

**OFFICE OF THE MINISTER
FOR ECONOMIC DEVELOPMENT**

The Chair
CABINET ECONOMIC DEVELOPMENT COMMITTEE

**MANAGEMENT OF UTILITIES' ACCESS TO ROAD, RAIL AND MOTORWAY
CORRIDORS**

PROPOSAL

- 1 I present recommendations following the further development of the policy framework approved in principle by Cabinet in October 2006 for improving the management of utility access to the transport corridors, and seek agreement for them to be taken to legislative drafting stage.

EXECUTIVE SUMMARY

- 2 In October 2006 I proposed policies to address issues raised by utilities (supplying electricity, gas and telecommunications services), local authorities (who also supply water services), Transit New Zealand and Ontrack around utility access to transport corridors (CBC Min (06) 17/27 refers).
- 3 Cabinet "approved in principle, subject to further development, the proposed policy framework for reducing the costs and inefficiencies of utility access to the road, motorway and rail corridors, and enhancing the sustainable management and multi-use of transport corridors".
- 4 The recommended framework includes the development of a proposal by key stakeholders to collaborate to create a national Code of practice as the main mechanism to advance the aim for better management of the competing demands on the transport corridor. This replaces the previous proposal to create an explicit governance role for road controlling authorities and statutory responsibility for managing and co-ordinating sustainable multi-purpose use of roads. The Code of practice has become the vehicle for some of the previous policy proposals to be given effect.
- 5 To enable the code to have legal status, I propose powers for the Minister for Economic Development, in consultation with the Ministers of Transport and Local Government, to approve, administer, amend and notify the code. I also propose legislation includes regulation-making powers for a regulated Code of practice if stakeholders fail to produce one that meets the mandatory requirements.
- 6 The recommended framework also makes consistent the allocation of costs when local authorities need to move utility infrastructure, and the timeframe for notification and response processes between utilities and local authorities. It also proposes a legislated timeframe for Transit and Ontrack to respond to utilities requests for access to the motorway and rail corridors.

Background

- 7 Cabinet (CBC Min (06) 17/27 refers) noted that following a review and associated consultation on reducing costs and inefficiencies of utility access to the road, motorway and rail corridors, and enhancing the sustainable management and multi-use of transport corridors, officials prepared a policy position paper “Utilities and the Road, Motorway and Rail Corridors” (the position paper) attached to the Cabinet paper CBC (06) 246. Report back date was 30th April 2007.
- 8 Cabinet approved in principle this policy framework, subject to a further report back, and invited the Minister for Economic Development to continue to develop the framework to a level that would enable drafting instructions for any resulting changes to legislation to be prepared.
- 9 Cabinet noted that the main policy proposals of the position paper included:
- a an explicit governance role for road controlling authorities and statutory responsibility for managing and co-ordinating sustainable multi-purpose use of roads;
 - b establishment of nationally consistent and enforceable codes of practice (for managing access to transport corridors) and standards for cost allocation, technical issues and reasonable conditions;
 - c a consistent mediation step for dispute resolution (generally about the setting of reasonable conditions) added to all legislation;
 - d harmonisation of key definitions, processes and timeframes throughout utility and local government legislation;
 - e a consistent regime for notification of affected parties for all utilities and locations (the road, rail and motorway corridors); and
 - f access rights of utilities to roads maintained and access rights of utilities to rail and motorway corridors enhanced.
- 10 The 2006 policy framework noted above has been revised following further consultation. In particular, the governance role under paragraph 9 (a) will not be advanced. This paper sets out the reasons for the revisions and proposes the amendments to legislation to give effect to the revised policies.

COMMENT

A stakeholder-developed national code of practice instead of the governance role for road controlling authorities

- 11 The 2006 proposal to create a statutory responsibility for managing and coordinating the sustainable multi-use of the transport corridor with an explicit governance role assigned to parties within the local authorities. This was intended to be the mechanism to address the perceived poor planning of works

- in the road corridor causing traffic delays, damage to road surfaces, and general inconvenience to the public and businesses.
- 12 Further consultation produced an almost unanimous rejection from both major stakeholder groups for it.
 - 13 The main reason for its rejection was the recognition of the different drivers for utilities and local authorities on how their assets are planned and managed. The Territorial Local Authorities plan the management of their road assets through Long Term Council Community Plans (LTCCP) and annual district plans. Transit NZ (Transit) is required to publish a 10-year State Highway Forecast detailing planned maintenance and capital improvements. In contrast, utilities, particularly telecommunications companies working in a fast-paced competitive environment, often do not wish to divulge forward plans and moreover need to supply services in response to consumer demand (which may be difficult to predict).
 - 14 Another concern raised by utilities were that local authorities have neither the incentives nor the expertise to make decisions about other parties' assets, and that such powers would need to be clearly defined and limited through legislation. This then raised the risk that decision-making under the governance role could have adverse impacts on the timing of infrastructure development, such that the necessary processes could be slowed down.
 - 15 Finally, a clear majority of local authorities did not wish to assume these responsibilities, although there was some support for such a management model to be able to be formed from willing parties, and a minority who thought they should have more powers.
 - 16 In consideration of the responses to the enhanced governance and management proposal, I consider that the policy originally proposed to address improved co-ordination of works in the roads is not tenable.
 - 17 Since the beginning of the review in mid-2005, there has been significant movement in the co-operation of local authorities and utility companies. Both are aware that the government wishes to see movement in improving the sustainable management of the multi-use transportation corridor.
 - 18 The stakeholders have submitted that the use of an agreed code of practice is their preferred solution to the problem of poor corridor management and have established a group (the 'working group') identified below¹ to develop it further. This builds on significant achievements in the Auckland region to create a code of practice which was then used as the model for the New Zealand Utilities Advisory Group (NZUAG) to create a '*Working in the Road*' code of practice that is voluntarily used by 30 other local authorities.
 - 19 Officials have been kept informed of the progress made in the development of a national code and the significant effort and commitment of this stakeholder-led

