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By email: wayne.hastie@gw.govt.nz

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Dear Wayne

Legal advice on safety obligations under the Railways Act 2005

Introduction

- 1 You have asked us to provide advice to Greater Wellington Regional Council ('**GWRC**') and its subsidiary Greater Wellington Rail Limited ('**GWRL**')¹ regarding the following matters:
 - a An outline of the statutory requirements under the Railways Act 2005 (the '**Act**') relating to safety;
 - b How those statutory requirements translate into the specific roles and responsibilities of GWRC and GWRL in accordance with the ownership and contractual arrangements that exist for the operation of metro rail in Wellington;
 - c The safety obligations of GWRC staff and councillors and/or the directors of GWRL that may arise from those organisations' own safety obligations under the Act;
 - d Advice on good practice for the above parties to follow in terms of meeting their respective safety obligations under the Act.
- 2 We have set out our advice in relation to each of these matters below. It deals with the Railways Act, and does not address health and safety obligations that may arise under other pieces of legislation, including the Health and Safety in Employment Act.

Summary of advice

- 3 'Rail participants' (as defined in the Act) have statutory safety obligations which vary from participant to participant depending on the particular 'rail activities' (also defined) that each rail participant carries out. Rail participants include rail vehicle owners, access providers, rail operators, maintenance providers, railway premises owners and railway premises managers.
- 4 Each rail participant is subject to a primary direct safety obligation to ensure that none of the rail activities for which it is responsible causes, or is likely to cause, death or serious injury.
- 5 Further, every member of a rail participant's 'rail personnel' is subject to a general obligation not to do (or omit to do) anything in respect of a rail vehicle, railway infrastructure or railway premises if he or she knows, or ought reasonably to know, that that act (or omission) will cause or be likely to cause death or serious injury.

¹ GWRL is a council-controlled trading organisation which is wholly owned by GWRC.

- 6 The Act also imposes a general safety obligation on everyone else (i.e. anyone other than a rail participant or rail personnel) who is on or near a rail vehicle, railway infrastructure or railway premises to take all practicable steps to ensure that no one dies or is seriously injured or that property is seriously damaged due to any act or omission of that person.
- 7 Particular rail participants are required to hold a licence as a condition of undertaking their rail activities. Licence-holders are subject to additional direct safety obligations. The NZTA has currently granted GWRC and GWRL an exemption from the requirement to hold a licence.
- 8 GWRC is likely to be a rail participant (in its capacity as a railway premises owner and railway premises manager) and, as such, has direct safety obligations under the Act in relation to its rail activities (paragraphs 43 to 50).
- 9 GWRL is a rail participant (in its capacity as a rail vehicle owner, rail operator, railway premises owner and railway premises manager) and also has direct safety obligations under the Act in relation to its rail activities (paragraphs 51 to 55).
- 10 As a rail operator, GWRL would be required to hold a licence, but it has currently been granted an exemption from the requirement to hold a licence by the NZTA. As such, it is not required to comply with the additional safety obligations applying to licence-holders (but must comply with other safety obligations which are applicable to rail operators (paragraphs 56 to 58)).
- 11 GWRC and GWRL's approach to meeting their direct safety obligations under the Act is through their contractual arrangements with KiwiRail and other parties that are involved in the operation of metro rail in Wellington (paragraphs 60 to 64).
- 12 As principals to particular contracts, in certain limited circumstances, GWRC (and/or its councillors) and GWRL (and/or its directors) can potentially derive liabilities under the Act resulting from breaches of safety obligations by KiwiRail and other parties with whom GWRC/GWRL contract for the provision of rail services (paragraphs 65 to 73).
- 13 KiwiRail and the other parties with whom GWRC/GWRL contracts to operate Wellington metro rail are required under those contracts to report regularly to, and liaise with, GWRC/GWRL on rail safety matters (in addition to KiwiRail and those other parties having their own direct safety obligations under the Act).
- 14 GWRC and GWRL should each ensure that they continue to exercise careful monitoring and supervision of their own rail activities as well as the rail activities of other rail participants (paragraphs 76 to 77).
- 15 This monitoring and supervision should be with a view to GWRC and GWRL satisfying themselves that the parties with whom they contract for the provision of the Wellington metro rail services have the appropriate people, systems, and equipment in place to satisfy GWRC/GWRL's safety obligations **and** those parties' own safety obligations under the Act (paragraph 78 onwards).

