

Review of Issues Affecting Utilities and Road, Rail and Motorway Corridors

Discussion Paper

MINISTRY OF ECONOMIC DEVELOPMENT

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Executive Summary

This discussion paper reviews the wider issues related to utility access to road, rail, and motorway corridors. On 20 October 2004 Cabinet Policy Committee directed officials to report back to POL by 31 October 2005 on wider issues related to utility access on the road and rail corridor, including cost sharing arrangements (POL Min (04) 25/20 paragraph 4 refers).

The Ministry of Economic Development was tasked with carrying out this directive with the outcome advising the process and findings of the review and, if needed, making recommendations on action needed to provide consistent conditions that will ensure the efficient use of road and rail corridors by utilities.

The key issues identified are:

- a. legislative consistency – the need for harmonisation;
- b. defining a road;
- c. notification of affected parties;
- d. cost sharing issues;
- e. definition and application of reasonable conditions;
- f. dispute provisions;
- g. access to rail and motorway corridors;
- h. interference and hazards;
- i. strategic planning and coordination of utility works within the road.

These issues are explored through discussion sections and concluded with proposals and questions to consider.

Submissions are due by Friday 5 August 2005.

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Review of Issues Affecting Utilities and Road, Rail and Motorway Corridors

Introduction

1. The most telling indicator that issues exist with utilities working in the road corridor is the patchwork of resealed works on New Zealand roads and footpaths. Road controlling authorities (RCAs: Local Authorities and Transit NZ) have long criticised the fact that no sooner have they resealed a road or foot path, than a utility operator¹ digs up the seal to access or create utility works, then reinstates the road surface, often to a substandard quality. RCAs describe the road surface as being like skin – once it is broken it is scarred and never quite the same. RCAs suggest that a significant proportion of road maintenance budgets – costs borne by taxpayers – is spent fixing roads around spots where utilities have opened the road. RCAs acknowledge a need for greater strategic planning and coordination of utility works and location within the road corridor.
2. On the other hand, utility operators are concerned with the inconsistency of the utilities legislative regime² that prescribes them as-of-right access to the road corridor, and the interpretation and application of provisions by RCAs on utility operators. Specifically, utility operators are concerned with the inconsistency of procedures for notification of parties affected by utility works, cost sharing arrangements for works, definition and application of reasonable conditions imposed by RCAs on utility access to the road corridor, the provisions for settling disputes over reasonable conditions and cost sharing, barriers to access to rail and motorway corridors, interference and hazards caused by utilities affecting each other, and the lack of strategic planning and coordination of utility works within the road.
3. In September 2004, the Ministry of Economic Development (MED, the Ministry) consulted on proposals to amend sections 24 and 31 of the Electricity Act, to extend the access regime for electricity works above 110kV and 100MVA on roads and level crossings. Parties consulted on the proposed changes to sections 24 and 31 of the Electricity Act raised the various broader issues, as above, about utilities access to road and rail corridors. Accordingly, when considering the amendment of sections 24 and 31, Cabinet agreed to a review of those broader issues by 31 October 2005.
4. The New Zealand Utilities Advisory Group (NZUAG) has been working towards the resolution of issues affecting utility operators and road managers since its formation in 2001. The NZUAG has achieved much, including a *Code of Practice* agreement³

¹ For the purpose of this discussion paper “Utilities”, or “utility”, encompass electricity, gas, telecommunications, water, wastewater, stormwater, postal, rail, street furniture and any other associated equipment above or below ground. “Utility operators” are considered to be the recognised owner of the utility network.

² The key legislation regulating utilities’ access to the road are: the Telecommunications Act 2001, the Gas Act 1992, the Electricity Act 1992, the Transit Act 1989, the Land Drainage Act 1908, the Postal Services Act 1998, the Local Government Act 2002, and the Railways Act 2005 (repeals the Railway Safety and Corridor Management Act 1992, effective July 2005).

³ Standards NZ (2003). *SNZ HB 2002:2003 Code of Practice for Working In the Road*. <http://www.standards.co.nz/oldshop/?sku=2002%3A2003%28SNZ+HB%29>

for working within the road. Some issues, however, remain and are at the point where progress may depend on decisions by government.

5. In line with an invitation issued by Hon Paul Swain at the April 2002 Utilities conference, the NZUAG identified three areas where consistency across the “utility statutes” could be improved, viz:
 - requirements regarding providing notice of any intention to work in the road;
 - the appeal and penalty provisions regarding road access issues, and
 - criteria providing guidance to set reasonable conditions on working in the road.
6. The departments administering the utility statutes (Ministry of Economic Development, the Ministry of Transport and the Department of Internal Affairs), have already indicated support for legislative changes in these areas. Drawing on the objective concluded in the Government’s May 2004 *Infrastructure Stocktake*, the Government aims “to enhance infrastructure’s net contribution to economic growth and societal well-being over time, while reducing the incidence and severity of service failures and adverse effects on the environment.”
7. As emphasised in the Ministry’s Statement of Intent 2005-2008⁴, the complexity of infrastructure issues, and the fundamental importance of infrastructure in a modern, export-led economy, make infrastructure development an on-going area of strategic importance for the Ministry. In the longer term, infrastructure presents a number of challenges for government policy. Specifically, there is a need to co-ordinate supply arrangements across different infrastructure suppliers (roading, electricity, sewerage, etc), including central and local government and the private sector.
8. In undertaking this review, the Ministry has sought to use a policy framework and analysis criteria that examines the issues at question in a just and reasonable manner, and explores solutions that provide a balanced result for key stakeholders and does not shift the balance of power so as to particularly favour one stakeholder over another.
9. Previous consultation, legal analyses, and policy analysis undertaken by the Ministry has led the Ministry to the opinion that while roads⁵, superficially, provide for transport of vehicles and people, they are also a transportation corridor for utilities (electricity, gas, telecommunications, postal water, wastewater, and stormwater). While the Road Controlling Authority ((RCA) typically a local council or Transit NZ) has the power of control over road corridors, the utilities legal framework provides utilities with a statutory power to locate networks within the road corridor, provided they do not impair the primary function of the road. The RCA has the power to impose reasonable conditions on utilities’ access to protect the safe and efficient functioning of the road and associated assets, and utilities’ rights are also subject to common law rights and Resource Management Act 1991 (RMA) controls. The Ministry recognises that RCAs manage the road on behalf of many stakeholders and that this access

⁴ Ministry of Economic Development (2005). *Statement of Intent 2005-2008*.
<http://www.med.govt.nz/about/soi/2005/index.html>

⁵ Roads are defined in Section B: Definitions of road, rail, and motorway corridors.

must be managed and coordinated in a safe, efficient, and fair manner. The Ministry also recognises that both utilities and RCAs all share a common interest as they are all serving the community.

10. The Ministry of Economic Development therefore seeks comments on proposals for the resolution of issues affecting utilities access to road, rail and motorway corridors. The key issues are:
 - a. legislative consistency – the need for harmonisation;
 - b. defining a road;
 - c. notification of affected parties;
 - d. cost sharing issues;
 - e. definition and application of reasonable conditions;
 - f. dispute provisions;
 - g. access to rail and motorway corridors;
 - h. interference and hazards;
 - i. strategic planning and coordination of utility works within the road.
11. The proposals in this document have been developed in light of the NZUAG/Standards NZ Code of Practice⁶, NZUAG Model Partnering Agreement⁷, and NZUAG Guide to Best Practice⁸, and the submissions received for the proposals to amend sections 24 and 31 of the Electricity Act in 2004.
12. The aim of this discussion document is to set out the key issues including for each an issue statement, identification of relevant statutes, standards or guidelines currently in place, a discussion of the issues, and solution proposals or questions to consider. The ultimate aim of this exercise is to produce a paper to Cabinet advising the outcome of the review and, if needed, making recommendations on action needed to provide consistent conditions that will ensure the efficient use of road and rail corridors by utilities.
13. The Ministry invites written submissions on any and all aspects of the proposals set out in this document for resolution of issues affecting utilities access to road, rail and motorway corridors. The Ministry requests that, where possible, any comments use the same headings as used in this discussion document.
14. Submissions on the discussion paper should be sent by Friday 5 August 2005 to:

⁶ Standards NZ (2003). *SNZ HB 2002:2003 Code of Practice for Working In the Road*. <http://www.standards.co.nz/oldshop/?sku=2002%3A2003%28SNZ+HB%29>

⁷ NZUAG Roadshare™ (2004). *Model Partnering Agreement between Utility Service Providers and Road Controlling Authorities*. <http://nzuag.org.nz/roadshare/partnering-agreement.html>

⁸ NZUAG Roadshare™ (2004). *Network Utilities Within the Road Corridor – The Role of the Resource Management Act: A Guide to Best Practice*. <http://nzuag.org.nz/roadshare/rma-guidelines.html>

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15. In order to facilitate the review and consideration of responses, the Ministry requests that an electronic copy (in Microsoft Word) also be supplied, either on diskette or emailed to electricity@med.govt.nz.
16. The Ministry intends to publish all written submissions on its website. Please indicate clearly if you consider that all or parts of your submission should not be disclosed. The Ministry will consider any request for non-disclosure in terms of the Official Information Act 1982.

Summary of Proposals and Questions to Consider

Issues	Proposals & Questions to Consider
Legislative Consistency	<ul style="list-style-type: none"> • A legislative regime providing a more efficient, coherent, and pragmatic framework for the relationship between utilities and road controlling authorities. • Should legislative consistency be achieved through amendment of current utilities legislation OR the creation of an all-encompassing specific utilities statute?
Defining a "Road"	<ul style="list-style-type: none"> • Amend the definition of "road" within the Telecommunications Act 2001 to that of the definition of "road" provided within the Electricity and Gas Acts 1992. • Call for submissions outlining the extent of any disputes over rights to "public places" as claimed within the definition of road. • Should the road surface (upon which vehicles travel, and including footpaths) be considered an individual utility alongside other utility operators (e.g. electricity, gas) within the road corridor? • Should the principal objective of the road corridor be to carry vehicular and pedestrian traffic, or provide a corridor for the location of utility networks (including vehicular and pedestrian traffic as a utility)?
Notification of Affected Parties	<ul style="list-style-type: none"> • Is there good reason for the legislative differences for required notification of affected parties? • Should they be consistent? • Should the RCA be required to notify affected parties and other utility operators of its intention to carry out works within the road corridor? • Should the RCA or the Utility Operator be responsible for notifying affected parties? • Should the RCA take on a coordination role and administer the notification process?