¹ Representatives from Auckland Territorial Authorities, Transit New Zealand, Ontrack, Gas Association of NZ Inc, Electricity Networks Association, Electricity Engineers Association, Telecommunications Carriers Forum, Local Government New Zealand (LGNZ) and the New Zealand Utilities Advisory Group (NZUAG).

response. I believe this will be a better mechanism to give effect to the policy intent to improve the management of the transport corridor. This submission to Cabinet was delayed to allow the process of developing the code of practice to inform whether any further changes to legislation would be required.

- 20 I recommend legislation empowering the Minister of Economic Development, in consultation with the Minister for Transport and the Minister of Local Government, to approve and enforce the use of a stakeholder-developed code of practice for access to the road (and to the motorway and rail corridor if a majority of service providers agree to voluntarily establish a satisfactory mechanism to implement the code)
- 21 Consultation with the Ministers of Transport and Local Government is to ensure that issues pertaining to transport safety and community values are considered and reflected.
- 22 I also recommend a regulation-making power for the Minister for Economic Development (in consultation with the Minister of Transport and the Minister of Local Government) to set up and administer an independent code of practice if a majority of stakeholders cannot agree to establish a satisfactory mechanism on a voluntary basis and it is considered that it is the best way to manage the multi-use of the transport corridor.
- 23 A stakeholder code of practice that is to be approved by the Minister of Economic Development must demonstrate:
- a that the process has resulted in a reasonable level of agreement between the parties, and that the level of agreement reflects the area to which the code applies;
 - b the principles by which the parties will collaborate, including how works can be co-ordinated;
 - c the scope of the reasonable conditions, the operational and maintenance procedures, and how the risk from road-side hazards are assessed and managed; and
 - d a process for dispute resolution.
- 24 **Appendix 1** describes the design and drafting details for these the stakeholder and regulated code of practice.
- 25 Funding for the approval of a code or the creation of a code will be from the Ministry of Economic Development, Ministry of Transport and Department of Internal Affairs baselines. This funding has been estimated to be \$0.210 million per year. The resource requirement is expected to be ad-hoc rather than continuous.
- 26 The Minister for Economic Development would notify approval of a code by, for example, a notice in the Gazette.

The code of practice covers reasonable condition of access; further legislative direction needed on their scope

- 27 Rights of access by utilities to the road corridor are subject to reasonable conditions prescribed by local authorities or other persons with jurisdiction over the road. Further direction for both main parties on the scope of such conditions is required, as this has surfaced as a sticking point in the development of the code of practice.
- 28 Section 119 of the Telecommunications Act lists a range of criteria for setting reasonable conditions, but the list does not limit a local authority's or other person's ability to prescribe other reasonable conditions (as indicated by the terms 'may consider all or any of'). The conditions listed are for consideration of
- a Safe and efficient traffic flow
 - b Health and safety of workers
 - c Damage to property (including the road)
 - d Compensation for damage
 - e Disruption to the community, including businesses
 - f Coordination with other installation works
 - g Coordination with road construction works, and
 - h Timely installation of networks.
- 29 A clear majority of stakeholders submitted that these criteria should be adopted for consistency into electricity and gas legislation in order to provide direction as to the scope of prescribed conditions.
- 30 I propose that the Electricity and Gas Acts be amended to be consistent with the Telecommunications Act.
- 31 Other conditions that have been prescribed relate to improving the area's amenity value, considering the risk from creating road-side hazards, and the common-law right of frontage to the road corridor. The working group identified that enthusiastic and sometimes contentious discussion on what is the scope of 'reasonable conditions' requires legislative direction. Utilities consider conditions should relate only to getting in and out of the road (as the list above indicates) whereas local authorities consider that their primary legislation (the Local Government Acts 1974 and 2002), specifically section 10 requiring them to consider the social, economic, environmental and cultural well-being of communities, must apply to all decisions in relation to the road corridor.
- 32 The main risk is that, although the negotiated and agreed code of practice is intended to provide certainty to all stakeholders on the reasonable conditions for 'getting in and out' of the road corridor, some local authorities will fall back on the protection of their primary legislation to set access conditions that go beyond the scope agreed in the code. A particular concern to utilities is the risk of having uncertain conditions and costs imposed on them through the imposition of conditions that relate to creating additional amenity value above what would be considered as 'like-for-like' (for example, requiring the reinstatement of an ordinary road surface to be replaced by an advanced road surface in order to reduce noise). The impact of such conditions is that infrastructure development could be significantly more costly than is efficient to deliver the services at a price that consumers are willing to pay.

