

NZUAG AND LGNZ FORUM

BRENTWOOD HOTEL, WELLINGTON, MONDAY 19 TH FEBRUARY 2007.

MINISTRY OF ECONOMIC DEVELOPMENT (MED) PROPOSALS FOR THE
MANAGEMENT OF UTILITIES WITHIN THE TRANSPORTATION CORRIDOR

BACKGROUND

1 This paper presents for discussion the ‘next steps’ following the release by the MED of the position paper “Utilities and the Road, Motorway and Rail Corridors”.

2 The Ministry of Economic Development (“the Ministry”) has been requested to report back to Cabinet by 30 April 2007 with proposed amendments for changes to legislation [CAB paper CBC (06) 246 refers]. Note that this paper does not present the actual amendments.

3 The relevant statutes are the Electricity Act 1992, Gas Act 1992, Transit New Zealand Act 1989, Telecommunications Act 2001, Railways Act 2005 and the Local Government Acts 1974 and 2002.

4 This paper uses the term “Network Utility Operator”¹ (NUO) for parties requesting access to the road, motorway or rail networks. For those parties that have jurisdiction over the road / motorway / rail for which access is requested the term Corridor Network Controller” (CNC) is used (i.e. road controlling authorities including Transit, and Ontrack).

5 We are seeking feedback on **all** the proposals presented, and in particular invite specific responses to the questions posed. Please submit written feedback by Friday March 2nd 2007².

MAIN ISSUES IDENTIFIED THROUGH CONSULTATION

6 The Government’s priority for economic transformation requires a world-class infrastructure to support it. Consultation with infrastructure stakeholders revealed the impact that differences in legislation had on the process for infrastructure development to occur efficiently and equitably. Delays, uncertainties, damage to assets and inconvenience to businesses and the general public have all been identified as barriers to achieving the objective.

7 A range of issues were presented in the Ministry’s discussion document entitled “Review of Issues Affecting Utilities and Road, Rail and Motorway Corridors” circulated in June 2005. Five seminars across the country through July 2005 enabled representatives from many organisations to meet and discuss what the Ministry could do to facilitate improving outcomes for road controlling authorities (RCAs), utilities and the public with regards to infrastructure

¹ As defined under section 166 Resource Management Act (RMA).

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development. The main issues identified as requiring Government intervention were:

- (a) Inconsistencies between current utilities legislation: the definition of road, notification requirements, and cost allocation;
- (b) The definition and application of reasonable conditions;
- (c) A better process for dispute resolution – current provisions are not effective or timely;
- (d) Access to rail and motorway corridors;
- (e) Poor planning and co-ordination of works within roads.

8 Government intervention will

- (a) Create new legislation that establishes *principal objectives* and *specific outcomes* for the management of transportation corridors;
- (b) Address the differences in legislation that create inconsistencies;
- (c) Establish through legislation *guidelines for the setting of reasonable conditions*, including reference to national standards and codes of practice;
- (d) Establish in legislation a mediation step in the notification process;
- (e) Establish through legislation enhanced utility access to the rail and motorway corridors with appropriate recognition of the transport and safety responsibilities specific to motorway (Transit) and rail (Ontrack) contexts.
- (f) Enable strategic planning and co-ordination of works in transportation corridors.

NEXT STEPS ON THE MAIN ISSUES

9 The following sections provide further detail on the interventions proposed to address each of these main issues.

New legislation that establishes principal objectives and specific outcomes for the management of transportation corridors

10 To enable transparency and accountability in this, legislation will set out **principal objectives** and **specific outcomes**. These will underpin the guidelines for reasonable conditions (see paragraphs 29 - 33).