Issues	Proposals & Questions to Consider
Cost Sharing	<ul style="list-style-type: none"> • What problems have respondents experienced with cost sharing arrangements for utility work within the road corridor? • Is there good reason for the legislative differences for cost sharing arrangements? • Should the legislation be consistent? • What solutions do respondents propose as providing the most balanced and effective outcome for resolving legislative inconsistency for cost sharing arrangements for utility work within the road corridor? • What solutions do respondents propose for ensuring the fair apportionment of the true whole of life costs of utility works to the road asset?
Definition & Application of Reasonable Conditions	<ul style="list-style-type: none"> • That the provisions in s119 of the Telecommunications Act 2001 outlining the criteria for setting reasonable conditions be adopted by other utilities legislation. • How can the interpretation and application of reasonable conditions be defined and tested?
Dispute Provisions	<ul style="list-style-type: none"> • Should mediation and arbitration be the primary means for dispute resolution? • Should there be a prescribed timeframe for mediation and arbitration? If so, what should it be? • Is the District Court the appropriate body for final recourse? Should it be the Environment Court?

Issues	Proposals & Questions to Consider
Access to Motorway & Rail Corridors	<ul style="list-style-type: none"> • That utility operators' right of access as set out in the Electricity Act 1992 NOT be extended to include the rail corridor. • That the Rail Access Provider's (ONTRACK) rail corridor access evaluation criteria be codified, published and made accessible to utilities. • That utility operators' right of access as set out in the Electricity Act 1992 NOT be extended to include motorways. • That Transit NZ's motorway access evaluation criteria be codified, published and made accessible to utilities. • Should the definitions of rail and/or motorway corridors be refined to differentiate the carriageway from the corridor? • Should utility operators be permitted as-of-right access to the rail and/or motorway corridors (subject to reasonable conditions), BUT NOT to the "carriageways"?
Interference & Hazards	<ul style="list-style-type: none"> • That s24 of the Electricity Act 1992 be amended to clarify the notification and imposition of reasonable conditions for the alteration of electrical characteristics of any works. • What solutions do respondents consider would best improve the management of interference between utilities? • What solutions do respondents consider would best improve the management of hazards to equipment and people from utility works within the road corridor?

Issues	Proposals & Questions to Consider
Strategic Planning & Coordination of Utility Works within the Road	<ul style="list-style-type: none"> • Is there a real issue with current practices of allocating utility space within the road corridor that is posing a barrier to infrastructure development? • What solutions do respondents propose as providing the most balanced and effective outcome for allocating utility space within the road corridor in a more effective, efficient, and fair manner? • Should it be a legal requirement for RCAs to install utility ducts in all new road construction and road improvement programmes for utility operators to locate utilities? • Should the RCA be the party responsible for managing utility space within the road corridor through District Plan provisions? • Should the RCA be the party responsible for maintaining a coordinated registry of location of utility networks within the road corridor? If so, how could it be funded? • Should an industry body be responsible for maintaining a central registry of location of utility networks within the road corridor? If so, how could it be funded? • Is it “reasonable” for RCAs to publish 2 year plans and “require” utilities to work only within the timeframes stipulated? • That the Ministry support and encourage NZUAG as a facilitator, but that this NOT be extended to legislation.

Legislative Consistency – The Need for Harmonisation

Background

17. Under utilities legislation, utilities are granted certain rights to construct and maintain their infrastructure within the public road corridor, but are subject to two key obligations:
 - to notify the Road Controlling Authority (RCA) responsible for the road (a council or Transit NZ) of their intention to carry out works;
 - to comply with any “reasonable conditions” which the RCA may impose.
18. This legislation has evolved over many years, resulting in every utility sector being covered by sector specific statutes. For example, the rights of waste water services are governed by the Land Drainage Act 1908 (and a number of local Acts of a similar age), while telecommunications providers are covered by the Telecommunications Act 2001. The Transit New Zealand Act 1989 confers certain powers on Transit New Zealand (Transit NZ) to deal with utilities on State Highways, and the Railways Act 2005 confer certain powers to the Rail Access Provider (New Zealand Railways Corporation – ONTRACK) to deal with utilities on the rail network.
19. It must be noted that the issues addressed in this review are not being considered within the bounds of the Resource Management Act 1991. This review is primarily concerned with utilities legislation. The RMA stands alongside utilities legislation, prescribing what utilities must comply with in terms of environmental and amenity issues, whereas the utilities legislation prescribes health and safety, operational, and asset management responsibilities and requirements. Regardless of the powers prescribed in utilities legislation to access roads, this does not equal an RMA right. If resource consent is required, due to the environmental issues of a utility operator’s intended project, it must be acquired as an exclusive process, most likely prior to giving notice to an RCA.

Key Issues

20. In consultation, stakeholders have suggested that the utilities legislative regime is piecemeal and disparate and has resulted in perceived inconsistency in the rights and responsibilities of utilities between sectors. This causes difficulties for road controlling authorities as they work with all utility sectors. Inconsistencies include the time allowed for notifying conditions, the rights of appeal against conditions, and the definition of “road”.
21. Key Issues:

Is the utilities legislative regime piecemeal and disparate?

Does the legislation result in inconsistency, vagueness, and difficulties for utility operators and RCAs to work together?

Discussion

22. It is suggested that the vagueness of the law has resulted in further inconsistency, as the 75 separate road controlling authorities have had scope to evolve their own

approaches to managing utility works (and their own interpretations of “reasonable conditions”). A utility with a national presence has to cope with a number of differing protocols for operating in the road corridor.

23. The NZ Utilities Advisory Group (NZUAG), which includes representatives of all utility sectors and is chaired by Local Government New Zealand, was set up in 2002 to improve the working relationship between councils and utilities. It has developed a Partnership Agreement⁹ “to provide a framework within which roading authorities and utilities can work together to achieve mutually agreed outcomes in the best interests of each organisation and the communities they serve.” The NZUAG has noted that a consistent and balanced legislative approach to utilities rights and obligations, taking the best features out of existing statutes, would help to further the aims of the Partnership Agreement.
24. The NZUAG has identified six problematic issues:
 - definition of road
 - notification of parties affected by work in the road;
 - definition and application of reasonable conditions;
 - appeal and penalty provisions;
 - management of utility congestion in the road corridor.
 - strategic planning and coordination of utility works
25. These will be elaborated on through this discussion paper.

Proposal

A legislative regime providing a more efficient, coherent, and pragmatic framework for the relationship between utilities and road controlling authorities.

26. Such a regime could bring together the best aspects of existing statutes. Desirable features may include the requirement in the Electricity and Gas Acts for the utility proposing to undertake the work to notify, in addition to the road controlling authority, other utilities affected by the work. Another desirable feature may be the guidance for formulating “reasonable conditions” as contained in the Telecommunications Act 2001.

Questions to Consider

Should legislative consistency be achieved through amendment of current utilities legislation OR the creation of an all-encompassing specific utilities statute?

⁹ NZUAG Roadshare™ (2004). *Model Partnering Agreement between Utility Service Providers and Road Controlling Authorities*. <http://nzuag.org.nz/roadshare/partnering-agreement.html>

27. There are two options apparent for achieving legislative consistency. Amendments of current utilities legislation through an Amendment Bill is most likely the simpler and faster solution, however, a more consistent and all-encompassing remedy could be achieved through the creation of a single utilities in the road corridor statute. This remedy would be slower and more complex to achieve, as it would have to be designed to integrate with all other utilities legislation. At this stage, an Amendment Bill is the preferred option.
28. The Ministry seeks comment on the practicality and usefulness of such legislative change. Principally, legislative change could encompass all the issues examined in the ensuing discussion, as opposed to a piecemeal approach to remedying the issues.
29. The following sections examine the key problematic issues affecting utilities access to road, rail and motorway corridors that have arisen from previous consultation and NZUAG suggestions, and could be fully, or in part, remedied through legislative change.

Defining a “Road”

Key Issues

30. Consultation with stakeholders has suggested that within various legislation, the term “road” is subject to disparate and inconsistent definitions. This creates ambiguity, confusion, and contention when applying utility access rights to “roads” under the different legislation.

31. Key Issue:

Are definitions of “road” in various legislation disparate and inconsistent, and what problems do they cause?

Discussion

32. The Local Government Act 1974 and the Transit NZ Act 1989 are the two major pieces of legislation that define the ownership, rights, and powers of road controlling authorities over roads. The Local Government Act 1974 legally defines roads in section 315 as including carriageways and unformed areas, footpaths and pedestrian accessways (berms and other grassed areas), and as the total area from boundary to boundary, customarily referred to as “Road Reserve” (Refer Appendix A for the full text).

33. Section 316 of the Local Government Act 1974 essentially prescribes that the property rights of all roads are vested to the council of the district of which they are located in, except for State Highways. Section 317 adds that all roads shall be under the control of the local council, except for State Highways which are under the control of Transit NZ. For the purposes of utility access to roads, *control* of the road rather than *ownership* is the imperative factor as the controlling entity has the power to grant entry and conditions.

34. A further definition of “road” is prescribed in section 43 of the Transit NZ Act 1989 which encompasses roads owned or controlled by the Crown, particularly, major strategic roads such as State Highways and motorways. “*Road* means a public highway, whether carriageway, bridle path, or footpath...” and includes a number of clauses relating to types of land allotments (Refer Appendix A for full text) “...and all bridges, culverts, drains, ferries, fords, gates, buildings, and other things thereto belonging, upon the line and within the limits of the road”. Section 44 of the Transit NZ Act 1989 vests State highways and Government roads in the Crown, and sections 48 and 61 of the Transit NZ Act 1989 prescribe the Ministerial powers and control.

35. Under section 85 of the Transit NZ Act 1989, a “motorway”¹⁰ is deemed to be a “road”, but section 73(k) prescribes that the Transit Authority may “exercise the powers, rights, duties, and liabilities vested in or imposed on the Minister as if the motorway were a Government road for the purposes of section 48 of this Act”. Section 5 of the Land Transport Management Act furthers the definition by adding that a road “includes toll booths and other toll-related infrastructure on a road”.

