crown may not recover under this subclause if the Recipient satisfies the Crown that it acted on reasonable grounds in deciding to abandon the Project or where the Project is abandoned due to a Force Majeure Event. Where any Funding has been applied to the purchase price of land prior to the date of abandonment the Recipient may, with the agreement of the Crown and subject to any statutory obligations in respect of the land, transfer the relevant land to the Crown or another department or crown entity in lieu of repayment of the relevant Funding.

6.5 Clauses 1.6, 1.7, 2.2, 2.3, 3.2, 3.11, 3.12, 3.13, 5, 6, 7, 9, 10, 11, 12 and 14 survive expiry or termination of this Agreement, along with any other parts of this Agreement necessary to give effect to those provisions. Expiry or termination of this Agreement does not affect any accrued rights, including any rights in respect of a breach of this Agreement or Termination Event that occurred before expiry or termination.

s9(2)(h)

s9(2)(h)

7 FORCE MAJEURE

- 7.1 Notwithstanding anything else in this Agreement, the Recipient is not liable for any failure or delay in performing, or a breach of, an obligation under this Agreement if the failure, delay or breach arises from an act of god, earthquakes, landslides, unforeseen ground conditions that could not be reasonably anticipate by the application of Best Industry Practice, floods, storms, fires, adverse weather conditions, civil commotion, or restrictions by government that materially impede implementation of the Project ("Force Majeure Event").
- 7.2 If a cause to which clause 7.1 applies arises, the Recipient must upon becoming aware of the cause, notify the Crown in writing of the nature of, expected duration of, and the obligation affected by, the cause, and the potential response of any of the Recipient's insurances to that cause. Notwithstanding that any such cause arises, the Recipient must use its reasonable endeavours to:
- (a) mitigate the effects of the cause on the Recipient's obligations under this Agreement; and
 - (b) progress any valid insurance claim that the Recipient may have in respect of that cause.

8 WARRANTIES

- 8.1 The Recipient warrants that, in the course of its activities in connection with the Project, it will not infringe any intellectual property or other rights of any third party.
- 8.2 The Recipient warrants that as at the date of this Agreement and, except as otherwise disclosed in reports provided to the Crown under this Agreement, as at the date of each Funding Request:
- (a) the information in the Acquisition Strategy submitted by the Recipient to the Provincial Growth Fund in respect of the Project was, as at the date of submission, and remains, true and correct in all material respects, does not omit any material matter, and is not likely to mislead or deceive the Crown as to any material matter, and the Recipient has made or will make the Crown aware of any material changes to that information which it has become or becomes aware of since the date of submission as soon as reasonably practicable following the Recipient becoming aware of such information;
 - (b) it has disclosed to the Crown all matters known to the Recipient (relating to Project, the Recipient or its personnel) that could reasonably be expected to have an adverse effect on the reputation, good standing or goodwill of the Crown; and
 - (c) it is not aware of any material information that has not been disclosed to the Crown which may, if disclosed, be reasonably expected to materially adversely affect the decision of the Crown whether to provide the Funding.
- 8.3 The Recipient acknowledges that the Crown has entered into this Agreement in reliance on these warranties.

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8.4 The Recipient acknowledges and agrees that neither the Crown nor MBIE has made any warranty or representation that any funding or financial support is or will be available to the Recipient in respect of the Project other than provision of the Funding on and subject to the terms of this Agreement.

9 LIABILITY

9.1 The maximum liability of the Crown under or in connection with this Agreement, whether arising in contract, tort (including negligence) or otherwise, is limited to the total amount of Funding paid or payable under this Agreement, except where (and to the extent) provided for under this Agreement.

9.2 The Crown is not liable for any claim under or in connection with this Agreement, whether arising in contract, tort (including negligence) or otherwise, where such claim is or relates to any loss of profit, loss of revenue, loss of use, loss of reputation, loss of goodwill, loss of opportunity (in each case whether direct, indirect or consequential) or any other indirect, consequential or incidental loss or damages of any kind whatsoever.

10 CONFIDENTIALITY

10.1 Any Confidential Information supplied by either party to the other party must not be disclosed by the Recipient to any third party without the prior written consent of the disclosing party, except to the extent:

- (a) required by Law; or
- (b) necessary to satisfy the requirements of any stock exchange; or
- (c) necessary to obtain the benefit of, or to carry out obligations under, this Agreement; or
- (d) that the information is or becomes available in the public domain without breach by a party of its confidentiality obligations under this clause or at Law; or
- (e) required to enable a party to meet its obligations under any constitutional or parliamentary convention (or other obligation at law) of or in relation to the New Zealand Parliament, the New Zealand House of Representatives or any of its Committees, any Minister of the Crown, or the New Zealand Auditor-General, including any obligations under the "no surprises" policy advised by Ministers of the Crown.