11 **Principal Objectives** and **Specific Outcomes** for managing access to the transportation corridor

- (1) The **principal objectives** of the Corridor Network Controllers (all RCAs, Transit, DOC, Ontrack and all other persons with jurisdiction over a road, motorway

or rail network), in relation to Network Utility Operators' access to road, motorway and rail corridors are—

- (a) to manage access to those corridors to ensure that the interests of the Network Controllers and Network Utility Operators are appropriately balanced for the provision of transport and utility services; and
 - (b) to facilitate the efficient use of road, motorway and rail corridors by the public, the Network Utility Operators and the Network Controllers
- (2) Consistent with those principal objectives, the Network Controllers as defined above must seek to achieve, in relation to access to those corridors, the following **specific outcomes**:

- (a) Resources are used efficiently:
- (b) Risks (including public safety) are properly assessed and efficiently managed:
- (c) Access is managed consistently under *reasonable conditions* for the long-term benefit of all the end-users of transport and utility services, giving fair and equitable protection of the rights and assets of all occupants of those corridors:
- (d) Investment and development in the networks and the services they deliver is maintained or enhanced, with no discrimination between public and private investment.

12 Questions for response – Principal objectives and specific outcomes

- (a) Do you agree with the intent of the principal objective(s) (POs)? If not, which bits?
- (b) Do you agree with the specific outcomes (SOs) as described? If not, which bits?
- (c) Do you consider that POs and SOs are actually needed, or should legislated guidelines for reasonable conditions be sufficient for decision - making and resolution of disputes?

Comment [c1]: Agree – more clarity

Comment [c2]: Agree

Address the inconsistencies between current legislation: the definition of road, notification requirements and cost allocation.

Definition of road

13 A consistent definition of “road” should be used in all utilities legislation. The definition in the Telecommunications Act incorporates areas not covered by the definitions in the Electricity and Gas Acts 1992, or the Railways Act 2005. One unintended consequence of the differing definitions is that telecommunications utilities have access rights to areas that are not roads under the jurisdiction of a local authority. This raises contention and ambiguity in the application of the

regime intended to manage the access of utilities to road corridors and the setting of reasonable conditions.

Proposal

14 The definition of “road” within the Telecommunications, Electricity and Gas Acts will be made consistent.

15 The definition of road excludes ‘motorway’. It is proposed that the definition of road in the section in legislation on access rights should include ‘motorway corridor excluding the carriageway’ (and for the purposes of this paper, the use of the word road will imply such).

Notification of affected parties

16 Requirements for the notification of affected parties prior to works commencing in the road corridor are not consistent, e.g. different acts have different notification periods.

Proposal

17 The Ministry is proposing to amend the notification process across the relevant legislation to eliminate the inconsistencies in notification periods. In addition,

- timeframes for the consideration of access requests are proposed to be included as new matters in both the Transit and Railway Acts;
- Transit and Ontrack will be required to publish their access evaluation criteria;
- a mediation step for dispute resolution will be incorporated in all notification processes;
- legislation will create guidelines for the setting of reasonable conditions
- the right of other parties to impose conditions is removed.

18 The Ministry is considering two options, A and B, for which diagrams are shown on a separate sheet. Both processes will incorporate the changes indicated above, but main differences between the two are

- who is responsible for the notification of other parties with assets in the vicinity.
- the extent of the decision-making powers of the Network Controllers.

Option A

19 Option A reflects the current practice but includes consistent timelines. The Network Utility Operator (NUO) has the responsibility of notifying the Corridor Network Controller (CNC) **and** affected parties. The NUO will notify their CNC (the RCA) using for example a Road Opening Notice (a RON) and will receive

information from them about who has other assets in the vicinity. The NUO then uses this information to notify the other parties.

Option B

20 Option B promulgates the position paper, by changing the responsibility for notification of affected parties **and** giving enhanced responsibilities for the management of the transportation corridor to the Corridor Network Controller. In this option the NUO first notifies the CNC (RCA / Ontrack / DOC) then the CNC is responsible for notification of all other affected parties – the rationale for this being that they receive the ‘as built’ notices of completed works and hence the party most likely to know where parties’ assets reside.

21 The affected parties, once notified by the CNC, will **advise** their reasonable conditions to them. The CNC is now the decision maker about where the assets are placed in the transportation corridor.

22 The CNC then considers both its **and** the other parties’ advised conditions in light of the principal objectives / specific outcomes and the guidelines for reasonable conditions. The CNC then provides the NUO with these conditions. If the NUO is happy with them, works proceed. If not, and agreement by negotiation cannot be reached, mediation would be the next step.