Documentation

- 16 The provision and operation of metro rail services in Wellington are governed by several inter-related and other inter-dependent contracts.

- 17 The relationships between the various parties to these contracts are relatively complex.
- 18 For clarity, we have summarised in the table below only the key documents which we refer to in this advice:

Agreement	Description	Parties
Contract for the Provision of Suburban Rail Services for Wellington Region 'Rail Operating Contract'	Agreement under which KiwiRail Limited currently operates the Wellington metro rail service for GWRC ²	GWRC KiwiRail Ltd
Wellington Network Agreement ³ 'Network Agreement'	Agreement which gives GWRC, through its nominated Metro Service Operator (currently KiwiRail Ltd), rights to operate on the Wellington rail network owned by KiwiRail Holdings Ltd (the rail infrastructure owner)	KiwiRail Holdings Ltd GWRC (KiwiRail Ltd will also become a party to the Agreement through a deed of accession)
Interim Agreement for Maintenance, Leasing and Operation of the EMU Fleets (A letter agreement dated September 2012) 'Maintenance Contract'	Agreement under which KiwiRail Ltd maintains the trains owned by GWRL, GWRL leases the trains to KiwiRail Ltd, and GWRC funds the maintenance work	GWRC GWRL KiwiRail Ltd
Railway premises maintenance agreements 'Premises Maintenance Contracts'	Agreements under which third parties agree to maintain (clean, repair, and keep secure) railway premises owned by GWRL (Wellington metro rail stations, excluding Wellington railway station)	GWRL Various third party contractors

- 19 The Network Agreement is currently in draft and is anticipated to be executed by the relevant parties soon. Because this agreement reflects the likely future contractual obligations of the parties in relation to track access and related activities, we reviewed this document in preparing our advice, as opposed to the current (and almost historical) track access contract.⁴

² As amended by the Maintenance Contract.

³ The document which we reviewed is currently in draft, but we understand is substantially in final form.

⁴ The Network Agreement does not itself impact on GWRC's rail activities for the purposes of the Act, but we have referred to it here as it is an important document in terms of the contractual relationship between GWRC and KiwiRail.

- 20 KiwiRail Holdings Limited and its subsidiary KiwiRail Limited undertake different rail activities for the purposes of the Act. However, the distinction is not material for the purposes of understanding GWRC's and GWRL's own safety obligations under the Act, and so we refer to both entities in this advice as 'KiwiRail'.

Safety obligations under the Act in relation to rail activities

- 21 The safety obligations of GWRC and GWRL under the Act result from the particular rail activities which each body carries out.
- 22 To the extent that the Act imposes safety obligations directly upon GWRC and/or GWRL we have referred to these below as 'direct safety obligations'.
- 23 In addition, liabilities under the Act of GWRC (and/or its councillors) and GWRL (and/or its directors) can potentially derive from GWRC's and GWRL's contractual arrangements with other rail participants (discussed below in the section titled 'Consequential Liabilities'). For this reason, it is necessary to comment in some detail on the rail activities of KiwiRail and a number of other parties which carry out rail activities in the Wellington region.

