

*Legislative Framework for  
New Zealand*

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Thank you Mai.

It is my pleasure to be speaking today about a subject I feel passionately about.  
Before we get going, let me set the scene



This is one of the most famous and powerful anti-war statements.... **Guernica**.

It's a mural painted by Pablo Picasso for the Spanish Pavilion of the 1937 World's Fair. He was troubled by the politics of Spain, as a brutal civil war ravaged the country. Republican forces were under attack from the fascist coup led by General Franco. Franco promised prosperity and stability; yet he didn't deliver.

The point I am making is there have been attempts at resolution between network utility companies and councils but more often there is dispute and potential warfare.

**Guernica** is a visual representation of the frightfulness of war

I must avoid politics as my firm, Brookfields, acts for numerous councils and network utility operators. Not, (of course), where they are in conflict with each other.

This paper is not a specialised one.

It pulls together perspectives that may not have been given much thought.

I suggest that consideration of perspectives other than the Resource Management Act might be advantageous.

Not a complete solution to our current situation, but different approaches that may be productive.

My key points are:

- we have a plethora of regulatory legislation of roads and the network utilities that employ the road corridor;
- we have a body of land law under legislation and the common law that also governs the use of the road, including for utilities;
- we are employing the former regulatory model to dispute rights and duties between the road owners and users;
- there appears to be a misunderstanding about costs of compliance and use of the road corridor.

Against this background, community interests and long term relationships are potentially under threat.

Peaceful relationships and productivity are at risk of being postponed to fighting in the courts.

If we don't invest in a co-operative basis for improving the relationship, the result of further regulation may become inevitable, the United Nations will come in to impose peace; Parliament will legislate, yet again.

The mechanisms that I propose to restore positive relationships are those of persuasion and the employment of a contractual model.

To start, who here is engaged directly or indirectly with some element of a litigation process over utilities in road?

These are our soldiers already in uniform. I am a peacenik.

Before commenting further on the relationships between the potential combatants, let me first comment on the legal background as I see it.

First, there is the legislative regulation.

Then there are other relevant statutes and the common law that apply generally to the circumstances.

Thirdly there are the administrative law principles that need to be observed by councils.

Starting with the particular utility legislation.

We have the Electricity Act and Gas Act, each of 1992, and the Telecommunications Act 2001.

These statutes ensure that the road owner does not take an interest in the utility by reason of the ownership of the land.

Remember, councils own roads, utility operators own the utilities.

The utility owner has rights of entry for existing works, for inspection, maintenance and operation.

Further, the operator can, of course, make use of the road corridor opening up the road, laying and altering the position of the utility.

The electricity and gas operators must comply with such reasonable conditions as are prescribed by the council and the owner of other works.

They have to meet the reasonable costs and expenses of the council in processing any notices and supervising the carrying out of the work.

The operator has to work in co-ordination with the council and the owner of other works.

There is a right of appeal to the District Court against conditions imposed by a council, but this should be taken as a reminder that the council can, indeed, set conditions.

The utility legislation here also follows the Local Government Act in providing that the cost of re-locating utilities falls on the party requiring them to be moved.

In respect of all utilities in the road, the council has a general duty under the Health and Safety in Employment Act

to take sufficient precautions for the general safety of the public, traffic and workmen employed on or near any road.

More specifically, this includes taking all reasonable precautions to prevent accidents during structural repair of any road by the council, or by any other agency, or when any opening is made for the utilities.

The council's responsibilities remain whether or not the works are those of a utility operator.

The council has authority under traffic regulations by which it can ensure safety and regulate traffic management.

This is in addition to regulatory management of the utility works under that specific legislation.

Then there is legislation by which the council may be involved in the location of power poles or trimming trees, which latter concern can be addressed under the utility legislation also.

Most importantly, there is the Resource Management Act.

I don't want to embark on a discussion of that legislation here as there are proceedings up and down the country in which Brookfields is engaged.

The Resource Management Act has come to be seen as the greatest power of councils; the big artillery of regulatory authority, to the infantry of the specific utility legislation.

Finally, because it's created little problem to date, there is the Building Act under which the council can yet again regulate the performance of network utility operators.