23 Questions for response – options

- (a) Which of the two options do you prefer and why?
- (b) Does the assumption that the CNC has responsibility for notifying all other affected parties because they receive ‘as built’ notification following the completion of works raise any issues? What **are** they?
- (c) What factors will affect the ability of the NUOs and CNCs to keep to timeframes?
- (d) If the NUO is owned by the Territorial Local Authority (TLA) which is also the CNC then the notification process may raise conflict of interest issues. What could be done to resolve potential conflicts?
- (e) Has anything been missed within either proposed process?
- (f) Can you give any quantification of the incremental costs incurred (if any) to fulfil the processing requirements?

Comment [c3]: Agree to ask what they are

Cost sharing rules

24 Cost sharing relates to who pays when one party needs to relocate or replace another party’s assets, for example when a road is being realigned for safety improvements. Currently the general principle is ‘causer pays’ as provided for in the Electricity, Gas and Telecommunications Acts, although there is recognition that betterment should be paid not by the causer but by the beneficiary.

25 Section 54 of the Transit Act describes that for relocation, the costs the works are split 50-50; but both the Electricity and Gas Acts state that section 54 shall not apply. There is no such statement within the Telecommunications Act. The rationale behind the cost-share is that if works are placed in a road that is identified for future realignment (as set out in a forward plan to occur within a specific timeframe), then Transit should not be required to pay in full for their relocation.

26 The Telecommunications Act provides that if there is a request to move their works, then the person (s) making the request is to pay the cost. This is in conflict with the provision in the Transit Act.

Proposal

27 The Ministry proposes that cost sharing continues to be defined in legislation but that inconsistencies are removed. However, cost sharing might include the use of a formula to calculate shares, the detail of which would be in a code of practice or partnership agreement³.

28 Questions for response – cost sharing

- (a) What rules for cost sharing do you think should apply?
- (b) If you think cost sharing should be calculated using a formula, what methods could apply?

Guidelines for the setting of reasonable conditions

29 The setting of reasonable conditions is the mechanism by which the CNC can enable the NUOs' rights of access to the road and railway corridors.

30 Reasonable conditions will not consider amenity values as these are addressed by District Plans/RMA.

Proposal

31 The Ministry proposes guidelines as follows for the setting of reasonable conditions based on the criteria currently in s119 of the Telecommunications Act.

32 In setting, varying or revoking reasonable conditions the local authority or any other person who has jurisdiction over the network may, **with reference to Codes of Practice and National Standards**, have regard **only** to:

- the safe and efficient flow of traffic (whether pedestrian or vehicular) [including trains]
- the health and safety of any person who is, or class or persons who are, likely to be directly affected by the work on the road or rail network
- the need to lessen the damage that is likely to be caused to property and assets as a result of work on the road or rail network

³ A partnership agreement is an agreement between all parties in a region on how access to the networks is managed and includes agreement over cost-sharing.

- the compensation that may be payable for property that is likely to be damaged as a result of work on the road or rail network that occurs immediately following the works or
- the need to lessen disruption to the local community (including businesses)
- the co-ordination of installation of other networks
- the co-ordination with network construction work by the local authority or other person who has jurisdiction over that road
- the need of a network utility operator to establish a network in a timely manner

33 Questions for response – guidelines for reasonable conditions

- (a) Are the conditions above tight enough (noting the use of the phrase have regard **only** to)?

Should the guidelines for the setting of reasonable conditions include

- (b) the need to complete works in one continuous operation
- (c) the need to obtain at the NUO's cost all necessary approvals, consents and permits
- (d) the need to manage environmental effects (noise, dust etc) during the works
- (e) prior agreement on special conditions that are specific to the request because of location
- (f) the management of interference according to prescribed technical standards
- (g) in the setting of the reasonable conditions, no regard shall be given to amenity values
- (h) the need to assess the risks to the public on the placement of works
- (i) What other possible guidelines could / should be included?