Direct safety obligations

Direct safety obligations of all rail participants under the Act

- 24 The Act imposes safety obligations directly on all '**rail participants**'. This term is defined under s 2 of the Act to mean eight distinct categories of rail participant. These include 'rail vehicle owner', 'rail operator', 'access provider', 'maintenance provider', 'railway premises owner' and 'railway premises manager'.⁵
- 25 In **appendix 1**, we have described the eight relevant categories of rail participant in more detail and summarised their respective rail activities under the Act.
- 26 The primary direct statutory safety obligation on all rail participants is set out at s 7(1) of the Act. This requires each rail participant to take all practicable steps to ensure that none of the rail activities **for which it is responsible** causes, or is likely to cause, the death of, or serious injury to, individuals (our emphasis).
- 27 The term 'all practicable steps' is separately defined at s 5 of the Act as being 'all steps to achieve the result that it is reasonably practicable to take in the circumstances' having regard to various matters set out in that section. These are:
- a The nature and severity of the injury that may be suffered if the result is not achieved;
 - b The current state of knowledge about the likelihood that an injury of that nature and severity will be suffered if the result is not achieved;
 - c The current state of knowledge about injuries of that nature;
 - d The current state of knowledge about the means available to achieve the result, and about the likely efficacy of each of those means; and
 - e The availability and cost of each of those means.

⁵ There is also a catch-all provision allowing for 'any other class of persons' to be prescribed as a rail participant by regulations, although this provision is not relevant for the purposes of our advice.

- 28 In these circumstances, the result to be achieved by each rail participant is ensuring that none of its rail activities kills or seriously harms any individual (or is likely to do so).
- 29 Further guidance on the interpretation of 'all practicable steps' may also be obtained from case law in the health and safety sphere, as s 2A of the Health and Safety in Employment Act 1992 ('**HSE Act**') uses substantially the same definition of all practicable steps as set out at s 5 of the (Railways) Act. Indeed, in relation to the HSE Act, it should be noted that nothing in the Act limits the HSE Act.⁶
- 30 The Act also imposes a number of other safety obligations which are applicable to all rail participants. All rail participants:
- a must undergo safety assessments conducted by the New Zealand Transport Agency ('**NZTA**') and co-operate in such safety assessments, under s 37(1);
 - b must provide documents and other evidence relevant to a safety assessment upon request by an NZTA-appointed safety assessor, under s 47(1);
- (although these first two obligations are likely to be primarily relevant to rail participants who are responsible for 'safety cases' as outlined below at paragraph 34)
- c must, under s 14 of the Act, comply with the dangerous goods provisions of the Land Transport Act 1998 which regulate the safe transport of dangerous goods.⁷
- 31 In relation to this last point, GWRC and GWRL's particular obligations under the Land Transport Act are to permit a dangerous goods enforcement officer access to their railway premises and rail vehicles. This is for the purpose of enabling the enforcement officer to determine whether KiwiRail (as the rail operator under the Land Transport Act) is complying with its obligations as to the safe loading/unloading and transport of any goods which have been declared to be dangerous goods under the Land Transport Act rules.

Direct safety obligations of specified rail participants under the Act

- 32 The Act imposes particular safety obligations on specified categories of rail participant.
- 33 Unless granted an exemption, rail operators and access providers must hold a licence granted by the NZTA.
- 34 As well as the obligations discussed above, additional more detailed and onerous obligations apply to rail operators and access providers **who are licence holders**. These include:
- a ensuring that all conditions of their licence are complied with;
 - b submitting and obtaining approval from NZTA of a safety case and ensuring that their approved safety case is complied with;
 - c ensuring that no serious/sustained breach of its safety system occurs;
 - d providing appropriate training and supervision of all rail personnel who do anything on its behalf in respect of its rail activities;

⁶ This is expressly stated in section 8(1) of the Act.

⁷ Sections 129 to 132 of the Land Transport Act 1998.