10.2 Each party acknowledges and agrees that nothing in this Agreement restricts the other party's ability to:

- (a) discuss, and provide all information in respect of, any matters concerning the Recipient, the Project or this Agreement with any Minister of the Crown, any other government agency or any of their respective advisors; and
- (b) disclose information to its personnel or contractors with a need to know, so long as the relevant personnel and contractors use the information solely to enable that party to perform its obligations and/or take the intended benefit of its rights under this Agreement, and so long as they are informed of the confidential nature of the information and in the case of the Recipient, the Recipient receives an acknowledgement from its personnel or contractors that they acknowledge, and will comply with, the confidentiality obligations in this Agreement as if they were party to it.

10.3 Each party acknowledges that:

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- (a) the contents of this Agreement; and
- (b) information provided to the Crown in connection with this Agreement,

may be official information in terms of the Official Information Act 1982 and, in line with the purpose and principles of the Official Information Act 1982, this Agreement and such information may be released to the public unless there is good reason, in terms of the Official Information Act 1982, to withhold it

- 10.4 The obligations under this clause are continuing obligations and will survive the termination of this Agreement for a period of 5 years.

11 PUBLICITY

- 11.1 Before making any media statements or press releases or general announcements (including in the Recipient's annual report) regarding this Agreement and/or the Crown's involvement with the Project, the Recipient will consult with the Crown and first agree the form of those statements, releases or announcements before that are made public.
- 11.2 The Recipient will acknowledge the Crown as a source of funding in all publications and publicity regarding the Project.
- 11.3 The Recipient does not have the right to enter into any commitment, contract or agreement on behalf of the Crown or any associated body, or to make any public statement or comment on behalf of the Crown.

12 DISPUTES

- 12.1 In the event of any dispute, controversy or claim arising out of or in connection with this Agreement, or in relation to any question regarding its existence, breach, termination or invalidity (in each case, a *Dispute*), either party may give written notice to the other specifying the nature of the Dispute and requesting discussions under this clause 12 (*Dispute Notice*). As soon as reasonably practicable following receipt of a Dispute Notice, the parties will meet (in person, or by audio or video conference) and endeavour to resolve the Dispute by discussion, negotiation and agreement.
- 12.2 If the parties fail to reach agreement in relation to a Dispute within 14 days of the date the Dispute Notice is served on the other party, the Dispute shall be referred to the Chair of the Recipient and to both Shareholding Ministers and the Chair of the Recipient and the Shareholding Ministers (or their respective nominees) will each use reasonable endeavours to resolve the Dispute within 21 days from the date such Dispute is referred to the last of them.
- 12.3 A party must not commence any proceedings in connection with a Dispute unless at least 40 days have elapsed since the issue of a corresponding Dispute Notice, and that party has used reasonable endeavours to comply with this clause 12. However, nothing in this clause will prevent either party from seeking urgent interim relief from a court (or other tribunal) of competent jurisdiction.

13 CONTACT PERSONS

- 13.1 All matters or enquiries regarding this Agreement will be directed to each party's Contact Person (set out in the Key Details).
- 13.2 Each party may from time to time change the person designated as its Contact Person on 10 Business Days' written notice to the other Party.

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14 GENERAL

14.1 Each notice or other communication given under this Agreement (each a notice) will be in writing and delivered personally or sent by post or email to the address of the relevant party set out in the Key Details or to any other address from time to time designated for that purpose by at least 10 Business Days' prior written notice to the other party. A notice under this Agreement is deemed to be received if:

- (a) **Delivery:** delivered personally, when delivered;
- (b) **Post:** posted, 5 Business Days after posting or, in the case of international post, 7 Business Days after posting; and
- (c) **Email:** sent by email:
 - (i) If sent between the hours of 9am and 5pm (local time) on a Business Day, at the time of transmission; or
 - (ii) If subclause (i) does not apply, at 9am (local time) on the Business Day most immediately after the time of sending,

provided that an email is not deemed received unless (if receipt is disputed) the party giving notice produces a printed copy of the email which evidences that the email was sent to the email address of the party given notice.