- 33 Officials consulted on whether reasonable conditions should be more prescribed in primary legislation. Submissions identified that utilities generally supported greater statutory guidance and prescriptive legislative criteria, but local authorities rejected prescription as being unfair to the diversity of local government requirements in accordance with its plans for the community it represents.
- 34 The direction of section 10 of the Local Government Act 2002 is expressed by each Council's Long Term Council Community Plan (LTCCP). As representative of local authorities, LGNZ submitted that utilities should participate in the consultation on the LTCCP, so that they better understand and can contribute to the vision that each local government is working toward for their communities.
- 35 The LTCCP is a 10 year plan that describes the community outcomes that are desired for areas such as road corridors and Central Business Districts, and the planning by a council of how it will contribute to achieving them. It is necessarily not a precise document in the longer term, as community expression of needs, wants and vision change over time. It is reviewed every 3 years to ensure it is meeting the desires of the community and is put into action through each local government's (i.e. council's) *annual plan*. The annual plan is the detail for the first year of each three-year review cycle; it identifies for example which roads are being altered, or which public spaces are being upgraded.
- 36 Utilities have previously argued that conditions imposed that improve amenity value should be addressed in the District Plan (DP). However, both the DP **and** the LTCCP provide for such improvements.
- 37 Local authorities' role as road controlling authority and corridor manager is mandated under the Local Government Act 1974 and 2002. It is not appropriate that the road opening process is used by local authorities to give effect to outcomes more properly described by the DP and governed by the Resource Management Act. It is reasonable that utilities have to abide by the DP, however the scope of reasonable conditions should not be used to provide for DP outcomes. Amenity or environmental issues raised by DP's could mean that activities by utilities will also require resource consent.
- 38 To clarify which statutory process is appropriate to use when local authorities set reasonable conditions, I note that environmental effects are managed by the District Plan process, whereas improvements to amenity value is managed through the Long Term Community Council Plan. Reviews of the LTCCP and DP are public processes and engagement with them will enable utility operators, local authorities and the community to discuss issues such as the costs of reducing risk from road-side hazards or creating additional amenity value. Utilities' engagement with the LTCCP process would be advantageous to both parties, as such a co-operative and collaborative approach will provide the best opportunity for understanding how conditions of access to the road corridor are given consideration consistent with the communities desired objectives for the road corridor.
- 39 To provide greater statutory guidance on the scope of reasonable conditions for utilities and local government, I propose the following changes:

- i That the Electricity and Gas Acts be amended to be consistent with the Telecommunications Act on reasonable conditions;
 - ii That a new requirement be included such that any conditions imposed to give effect directly to creating additional amenity value (i.e. in addition to 'like-for-like') can only be considered reasonable if such outcomes are consistent with what is identified in the LTCCP. The costs of imposing conditions that go beyond the 'like-for-like' amenity value of an area are to fall on local government, as the value of the benefits accrues to the community that desires them. Conditions prescribed that improve amenity values not thus identified could not be considered reasonable, (but may become reasonable if for example the requester covered the costs);
 - iii That, for clarification, where a utility decides to install infrastructure on a road that is identified in the LTCCP for future alteration or it is in an area that is to have road construction, then the costs of moving it to accommodate the future changes will be as outlined in s 33 4(b) of the Electricity Act 1999 (and similar sections in the Gas and Telecommunications Acts), which provides for utility contribution to local authorities for the costs incurred by the local authority to move utility assets.
- 40 An additional issue is that existing use rights deemed by the RMA for utility infrastructure means the utility providers still have statutory protection against being requested to, for example, put their poles underground or move them to make room for a cycleway. With the clarification of causer pays – i.e. that the costs of implementing the request falls on local authorities – utilities' initial objections may be reduced and they can co-operate with local government to produce desired outcomes.
- 41 Finally, the October 2006 policy also proposed removing the right of utility operators to impose reasonable conditions on other providers when the other providers need to alter the position of others' assets in the road and change it instead to advise. This has not changed and is recommended to reduce the risk of anti-competitive practice.

The code of practice provides for a dispute process other than the district court

- 42 The policy proposed in 2006 was to legislate for an alternative dispute resolution process as a step before recourse to the District Court. The objective was for a low cost and time-bound process for resolving disputes between parties, while providing for escalation where necessary.
- 43 I now propose that an alternate dispute resolution process is a mandatory requirement for the code of practice, with the advantage that parties have the flexibility to choose and agree the dispute resolution process.

Harmonisation of key definitions, processes and timeframes throughout utility and local government legislation

Definition of “road”

- 44 The October 2006 policy proposal was to amend the Telecommunications Act to have a definition of road consistent with that used in the Electricity and Gas Acts.
- 45 Following further consultation on whether the different (broader) definition of road in the Telecommunications Act created material problems, there was insufficient detailed evidence of any problems arising to support the proposed change.
- 46 As the change could potentially reduce the existing rights enjoyed by telecommunications operators and constrain responsive actions in the contestable market for telecommunications services, I recommend that there be no amendment to the definition of road in the Telecommunications Act.

Cost Allocation

- 47 The Electricity and Gas Acts both provide that the reasonable cost of all works that are required to be moved by a local authority is paid by the authority, unless the works were constructed contrary to provisions in other Acts in which case the electricity and gas operators, as owners, must pay.
- 48 The Electricity and Gas Acts also provide for cost-allocation for works in roads that are identified to be constructed or altered in that if the costs of the road project are increased because of the requirement to subsequently move the electricity or gas works, then the owner of the assets being moved must pay the increase in cost.
- 49 These legislative provisions are different from the treatment of cost-allocation in the Telecommunications Act. The provision in this Act is that if the local authority or Transit request a telecommunications asset to be ‘altered’ then the requester meets that cost; but it does not describe cost allocation for asset relocation when a road is realigned.
- 50 Section 54 of the Transit New Zealand Act 1989 provides that Transit can request an equal cost share when it requests asset relocation. However, this provision is overridden in the Electricity and Gas Acts. This is not the case in the Telecommunications Act. This creates inconsistency in application of local authority and Transit’s treatment of costs when requesting that telecommunications utilities move assets.
- 51 Stakeholders submitted that the cost allocation provision should be consistent in legislation. This should reduce compliance costs for companies operating across electricity, gas and telecommunications services and for local authorities and Transit that handle access requests.
- 52 I recommend that the cost allocation provisions under the Telecommunications Act be amended to be consistent with the cost allocation provisions under the Electricity and Gas Acts.