¹⁰ Motorways are discussed in more detail in the section “Access to rail and motorway corridors”

36. Adopting the tenor of these three acts, sections 2 of the Electricity and Gas Acts 1992, and section 4 of the Railways Act 2005 all define road as having:

the same meaning as in section 315 of the Local Government Act 1974; and includes a road under the jurisdiction of any local authority; [and also includes a public footpath;] and also includes a State highway within the meaning of section 2(1) of the Transit New Zealand Act 1989; but does not include—

- (a) *A private road within the meaning of section 315 of the Local Government Act 1974; or*
- (b) *A motorway within the meaning of the Transit New Zealand Act 1989; or*
- (c) *Any roadway laid out by order of the Maori Land Court under [sections 315 to 327 of Te Ture Whenua Maori Act 1993] or under any former Act, except where that order has been cancelled, or where the roadway has been declared under [section 320] of that Act to be a road; or*
- (d) *Any level crossing.*

37. These definitions have been accepted as reasonable and promoted by the NZUAG as the appropriate definition of “road” for utilities legislation. The inconsistency and contention lies in the definition of “road” as prescribed in the Telecommunications Act 2001, which adopts a much wider scope and incongruence with the tenor of definitions contained within related utilities and roading legislation (Refer Appendix A for full text). Fundamentally, the contention lies in the wording “...*any place to which the public has access...*” which provides Telecommunication operators with the right to treat parks and reserves and other public places, essentially as “roads”, which infers the right to use these places for the purpose of utility networks¹¹.

38. The definition used in the Telecommunications Act is drawn from the Transport Act 1962 and Land Transport Act 1998 that had the purpose of legislating for driver behaviour and driving offences in order to facilitate enforcement by Police of traffic law. The wider coverage of this definition was most likely intended to cover driver behaviour in motor vehicles both on and off the road. The issue has been considered by the Courts on a number of occasions over the years and they have found that a road in a motorcamp, an aeroclub carpark and a parking building are roads for the purpose of prosecuting traffic offences. In terms of utilities legislation, this is quite incongruent with all other legislative definitions of a “road” and it is proposed that this is not commonsense and extends the powers of utility operators beyond what is reasonable.

Proposal

Amend the definition of “road” within the Telecommunications Act 2001 to that of the definition of “road” provided within the Electricity and Gas Acts 1992.

39. It is considered that amending the definition of “road” within the Telecommunications Act 2001 to the definition of “road” within the Electricity and Gas Acts 1992 would provide more coherence and consistency between the utilities legislation and reduce ambiguity, confusion, and contention over the definition of “road”. This would also

¹¹ It appears that telecommunications operators have never attempted to assert the rights apparently conferred by the definition of road in the Telecommunications Act 2001 to spaces off local authority roads and State Highways.

curtail the possibility of Telecommunications providers testing the definition of “road” within the Telecommunications Act as extending to “any public place” and setting precedence contrary to the original intentions of the law.

Call for submissions outlining the extent of any disputes over rights to “public places” claimed within the definition of road.

40. The Ministry would like to examine any cases where disputes have arisen due to utility providers claiming as-of-right access to “public places” as defined as a road in the Telecommunications Act 2001, and as not commonly defined as a road within other utilities legislation.

Questions to Consider

41. An option has also been identified to construct an exclusive definition of “road” expressly for the purpose of utilities legislation. A concern raised by some stakeholders is the current legislative definitions exclude *road traffic* as a further utility usage of the “road corridor”, instead viewing the “road” as primarily for the movement of vehicular traffic, and view utility access within the corridor as supplementary. For example, the RCA has the power to prescribe reasonable conditions for utility access, however, utility operators do not have the power to impose reasonable conditions on the RCA for road works that may affect their assets.
42. It has been expressed by some parties that the physical “road” itself upon which vehicles travel, is a further utility within the wider “road corridor” and should be treated alongside other utilities (e.g. electricity, gas, telecommunications) as a separate utility within the road corridor. There is a perceived imbalance of power possessed by the RCA in its ability to dictate to other utility operators so as to maintain road traffic functions, but the inability of utility operators to hold similar power on any works carried out by the RCA that may affect utility networks in the road.

Should the road surface (upon which vehicles travel, and including footpaths) be considered an individual utility alongside other utility operators (e.g. electricity, gas) within the road corridor?

Should the principal objective of the road corridor be to carry vehicular and pedestrian traffic, or provide a corridor for the location of utility networks (including vehicular and pedestrian traffic as a utility)?

Notification of Affected Parties

Key Issues

43. Utility operators opening the road to install, maintain or alter their assets could affect the other utility services in the road. The definition of an affected party and the procedures applied for notifying an affected party are believed to be inconsistent.
44. Key Issue:

Is there inconsistency regarding the procedure to provide notice of an intention to carry out work to other utilities whose services could be affected?

Discussion

45. Utility owners or others proposing to carry out any work on a public road must apply for a Road Opening Notice (RON) from the RCA. A RON is a permit from the RCA to carry out works within the public road. The RON system aims to minimise disruption to residents and ensure that roads are returned to an acceptable standard when utility companies and various contractors complete their work. The onus is on the “road opener” to check with or advise other service utilities of their proposed plans.
46. Table 1 illustrates the variation in statutory requirements for giving notice for utilities working within the roads.

Table 1 Statutory Requirements to Give Notice of Intention for Utility Works Within the Road

Legislation	Relevant Section	Parties that notice is required to be given to	Notice period for conditions/before works may commence
Electricity Act 1992	s24/25	Road Owner <i>and</i> owner of other utility works that might be affected	15 working days
Gas Act 1992	s25/26	Road Owner <i>and</i> owner of other utility works that might be affected	15 working days
Postal Services Act 1998	s41	Local authority or other body with jurisdiction	15 working days from receipt
Telecommunications Act 2001	s136 (lines) s142 (cabinets)	Road Owner Road Owner	20 working days from receipt 20 working days from receipt
Local Government Act 2002	No express provision 14 th Schedule to the 1974 Act (notice)	No notice required for works in local roads where Council owns road Road owner <i>and/or</i> owner of another work only where this is <i>not</i> the council	 1 month for road owner/owner of another work to <i>object</i>
Railways Act 2005	s88 Notice of alteration to railway lines or works on roads	Road Owner <i>and</i> owner of other utility works that might be affected	10 working days

47. The Telecommunications Act 2001 appears to focus only on the need of the telecommunications operator to notify the local authority (or RCA) "...the network operator must give to the local authority or other person who has jurisdiction over the road written notice of the intention to carry out the work." This neglects to address the advising of other affected parties.
48. The Electricity Act 1992 indicates that electricity operators may "...alter the position of pipes, telecommunications lines or other such works that are constructed in, on, along, over, across, or under that road (as part of upgrading or maintaining their lines) in accordance with reasonable conditions set out by the local authority and the owner of the pipe, telecommunications line or other works."
49. The Electricity Act also requires the electricity operator to give notice of the intention to undertake the work to the local authority and the other potentially effected parties. The onus is then on these parties to impose "reasonable" conditions on the electricity operator in an attempt to protect their assets. The use of the text "*alter the position of*" may be of significance, as while electricity operator works may not physically alter the position of an asset, they may affect the quality of the service it provides. The Gas Act 1992 follows the same line as the Electricity Act.
50. Section 52 of the Transit NZ Act 1989 notes that any local authority or other person having lawful power to execute or maintain works on, under, or over any road shall not commence any works or maintenance essentially without the consent of the local authority. In addition, section 53 notes that "...a pole or tower...shall not be erected or re-erected on any road outside the urban area of a district of a territorial authority otherwise than adjacent to the frontage line of the land adjoining the road, or as near thereto as is practicable, having regard to---...(b) The necessity of ensuring that any telecommunications line or electricity transmission line is not susceptible to instability or to damage by, or interference from, natural causes, or trees or structures or other lines or transmission lines."
51. The Railways Act 2005 indicates in section 87 that "a licensed access provider may maintain railway infrastructure in, on, along, over, across or under a road", and may open the road, and alter the position of pipes and cables. The access provider must do so in accordance with any reasonable conditions prescribed by the owner of the utilities, or RCA. Before undertaking this work the access provider must give written notice, and the person (utility) affected has 10 days after receipt to notify any conditions. If work is urgent, no notice is required before commencement, but as soon as practicable (s88).
52. Under the Local Government Act 2002, there is no provision for RCAs to notify utility operators and affected parties of any work the authority intends to undertake in the road corridor. This may involve the operation of roading and water services utilities that are operated by the local authority. In this case, it is other utility operators whose networks are located within the road corridor that are the effected parties, but are not protected by a requirement for the local authority to notify them. This issue of when it is the local authority's works affecting other utility operators also extends to utility operators having no rights to impose reasonable conditions or cost sharing arrangements upon the local authority.
53. While this review is principally concerned with utilities legislation, there *may* be RMA notification requirements. If so, Section 93 of the Resource Management Act (Notifications of Applications) indicates that if a consent authority is satisfied that it

has received adequate information, it shall ensure that notice of every application for a resource consent made to it in accordance with this Act is (amongst other requirements) “...(e) Served on such persons who are, in its opinion, likely to be directly affected by the application, including adjacent owners and occupiers of land, where appropriate.” It is considered that if an application for works is considered a non-notified activity in the council’s District Plan, potentially affected parties may not be advised or consulted about the proposed works.

54. To resolve the inconsistencies, the New Zealand Utility Advisory Group (NZUAG) has developed a code of practice¹² for working in the road which outlines a responsible approach. This guide indicates that the “road opener” must submit copies of the RON to other utility operators likely to be affected by the construction or maintenance works proposed. When undertaking any major work, written notification must be given to affected parties at least 5 days prior to the commencement of works.
55. The guide notes that utility operators are permitted to install and maintain their services in and on roads with notice to the RCA. The RCA has statutory right to impose “reasonable” conditions that relate to their responsibilities and risks. The objective is to provide for conditions and requirements of works to be met by the “road opener” and their contractors and notes a number of matters that may be included when imposing conditions.
56. Of note, is that under the Electricity and Gas Acts 1992 and Railways Act 2005 the onus is on the utility operator to notify effected parties. Is this responsibility being undertaken effectively? The issue for consideration is, do utility operators know who all the affected parties are? Is there a need for a register (database) of the locations of all utility networks within the road corridor, maintained by local authorities and accessible by utilities for the purpose of planning works and notification? Or, for reasons of commercial sensitivity, should the system involve the utility operator notifying the RCA of intended works and the RCA then notifying affected parties? Would this, however, make RCAs liable for utility operators’ work? This will be elaborated on in the section addressing strategic planning and coordination of utility works within the road.

Questions to Consider

57. The Ministry offers no proposals for this issue at this stage. Instead the Ministry calls for submissions on the following questions:

Is there good reason for the legislative differences for required notification of affected parties?

Should they be consistent?

Should the RCA be required to notify affected parties and other utility operators of its intention to carry out works within the road corridor?

Should the RCA or the Utility Operator be responsible for notifying affected parties?