So that's the overview of legislative regulation by councils of network utility operators under the Electricity, Gas and Telecommunications Acts, then there is the Health and Safety in Employment Act, Traffic regulations, Public Works Act, Resource Management Act and Building Act.

Under each of these, the council can regulate the performance of network utility operators.

I said that I wanted to look at the relationship between councils and operators from a different perspective.

This is to recognise the dual role of a council.

On the one hand, the council is the regulator under the list of legislation I have discussed.

On the other hand, the council is also the owner of the road and by that ownership generally has other rights, powers and duties, though varied by statute and common law in numerous respects.

There is the Local Government Act, by which all roads vest in fee simple in the Council. The Council has wide powers in respect of its roads, not only to construct, upgrade and repair, but also to divert or alter the course of roads and to alter the level.

The Council could, for example, lower the level of a road although it would leave pipes or cables only a few inches under the surface and thus exposed to injury.

Equally, it could raise the level of the road without raising the level of the utilities.

If the Council does require the utilities to be moved, then under the Local Government Act it has to meet the cost.

Under that legislation, easements or licences can be granted for utilities or even a bridge over, or stock pass under the road.

Then, in the same manner as any other owner of land, the council may grant to another person the right to use council land subject to statutory and common law limitations.

Specifically, the council can grant licences or easements over road.

It can grant licences, leases or even sell outright the air space over, or sub-terrain space under, roads.

For our client, the University of Auckland I am aware of the council granting licences for tunnels under, and bridges over the road.

From acting for city building owners in Wellington I know of licences granted by that council for the foundations of buildings on adjoining land to encroach into the subsoil of road.

For council clients of Brookfields, I have done licences for underground private water pipelines, conduits for private computer cabling and septic tank effluent trenches under the road.

In rural areas, private water pipelines for irrigation or watering purposes from one part of a farm to another often cross or travel along the road under council licences.

In simple terms, there are many other private users of the road corridor. The council's relationship with the network utility operators should not be seen in isolation from these other ones.

It appears that these factors might encourage councils to develop a consistent policy as landowner of the road towards those seeking to make use of the road for private purposes.

In considering a consistent policy for the council, as landowner, as distinct from regulator, in granting licences for the use of road,

I acknowledge that it may be desirable to allow public bodies such rights on different terms from other businesses.

For example, in Auckland I could envisage an argument being made for rights allowed to Metrowater or Watercare to be on different terms from those that may be required of others.

However, it may be difficult to justify any distinction between Telecom and Telstra Clear. The ownership of the local power reticulation enterprise may also be a factor for power lines over or under roads.

I started off by talking about the council's powers of regulation in terms of legislation. I have now made reference to the separate interests that councils will have as owners of the road land. These land law rights of a council are quite distinct from the council's responsibilities as regulator under any one or more of the statutes or regulations that I have referred to.

They are the cavalry that have been out of sight and can be brought into the battle.

A third element has to be introduced at this point.

Councils also have responsibilities to observe administrative law principles.

In simple terms, these require councils to act with fairness and reasonably.

As with resource management law, I do not wish to enter into a broad review of administrative law principles.

I simply observe that amongst those principles there is an obligation for councils, when making a decision in one matter to take into account all relevant factors and to take into account no irrelevant factors.

As can be seen from the multiplicity of legislative provisions, it might become difficult for a council, when making a decision in terms of one regulatory authority, not to be influenced by its concerns in respect of other such authority.

In practice, however, I suspect that the biggest problem is to ensure that when making a decision,

for example, under the Resource Management Act, a council acting as regulator does not take into account and make decisions on the basis of its own land ownership.

Under the Resource Management Act the council acts as regulator, not as owner.

Conditions of a resource consent should be for environmental reasons.

Regulatory conditions under the specific utility legislation should be for those purposes, not to advance other agendas of the council.

But there are, however, certain aspects of the council's land ownership of the road that are of particular concern for the council.

There are costs and risks.

Historically, councils had cost sharing agreements with the New Zealand Post Office, when a department of the Crown, relative to telephone cables.

The suitability of such arrangements with contemporary utility operators may well be questioned.

As landowner of the road, and being responsible to the district's community, the council should consider the terms and conditions on which it allows non-public bodies to make use of the road for the purpose of utilities.

Consideration has to be given to associated risk and costs.