A consistent regime for notification of affected parties for all utilities and locations

- 53 The policy proposed in 2006 Cabinet was to require that all legislated notification requirements should be consistent for all utilities and local authorities. The initiator of works should have responsibility for notification of affected parties. This proposal has not changed.
- 54 Under current legislation, electricity and gas operators must notify the local authority or other body or person who has jurisdiction over the road and affected utility operators of the upcoming work. The Local Government Act 1974 (which deals with roads), Transit New Zealand Act (1989), and the Telecommunications Act do not currently require that affected utility operators are notified about the upcoming work.
- 55 There are also different response periods for a person who has been given a notice of intention to access the road to respond with its reasonable conditions. For example, the Electricity and Gas Acts prescribe 15 working days, the Telecommunications Act prescribes 20 working days.
- 56 Currently, there is no specific time period for Transit or Ontrack to respond to access requests to the motorway or railway. It is proposed that when utilities request access to these corridors, both Transit and Ontrack will have to respond to the request within 30 working days. The statutory time-frame to respond to access requests to the motorway and railway will be longer than the time-frame to respond to access to the road because of the requirement to consider more stringent safety issues.
- 57 I recommend that telecommunications operators, Transit and local authorities are required to notify all parties with assets at the location when initiating significant works (i.e. not minor and emergency works) in the road. This will require amendments to the Telecommunications Act 2001, Transit New Zealand Act 1989 and the Local Government Act 1974.
- 58 I recommend that the period for response to the notification should be made consistent in the utility legislation to 15 working days. Any access requests made to Transit or Ontrack under the relevant legislation must be responded to within 30 working days.
- 59 The guidelines for the implementation of the reasonable conditions for access, including the operational and maintenance procedures should include adherence to relevant codes and standards for the mitigation of interference between assets.

Access rights to roads maintained and access to the rail and motorway corridors enhanced

- 60 The 2006 policy proposed that access to rail and motorway corridors (the side of the motorway or rail track) should be enhanced while recognising the transport and safety responsibilities of Transit NZ, and the transport, safety and business interests of Ontrack. This was proposed because submissions from utility

companies identified these corridors as underutilised for the provision of utility infrastructure and preferable to accessing private land.

- 61 In addition, statutory time limits and the publication of motorway and rail access evaluation criteria were proposed to improve the understanding of how access could be granted and timeliness in consideration of requests.
- 62 A further submission from Transit repeated its statutory responsibility under the Land Transport Management Act 2003 to contribute to a safe transport system (section 1 of that Act). It described also that under the Transit Act utilities are prohibited from placing poles and wires on motorways without Transit's written consent and explained that since motorways are prime traffic routes with high traffic volumes designed to have minimal distraction, any utility works carried out on the side of the motorway are very likely to create distraction and obstruction of these routes.
- 63 Transit stated that it already accommodates works on motorways where there is a clear national benefit and safety is not compromised, for example crossing under the motorway or attaching infrastructure to motorway bridges.
- 64 With further consideration, I recommend leaving the arrangements for access as currently in place in the Transit Act to ensure there is no additional risk that safety could be compromised.
- 65 Ontrack also highlighted that in relation to the rail corridor, its primary responsibility is operating safety. It identified significant issues with access to the railway corridor such as insufficient space, lack of alternative routing for services on the network, and little or no access to parts of the network.
- 66 Requests for access to the rail corridor are considered under the Railways Act 2005. As Ontrack is a commercial entity, access to the rail corridors is achieved under contractual access arrangements and some utilities already have contracts in place.
- 67 With further consideration, I recommend leaving the arrangements for access to the rail corridor as currently in place in the Railways Act to ensure there is no additional risk that safety could be compromised.
- 68 I recommend that the policy on statutory time frames and publication of access evaluation criteria remains as was originally proposed. This is to improve the timeliness of the response to utility operators seeking access and to make transparent the decision criteria that Transit and Ontrack use which will assist utilities in the preparation of access requests.
- 69 A longer statutory time-frame to respond to access requests is proposed because of the greater requirement for full consideration of safety aspects.
- 70 I recommend that both the Transit Act 1989 and the Railways Act 2005 be amended to include a statutory time-frame, plus a requirement that Transit and Ontrack's access evaluation criteria be published.

CONSULTATION

- 71 The first consultation round through August 2005 followed the release of a discussion paper (EDC min (05) 16/7 paragraph 3 refers). This round consisted of five nationwide seminars and had 177 organisations represented. There were 53 submissions.
- 72 Further consultation has occurred following the release of the position paper in October 2006 (CBC (06) 246 refers). This included a forum jointly hosted by the NZUAG and LGNZ. As the basis for the further discussion on the policy framework the MED presented a paper "Proposals for the Management of Utilities in the Transportation Corridor" to which feedback was invited. There were over 150 participants.
- 73 Feedback came from 40 parties: 19 District Councils, four City Councils, Auckland Territorial Authorities (as one group); Auckland Regional Transport Authority, Transit NZ, Ontrack; Telstra, Telecom, four Lines companies (Vector, Powerco, Orion, and Delta Services for Aurora Energy); NZUAG, LGNZ, two industry groups (Electrical Engineers Association, Electricity Networks Association); and three private individuals. There were no submissions from water companies.
- 74 In addition, further consultation has occurred with the Automobile Association, specifically on roadside hazard consideration.
- 75 With the request from LGNZ to delay the Cabinet paper, further engagement with the code of practice working group (representatives from Transit, NZUAG, Vector, Telecom, Auckland Territorial Authorities, consultancy MWH and LGNZ (in particular)) in the intervening period has occurred.
- 76 The paper has implications for the Ministry of Economic Development (MED), Ministry of Transport, Department of Internal Affairs (DIA) and Treasury. The views of these departments have been sought and considered in this paper. The Ministry for the Environment was informed as there are links with their work on the Proposed National Environmental Standards for Telecommunications Facilities.