- e maintaining all railway infrastructure or rail vehicles provided for in the applicable safety case; and
 - f presenting for inspection any rail vehicle or relevant railway infrastructure whenever required to do so by the NZTA.
- 35 A 'safety case' is a prerequisite to obtaining a license. Although the NZTA is given discretion to grant licenses, it may only do so once an applicant has first had a proposed safety case approved under s 32 of the Act. A safety case must contain various matters listed under s 30, including information on:
- a the rail participant's rail activities;
 - b the rail participant's safety policy and objectives and how these will be implemented or given effect;
 - c the safety risks arising from the rail participant's rail activities and details of the measures put in place to mitigate those risks;
 - d the arrangements for ensuring that safety is maintained or continuously improved despite possible changes in circumstances that may occur from time to time; and
 - e arrangements for reporting safety concerns and other related matters to other relevant rail participants.
- 36 The NZTA is required to take into account various matters when considering approval or rejection of each safety case.⁸ It can only approve a safety case if it is satisfied that the safety case includes all required matters, clearly defined, and the relevant rail participant (rail operator or access provider) is capable of carrying out the matters set out within the safety case.
- 37 The particular safety obligations described in paragraph 34 above are currently imposed directly on KiwiRail in its capacity as the rail operator and access provider in respect of the Wellington metro rail services. Accordingly, the NZTA has approved KiwiRail's safety case to undertake rail activities as both rail operator and access provider and has granted KiwiRail a licence to operate in both capacities.⁹
- 38 GWRC/GWRL have an exemption, issued by the NZTA, from the requirement to hold a licence. This exemption means that the particular safety obligations applying to licence holders do not directly apply to them (see further at paragraphs 56 to 58 below).
- 39 Notwithstanding that exemption, all rail operators, regardless of whether or not they must hold a licence, are required to comply with any instructions given by the network controller (unless complying would imminently cause an accident or incident), and all rail operators and access providers have a duty to notify the NZTA of any accident or incident with which that rail operator or access provider (or its personnel) is concerned.¹⁰

⁸ Section 31 of the Act.

⁹ As noted in Appendix 1, KiwiRail also undertakes rail activities in its capacity as railway infrastructure owner, network controller, maintenance provider, railway premises owner and railway premises manager. These activities do not require a licence. As such, KiwiRail's primary safety obligations in relation to these activities will be to comply with the general safety obligations.

¹⁰ Sections 12 and 13 of the Act.

General safety obligation of rail personnel under the Act

- 40 The term '**rail personnel**' is defined in the Act to mean **an individual** who is engaged by the rail participant (or by an agent or contractor of that rail participant) for the purposes of carrying out or assisting in carrying out that rail participant's rail activities. Under the Act, it does not make a difference whether the individual is engaged as an employee, agent, contractor or volunteer.
- 41 Every individual who satisfies the definition of rail personnel is themselves subject to a general obligation not to do (or omit to do) anything in respect of a rail vehicle, railway infrastructure or railway premises if he or she knows, or ought reasonably to know, that that act (or omission) will cause or be likely to cause death or serious injury.¹¹ Certain members of GWRC's staff who assist GWRC and GWRL with its rail activities are likely to be covered by this definition and, therefore, subject to this general safety obligation (see further at paragraph 64 below).

General safety obligation under the Act applying to persons other than rail participants/rail personnel

- 42 The Act also imposes a general safety obligation on every other person (i.e. other than a rail participant or rail personnel) who is on or near a rail vehicle, railway infrastructure or railway premises to take all practicable steps to ensure that no one dies or is seriously injured or that property is seriously damaged as a result of any act or omission of that person.¹²

Direct safety obligations of GWRC/GWRL under the Act

Safety obligations of GWRC

- 43 GWRC owns car parking land immediately adjacent to the stations that are owned by GWRL.
- 44 It is not entirely clear whether this car parking land would satisfy the definition of 'railway premises' in the Act so as to trigger the safety obligations of a railway participant in relation to GWRC as owner of the land.
- 45 We assume that a significant number of users of the car parks on GWRC's land are parking cars to assist with transport on the adjacent railway line, e.g. picking people up, dropping people off, or catching the train themselves and leaving their car behind.
- 46 Adopting a cautious approach, we recommend that GWRC conducts itself as if it is a railway premises owner in the circumstances, and therefore a rail participant under the Act.
- 47 Assuming that GWRC is a railway premises owner, GWRC must comply with the general safety obligations applicable to all rail participants described at paragraphs 24 to 31 above in relation to the rail activities for which it is responsible.
- 48 As a railway premises owner, GWRC has responsibility under s 4(2)(c) for the ownership and maintenance of its railway premises. GWRC is therefore required to take all practicable steps to ensure that the ownership and maintenance of its car parks do not cause, and are not likely to cause, the death of, or serious injury to, individuals.