¹² Standards NZ (2003). *SNZ HB 2002:2003 Code of Practice for Working In the Road*.
<http://www.standards.co.nz/oldshop/?sku=2002%3A2003%28SNZ+HB%29>

Should the RCA take on a coordination role and administer the notification process?

Cost Sharing Issues

Key Issues

58. The issue of sharing of the costs for utility related activities in the roading corridor has been an ongoing issue for both road controlling authorities and utilities for some time.

59. Issues that have arisen from consultation:

Is there inconsistency with the provision of cost sharing arrangements in the legislation?

Is there a lack of an accepted payment formula/ratio (depending on who wants the works, who owns them and who benefits from them)?

Is there agreement on the categories of chargeable services or on the principles for charging/not charging?

Discussion

60. There are two separate issues within the broader issue of cost sharing that will be addressed in this section:

- i. Cost sharing arrangements for the works
- ii. Auxiliary service charges (e.g. inspections).

Cost Sharing Arrangements for Works

61. The NZUAG has identified 4 key issues in relation to charging for services in the road corridor as follows:

- Definition of the range of chargeable services and the beneficiaries;
- Establishment of fair and reasonable principles for charging and not charging;
- Definition of how charges are calculated and applied (i.e., application of fair ratios, e.g., 50:50 provisions); and
- Avoidance of duplication of charges.

62. For the relocation of utilities caused by another party's work within the road, it could be argued that the full cost should fall with the party initiating the work since it represents a cost of the work they are doing, and is not being caused by the utility asset owner. With 50:50 provisions there are circumstances where it may not be fair, e.g., in some cases a relocated utility will result in a brand new section of the network and the original network may have been at the end of its economic life.

63. The opposite of this is where an asset may have only recently been installed, and the utility has sought the approval of the road controlling authority and gained confidence that the road would not be altered in the near future, only to find that it is required to be shifted.

64. Table 2 illustrates the various statutory provisions for cost sharing for utility works within the road.

Table 2 Statutory Provisions for Cost Sharing for Utility Works within the Road

Legislation	Relevant Section	Party to Bear the Costs	Proviso
Transit NZ Act 1989	s54 (removal of roadside structures)	50/50 equal split between RCA and utility	
Electricity Act 1992	s24 s33	Electricity operator to meet reasonable costs of local RCA for processing notices and supervising works Who causes works pays (including for relocation) If required by RCA – RCA to pay for work, <i>but</i> Utility operator must pay for fittings	Does not apply to fittings Utility owner not entitled to claim for betterment of utility Utility owner not entitled to claim for betterment of utility s54 of Transit NZ Act 1989 <i>shall not apply</i> to electricity and gas operators
Gas Act 1992	s24 s34	Gas operator to meet reasonable costs of local RCA for processing notices and supervising works Who causes works pays (including for relocation) If required by RCA – RCA to pay for work, <i>but</i> Utility operator must pay for fittings	Does not apply to fittings Utility owner not entitled to claim for betterment of utility Utility owner not entitled to claim for betterment of utility s54 of Transit NZ Act 1989 <i>shall not apply</i> to electricity and gas operators
Telecommunications Act 2001	s148 (alteration to line or road)	Party that makes request to meet costs	Network operator not entitled to be paid the cost of any <i>improvement</i> to the line
Local Government Act 2002	s198	“Development contribution” may be required by local authority for issuing of resource or building consents, or service connections	s197: Does not include the pipes or lines of a network utility operator

65. Section 54 of the Transit NZ Act 1989 (the removal of roadside structures) considers that where any structure has been erected upon, under or over any road by any utility authority, “the reasonable costs, subject to any agreement to the contrary, incurred by a utility authority in removing any structure shall be borne by the controlling authority and the utility authority in equal shares”. A controlling authority or utility authority may apply to the District Court to vary the proportions in which the costs and the compensation shall be borne, and the District Court’s decision shall be binding. Within the Act a “utility authority” means the Crown, a local authority, company or person lawfully authorised to construct, maintain, utilise or use the structure. Therefore this applies to Transit NZ Ltd (if they are a utility authority), local authorities (e.g. water, waste water, storm water) or utility owner.
66. Section 148 of the Telecommunications Act 2001 notes that if there is an alteration to a line on a road (requested by the owner), the person who makes the request is to

meet the costs. The network operator may require the person who makes the request to pay the cost of the alteration. However, the network operator is not entitled to be paid the cost of any improvement to a line. The Telecommunications Act does not seem to provide an explicit provision for an "agreement to the contrary", but this could be covered by Section 54 of the Transit NZ Act 1989. As the Telecommunications Act does not provide any clause that negates Section 54 of the Transit NZ Act, it applies.

67. Section 33 of the Electricity Act 1992 indicates that the costs of work required by a RCA shall be paid by the person that requires the work to be done. However, where a RCA requires the work (as defined in the Transit NZ Act 1989), the owner of the works shall pay for the costs of all fittings and the owner of the works are also required to pay for increased costs or where the works are reconstructed to specifications different from those of the original works. This section is subject to any agreement between the persons requiring the work to be done and the owner of the works, i.e. alternative agreements are possible.
68. Section 24 of the Electricity Act 1992 (construction or maintenance of works in the road) notes that a local authority (or other body with road jurisdiction) may require the electricity operator to meet the reasonable costs and expenses of the local authority (or other body with road jurisdiction). Under the provisions of the Gas Act 1992, where a local authority requires work to be relocated this shall be paid for by the person that requires the work to be done. However, if it is a controlling authority (as defined in the Transit NZ Act 1989), the cost of fittings shall be paid for by the owner and increased costs or costs as a result of different specifications shall be paid for by the owner of the works. The provision for an alternative agreement is also available under the Gas Act 1992. The appeal provision against these provisions is by reference to an arbitrator under the provisions of the Arbitration Act. Both the Electricity Act 1992 and the Gas Act 1992 specifically provide that Section 54 of the Transit NZ Act 1989 shall not apply to electricity and gas.
69. The Railways Act 2005 provides no mechanism for cost sharing for works in the road corridor. However, for utility access to the rail corridor, section 75 in the Railway Act 2005 gives the railways premises owner the right to set "reasonable" charges for granting access to works, that a charge for "a deed" or "agreement" must be "reasonable" and, similarly, access cannot be denied without "reasonable" grounds. In addition, section 75(7) states that the rental "from an easement granted to a public body on, over, or under a railway at a level crossing may be no more than nominal." The requirement for permission is imposed in section 75 "despite anything in any other Act", which negates rights under the other key infrastructure Acts, including the Gas and Electricity Acts 1992.
70. Under the Railway Safety and Corridor Management Act 1992 there was no restriction on the conditions that could be specified by a rail operator. Therefore, if a charge was imposed there were no criteria of reasonableness. Under the Railways Act 2005, this has been amended to ensure that any charge imposed must be "reasonable" (clause 75(4) of the Act).
71. Finally, section 198 of the Local Government Act 2002 indicates that a local authority may require a development contribution to be made when it grants a consent (resource and building) or an authorisation for a service connection. Development contributions may be required in relation to developments if the effect of the developments is to require new or additional assets or assets of increased capacity

and, as a consequence, the territorial authority incurs capital expenditure to provide appropriately for reserves, network infrastructure or community infrastructure. Under section 197, it “does not include the pipes or lines of a network utility operator”, however, this may mean that it could still cover other utility assets such as cellular network towers, cabinets, or letter boxes, for example.

72. In terms of non-statutory activity, the New Zealand Committee for the Co-ordination of Power and Telecommunication Systems (NZCCPTS) has produced a guide which sets down principles for determining the apportionment of costs between electricity and telecommunications network operators when cases of earth potential rise (EPR) hazard, induction hazard or interference to telecommunication networks require investigation and remedial action, and incur expenditure by either or both parties¹³. The principles are aimed at achieving resolution of issues by agreement, thus avoiding costly litigation.
73. In 2004 the NZUAG carried out a survey of RCAs to help gather information on charging between RCAs and utilities as part of the Road Opening and Service Location processes. The survey provides a good indication of current practice and the NZUAG proposes to carry out further work on this issue, in particular the development of a Guideline to outline current legislative provisions and best practice for the various charging and cost relationships between utilities and road controlling authorities. In particular the Guideline could:
- provide legal clarification of whether the Transit NZ Act (section 54) applies to local authorities or not.
 - explain the current legislative provisions for RCAs and utilities in plain language.
 - discuss the advantages and disadvantages of cost sharing – from the perspective of the party initiating the work paying the full cost, 50:50 provisions, and the cost of the utility paying all the work.
 - provide case studies of “agreements to the contrary” for different approaches.
74. Another issue is the long term damage of utilities to the road asset. RCAs note that there is a need to consider fair apportionment of the true whole of life costs.

Cost Sharing Arrangements for Auxiliary Charges

75. A further issue to consider is the charging for auxiliary service costs by local authorities to utility operators. This covers charges for expenditure that local authorities incur in their duty to inspect and audit utility network additions, maintain a register of utility network locations, ensure traffic safety, and ensure the return of the road to a state of roadworthiness post utility works. Currently, only some local authorities charge for these services, creating a perceived imbalance of fairness. A consequence is that extra charges create a disincentive for utility operators to disclose locations of networks to local authorities.

¹³ New Zealand Committee for the Co-ordination of Power and Telecommunication Systems (NZCCPTS) (2002). *Guide for Cost Apportioning Principles for the Mitigation of Hazards and/or Interference Between Power and Telecommunication Networks*. http://www.eea.co.nz/nzccpts_publications.html

76. While this is an issue causing concern, the Ministry believes that local government and industry stakeholders are the more appropriate parties for discussing and implementing remedies to achieve consistency and fairness.

Questions to Consider

77. The Ministry offers no proposals for this issue at this stage. Instead the Ministry calls for submissions on the following questions:

What problems have respondents experienced with cost sharing arrangements for utility work within the road corridor?

Is there good reason for the legislative differences for cost sharing arrangements?

Should the legislation be consistent?

What solutions do respondents propose as providing the most balanced and effective outcome for resolving legislative inconsistency for cost sharing arrangements for utility work within the road corridor?

What solutions do respondents propose for ensuring the fair apportionment of the true whole of life costs of utility works to the road asset?

Definition and Application of Reasonable Conditions

Key Issues

78. The NZUAG has identified the definition of “reasonable” conditions as a term that is applied inconsistently and the need for it to be addressed by legislative change to provide a consistent policy formula across all utilities legislation. The term “reasonable” is subjective and prone to legal interpretation.
79. Key Issue:

Does the current legislative framework create inconsistency and incompleteness regarding the criteria providing guidance to set “reasonable” conditions on working in the road corridor?