Fiscal Implications

- 77 The proposal to introduce a new administrative function for approving or creating codes by the Minister for Economic Development in consultation with the Minister of Transport and the Minister of Local Government has an estimated annual cost of \$0.215 million (0.5 FTE for Ministry of Economic Development, 0.25 FTE for Ministry of Transport and 0.25 FTE for the Department of Internal Affairs, plus industry consultation costs). With reprioritisation these costs would be met from baselines.
- 78 The proposal to change the cost-share provision in the Telecommunications Act will mean some additional costs to Transit on roads planned for re-alignment that carry telecommunications assets. Relocation costs are estimated to be around \$1 – 2 million per year but these costs depend on where Transit has plans for re-alignment and where telecommunications companies have their assets.

Human Rights

79 There are no human rights implications.

LEGISLATIVE IMPLICATIONS

80 The proposal would result in amendments being required to:

The Gas Act 1992; The Electricity Act 1992; The Telecommunications Act 2001; The Local Government Acts 1974 and 2002; The Railways Act 2005 and Transit NZ Act 1989 (and any other Act identified as needing amendment to achieve the policy objectives).

81 The proposed **Utilities Access Amendment Bill** has sought a 'category 4' slot 'proceed to a select committee in 2008' on the legislative programme for 2008.

82 The date requested for enactment is March 2009.

REGULATORY IMPACT ANALYSIS

83 MED confirms that the proposal complies with the Code of Good Regulatory Practice. MED has assessed the regulatory impact analysis and Regulatory Impact Statement and considers both to be adequate.

PUBLICITY

84 I propose to issue a joint press release with the Ministers of Transport and Local Government to inform stakeholders and the public of the progress that has been made towards improving the management of utilities in the transportation corridor with the government's twin objectives of infrastructure development and improved road safety highlighted.

RECOMMENDATIONS

The Minister for Economic Development recommends that the Committee:

Background

- 1 **note** that in October 2006, the Cabinet Business Committee (CBC):
 - 1.1 approved in principle, subject to the further report in paragraph 1.2, the proposed policy framework described in the submission under CBC (06) 246, and the position paper 'Utilities and the Road, Motorway and Rail Corridors', attached to the submission under CBC (06) 246, for reducing the costs and inefficiencies of utility access to the road, motorway and rail corridors, and enhancing the sustainable management and multi-use of transport corridors;
 - 1.2 invited the Minister for Economic Development to continue to develop the policy framework to a level that will enable drafting instructions for amending legislation to be prepared, and to report to the Cabinet Economic Development Committee by 30 April 2007 [CBC Min (06) 17/27 refers];

- 2 **note** subsequent extensions to the report back were sought and were received from the Chair of EDC (30th September 2007 and 30th November 2007).

Changes to the policy framework

- 3 **note** that the following proposed amendments to the Telecommunications Act 2001 will have a cost implication for Transit New Zealand when road realignment requires asset relocation;
- 4 **note** that the following proposed amendments to the Electricity Act 1992, the Gas act 1992 and the Telecommunications Act 2001 will have a cost implication for local authorities if a condition of access to the road gives effect to creating additional increased amenity value;
- 5 **agree** that, as a result of the further work on the development of the policy framework agreed in October 2006 referred to in paragraph 1:
- 5.1 the proposal for an explicit governance role for local authorities with statutory responsibility to manage the sustainable multi-use of the transportation corridor will now involve the management of the transport corridor through a stakeholder-agreed and Minister-approved Code of practice;
- 5.2 the proposal for a dispute resolution process, incorporating mediation provisions before recourse to the District Court, to deal with disputes on conditions of access, becomes a mandatory requirement for a dispute resolution process to be set out in a stakeholder-agreed and Minister-approved Code of practice;
- 5.3 the proposal to make the definition of “road” in the Telecommunications Act consistent with the definition of road in the Electricity Act 1992 and the Gas Act 1992 will not be advanced because of insufficient evidence of problems due to the inconsistency; the reduction in existing rights of telecommunications operators; and the potential to constrain the responsive provision of telecommunications services to consumers;
- 5.4 enhanced utility access rights to the motorway and rail corridors will not be further advanced because of the potential to compromise safety objectives.

Legislative amendments to implement the policy framework

- 6 **agree** to the following legislative amendments to give effect to the policy framework:
- 6.1 that the cost allocation provision in the Telecommunications Act, which sets out how costs are to be allocated between parties, will be amended to be consistent with the Electricity and Gas Acts;