- 14.2 Each party agrees to execute and deliver any documents and to do all things as may be required by the other party to obtain the full benefit of this Agreement according to its true intent.
- 14.3 No legal partnership, employer-employee, principal-agent or joint venture relationship is created or evidenced by this Agreement.
- 14.4 This Agreement constitutes the sole and entire understanding with respect to its subject matter and supersedes all prior discussions, representations and understandings, written or oral.
- 14.5 No amendment to this Agreement will be effective unless agreed in writing and signed by both parties.
- 14.6 The Recipient may not assign or transfer any of its contractual rights or obligations under this Agreement, except with the Crown's prior written approval.
- 14.7 The Crown may assign or transfer any of its contractual rights or obligations under this Agreement without the Recipient's prior approval. The Crown may at any time disclose to a proposed assignee or transferee any information which relates to, or was provided in connection with, the Recipient, the Project or this Agreement.
- 14.8 No failure, delay or indulgence by any party in exercising any power or right conferred on that party by this Agreement shall operate as a waiver. A single exercise of any of those powers or rights does not preclude further exercises of those powers or rights or the exercise of any other powers or rights.
- 14.9 The exercise by a party of any express right set out in this Agreement is without prejudice to any other rights, powers or remedies available to a party in contract, at law or in equity, including any rights, powers or remedies which would be available if the express rights were not set out in this Agreement.

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- 14.10 This Agreement is not intended to confer any benefit on or create any obligation enforceable at the suit of any person not a party to this Agreement.
- 14.11 Any provision of this Agreement that is invalid or unenforceable will be deemed deleted, and will not affect the other provisions of this Agreement, all of which remain in force to the extent permitted by law, subject to any modifications made necessary by the deletion of the invalid or unenforceable provision.
- 14.12 This Agreement is to be governed by the laws of New Zealand, and the parties submit to the non-exclusive jurisdiction of the courts of New Zealand.
- 14.13 This Agreement may be executed in any number of counterparts (including scanned and emailed copies). So long as each party has received a counterpart signed by each of the other parties, the counterparts together shall constitute a binding and enforceable agreement.

END OF PART 2

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

FUNDING AGREEMENT – PROVINCIAL GROWTH FUND

PART 3: DEFINITIONS AND CONSTRUCTION**Defined terms**

In this Agreement, unless the context requires otherwise:

Agreement: means this funding agreement inclusive of the Parts 1, 2 and 3 of this document and all schedules attached hereto.

Acquisition Strategy: is defined in section 4 of Part 1 of this Agreement

Best Industry Practice means that degree of skill, care and foresight and operating practice that would reasonably and ordinarily be expected of a skilled and competent supplier of services engaged in the same type of undertaking as that of the Recipient or any contractors (as applicable) under the same or similar circumstances as those contemplated by this Agreement;

Business Day means any day other than a Saturday, Sunday or public holiday within the meaning of section 44 of the Holidays Act 2003.

Commencement Date means the date that this agreement is signed by authorised signatories on behalf of each party;

Confidential Information means any information, documents and communications provided by one party to the other that is either:

- (a) related to the Project; or
- (b) designated by the disclosing party as confidential,

and, without limitation, includes any notes, documents, formula, plans, drawings, designs, models, trade secrets and includes any of the aforesaid which may be oral, written, stored in electronic form, translated from original form, re-compiled, copied, made into a compilation or altered from original form.

Conflict of Interest means any matter, circumstance, interest or activity of the Recipient, its personnel or contractors in connection with the Project that might reasonably be expected to substantially erode public confidence in the Project or the role of the Recipient in the delivery of the Project because it:

- (a) conflicts with:
 - (i) the obligations of the Recipient (or its personnel or contractors) to the Crown under this Agreement; or
 - (ii) the interests of the Recipient in relation to this Agreement and/or the procuring of the Project; or
- (b) otherwise significantly impairs or is reasonably considered to significantly impair the ability of the Recipient (or any of its personnel or contractors) to diligently and independently carry out the Project in accordance with this Agreement.

Core Lease means the Variation and Restatement of Lease of the Crown rail estate between the Crown, NZRC and KiwiRail Limited dated 20 February 2013 as varied from time to time.

Eligible Costs means, in respect of the Project, the forecast and actual costs reasonably incurred by the Recipient in good faith on or after the Eligible Costs Start Date and no later than the End Date:

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- (a) for the purposes of purchasing land or interests in land required for the Project; and
- (b) for the purposes of otherwise carrying out the Project or for purposes incidental to the Project, including all internal costs, disbursements and expenses incurred by the Recipient for such purposes (and to the extent the Recipient is carrying out any other activities) reasonably and proportionately allocated towards such purposes; and
- (c) to a third party as a result of a breach of the Crown's obligations to pay the funding in accordance with this Agreement and the consequent inability of the Recipient to meet a purchase or payment obligation to that third party; and
- (d) to the extent that the expenditure relates to work performed by parties not at "arm's length", that expenditure is assessed at reasonable market value, and contains no unacceptable overhead and no element of "in group profit",

and for the avoidance of doubt does not include working capital or operational costs (including salaries or staffing costs) of the Recipient except to the extent that these relate to the Project.