Discussion

80. The criteria for setting “reasonable” conditions are prescribed in section 119 of the Telecommunications Act 2001 and are generally accepted as the norm for road opening activities. These have been adopted in the Railways Act 2005. Under most utility Acts the RCA has the right to impose “reasonable” conditions on networks for the purpose of their digging in the road activities through the RON application process. Typically the conditions relate to safety and damage to property, coordination, and compensation (refer Appendix B for reasonable conditions), but the interpretation of reasonable conditions in current legislation is difficult to implement in practice.
81. The Electricity Act 1992, the Gas Act 1992, and the Railways Act 2005 all note that “operators” (electricity, gas and railway¹⁴) can only access their works in the road corridor in accordance with reasonable conditions as may be prescribed by the local authority and the owner of a pipe, telecommunications line or works that will be affected, or are likely to be affected by their works. Similarly, section 40 (2) of the Postal Services Act 1998 prescribes that postal operators must comply with any reasonable conditions prescribed by the local authority or RCA, and that “a public letterbox must not be so placed as to interfere with ordinary traffic”. This does not appear to cover other utilities that might be affected by the work.
82. The Telecommunications Act 2001 prescribes that “network operators” (telecommunications) must use their powers of access to lines within the road corridor “in accordance with any reasonable conditions that the local authority or other person who has jurisdiction over that road requires.”
83. The role of a local authority as a road controlling authority is provided for under section 24 of the Electricity Act where they are able to set “reasonable conditions”. Concerns usually relate to reinstatement of the carriageway, the safe and efficient flow of traffic and minimising disruption to the local community as set out in the Telecommunications Act 2001. The imposition of “reasonable” conditions by RCAs,

¹⁴ “Operator” in the Railways Act means ‘rail operator’, so section 88 refers only to the work being undertaken by the licensed access provider (ONTRACK), while section 86 covers when the utility is doing the work within the rail corridor.

as suggested in utilities legislation, is the exercising of a public law function and should not encompass conditions on matters which relate to private law commercial or contractual arrangements, except to the extent that it is within the RCA's statutory powers.

84. Many local authorities appear to rely on the “reasonable” conditions provisions in the legislation to control utility activities’ amenity effects. It is the Ministry’s opinion that the express purpose of utilities legislation is not to achieve amenity outcomes, but provide “reasonable conditions” that pertain to utilities’ operational and asset management role. In terms of addressing amenity effects, the RMA process and District Plan provisions are a more appropriate means. Further, District Plan provisions are usually an effective means of controlling overhead reticulation and the RCA’s role is more effective in managing the roading asset, underground installations and resolving coordination issues with other utilities¹⁵.
85. An example of the statutory use of “reasonable conditions” is found in the Resource Management Act 1991. The Ministry for the Environment publication “Effective and enforceable consent conditions—A guide to drafting conditions under the Resource Management Act 1991” notes that the general power set out in section 108(1) of the RMA is subject to established principles relating to the validity and scope of conditions. These principles note the obligations an authority has when imposing conditions on a consent; one of which is “reasonable”. It notes that a condition should not be so unreasonable that a reasonable planning authority duly appreciating its statutory duties could not have approved it. The publication also notes that a Court would examine whether in the circumstances it considers that no reasonable consent authority could have imposed a condition of this type. The test of “reasonable conditions” is an objective one and would involve the Court exercising judgement as to the appropriateness or otherwise of the condition. However, the threshold for the Court overturning such conditions is high and it is rare that a condition would be overturned on this basis.
86. Taking the view that utilities legislation prescribes the exercising of “reasonable conditions” by RCAs for the purpose of operational and asset management, NZUAG¹⁶ suggests that, for utility works in the road, “reasonable conditions” may relate to (inter alia):
 - a. The location of works in roads (e.g. to avoid conflict with other utilities, to facilitate maintenance etc);
 - b. Interference with, or damage to, council assets within the road such as street trees or furniture;
 - c. Timing of works (e.g. outside peak traffic periods);

¹⁵ The holder of a resource consent will still require the permission of the road controlling authority to get access to the road unless it is entitled to that right by one of the relevant Acts (e.g. a network utility operator through the Gas and Electricity Acts). In both cases (designation and resource consent) an application must be lodged with the road authority who can impose “reasonable” conditions under which the work should be a carried out.

¹⁶ NZUAG Roadshare™ (2004). *Network Utilities Within the Road Corridor – The Role of the Resource Management Act: A Guide to Best Practice*. <http://nzuag.org.nz/roadshare/rma-guidelines.html>

- d. Requiring that works not unduly interfere with vehicular and pedestrian traffic movement and safety, and access to private land from a road;
 - e. Public safety generally (e.g. placing cones or barriers to restrict access to work areas); and
 - f. Requiring reinstatement of roads or berms where the surface is broken up and/or plants disturbed.
87. Under the Railway Safety and Corridor Management Act 1992 there was no restriction on the conditions that could be specified by a rail operator (no defined criteria of reasonableness). However, under the new Railways Act 2005, this has been amended to ensure that any charge imposed must be “reasonable” (clause 75(4)) (although “reasonable” is not defined). It is noted in the Act the requirement for permission is imposed in section 75 “despite anything in any other Act”, which negates rights under the other key infrastructure Acts, including the Electricity and Gas Acts 1992.
88. One of the principal concerns of RCAs is the reinstatement of roads or berms where the surface is broken up and/or plants disturbed by utility operators. Reasonable conditions can prescribe quality standards for reinstatement, but often the actual quality is substandard. This results in significant maintenance costs by RCAs to repair road surfaces damaged by utility works. Road corridors are often left looking like patchwork after various utility operators open and reseal the road. The notion of strategic coordination and planning of utility works and road opening is addressed in a later section.

Proposals

That the provisions in s119 of the Telecommunications Act 2001 outlining the criteria for setting reasonable conditions be adopted by other utilities legislation.

89. Given the lack of consistency of definitions of “reasonable conditions” within utilities legislation and the resultant inconsistency of application, the Ministry believes that other utilities legislation should include the provisions set in the Telecommunications Act 2001.

Questions to Consider

How can the interpretation and application of reasonable conditions be defined and tested?

Dispute Provisions

Key Issues

90. Under the main utilities Acts (electricity, gas and telecommunications), the only recourse available for disputes around conditions imposed or charges made is to the District Court.

91. Key Issue:

Does current legislation provide a satisfactory appeal mechanism to cover disputes around “reasonable” conditions and penalty provisions?

Discussion

92. Section 27 of the Electricity Act 1992 and section 28 of the Gas Act 1992 provide an appeals provision for electricity and gas operators against “all or any of the conditions imposed by the local authority or other body or person having jurisdiction over the road; or the owner of any pipe, telecommunications line, or works.” This includes both local authorities and Transit NZ as RCAs. The Postal Services Act 1998 and the Railways Act 2005 have a similar provision for appealing conditions imposed on access to the road. Recourse is to the District Court and must be lodged within 40 working days after the date of notification of the conditions imposed, or a period set by the court upon application from the utility operator. The District Court has the power to confirm, modify, or cancel any or all of the conditions imposed.

93. Under the Electricity and Gas Act 1992 and the Railways Act 2005, District Court decisions can be appealed to the High Court only over questions of point of law. Table 3 illustrates the various provisions for appealing to a court.

Table 3 Current Provisions for Appealing to a Court

Legislation	Relevant Section	Appeal Period	Courts Available
Electricity Act 1992	s27	Within 40 working days after the date of notification	District Court High Court: Appeals on point of law
Gas Act 1992	s28	Within 40 working days after the date of notification	District Court High Court: Appeals on point of law
Postal Services Act 1998	s43	Within 40 working days after the date of notification	District Court
Railways Act 2005	s89	Within 40 working days after the date of notification	District Court High Court: Appeals on point of law
Telecommunications Act 2001	s141	Within 45 days after the date of notification	District Court

94. Section 141 of the Telecommunications Act 2001 provides an appeals provision for telecommunications operators against “all or any of the conditions imposed by the local authority or other body or person having jurisdiction over the road; or the owner of any pipe, telecommunications line, or works.” Appeals are to the District Court and must be lodged within 45 working days after the date of notification of the conditions

imposed, or a period set by the court upon application from the utility operator. The District Court has the power to confirm, modify, or cancel any or all of the conditions imposed. Under this section, the decision of a District Court over an appeal is final.

95. The question at issue is does this legislation provide a satisfactory dispute resolution process? It has been expressed by parties that the current legislation is not satisfactory. A possible remedy is the inclusion of an alternative dispute resolution process that promotes mediation as the first remedy for disputes, then if that fails, arbitration, and then failing that, recourse to the District Court.
96. Mediation and arbitration are an attractive alternative to court dispute resolution as they are confidential, which ensures future business relationships are not tarnished by publicly aired disputes. Industry stakeholders suggest business relationships and integrity are extremely valuable and publicly aired disputes in the court are damaging. Mediation and arbitration are also substantially cheaper than court resolution. The cost of appealing to a court may be a current disincentive for utility operators. A further disincentive for appealing to court is the precedent effect that court decisions have and the risks that precedents pose to the broader industry and local government stakeholders. Mediation and arbitration do not have a precedent setting effect.
97. Due to the disincentives of appealing to the court, and the apparent advantages of mediation and arbitration, the Ministry, therefore, invites submissions on whether an alternative dispute resolution process involving mediation and arbitration be considered as a means to resolve disputes over conditions imposed.
98. The Ministry considers that final recourse should be to a court. However, a number of Councils have identified the Environment Court as a preferred appeal body. The Environment Court is available for appeals on RMA and District Plan issues, but is not legally available for a “reasonable” conditions appeal under current utilities legislation.
99. It seems the rationale for the current legislative arrangements is that the District Court is a more appropriate body for final recourse for dispute resolution as financial, operational, and business matters are within its prerogative. Whereas, the Environment Court is the appropriate body for amenity and RMA issues, not the business and operational issues of utilities, which as discussed earlier, is a quite separate issue. The Ministry, however, would like to gauge stakeholders' views on this matter.

Questions to Consider

Should mediation and arbitration be the primary means for dispute resolution?

Should there be a prescribed timeframe for mediation and arbitration? If so, what should it be?

Is the District Court the appropriate body for final recourse? Should it be the Environment Court?

Access to Rail and Motorway Corridors

Key Issues

100. During the consultation to amend sections 24 and 31 of the Electricity Act for high voltage works, some submitters noted that the amendments to sections 24 and 31 of the Electricity Act (specific to access to roads and level crossings) could also be applied to railroads and motorways.