- 6.2 that the time period in the Telecommunications Act for response to the notification of an intention to access the road be amended to 15 working days, to be consistent with the Electricity and Gas Acts;
- 6.3 that the criteria for the setting of reasonable conditions for access to the road as set out under the Telecommunications Act be included in the Electricity and Gas Acts;
- 6.4 that the Electricity, Gas and Telecommunications Acts each be amended to include a requirement that any condition imposed for the purpose of increasing amenity value can only be imposed if the area in question has been clearly identified in the Long Term Council Community Plan, and that the costs of achieving the additional amenity will be subject to the causer - pays principle for cost provision;
- 6.5 that the Electricity, Gas and Telecommunications Acts each be amended to include the clarification that when a utility installs infrastructure in an area clearly identified in the Long Term Council Community Plan for future alteration or new construction, that it will be subject to the payment of costs to the local authority under the cost provisions of each utility's Act;
- 6.6 that the provision in the Electricity, Gas and Telecommunication Acts that enables parties whose asset's position is being altered by a third party to impose conditions on the third party be amended from 'impose' to 'advise';
- 6.7 that the Transit New Zealand Act 1989 and the Railways Act 2005 be amended to include a statutory time-frame of 30 working days for the consideration of access requests to motorway and rail corridors;
- 6.8 that the Telecommunications Act 2001, the Transit New Zealand Act 1989, and the Local Government Act 1974 be amended so that affected parties must be notified when telecommunications operators, Transit New Zealand and local authorities initiate significant works (not minor or emergency works);
- 6.9 that the Transit New Zealand Act 1989 and the Railways Act 2005 be amended to require Transit New Zealand and Ontrack respectively to publish utility evaluation criteria for utilities access to the motorway and the railway.

Stakeholder developed Code of practice

- 7 **agree** that the Minister for Economic Development, in consultation with the Minister of Transport and the Minister of Local Government, be empowered to approve and enforce the use of a stakeholder-developed Code of practice for access to the road, and to the motorway and rail corridor;

- 8 **agree** to provide regulation-making powers that require the Minister for Economic Development, in consultation with the Minister of Transport and the Minister of Local Government, to set up and administer an independent code of practice for access to the road, and to the motorway and rail corridor, if stakeholders cannot agree to establish a satisfactory mechanism on a voluntary basis and if this is considered to be the best way to improve the efficiency of utility access to the transport corridor while not compromising safety;
- 9 **agree** to the design and drafting details for the proposals in paragraphs 7 and 8, as set out in Appendix 1 of the paper;

Next steps

- 10 **invite** the Minister for Economic Development to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above proposals, including the design details for the code of practice, as set out in Appendix 1 of the paper;
- 11 **note** that the Minister for Economic Development intends to publish the paper, and its associated Regulatory Impact Statement, on the Ministry of Economic Development's website;
- 12 **note** that the Minister for Economic Development, the Minister of Transport and the Minister of Local Government intend to make a joint press release to advise stakeholders and the public of the outcome of the review into the management of utility access to the transport corridors.

Hon Pete Hodgson
Minister for Economic Development

Date: _____

Appendix 1 Design and Drafting Details

Code of practice

- 1 Provide for or amend legislation which will empower the Minister of Economic Development, in consultation with the Minister of Transport and the Minister of Local Government to:
 - i approve one stakeholder code of practice that has been developed through a suitable process which will demonstrate:
 - (a) that the process has resulted in a reasonable level of agreement between the relevant parties (network operators and local authorities) and that the level of agreement reflects the balance of interests of the parties and the area to which the code applies;
 - (b) the principles by which the parties will collaborate, including how works can be co-ordinated;
 - (c) the guidelines for the implementation of the reasonable conditions for access, including the operational and maintenance procedures, and how the risk from road-side hazards are assessed and managed; and
 - (d) a process for dispute resolution.
 - ii reject a code of practice that does not meet the above criteria and notify the relevant stakeholders;
 - iii where necessary, review and revoke a code of practice at either the request of a reasonable number of relevant parties reflecting a balance of interests, or on the Ministers own initiative;
 - iv require that any significant amendment to an approved code of practice must be approved by the Minister for Economic Development. The test for significant will be that the amendment will materially change the requirements outlined in (i).

The significant amendment must:

- (e) demonstrate a reasonable level of agreement;
- (f) contain a statement of the amendment;
- (g) provide the reason(s) for the amendment;
- (h) contain a statement of how the amendment changes the code of practice; and

- (i) contain a statement of how the amendment impacts on stakeholders interests.
- v require that any regional variation to an approved code of practice must be approved by the Minister for Economic Development. The regional variation must:
 - (j) be consistent with the code of practice;
 - (k) be required because of specific regional issues such as geology or geography that result in inefficient or uneconomic outcomes if the code of practice was followed;
 - (j) have been sought and agreed to by the relevant parties (network operators and local authorities) in the region and that the level of agreement reflects the balance of interests of the parties.
- vi Notify stakeholders of the approval of a code of practice.

Creating a regulated Code of practice

- 2 The empowering provisions and any regulations should enable the Minister of Economic Development, in consultation with the Minister for Transport and the Minister of Local Government, to
 - i Decide that stakeholders cannot agree to establish a satisfactory mechanism on a voluntary basis. The test would be that parties would continue to raise issues that seemed unable to be reasonably agreed on, or that the parties were failing to produce a Code of practice within a reasonable period of time, or any other circumstances under which the conclusion would be reached.
 - ii Decide that a regulated code of practice should be created. The test would be that the development of a regulated code of practice would be the most appropriate way to improve the efficiency of utilities access while not compromising road safety, taking into account previous efforts by stakeholders to develop their own.

UTILITIES ACCESS TO ROAD, RAIL AND MOTORWAY CORRIDORS

REGULATORY IMPACT STATEMENT

EXECUTIVE SUMMARY

- 1 When utilities exercise their statutory access to the road they allege inconsistent application of 'reasonable conditions' by local authorities; in turn local authorities allege poor-quality re-instatement of roads by utilities. Other disquiet arises from inconsistencies in utility statutes creating advantages for some operators. The preferred option is to make utility legislation consistent where appropriate and to provide a legislated process to give legal status to a stakeholder-created code for managing access to the road, and motorway and rail corridor, and a regulated code if considered necessary. The impacts of legislative change are that some parties will face increased compliance and resource costs, but greater benefits arise from the more certain regulatory environment for investment decisions, and the improvement in the management and co-ordination of utility works in road, rail and motorways. The process of engagement between stakeholders in agreeing a Code of practice should produce better outcomes for all parties.