End Date means the "End Date" specified in the Key Details.

Force Majeure Event has the meaning given to that term in clause 7.1 of the General Terms.

Funding means the funding or any part of the funding (as the context requires) payable by the Crown to the Recipient in accordance with the terms of this Agreement, as described in the Key Details.

Funding Period means each of the following periods during the Term:

- (a) 1 March to 30 June;
- (b) 1 July to 31 October; and
- (c) 1 November to 29 February;

Funding Start Date means the "Funding Start Date" specified in the Key Details.

Key Details means Part 1 of this Agreement.

Payment Request is described in clause 1.4 and is to be delivered in the form set out in the Schedule to this Agreement.

Project means the "Project" described in the Key Details.

Recipient means the Recipient specified in the Key Details.

Shareholding Ministers mean the Minister for State Owned Enterprises or the Minister of Finance, and includes any other Minister of the Crown appointed from time to time to hold shares of the Recipient.

Termination Event means any one or more of the events or circumstances set out in clause 6.2.

Construction

In the construction of this Agreement, unless the context requires otherwise:

Currency: a reference to any monetary amount is to New Zealand currency;

FUNDING AGREEMENT – PROVINCIAL GROWTH FUND

Defined Terms: words or phrases appearing in this Agreement with capitalised initial letters are defined terms and have the meanings given to them in this Agreement;

Documents: a reference to any document, including this Agreement, includes a reference to that document as amended or replaced from time to time;

Inclusions: a reference to “includes” is a reference to “includes without limitation”, and “include”, “included” and “including” have corresponding meanings;

Joint and Several Liability: any provision of this Agreement to be performed or observed by two or more persons binds those persons jointly and severally;

Parties: a reference to a party to this Agreement or any other document includes that party's personal representatives/successors and permitted assigns;

Person: a reference to a person includes a corporation sole and also a body of persons, whether corporate or unincorporated;

Precedence: if there is any conflict between the different parts of this Agreement, then unless specifically stated otherwise, Part 2 will prevail over the Key Details, and the Key Details will prevail over any Attachments;

Related Terms: where a word or expression is defined in this Agreement, other parts of speech and grammatical forms of that word or expression have corresponding meanings;

Statutes and Regulations: a reference to an enactment or any regulations is a reference to that enactment or those regulations as amended, or to any enactment or regulations substituted for that enactment or those regulations;

Writing: a reference to “written” or “in writing” includes email and any commonly used electronic document format such as .DOC or .PDF.

END OF PART 3

FUNDING AGREEMENT – PROVINCIAL GROWTH FUND

Schedule: Payment Request

To: THE TREASURY

Dated: [•]

PAYMENT REQUEST NO. [•]

1. We refer to the Funding Agreement dated [•] and agreement number [•] between [x] as recipient (**Recipient**) and the Crown (**Crown**) (the **Agreement**). Terms defined in the Agreement have the same meaning in this Payment Request.
2. This is a Payment Request for the purpose of clause 1.4 of the Agreement.
5. The amount of Funding requested is \$[x] excluding GST if any.
6. The Funding requested in this Payment Request is required to meet the following Eligible Costs that are forecast or have been incurred by us:
[include breakdown description of Eligible Costs].
8. Each of the items referred to in paragraph 6 are Eligible Costs for the purpose of the Agreement and have been paid or are currently due and payable or are expected to become payable within the Funding Period to which this Payment Request relates.
9. A copy of the share subscription and entitled persons agreement is attached *[together with particulars of the other information that the Crown has requested for the purposes of this Payment Request]*.
10. *[Include valid GST invoice if relevant]*.
11. We confirm that no Termination Event is subsisting.
12. Any departures or anticipated departures from the Acquisition Strategy that have not already been reported in quarterly reporting are attached.

Except to the extent otherwise agreed in writing by the Crown, all those items forming part of the Eligible Costs identified in the previous Payment Request as due or becoming due and payable, have been paid in full (subject to the terms of any retentions as agreed between the Recipient and a Contractor).

By and on behalf of the Recipient by

[insert name of Recipient]

 Authorised Officer