101. Key Issues:

Is the current legislation regarding access specific only to access to the road corridor and to level crossings?

Does the difference in legislation covering access to the rail corridor and motorways result in unreasonable delays and uncertainty in terms of the outcome for utility providers wishing to undertake works?

Discussion

Utility Access to the Rail Corridor

102. The New Zealand Railways Corporation (ONTRACK) is the owner and rail access provider for the national rail network. Only Toll, Connex (in Auckland) and Taieri Gorge Railway (in Dunedin) have access to the national rail network. Toll Holdings owns and operates the majority of New Zealand's rolling stock. ONTRACK is not the only railway infrastructure owner – the Railways Act 2005 also applies to approximately 80 licensed rail operators, many of whom own land and rail of their own, and who have all the rights and obligations of an infrastructure owner (or access provider as termed in the Railways Act 2005). The provisions of other Acts which cover the rail corridor also include these other rail corridors.

103. Section 75 of the Railways Act 2005 notes that the Act has priority over any other Act (i.e., key infrastructure Acts) with respect to managing access to the rail corridor for works that are on, over or under any railway infrastructure or railway premises. While the party proposing the works can request permission from the rail access provider, the rail access provider can refuse on the basis of “reasonable” grounds. It is noted that while section 75(7) applies to level crossings it doesn't extend to the rest of the rail corridor. The Act, unlike the Electricity and Gas Acts 1992, makes no reference to the timescale within which decisions on an application for access to the rail corridor must be carried out leading to costly delays and uncertainty, and solutions sought on a case by case basis.

104. Some submitters called for an extension of utility operator access rights to the rail corridor, suggesting that utilities should have access to the rail corridor on the same basis as they have access to the road corridor (i.e. as-of-right-access subject to notification and to reasonable conditions set by the RCA and affected parties). Utility operators cite the rail corridor as being an underutilised, cheaper option for locating cables, lines, and cellular transmitter towers. Consultation with the Ministry of Transport and the rail network operator, ONTRACK, have identified a number of issues that explicitly differentiate the rail and road corridors, making an extension of access rights to the rail corridor problematic.

105. The fundamental difference between the road corridor and rail corridor is the actual physical properties of the corridors and the vehicular movement within the corridor. The rail corridor is constrained by the fact that the network is generally made up of single track routes with auxiliary lay-bys to facilitate two-way traffic along the single line routes. While some routes are double tracked, there is, on the whole, no flexibility of route. To facilitate the safe and efficient movement of traffic along the rail network, the rail control authority, ONTRACK, operates a centrally coordinated *National Train Control Centre* which provides scheduling and management of all rail traffic through the network. To maintain safety for both rail traffic and utility operators working within the rail corridor, Train Control must coordinate the access and operations of utility operators so as to close the line if required and reschedule traffic, or notify rail traffic of the utility operators' activities and communicate with both the utility operator and the rail traffic as they approach the hazard.
106. Other problematic issues further relate to the physical properties of the track. For a utility operator to work within the rail corridor, they must have access to the actual track. This is problematic in that the track doesn't always follow road corridors, travels through difficult geography, is tunnelled, and the corridor itself is often very narrow (generally around 6 metres wide). Based on these features, often there is no room for utilities within the rail corridor.
107. A further issue is the fragility of the rail network – tracks upon sleepers upon ballast base. If a utility operator working within the rail corridor (i.e. laying cable via a tunnel underneath or through the ballast base) reinstated the line to a substandard quality, it could pose a serious risk of weakening the line, resulting in derailment of rail traffic and causing serious injury to staff, passengers, and passers-by, and damage to freight, plus seriously disrupting the scheduling and movement of rail traffic.
108. Of interest, however, is that some gas and water utilities are currently located in the rail corridor, but these instances are mostly historical. Fibre optic cable was laid in the North Island along the main trunk line corridor during the 1980s. These were subsequently sold to Clear Communications (now TelstraClear). Clear laid more cable in the 1990s.
109. While as-of-right access to the rail carriageway itself poses problems, utility operators have suggested that refining the definition of rail corridor to differentiate between the carriageway and corridor could provide as-of-right access (subject to reasonable conditions) to the corridor, but not the carriageway, which would satisfy utility operators.

Utility Access to the Motorway Corridor

110. Sections 2 and 71 of the Transit NZ Act 1989 explicitly differentiate motorways from roads with the main proviso that a motorway must be declared as such by the Governor-General in Council (See Appendix A for full text), and while including all bridges, drains, culverts, or other structures or works forming part of any motorway so declared, does not include any local road, access way, or service lane (or the supports of any such road, way, or lane) that crosses over or under a motorway on a different level.
111. Sections 2 of the Electricity and Gas Acts 1992 and section 4 of the Railways Act 2005 all explicitly exclude a motorway from falling within the definition of road and access as-of-right for utility operators. The Telecommunications Act 2001 does not

explicitly cite or define the term motorway, but it may fall within Section 5's definition of road as being "any other place to which the public have access, whether as-of-right or not".

112. In terms of extending the access rights of utility operators to the motorway corridor, it must be recognised that motorways possess quite different features to roads. Motorways are generally primary arterial routes servicing major cities with a very large volume of traffic compared with roads, and the speed limit is generally higher than roads or streets (100km/h). The kind of irregularities in the road surface caused by trenching for underground cables, while tolerable on relatively low speed urban streets, would cause a grave safety hazard on motorways which are intended for high speed traffic. Further, due to the restricted access to motorways via on/off ramps and with motorways operating so close to capacity, traffic flow is easily disrupted and any physical or visual disruption (i.e. work alongside or in the carriageway) can cause major delays. As traffic volume grows over time, increased capacity may be required, which involves a major construction project to increase lanes.
113. It is these differences that make utility access to motorways a more serious issue requiring deeper analysis. Based on these differences, Transit NZ is of the view that as-of-right access to motorways, such as applicable for local roads and State Highways, is inappropriate. This does not mean that Transit NZ refuses access outright, but considers the costs and benefits of individual applications. In this consideration, Transit NZ now applies two criteria:
 - i. utility works must not, either during construction or maintenance, affect the structural integrity of the carriageway and bridges (utilities to pay for any brackets etc. needed to attach cables, pipes to bridges); and
 - ii. utility works must not, either during construction or maintenance, affect traffic flow.
114. Discussion with Transit NZ suggests that if an application from a utility meets this criteria it will be approved. Often this involves tunnelling under the motorway, from a starting point outside of the motorway reserve. Tunnels must be a minimum of 10 metres deep to avoid subsidence of the carriageway. Attaching cables and pipes to the underside of bridges and viaducts is permitted providing that they don't overload the bridge or affect its load bearing capacity.
115. While as-of-right access to the motorway carriageway itself poses problems, utility operators have suggested that refining the definition of motorway to differentiate between the carriageway and corridor could provide as-of-right access (subject to reasonable conditions) to the corridor, but not the carriageway, which would satisfy utility operators.

Proposals

116. Due to the safety issues and requirements for centrally coordinated tight control of the rail network, access to the rail corridor has to be more discretionary and closely managed than that of the road corridor. With these differences in mind, it is considered that extending the as-of-right access for utility operators to include the rail corridor would not be in the interests of public safety. However, it is proposed that there would be benefits of having greater transparency and more certainty for utilities

if these criteria were codified and published somewhere easily accessible to utilities. Therefore it is proposed:

That utility operators' right of access as set out in the Electricity Act 1992 NOT be extended to include the rail corridor.

That the Rail Access Provider's (ONTRACK) rail corridor access evaluation criteria be codified, published and made accessible to utilities.

117. In principle, motorways are a different category of road and for that reason, access to the motorway has to be more discretionary and closely managed. Considering the differences in safety requirements of motorways, it is proposed that extending the rights of access of utility operators to include motorways would not be in the interests of public safety. However, it is proposed that there would be benefits from having greater transparency and more certainty for utilities if these criteria were codified and published somewhere easily accessible to utilities. Therefore it is proposed:

That utility operators' right of access as set out in the Electricity Act 1992 NOT be extended to include motorways.

That Transit NZ's motorway access evaluation criteria be codified, published and made accessible to utilities.

Questions to Consider

Should the definitions of rail and/or motorway corridors be refined to differentiate the carriageway from the corridor?

Should utility operators be permitted as-of-right access to the rail and/or motorway corridors (subject to reasonable conditions), BUT NOT to the "carriageways"?

Interference & Hazards

Key Issues

118. The quality of telecommunications services can be adversely affected due to interference from power lines. The impact on the quality of a service provided by another was raised by telecommunication operators during the recent consultation on extending the access regime for electricity works above 110kV and 100MVA on roads and level crossings.

119. Key Issues:

Do the current legislation and regulations adequately ensure that the quality of a service provided by one utility is not adversely affected by the activities of another?

Do the current legislation and regulations adequately provide effective means of addressing safety issues related to the management of hazards to equipment and people?

Discussion

Interference Between Electricity and Telecommunication Services

120. In a submission to the Local Government and Environment Select Committee on the Resource Management Act and Electricity Legislation Amendment Bill, concerns were raised over the interference caused by electricity works to telecommunications lines in the form of “hazardous induction” and “noise”. It was suggested that the current utilities legislation and regulations do not adequately provide for managing these risks.

121. Both electricity operators and telecommunications operators share the road corridor to locate their network and nearly every road in New Zealand has both a telecommunications and electricity line located in its corridor – either aerial or buried. It has been suggested that where electricity works that carry an earth fault current run parallel to, or cross over (at any angle other than a right angle), a telecommunications line¹⁷, a possibly hazardous voltage can be induced along the telecommunications cables' conductors. Earth fault currents can be limited on lower voltage lines (e.g. 11kV, 22kV, and 33kV) by using neutral earthing resistors, however, it is suggested that these are impractical at voltages higher than 66kV.

122. A serious safety hazard is also posed by failures at a concrete pole, steel pole, or steel pylon, predominantly from, but not limited to, high voltage works. It was submitted that “if such a failure results in a phase to pylon (or conductor to pole) fault, a very high earth potential rise could occur. In turn, this may cause very high voltages in the ground surrounding nearby telecommunications cables or ready access points.” It is suggested that this could result in degradation of the telecommunications plant's insulation and allow hazardous fault voltages into the

¹⁷ It appears that interference is mostly concerned with copper telecommunications wires not fibre optic cable as, in some cases, Transpower strings fibre optic cable along its pylons.

telecommunications network. Potentially, this could damage telecommunications equipment and electrocute utility workers or even people when they pick up a phone.