ADEQUACY STATEMENT

- 2 The Ministry of Economic Development (MED) confirms that the proposal complies with the Code of Good Regulatory Practice. MED has assessed the regulatory impact analysis and Regulatory Impact Statement and considers both to be adequate. The discussion document was not required to comply with the RIA requirements as it was disseminated prior to April 2007.

STATUS QUO AND PROBLEM

- 3 Legislative provision for the access to the road, rail and motorway corridors by utility providers (electricity, telecommunications, water, sewerage, drains, and gas) is inconsistent across statutes. Inconsistencies include the notification requirements prior to works commencing (different periods, notification responsibilities and processes); the allocation of costs when installations are moved; and the criteria for setting "reasonable conditions" on the works by those with jurisdiction over the transport corridor.
- 4 Utilities have a statutory right of access to roads (subject to "reasonable conditions"). The 75 local authorities have established differing requirements for works in the road, resulting in increased costs and uncertainty of compliance for regional and national utility providers. There is some voluntary use of a code of practice that improves the understanding of process and conditions between some utilities and local authorities, but there is more that one code and many areas do not use one at all. Some utility operators are empowered to impose "reasonable conditions" on the proposed works of others utilities in the vicinity, creating the risk of anti-competitive practices.

- 5 Utilities do not have a right of access to motorway or rail corridors, but can request it. They describe that considerations are delayed and costly and that there is insufficient access granted.
- 6 The Land Transport Management Act 2003 has one objective of an 'integrated, safe, responsive and sustainable land transport system'. The Ministry of Transport advises that the current level of fatal and serious injuries as a result of hitting a roadside hazard (e.g. a tree, ditch, and pole) is not acceptable (50% of rural and 27% of urban crashes involve a roadside hazard/obstacle). When local authorities wish to change the location of, for example, a utility pole that is now considered a hazard, or need to move utility assets in the road (because the road has been realigned) there are issues arising from the costs of this.
- 7 The Local Government Act (LGA) 2002 requires councils "to promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future" (section 10) but utilities allege that councils are setting 'unreasonable' access conditions based on amenity criteria that councils consider aligns with their LGA objective. There is contention over the increased cost that for example under grounding imposes on utility companies.
- 8 The volume of utility works is considerable. For example, the Auckland region processes around 8,000 requests per year. Local Government New Zealand's high-level estimate of the national cost of road re-work and repairs associated with utility works is \$40 million per annum (\$30 million in direct repairs and \$10 million in lost service potential due to utility works reducing the life of the affected road surface by up to 33%).
- 9 Government action is necessary to make legislation consistent where appropriate and to enable a statutory process for the approval, administration, amendment and notification of a stakeholder-developed Code of practice.

OBJECTIVE(S)

- 10 The public policy objectives are:
 - a To reduce the costs and inefficiencies arising from the current statutory framework, including avoidable damage to roads and utility networks, delays and disputes, inconsistencies between statutes, and poor coordination.
 - b To provide for better management of the multi-use of road corridors in the public interest, including road safety, and balancing the provision of utility services with efficient transport and universal access to roads.
 - c To provide the potential for increased utility access to rail and motorway corridors while recognising the transport and safety responsibilities of Transit NZ, and the transport, safety and business interests of ONTRACK.

ALTERNATIVE OPTIONS

- 11 There is no alternative option put forward at this time as this paper is the result of further development of a policy position that was approved in principle subject to the further development and report back 30th April 2007 (CAB 06 17/27 refers).

PREFERRED OPTION

- 12 This option is to amend legislation to create consistency where appropriate and to create a legislated process for ministerial approval for stakeholder developed codes of practice plus back stop regulation-making power for a national code.
- 13 **Proposed amendments** to existing provisions include:
- The cost-share provision outlined in the Electricity and Gas Acts to be replicated to the Telecommunications Act;
 - Consistent notification requirements across all utilities, including the notification of proposed road controlling authority road works to utilities. Time for reply to notification to be a maximum of 15 working days;
 - Remove the ability of utility providers to impose conditions on other utilities (they can *advise*).
- 14 Proposed **new elements** of the regulatory framework include:
- A mechanism for the Minister of Economic Development, in consultation with the Minister of Transport and the Minister of Local Government, to approve, administer, amend and notify a code of practice for utilities access to transport corridors that have been created and agreed to by stakeholders. A code of practice would have some mandatory requirements for process and content.
 - Empowering provisions to create a regulated code of practice should stakeholders fail to create their own code.
 - Ontrack and Transit to have a statutory obligation to process utilities applications for access to motorway and rail corridors according to prescribed timeframes and to publish their access evaluation criteria.