34 The position paper proposes a mechanism to give status to standards and codes of practice so that they can be relied on as part of the reasonable conditions. This mechanism would be a legislated process for the adoption of standards and codes of practice requiring approval by the Ministers of Economic Development and / or Transport. Existing codes and standards would be adopted in the first instance. The process would include consultation and promulgation procedures and an enforcement regime.

Use of a mediation step for dispute resolution

35 General provision currently is recourse to the District Court. This is costly and time-consuming.

Proposal

36 Include a mediation step and timeframe in the notification process – see diagrams for options A and B. The mediator would make assessments against the primary objectives and specific outcomes and the guidelines for reasonable conditions. The costs of mediation would be shared by all parties to the dispute, or as determined by the mediator.

37 Amend the appeal period to the District Court to 40 days in all relevant legislation.

Enhanced access to the motorway corridor (excluding the carriageway)

38 Currently motorways are not part of the definition of a road in Transit, Electricity, and Gas Acts so there is currently no access to the motorway corridor. However, although the definition of road will be amended to include motorway to enable access, motorways must be considered differently from roads due to their high speed, high volume traffic.

Proposal

39 The position paper proposes that utilities should have access to the motorway corridor but not to the carriageway, subject to the same guidelines for the setting of reasonable conditions as provided for access to roads. To enable greater transparency in Transit’s application of the guidelines and certainty in the length of time for a decision to be reached, Transit will be required to publish their access evaluation criteria and be subject to legislated time-frames and the disputes process.

Enhanced access to the rail corridor (excluding the track)

40 There are no access rights for utility infrastructure to the railway. The June 2005 MED discussion paper identified that granting access may be problematic because in many places the corridor is narrow leaving insufficient space for the location of other infrastructure and there is little or no road access necessary for the construction of works. However, the majority of submissions were in favour of enhanced access rights.

Proposal

41 The position paper proposes that utilities should have access to the rail corridor to the rail corridor (not the track) subject to conditions that are reasonable in the rail corridor context. Further, to enable greater transparency in Ontrack’s application of the guidelines for reasonable conditions and certainty in the length of time for a decision to be reached, Ontrack will be required to publish their access evaluation criteria and be subject to legislated time-frames and the disputes process.

42 Question for response – Ontrack’s reasonable conditions

- (a) Could the legislated guidelines for reasonable conditions be the same in the Railways Act as will be in all Utilities Acts and the Transit Act?

Strategic planning and co-ordination of works within the transportation corridors

43 Territorial Local Authorities already have obligations to plan the management of their road assets (producing long term community plans and annual plans), and Transit NZ has an obligation to publish a 10-year State Highway Forecast detailing planned maintenance and capital improvements. Hence there is information available to assist strategic planning and co-ordination of works.

44 However, the intent to have co-ordinated and planned road and utility work programmes may be complicated by NUOs who work in a competitive environment (not wanting to divulge forward plans and the fact that many utility services are supplied in response to consumer demand (which may be difficult to predict).

Comment [c4]: But there are NUOs that don't so this was meant to cover just those that do!

Proposal

45 Both Option A and Option B are proposed as improving the planning and co-ordination of works in the transportation corridor because of greater consistency and certainty in how and when decisions will be reached.

46 However, Option B with its enhanced management role for Network Controllers will require decisions to be made on competing or conflicting uses of the transportation corridor.

47 The position paper describes some of the additional responsibilities conferred on the CNCs that are being considered to achieve the best use of the road and motorway for all interested parties. These are that the CNCs would, in consultation with parties, set policies on:

- the promotion of the shared use of poles, ducts, trenches etc
- how to manage the corridors as effective capacity is reached
- the removal of decommissioned, unused or obsolete utility assets and facilities
- the maintenance, repair or relocation of utility assets and facilities

48 Questions for response – additional responsibilities of the CNCs

- (a) We wish to explore further the implications of assigning such powers to the CNCs and invite responses – in particular, on the additional resource time and capability this would need.
- (b) Option A may be a more suitable process for CNCs with fewer resources and less complex issues to resolve. Should Option A be made the default process but without restricting CNCs ability to undertake the additional responsibilities as proposed in Option B?

APPENDIX

49 Diagrams of proposed options for notification process (A and B) – see separate sheet.

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