¹¹ Section 7(2) of the Act.

¹² Section 9 of the Act.

- 49 GWRL contracts on GWRC's behalf with third parties for those third parties to maintain the car parks. Those third parties will then have similar general safety duties to GWRC by virtue of being maintenance providers under the Act. This does not absolve GWRC of its general safety obligations as a railway premises owner, including the primary safety obligation.
- 50 However, the fact that the actual maintenance activities are being undertaken by the third party will be a highly relevant factor in determining the steps which it would have been practicable for GWRC to take to comply with its own direct safety obligations. We discuss this below from paragraph 59 onwards.

Safety obligations of GWRL

- 51 GWRL owns all of the Wellington metro rail rolling stock assets and station premises (other than Wellington railway station).
- 52 GWRL is therefore a rail participant by virtue of being a rail vehicle owner, a railway premises owner and a railway premises manager.
- 53 As such, GWRL must also comply with the general safety obligations applicable to all rail participants described at paragraphs 24 to 31 above.
- 54 In terms of GWRL's rail activities, GWRL is required to take all practicable steps to ensure that the following activities for which it is responsible do not (and are not likely to) cause death or serious injury to individuals:
- a owning and managing its rolling stock;
 - b owning and maintaining its railway premises;
 - c managing and operating its railway premises.
- 55 Again, the fact that the actual operation and maintenance activities are being undertaken by the third parties (which are subject to their own direct safety obligations as rail participants) will be relevant in determining the steps it would have been practicable for GWRL to take to comply with its own direct safety obligations.

GWRL's safety obligations as a rail operator

- 56 Under the Act, GWRL also satisfies the definition of a 'rail operator' by *providing* the rolling stock to KiwiRail to operate on its behalf. As such, GWRL would ordinarily be required to hold a licence as a rail operator. However, as noted above, GWRL currently has an exemption from this requirement, including from the requirement to have an approved safety case covering the Wellington metro rail operations, on the basis that NZTA is satisfied that all of the rail activities of GWRL are covered under KiwiRail's licence and approved safety case.¹³
- 57 The exemption from the requirement for GWRL to hold a licence means that GWRL is not subject to the specific safety obligations applying to licence holders.
- 58 This does not absolve GWRL from the general direct safety obligations as a rail operator (see paragraph 39 above), nor the primary safety obligation for GWRL to take all practicable steps

¹³ We understand that, for avoidance of any doubt, GWRC has also applied for and been granted an exemption by NZTA from any requirement to hold a licence.

to ensure that the operation and maintenance of rail vehicles do not/are not likely to cause death or serious injury to individuals.

GWRC and GWRL's contractual arrangements with KiwiRail and other third parties

- 59 As noted above, GWRC and GWRL have entered into contracts with KiwiRail under which KiwiRail manages, maintains, and operates GWRL's rolling stock (through the Rail Operating Contract and the Maintenance Contract).
- 60 GWRL also contracts with other third parties to maintain and ensure the safe and effective operation of its railway premises.
- 61 These agreements contain detailed provisions under which the other parties are obliged to observe and comply with health and safety requirements in connection with their rail activities. We consider that they therefore assist GWRC and GWRL to comply with their respective direct safety obligations under the Act.
- 62 For example, under the Rail Operating Contract, KiwiRail:
- a Is fully responsible for all matters relating to passenger safety and security;
 - b Must provide a monthly report on the operations to enable GWRC to appropriately monitor (among other things) KiwiRail's observance of its safety obligations; and
 - c Must report any death/serious injury to GWRC within 24 hours.¹⁴
- 63 Similarly, under the Premises Maintenance Contract which we have reviewed, the maintenance contractor is required (amongst other things) to have a safety plan for the contract and to liaise with GWRL regarding all matters concerning health and safety on the site.
- 64 In relation to KiwiRail's reporting obligations under the Rail Operating Contract, GWRL does not itself have any employees. Instead, GWRC, through its staff, manages GWRL's investment in its rail assets pursuant to the terms of a management services agreement between GWRC and GWRL. This means that, in practice, KiwiRail will report to GWRL through relevant GWRC staff and GWRC will assist GWRL to comply with its direct safety obligations.