Preferred option: costs and benefits

- 15 Benefits outweigh costs by an order of magnitude (\$10 – 100M / \$1 – 10M) i.e. potentially 10:1.
- 16 This is detailed below:

Government

- 17 There will be administrative costs for the Ministries of Economic Development and Transport and the Department of Internal Affairs to examine and approve a code of practice, or to create a code of practice:

- **Ministry of Economic Development:** Analysis of code; industry consultation and processing (0.5 FTE) \$75,000 p.a.
 - Advertising and publishing code \$20,000 p.a.
 - Specialised technical advice relating to code \$40,000 p.a.
 - **Ministry of Transport:** analysis of code and consultation (0.25 FTE) \$37,500 p.a.
 - **Department of Internal Affairs:** analysis of code and consultation (0.25 FTE) \$37,500 p.a.
 - Total per annum **\$0.210** million p.a.
- 18 The volume of applications to Transit for access to motorway corridors could be expected to increase, with associated resource demands. The inclusion of a notification of impending works requirement and statutory response time limit will also increase resource demands. **Cost \$0.3M** pa.
- 19 ONTRACK already processes applications for access and placement of assets in the rail corridor, but to process them in accord with new statutory timeframes will have a resource impact. Costs would be recoverable from applicants.
- 20 With the removal of the applicability of section 54 of the Transit Act to Telecommunications, there will be increased asset relocation costs to Transit. However these are still a small percentage (less than 5%) of the overall costs for a road realignment project. **Cost \$1M** pa.

Local Government

- 21 A change to legislation to require **all** 73 local authorities to notify other parties of their significant works and to have a time period for receipt of advised conditions will create additional resource costs. **Cost \$1M**
- 22 Costs of imposing conditions of access that creates additional amenity value of an area. Cost \$ **variable** depending on each local authority's plans.
- 23 Resource costs for stakeholder developed code of practice. **Cost \$0.3M**
- 24 Reduction in reinstatement costs across the whole country. **Benefit \$1M**

Utilities

- 25 The move to greater consistency and certainty in how local authorities manage utility access to roads by the use of an approved code should reduce utility's compliance costs. **Benefit \$1M**
- 26 There will be a reduction in the costs of redoing reinstatement of the roads if there is better co-operation through the code of practice to renew surface as required. As an example a given 34 % failure rate for 650 km of road would cost around \$55M to put right at \$250,000 per lane km ($0.34 \times 650 \times 250000 = \$55.25M$). If by the use of a code of practice the reinstatement costs are reduced by 50%, then the benefit (avoided cost of re-doing the road once done) is roughly \$25M. **Benefit \$10M**

- 27 Other benefits accrue to society due for example to less vehicle wear and tear and less need for road-works for reinstatement (counted under 'society').
- 28 The benefits of additional notification from local authorities should be to reduce the avoidable damage to utility networks of asset strikes when the local authorities undertake road works (note that this does not imply that the only third party damage is local authorities on utility infrastructure – often it is one utility operator to another, and notification requirements already exist between these).
Benefit \$1M
- 29 Resource costs for process to agree codes of practice. **Cost \$0.3M**

Society

- 30 Society benefits both from an improvement (i.e. reduction) in time costs due to road works because of construction and reinstatement and the efficient roll-out of infrastructure. **Benefit \$30M**

Total impact and net benefit

- 31 Total impacts considering all utilities, one local authority (Auckland), Transit and all society = \$36M per year (total benefits \$ 33M (magnitude \$10 – 100M); total costs \$ 3M (magnitude \$1 – 10 m).
- 32 Benefits outweigh costs by an order of magnitude (\$10 – 100M / \$1 – 10M). The benefit cost ratio is of the order 10:1.

IMPLEMENTATION AND REVIEW

- 33 The Utilities Amendment Bill is proposed as a category 4 on the legislative programme for 2008. The amendments will come into force during 2009. This would be the start date by which the stakeholder-developed code of practice could be legal and enforceable. The MED will continue to be in contact with the NZUAG to determine the extent of progress on the stakeholder-developed code. A draft code is anticipated by December 2007.

STATEMENT OF CONSULTATION UNDERTAKEN

Stakeholder Consultation

- 34 This round of stakeholder engagement followed on from significant consultation that created the initial position paper in October 2006. The MED presented a discussion paper that developed the policy framework of the position paper (in effect a 'possible next steps') at a forum jointly hosted by the two major stakeholder groups, Local Government New Zealand (LGNZ) and the NZ Utilities Advisory Group (NZUAG). This forum was attended by over 150 representatives of local authorities, government agencies and utility operators. Feedback was invited and 40 responses were received: 19 District Councils, four City Councils, Auckland Territorial Authorities (as one group); Auckland Regional Transport Authority, Transit NZ, Ontrack; Telstra, Telecom, four Lines companies (Vector, Powerco, Orion, and Delta Services for Aurora Energy); NZUAG; LGNZ, two industry groups (Electricity Networks Association and Electrical Engineers

Association); and three private individuals. There were no responses from water companies.

- 35 The issues raised through this most recent engagement round meant that the initially proposed policy framework was revised. The proposal for the statutory responsibility for an explicit governance role of local authorities was clearly not supported. Stakeholders have been co-operating on developing a code of practice as the solution to address the policy problem. Representatives from Auckland Territorial Authorities, Transit NZ, Ontrack, the Gas Association of NZ Inc, Electricity Networks Association, Electricity Engineers Association, Telecommunications Carriers Forum, Local Government New Zealand and the New Zealand Utilities Advisory Group have been meeting and working together on the issues to be addressed. Since the further discussion paper in February 2007, momentum has increased and the stakeholder developed final draft of the code of practice is expected to be produced by December 2007. Wider stakeholder engagement is signalled for February 2008, initiated by the NZUAG.

Government Departments/Agencies Consultation

36 An official's review group consisting primarily of the Ministry of Economic Development, Ministry of Transport, and Department of Internal Affairs provided a relevant across - government perspective. The Ministry of Transport maintained contact with Transit NZ and Ontrack. The Ministry for the Environment was informed (as there are links with their work on the Proposed National Environmental Standards for Telecommunications Facilities), as was Treasury.