123. A further problem submitted was the issue of service quality affected by “noise” induced from harmonic currents from high voltage (110kV and 220kV) lines located along public roads, and the exacerbation from adding 66kV and 100kV lines along the same corridor. Noise problems experienced include: “audible noise so loud that customers have to shout to communicate; calls being cut off; reduced transmission speeds; intermittent or delayed faxes; and slow and/or unreliable internet access, severely limiting email and other internet based services”. Both issues can also cause significant business costs through damage to utility networks and equipment.
124. The Electricity Regulations 1997 (regulation 58), provide for electrical interference with telecommunications lines and notes:
 1. Where any telecommunications lines, or any other structure, device, or thing, designed or intended for use for telecommunications purposes, is being constructed in the vicinity of any works or electrical installation, the person constructing the lines, structure, device, or thing must ensure that the lines, structure, device, or thing is constructed so as to ensure that electricity conveyed through the works or electrical installation does not cause any induced voltage, earth potential rise, or shock currents, that is or are likely to cause damage to the lines, structure, device, or thing or a hazard to persons.
 2. Where any works or electrical installation is being constructed in the vicinity of any telecommunications lines, or any other structure, device, or thing, designed or intended for use for telecommunications purposes, the person constructing the works or electrical installation must ensure that the works or electrical installation is constructed so as to ensure that electricity conveyed through the works or electrical installation does not cause any induced voltage, earth potential rise, or shock currents, that is or are likely to cause damage to the lines, structure, device, or thing or a hazard to persons.
125. While these regulations address the issue of interference in terms of the hazards of induced voltage, earth potential rise, and shock currents, there is no provision for interference affecting service quality, such as “noise” interference. The terms “interference” or “service quality” are not mentioned specifically in the regulations.
126. The Transit NZ Act 1989 (section 53 Poles, etc., on roads to be adjacent to boundaries) notes that a pole or tower cannot be erected or re-erected without having regard to(b) The necessity of ensuring that any telecommunications line or electricity transmission line is not susceptible to instability or to damage by, or interference from, natural causes, or trees or structures or other lines or transmission lines.
127. The Radiocommunications (EMC Standards) Notice 2004 No. 2 lists the New Zealand standard NZS 6869 Limits and measurement methods of electromagnetic noise from A.C. power systems. We understand that these standards are not applicable to interference attributable to induced voltages.
128. The NZCCPTS has developed a number of guides aimed at mitigating/preventing interference between electricity and telecommunications technologies. Key Guides include:

- Guide for Investigations and Mitigating Power System—Telecommunication System Noise Interference
- Application Guide for Single Wire Earth Return (SWER) High Voltage Power Lines for the control of interference to telecommunication circuits
- Cost Apportioning Principles for the Mitigation of Hazards and/or interference between Power and Telecommunication Systems
- Application Guide for cable-sheath bonding for the control of earth potential rise and for the limitation of hazardous induction into telecommunication circuits.

129. While these regulations, standards, and guidelines provide some guidance and statutes provide some limited statutory safety provisions, there is still concern that there is limited communication from electricity operators to telecommunications operators regards alteration and upgrading of existing works. In the recent consultation to the Local Government and Environment Select Committee on the Resource Management Act and Electricity Legislation Amendment Bill, it was submitted that under section 24 of the Electricity Act 1992, communication be made mandatory between electricity operators and other utility operators who would be affected when electricity operators “alter the electrical characteristics of any works”.

130. As the legislation currently stands, electricity operators must notify affected parties (including telecommunications operators) of the intention to construct, alter, remove, or repair electricity works within the road corridor. It was submitted that the current clauses do not cover the intention to “alter the electrical characteristics of any works”, and therefore reasonable conditions cannot be imposed by an affected party based on the effects of a change of electrical characteristics. For example, notification should cover such changes as replacing a wooden pole with a concrete pole as this significantly alters the conductivity properties of the pole and the effects on nearby utilities. While regulation 57(1) of the Electricity Regulations provides that “no person supplying electricity or line function services may alter the electrical characteristics of the supply system in a way which may cause danger to persons or property” and regulation 57(2) covers reasonable steps to ensure fault currents are limited to reasonable levels, it is felt that these do not provide the same protection as the ability for affected parties to impose reasonable conditions.

131. It was submitted that a minor amendment be made to section 24 of the Electricity Act 1992 to clarify the notification and imposition of reasonable conditions for the alteration of electrical characteristics of any works. The Ministry supports this proposition and thus makes it a proposal below.

Interference between Utilities

132. It must also be noted that on occasion, one utility may interfere with another utility within the road corridor. The prominent example is the flooding of storm water and wastewater pipes, causing flooding and damage to other utilities (roads, telecommunications, gas, and electricity).

The Management of Hazards to Equipment and People;

133. Within the broader issue of interference, the issue has been raised regards the management of hazards to equipment and people from utility works within the road

corridor. Specific concerns have been raised regarding the lack of formalised mapping of utility networks within the road corridor and the ability to check before you dig. Utility operators are concerned about the lack of effective means to ensure that utility operators working in the road know the location of other utility networks and avoid inadvertently digging into another utility network. For example, the case of a telecommunications operator digging and fracturing a gas pipe they did not know was there. Utility operators cite specific concerns about accidentally digging into buried high voltage cables and the risks this poses to workers.

134. An effective means of addressing safety issues could be the development and use of a safety code of practice between organisations to cover safety issues. This could outline best practice approaches to checking with other utilities as to the locations of networks in the proposed work area during the notification period. This is an option for industry and local government to develop.
135. Another option is a formal database mapping utility networks and available for utility operators to plan proposed works against for issues of interference with other utility networks. The question is who would manage and coordinate such a system? Should the RCA or local authority, or a private enterprise manage such a system? The management of such a system by the local authority is discussed in the next section addressing strategic planning and coordination of utility works in the road corridor.
136. Concerns have also been raised about the safety of utility workers working within the road corridor. Work sites involving utility structures on roads are adequately covered by the Code of Practice for Temporary Traffic Management.

Proposals

That s24 of the Electricity Act 1992 be amended to clarify the notification and imposition of reasonable conditions for the alteration of electrical characteristics of any works:

24. Construction or maintenance of works on roads—

- 1) Except as provided in subsection (2) of this section, an electricity operator may from time to time construct and maintain works in, on, along, over, across, or under any road, and for any of these purposes may—
 - (a) Open or break up any road:
 - (b) Alter the position of—
 - (i) Any pipe (not being a main) for the supply of water or gas; or
 - (ii) Any telecommunications line; or
 - (iii) Any works—
that are constructed in, on, along, over, across, or under that road:
 - (c) Alter, repair, or remove any works so constructed or maintained, or any part of any such works.

[(d) Alter the electrical characteristics of any works.]

- (2) No electricity operator shall exercise the powers contained in subsection (1) of this section otherwise than in accordance with such reasonable conditions as may be prescribed by—
 - (a) The local authority or other body or person having jurisdiction over the road; and
 - (b) ~~The owner of the pipe, telecommunications line, or works, as the case may require.~~

- (b) [The owner of any pipe, telecommunications line, or works that are constructed in, on, along, over, across, or under the road and that will be affected, or may be affected, by the works.]

Questions to Consider

What solutions do respondents consider would best improve the management of interference between utilities?

What solutions do respondents consider would best improve the management of hazards to equipment and people from utility works within the road corridor?

Strategic Planning and Coordination of Utility Works within the Road

137. Building on previous issues discussed, this section explores the practicalities of the RCA taking a strategic planning and coordination role in the management of the road corridor.

Key Issues

138. NZUAG indicates that there is an inconsistent approach to the coordination and location of services in the road corridor particularly in old and new suburbs. This results in the installation of some services on the basis of available space rather than consistent location.

139. Key Issue:

Is there an inconsistent approach to the allocation of space in the road corridor with no consistent rule of thumb approach?

Is there a need for greater local government strategic planning and coordination of utility works within the road?

Discussion

140. Space is increasingly an issue as many local authorities express a preference for the under-grounding of new or refurbished works. The ability to control the space issue through the RMA and District Plans is limited. Other than the limited legislative provisions, arrangement for space allocation tends to be on a voluntary basis. The NZUAG has pioneered initiatives such as RoadShare, the development of guidelines and a Code of Practice on working in the road, and the promotion of best practice in District Plans (with the aim of promoting consistency of approach). The NZUAG/Standards NZ Code of Practice for Working in the Road¹⁸ provides detailed standards for the best practice location of utility works within the road, but is only voluntarily adhered to.

141. The NZCCPTS publication "Minimum Separations between Buried Power and Telecommunication Cables"¹⁹ provides industry guidelines on the minimum separations that should apply between buried power and telecommunication cables. Rules explain how minimum separations should be applied and what exceptions are permitted.

142. An additional issue is the mapping of the location of underground utilities. Incidents in recent history have highlighted the lack of a coordinated registry of location of utility networks within the road corridor. In terms of health and safety, and the

¹⁸ Standards NZ (2003). *SNZ HB 2002:2003 Code of Practice for Working In the Road*. <http://www.standards.co.nz/oldshop/?sku=2002%3A2003%28SNZ+HB%29>

¹⁹ New Zealand Committee for the Co-ordination of Power and Telecommunication Systems (NZCCPTS) (2002). *Guide on Minimum Separations between Buried Power and Telecommunication Cables*. http://www.eea.co.nz/nzccpts_publications.html

planning and coordination of allocating space within the road corridor, a coordinated registry would be most beneficial and practical. There have been recent cases of Local Authorities taking the initiative and creating specific utility ducts in the road corridor and utility operators being required to locate utilities, which is a positive move in resolving this issue. Should this be a requirement of all new road construction and road improvement programmes?