Consequential Liabilities

Consequential Liabilities of GWRC and GWRL as principals

- 65 If an offence under the Act is committed by an employee, agent, or contractor of GWRC, GWRC will also be treated as having committed that offence (whether or not the offence was committed with GWRC's knowledge or approval), if it is proved that:
- a GWRC knew, or could reasonably have known the offence was being committed;
 - b GWRC failed to take all practicable steps to prevent the offence being committed; and
 - c GWRC failed to take all practicable steps to remedy the effects of the act or omission which led to the offence.¹⁵

¹⁴ KiwiRail's rail safety reporting and compliance obligations are detailed in clauses 25 and 26 of the Rail Operating Contract.

- 66 This means, for example, that if KiwiRail committed an offence against the Act in its capacity as rail operator then, under the Act, GWRC would also be treated as having committed that offence as the principal to the Rail Operating Contract with KiwiRail, provided that all of the above elements were proved.
- 67 Similarly, GWRL could potentially be found liable because of actions or omissions of KiwiRail or other third parties as principal to the Maintenance Contracts or the Premises Maintenance Contracts in the limited circumstances described above.
- 68 The HSE Act contains an express restriction which renders any insurance policy which indemnifies or purports to indemnify a person for the person's liability to pay a fine under the HSE Act unlawful to the extent it does so.
- 69 However, the (Railways) Act contains no such restriction. It is therefore possible that insurance cover might (depending on its terms) indemnify GWRC/GWRL for any fine in such circumstances.

Consequential liabilities of GWRC's councillors/GWRL's directors

- 70 Further to the above provisions, if a body corporate is convicted of an offence against the Act, every director of that body corporate will also be found to have committed the offence and be liable to the same penalty as the body corporate if it is proved that:
- a The act or omission constituting the offence took place with the director's express or implied authority; and
 - b The director failed to take all practicable steps to prevent or stop the act, or to remedy the omission.
- 71 Under the Act, councillors of GWRC will be treated as directors of GWRC because they fall within the Act's definition of 'director'.
- 72 Therefore, in the event that GWRC or GWRL were held to be in breach of their obligations under the Act (either through breach of a direct safety obligation or resulting from a consequential liability), GWRC's councillors or GWRL's directors could potentially be found liable for those failures. Any such liability would need to be established through a formal prosecution of those individuals, in which each of the elements we have described in paragraph 70 above would need to be proved to the criminal standard of evidence (i.e. beyond reasonable doubt).
- 73 In light of the above, we would recommend that GWRC and GWRL check the terms of their respective directors and officers insurance policies.

Overview of safety offences and maximum liabilities under the Act

- 74 The various safety offences and the maximum applicable penalties are described in subpart 6 of Part 2 of the Act (sections 61 to 67). The types of offence and maximum applicable penalties vary depending on the particular offence committed and whether the person convicted of the offence is an individual or a body corporate. In **appendix 2**, we have

¹⁵ Section 65 of the Act.

summarised the various safety offences described in the Act, together with the maximum liabilities which can apply in respect of each offence.

