

KiwiRail - Selwyn District Council – Deed of Grant – Proposed New Deed

1. This request has been forwarded to all Councils who have rail access through their boundaries. The email raises concerns expressed by Selwyn District Council at the last Rural and Provincial Sectors meeting, outlines the background to the Selwyn case and, importantly, seeks support from fellow Councils to join action against KiwiRail. The reason for seeking this support is that we are of the view that the outcome of any case against Selwyn will potentially be used as a national standard against which KiwiRail will attempt to negotiate outcomes with all directly affected Councils.

Local Government New Zealand is providing support to Selwyn District Council in this matter.

Background

2. As outlined in the presentation by David Ward at the Rural and Provincial Sectors meeting on 16 and 17 June 2016, KiwiRail Holdings Limited and NZ Railways Corporation have issued High Court proceedings against Selwyn District Council to determine liability for the cost of repairing a water race culvert passing under the railway line. KiwiRail also seeks the costs of alleged disruption to rail traffic on the Main South Line before the repair took place.
3. KiwiRail has located a deed of easement dated 4 September 1913 between the Crown and a predecessor of SDC (the Selwyn County Council). SDC understands that many local authorities have similar historic deeds.
4. KiwiRail considers that it can cancel the historic deed by giving 3 months' notice and that if this occurs the Council will have to fill in the race. It has given notice of cancellation and suspended the notice while the litigation continues.
5. SDC has consistently denied liability for the costs of repair and ongoing maintenance costs as it has not paid maintenance or carried out repairs in the past. It also denies there is any ability for KiwiRail to cancel the terms of any arrangement by the giving of 3 months' notice.
6. KiwiRail has proposed that the situation be remedied by a new deed of grant. SDC has yet to agree to this. There are a number of issues to be resolved between the parties including:

Terms of historic deed

- (a) Whether KiwiRail, by its conduct over the past 100 years, has accepted responsibility for the repair and maintenance of stockwater race culverts that run under KiwiRail's railway network.
- (b) The question of whether the terms of the historic deed between Selwyn County Council and the Crown are in force and enforceable by KiwiRail has wider application to other Councils which are subject to similar historic arrangements.

Proposed new deed

- (c) Whether KiwiRail's proposed new deed of grant (the form of which has also been circulated to other local authorities and commercial entities) is an appropriate way to address the current situation. The provisions of the draft deed are heavily in favour of KiwiRail and potentially onerous for the Council:

- (i) A grant fee of a specified sum per annum per culvert is proposed and this will increase by an automatic 2% per annum under the fee review provisions. This cost is a significant step change from what has been paid historically.
- (ii) The Council would also be required to pay all of the maintenance costs and all other costs which arise as a consequence of the existence of the culvert.
- (iii) The use of the culvert land by the Council is very much at the Council's own risk and it is required to indemnify KiwiRail in respect of any loss or damage that KiwiRail may suffer as a result of the Council's use of the land.
- (iv) KiwiRail is given reasonably arbitrary powers to determine matters under the new deed.

Next Steps

- 7. SDC has advised KiwiRail that it wants to consult with all local authorities about the proposed terms as the entry into a new deed of grant by SDC will have precedent setting implications for other Councils, particularly in relation to licence fees.
- 8. SDC is seeking an indication of support for a joint approach to be taken to the negotiation of terms of the deed of grant. SDC can circulate suggested terms for comment to any interested parties. There would be greater bargaining power if the negotiation was approached collectively.
- 9. In addition, the implementation of grant fees and charges by KiwiRail for local authorities (along with the suggestion that existing water race use rights can be terminated) raise policy issues that should appropriately be addressed at a ministerial level.

Your Consideration

- 10. SDC seeks support for the drafting and circulation of a letter from local authorities to appropriate Ministers raising concerns with the approach taken by KiwiRail.
- 11. We would appreciate if you would discuss this request with your Council and provide an indication of support either directly to Malcolm Alexander, Chief Executive of LGNZ or David Ward, Chief Executive of Selwyn District Council.
- 12. We appreciate your giving consideration to our request.

Regards

Malcolm Alexander
Chief Executive
Local Government New Zealand
DDI 04 924 1201 **M** 021 737 681
E malcolm.alexander@lgnz.co.nz
W www.lgnz.co.nz

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