

BEFORE THE HEARING PANEL

UNDER	The Resource Management Act 1991
IN THE MATTER OF	A Notice of Requirement to construct and operate a new intermodal rail and freight hub on land between Palmerston North and Bunnythorpe
AND	A hearing by Palmerston North City Council pursuant to s 100A
REQUIRING AUTHORITY	KiwiRail Holdings Ltd
HEARING DATE	9 August 2021

MEMORANDUM OF COUNSEL ASSISTING REPORTING OFFICERS

Dated: 12 July 2021



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MAY IT PLEASE THE HEARINGS PANEL

[1] This memorandum is filed in response to the memorandum of counsel for Dr Whittle and Dr Fox, dated 8 July 2021, which raises substantive and procedural issues concerning the scope of KiwiRail's approval as a requiring authority. Counsel has also read and considered the memorandum filed by Kiwirail on 12 July 2021.

[2] Dr Whittle and Dr Fox have asked the Panel to consider the appropriateness of proceeding to a two week hearing in the face of the potential jurisdictional issue set out in its memorandum.

[3] Kiwirail, in reply, submits that:

(a) The activities in its Notice of Requirement "*...are well within the scope of Kiwirail's approval as a requiring authority*";¹

(b) That the issue can be addressed by the Panel at the hearing of the Notice of Requirement; and

(c) That it would be "*...both unreasonable and unfair for the upcoming hearing to be postponed or adjourned at this late stage*".²

[4] As noted by both counsel for Drs Whittle and Fox, and Kiwirail, the Council's Section 42A Planning Report considered this issue, saying:³

Two submissions seek clarification of the scope of activities authorised by the designation. The submitters consider the designation can only authorise activities for which KiwiRail has financial responsibility and within the scope of its Requiring Authority Approval. To our understanding, the issue raised is largely a legal point, and therefore we leave this matter to be addressed in legal submissions.

[5] While the above paragraph does not refer Dr Fox's submission, it could have. In any case, it is implicit in the above passage that the reporting officers

¹ Memorandum of counsel on behalf of Kiwirail Holdings Limited, paragraph 8.

² As above, paragraph 10.

³ Section 42A Planning Report at paragraph 44.

consider that the jurisdiction issue raised in submissions is live and can be appropriately and fairly considered at the hearing. They remain of that view.

- [6] This position is supported by commentary from the Environment Court in *Malvern Hills Protection Society Incorporated v Selwyn District Council* C105/97. In considering an application for declaration as to whether a NOR was ultra vires to the requiring authority approval, the Court commented:

[30] ... It is difficult to see that this [declaratory relief] would restrict the Council's decision given that it may always be possible for the requiring authority to obtain status to cover such an application prior to the hearing, or even prior to the implementation of the designation. On its face there would still be a valid NOR given by the CPW, within jurisdiction, under section 168 of the Act.

[31] Finally this Court considers that the method provided under the Act to address a concern about particular aspects of a proposal is through the public and participatory procedure envisaged in terms of section 171 of the Act. **It is competent for the territorial authority to decide whether any particular aspect of the NOR is within scope. If the parties disagree with the decision of the Council or commissioners on this issue it can be referred to the Environment Court, and subsequently on appeal on law to superior Courts...**

[emphasis added]

- [7] Subject to the correction that the Council gives 'recommendations' under s 171 as opposed to 'decisions' (which are made by the Requiring Authority under s 172), the Environment Court's procedural commentary otherwise appears to be on point. In order for the Requiring Authority to access its power to decide on recommendations under s 172 and open potential rights of appeal, it must first be given the Council's recommendations on its NOR. This would require a hearing.



Nicholas Jessen

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