143. The NZUAG has recognised the need for RCAs and utility operators to work together to benefit all groups using the road. Among the resulting Roadshare documentation is the *Model Partnering Agreement Between Utility Service Providers and Road Controlling Authorities*, which has the express purpose of providing a framework for partnership to work together to achieve “mutually agreed outcomes in the best interests of each organisation and the communities they serve”.
144. Within the agreement, NZUAG propose the strategic planning and coordination of utility works within the road to reduce the unnecessary traffic disruption and significant additional cost to the public, road users and passenger transport operators caused by the uncoordinated activities of utility works in the road reserve. The agreement further recognises the importance of undertaking works in a “manner that minimises the impact on business and reduces the frequency of digging up the roads”.
145. The NZUAG advocate two key principles in this agreement to which both Utility operators and RCAs must adhere:
 - i. The importance of close co-operation and liaison between the RCA and Principal Providers (utility operators) as well as amongst the Principal Providers themselves, including the need to balance potentially conflicting interests.
 - ii. An acknowledgement by all parties that the work programmes and practices may have to be adjusted in order to ensure that the objectives of the coordination provisions are achieved.
146. In achieving strategic planning, cooperation, and coordination, the agreement emphasises the importance of sharing information based on excellent communication. This involves regular coordination meetings between each RCA and the Principal Providers. An initial meeting will involve the RCA providing all Principal Providers with a proposed work programme for that financial year, and the Principal Providers will provide a proposed work programme to the RCA and all parties considered likely to be affected. As the process develops, detailed plans showing the nature and extent of proposed works should be provided.
147. NZUAG then proposes that parties take a month to evaluate for any potential conflict of works, meet to discuss and resolve issues, and in particular, consider and agree on techniques and methodologies, and cost sharing arrangements for the works. NZUAG suggests that in following this process, RCAs and Principal Providers who have given advance notice of proposed works, have good reason to expect their works to remain undisturbed for at least two years post completion. NZUAG also suggests that parties could extend planning longer term strategy (e.g. up to 10 years ahead).

148. This regime is designed with the intention of balancing the need for minimal delay and inconvenience to customers with the need to maintain the integrity of the roading and utility service assets with a minimum of administrative effort. For this process to work, all parties would need to implement systems to ensure quality and consistency of management of the processes and the relationships.
149. The Ministry approves of the NZUAG model partnership agreement and the strategy underlying it. The Ministry feels that legislating to impose such a system on stakeholders is beyond the scope of the Government's policy objectives. The Ministry believes industry self-governance of this strategy is more appropriate.

Questions to Consider

Is there a real issue with current practices of allocating utility space within the road corridor that is posing a barrier to infrastructure development?

What solutions do respondents propose as providing the most balanced and effective outcome for allocating utility space within the road corridor in a more effective, efficient, and fair manner?

Should it be a legal requirement for RCAs to install utility ducts in all new road construction and road improvement programmes for utility operators to locate utilities?

Should the RCA be the party responsible for managing utility space within the road corridor through District Plan provisions?

Should the RCA be the party responsible for maintaining a coordinated registry of location of utility networks within the road corridor? If so, how could it be funded?

Should an industry body be responsible for maintaining a central registry of location of utility networks within the road corridor? If so, how could it be funded?

Is it "reasonable" for RCAs to publish 2 year plans and "require" utilities to work only within the timeframes stipulated?

Proposal

That the Ministry support and encourage NZUAG as a facilitator, but that this NOT be extended to legislation.

Other Issues

150. In addition to the key issues already identified, one other issue is presented here. It may not ultimately be an issue that requires resolution but its discussion here may aid understanding and help establish if as an issue it needs to be considered or not.

Water related issues

151. The provision of water utility services (water, waste water, and stormwater) in New Zealand is in the main managed directly by local authorities under the Local Government Act 2002. There are some limited instances of outsourcing water utility operations, however, the ownership and control of the utility assets remain with the local council. Because the water utility services are usually owned and operated by the local council, who is generally the RCA, there are no apparent issues. While the Ministry is not aware of any problems or issues to be resolved in relation to water issues per se, given that water and sewerage are utility services and services that are privatised in many countries, they are included here to provide an opportunity for potential issues to be raised and addressed if necessary.

Appendix A – Road Definitions: Relevant Statutes

LOCAL GOVERNMENT ACT 1974

PART 21 - ROADS (OTHER THAN REGIONAL ROADS), SERVICE LANES, AND ACCESS WAYS

315. Interpretation—

“Road” means the whole of any land which is within a district, and which

- (a) Immediately before the commencement of this Part of this Act was a road or street or public highway; or*
- (b) Immediately before the inclusion of any area in the district was a public highway within that area; or*
- (c) Is laid out by the council as a road or street after the commencement of this Part of this Act; or*
- (d) Is vested in the council for the purpose of a road as shown on a deposited survey plan; or*
- (e) Is vested in the council as a road or street pursuant to any other enactment;*

and includes

- (f) Except where elsewhere provided in this Part of this Act, any access way or service lane which before the commencement of this Part of this Act was under the control of any council [or is laid out or constructed by or vested in any council as an access way or service lane] or is declared . . . by the Minister of Works and Development as an access way or service lane after the commencement of this Part of this Act [or is declared by the Minister of Lands as an access way or service lane on or after the 1st day of April 1988*
- (g) Every square or place intended for use of the public generally, and every bridge, culvert, drain, ford, gate, building, or other thing belonging thereto or lying upon the line or within the limits thereof;*

but, except as provided in the Public Works Act 1981 or in any regulations under that Act, does not include a motorway within the meaning of that Act.

TRANSIT NEW ZEALAND ACT 1989

2. Interpretation—

"Motorway"—

- (a) Means a motorway declared as such by the Governor-General in Council under section 138 of the Public Works Act 1981 or under section 71 of this Act; and*
- (b) Includes all bridges, drains, culverts, or other structures or works forming part of any motorway so declared; but*

- (c) *Does not include any local road, access way, or service lane (or the supports of any such road, way, or lane) that crosses over or under a motorway on a different level.*

PART 4 - ROADING

43. Interpretation—

“Road” means a public highway, whether carriageway, bridle path, or footpath; and includes the soil of

- (a) *Crown land over which a road is laid out and marked on the record maps:*
- (b) *Land over which right of way has in any manner been granted or dedicated to the public by any person entitled to make such grant or dedication:*
- (c) *Land taken for road under the provisions of this Act[, the Public Works Act 1981,] or any other Act or Provincial Ordinance formerly in force:*
- (d) *Land over which a road has been or is in use by the public which has been formed or improved out of the public funds, or out of the funds of any former province, or out of the ordinary funds of any local authority, for the width formed, used, agreed upon, or fenced, and a sufficient plan of which, approved by the Chief Surveyor of the land district in which such road is situated, has been or is hereafter registered by the District Land Registrar against the properties affected by it; and the Registrar is hereby authorised and required to register any such plans accordingly, anything in any other Act notwithstanding, when the plans are presented for registration by or on behalf of the Minister:*
- (e) *Land over which any road, notwithstanding any legal or technical informality in its taking or construction, has been taken, constructed, or used under the authority of the Government of any former province, or of any local authority, and a sufficient plan of which is registered in the manner provided for in paragraph (d) of this subsection,—*

and, unless repugnant to the context, includes all roads which have been or may hereafter be set apart, defined, proclaimed, or declared roads under any law or authority for the time being in force, and all bridges, culverts, drains, ferries, fords, gates, buildings, and other things thereto belonging, upon the line and within the limits of the road.

71. Governor-General may authorise and declare motorways—

- (1) *At the request of the Authority, the Governor-General may from time to time, by Order in Council published in the Gazette,—*
- (a) *Authorise the construction of any motorway, and in doing so state as nearly as possible the route of the motorway, and its 2 termini:*

- (b) Declare any land, or any part of the air space above or the subsoil below the surface of any land, or any road, whether then actually constructed as a motorway or not, to be a motorway.*
- (2) Every Order in Council under this section may in the same manner from time to time be amended or revoked.*
- (3) No request may be made under subsection (1) that affects or is likely to affect Maori land, land registered in the name of Pootatau Te Wherowhero under section 19 of the Waikato Raupatu Claims Settlement Act 1995, land subject to any other Maori claims settlement Act, or Maori historical, cultural, or spiritual interests, unless Transit has consulted,—*
- (a) in the case of land registered in the name of Pootatau Te Wherowhero or interests relating to that land, the land holding trustee (as defined in section 7 of the Waikato Raupatu Claims Settlement Act 1995):*
- (b) if any other Maori claims settlement Act requires consultation about the request, in accordance with that Act:*
- (c) in any other case, every iwi or hapu that, in the opinion of Transit, will or may be affected by the request.*
- (3A) Transit must be satisfied after such consultation that the request should be made.*
- (4) The Minister shall cause a copy of every Order in Council made under subsection (1)(b) of this section, and of every plan referred to in it, to be deposited in the office of the District Land Registrar; and on receipt of it the District Land Registrar shall note the Order in Council upon the appropriate folio of the proper register.*
- (5) Where any land affected by any Order in Council made under subsection (1)(b) of this section is Maori land, the Minister shall cause a copy of that order to be deposited in the office of the Registrar of the Maori Land Court who shall record it in the records of the Court.*
- (6) Every motorway declared as such by the Governor-General under section 138 of the Public Works Act 1981 and having that status under that Act immediately before the commencement of this Act is hereby deemed to have been declared to be a motorway under this Act.*

LAND TRANSPORT MANAGEMENT ACT 2003

PART 1 - PRELIMINARY PROVISIONS

5. Interpretation—

“road” —

- (a) means a road as defined in section 2(1) of the Transit New Zealand Act 1989; and*
- (b) despite the terms of that definition, in subpart 2 of Part 2, includes a motorway as defined in that section; and*

(c) includes toll booths and other toll-related infrastructure on a road

TELECOMMUNICATIONS ACT 2001

PART 1 - PRELIMINARY

5. Interpretation—

“Road” includes

- (a) a street and any other place to which the public have access, whether as of right or not; and*
- (b) land that is vested in a local authority for the purpose of a road as shown on a deposited survey plan; and*
- (c) all bridges, culverts, ferries, and fords that form part of any road, street, or any other place referred to in paragraph (a) or paragraph (b).*

Appendix B – Reasonable Conditions

TELECOMMUNICATIONS ACT 2001

PART 4 – NETWORKS

119. Criteria for setting reasonable conditions—

(1) In setting, varying, or revoking reasonable conditions under section 135(2) or section 142(2)(b), the local authority or other person who has jurisdiction over the road concerned may consider all or any of the following matters:

(a) the safe and efficient flow of traffic (whether pedestrian or vehicular):

(b) the health and safety of any person who is, or class of persons who are, likely to be directly affected by the work on the road:

(c) the need to lessen the damage that is likely to be caused to property (including structural integrity of the roads) as a result of work on the road:

(d) the compensation that may be payable under section 154 for property that is likely to be damaged as a result of work on the road:

(e) the need to lessen disruption to the local community (including businesses):

(f) the co-ordination of installation of other networks:

(g) the co-ordination with road construction work by the local authority or other person who has jurisdiction over that road:

(h) the need of a network operator to establish a telecommunications network in a timely manner.

(2) Nothing in subsection (1) limits a local authority's or other person's ability to impose reasonable conditions under section 135(2) or section 142(2)(b).