Good practice recommendations for GWRC (and its councillors) and GWRL (and its directors) to ensure compliance with Act obligations

- 75 In light of the above, GWRC and GWRL should each ensure that it continues to exercise careful monitoring and supervision of its own rail activities as well as the rail activities of other rail participants, led by the councillors and directors of each body respectively.
- 76 This does not mean that GWRC (or its councillors) or GWRL (or its directors) should seek to get involved in the development of KiwiRail's safety case, or its rail services or maintenance operations.
- 77 Rather, they should ensure that their monitoring and supervision equates with best practice for good governance. This includes ensuring that KiwiRail and the other contractors comply with their safety and incident reporting obligations as outlined in the various contracts, that such reports are carefully analysed, and that any actual or potential failings on the part of the contractor are followed up with them promptly.
- 78 This monitoring and supervision should be with a view to GWRC and GWRL satisfying themselves that the agencies with whom they contract for the provision of the Wellington metro rail services have the appropriate people, systems, and equipment in place to satisfy GWRC/GWRL's safety obligations **and** those parties' own safety obligations under the Act.
- 79 The principles of the *Good Governance Practices Guideline for Managing Health and Safety Risks*, recently issued by the Ministry of Business, Innovation & Employment and the Institute of Directors, are highly relevant to GWRC and GWRL's governance responsibilities under the Act, although this was developed to provide guidance on general health and safety governance.

Yours faithfully
Kensington Swan



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Appendix 1

Description of rail participants under the Act and related rail activities¹⁶

Bolded terms are separately defined under s 2 of the Act

Category of rail participant	Description of rail activities for which the rail participant is responsible	Entity	Comments
Railway infrastructure owner	Responsible for the ownership of railway infrastructure .	KiwiRail	
Access provider	Responsible for the operation and maintenance of all railway infrastructure that relates to the railway lines controlled by the access provider.	KiwiRail	
Network controller	Responsible for the authorisation of rail vehicles occupying or moving on a railway line .	KiwiRail	
Rail vehicle owner (N.B. defined as a person who owns or leases for a period of 7 years or more a rail vehicle)	Responsible for the ownership and management of rail vehicles .	GWRL ¹⁷	
Rail operator (N.B. definition includes a person who provides or operates a rail vehicle)	Responsible for the operation and maintenance of rail vehicles.	GWRL KiwiRail	GWRL likely to be deemed a rail operator by virtue of <i>providing</i> the rail vehicles to KiwiRail for KiwiRail to operate under the Operating Contract
Maintenance provider	Responsible for the maintenance of any railway infrastructure or rail vehicles or railway premises .	KiwiRail	Pursuant to the Maintenance Contract
		Third parties	Other parties contract with GWRL to maintain railway premises owned by GWRL

¹⁶ Rail participants do not include 'rail personnel', which is defined in the Act as an **individual** engaged by a rail participant (whether as an employee, agent, contractor, or volunteer), to carry out, or assist in carrying out, rail activities of the rail participant.

¹⁷ KiwiRail also owns some rail vehicles, but this is not relevant to this advice.

Category of rail participant	Description of rail activities for which the rail participant is responsible	Entity	Comments
Railway premises owner	Responsible for the ownership and maintenance of railway premises .	GRWC	GRWC owns car parking land adjacent to some stations
		GRWL	GWRL owns railway premises other than Wellington Rail Station
		KiwiRail	Owns Wellington Rail Station
Railway premises manager	Responsible for the management and operation of railway premises	GWRC GWRL KiwiRail	

Appendix 2

Safety offences and maximum liabilities under the Act

Offence	Who it applies to	Maximum penalty (imprisonment / fine)		Statutory references
		Individual	Body corporate	
Failing to comply with safety duties				
Failing to take all practical steps to ensure that none of the rail activities for which it is responsible causes, or is likely to cause, the death of, or serious injury to, individuals.	Rail participants	6 months' and/or \$50,000	\$50,000	7(1), 61
Doing or omitting to do anything in respect of a rail vehicle, railway infrastructure, or railway premises if he or she knows or ought reasonably to know that act or omission will cause, or will be likely to cause, the death of, or serious injury to, individuals.	Rail personnel	6 months' and/or \$50,000	\$50,000	7(2), 61
Failing to ensure that: <ul style="list-style-type: none"> (i) every condition of its safety licence is complied with; and (ii) its approved safety case is complied with; and (iii) no serious or sustained breach of its safety system occurs. 	Licence holders	6 months' and/or \$50,000	\$50,000	11(a)(i), (ii), (iii), 61
Failing to provide appropriate training and supervision of all rail personnel who do anything for, or on behalf of, it in respect of its rail activities and ensuring that those persons comply with: <ul style="list-style-type: none"> (i) the conditions of its licence; and (ii) its approved safety case; and (iii) its safety system. 	Licence holders	6 months' and/or \$50,000	\$50,000	11(b)(i), (ii), (iii), 61

Offence	Who it applies to	Maximum penalty (imprisonment / fine)		Statutory references
		Individual	Body corporate	
Failing to comply with instructions given by the network controller with respect to the entry onto, occupancy of, or movement of rail vehicles on, a railway line, unless the person believes on reasonable grounds that complying with the instruction would imminently cause an accident or incident and the person immediately notifies that network controller of the refusal.	Rail operators Rail personnel Any person authorised to access a railway line	6 months' and/or \$50,000	\$50,000	12, 61
Failing to take all practicable steps when near a railway vehicle, railway infrastructure, or railway premises to ensure that no individual dies or is seriously injured, and that no property is significantly damaged, as a result of any of their acts or omissions, or otherwise acting in relation to, or interfering with any part of a railway or rail vehicle without lawful authority.	Any person other than rail participants and rail personnel	6 months' and/or \$50,000		9, 61
Failing to hold licence				
Carrying out the rail activities of a rail operator or access provider without a licence to carry on those rail activities.	Rail operators and access providers	\$50,000	\$500,000	15, 62
Operating a rail vehicle or permitting a rail vehicle to be operated on a railway line when either or both of the relevant rail operator and access provider does not hold a required licence.	Rail operators	\$50,000	\$500,000	10(1), 62
Permitting a rail vehicle to be operated on a railway line controlled by it when either or both of the relevant rail operator and access provider does not hold a required licence.	Access providers	\$50,000	\$500,000	10(2), 62

Offence	Who it applies to	Maximum penalty (imprisonment / fine)		Statutory references
		Individual	Body corporate	
Failing to report 'accident' or 'incident' (see note below)				
When an accident arising directly or indirectly from the operation of a rail vehicle has occurred, failing to stop the vehicle as soon as safety practicable, ascertaining whether a person has been harmed and, if so, ensuring all practicable assistance is rendered.	Rail personnel (specifically, the driver of the rail vehicle)	\$5,000	N/A	13(1), 63(1)
Failing to report, as soon as practicable, any accident or incident to the relevant rail operator, relevant access provider, and/or relevant network controller (as the case may require), as well as (if separate) the rail participant that engages the rail personnel.	Rail personnel	\$5,000	N/A	13(2), 63(1)
Failing to ensure, as soon as practicable, that the NZTA is notified of any accident or incident and is provided with the information about the accident reasonably required by the NZTA or rules.	Rail operators Access providers Railway premises owners	\$5,000	\$30,000	13(3), 63(1)
Obstructing safety officer				
Obstructing a safety assessor or failing to comply with a lawful requirement of a safety assessor.	Any person	\$25,000	\$250,000	64

Notes to table:

- Under the Act, 'accident' is defined to mean an event causing death or serious injury, or serious damage to property; 'incident' is defined to mean an event that placed or could have placed a person at risk of death or serious injury, or which risked serious damage to property.
- Although, in many cases, the Act details the maximum penalties that would be applicable to both individuals and body corporates if convicted of an offence.
- Where agents commit an offence (e.g. employers, contractors, etc) act on behalf of an employer, the employer may **also** be liable (section 65 of the Act) (see discussion at paragraphs 65 to 69 of the advice).
- If a body corporate commits an offence, every director of the body corporate may **also** be liable (section 66 of the Act) (see discussion at paragraphs 70 to 73 of the advice).
- Part 3 of the Act contains specific obligations relating to the protection of the rail corridor and the interaction of rail and road which are not specifically related to safety (e.g. prohibition against trespass, operation of rail crossings, etc). We have not included these offences in the table.