I have been told that the effective cost of damage or interruption to certain telecommunication services, may be very high indeed.

I have heard of charges of \$90,000.00 per hour for a break in a fibre-optic- cable.

The risks of such an interruption may be low, but the high contingent cost makes for a real concern if the council is to bear that risk.

But is this a resource management issue or is it a land ownership one?

As landowner, the council may wish to establish policy criteria for imposing conditions on users of the road for utility or other purposes.

It will be important to have a consistent and reasonable policy reflected in both the resource management consents and consents of the council as landowner.

Further, it will be important to make clear that consent conditions for one purpose do not affect the need for consent, and the impact of conditions that may be imposed, for other purposes.

I have recognised the regulatory functions of the council under legislation and have commented upon the distinctly different powers and concerns of a council as road owner.

I am not tempted to have civil war between councils and utility operators over these relationships.

I have identified the issue of risk and cost.

I am now talking about money.

Under the utility legislation, the council cannot charge a utility operator rent for use of the road.

But money, that is to say costs and the cost of risk, will necessarily be of great concern to the council.

As it is, no doubt, to the utility operators.

Utility operators may read the relationship just in terms of the utilities legislation, which gives them comfort.

Councils may read the relationship in terms of their resource management powers and rates.

To do so may be less than productive in the long run.

It is measuring one's own armoury, without examining the enemy's.

There may be argument about whether the utilities legislation entirely rules out the council obtaining security against cost and risk from the utility operator,

I doubt that it does.

It is, however, debatable.

Most importantly, of course, the council can rate the utility.

This requires a system of capital or annual value rating.

Any council can rate the utilities this way.

Again, the application of rating powers to utilities has been argued at length, but the law is presently clear.

Utilities are rateable.

As we all know from the cases over the last ten years, rates are in the nature of a tax and service charge.

Taxes are one of those certainties in this paradise of ours, along with death.

Those who have land rights are liable to fund the financial requirements of the community.

This fundamental goes back to the statute of Elizabeth.

That is to say Elizabeth the First, a full 400 years ago.

Why should utility operators now be exempt?

They may argue that they are simply using the road for carriage of product through a cable or pipe which is like the use of the road by a truck or car, similarly carrying product through the road corridor.

The utility operator can argue that its conduits are like railway lines that are not rateable.

Utility operators can argue that hugely anomalous consequences arise from rating on value when some assets are cheap by comparison with others.

Ultimately, however, taxes catch us all.

Rating mechanisms can be designed to achieve quite delicately balanced results if councils choose to select suitable authorities with precision.

Councils can rate.

Councils have powers of governing within their district and they can make network utility operators pay, one way or another.

My suggestion is that consideration could be given in principle to whether it is the wisest policy for councils to pursue such income as rates and dictate to the network utility operators, or whether the income that a council seeks should be settled by negotiation. Again my question is, Why go to war over this?

Councils and utility operators are going to have to get along together for a long, long time.

If a council is negotiating the terms and conditions under which a network utility operator is to have access to the council's roads, then access itself cannot be denied.

Nevertheless, the council is able to impose conditions.

Primarily these will be as to effects in environmental terms and the avoidance by the council of liability for risk.

The council can then follow Auckland City by making and levying rates.

*To the extent that the parties may agree to fees, for example, on an annual basis per kilometre, then that fee could be negotiated such that it becomes the income stream for the council in mitigation of costs and risks, and to provide revenue for the community rather than by the council seeking to impose rates unilaterally.*

Such an arrangement would have the advantage of being agreed rather than imposed and thus less likely to attract the litigation which has been evidenced by the Auckland City approach.

More particularly, being agreed, it can be set for a number of years so that there is certainty for both the council and the network utility operator for that term of the income and cost respectively.

I have not examined in detail the issues that might arise in the context of councils seeking to negotiate agreements with the network utility operators under the relative legislation, as the principles need to be addressed first.

Furthermore, I am of the view that it will be most advantageous for the councils to act in unison to counterbalance the financial weight, that I believe will surely be brought to bear, by the network utility operators.

But they too may suffer from being divided rather than being united.

The negotiating balance is ultimately, however, with the councils as they can always make and levy rates.

That is their fall back position, but it must be exercised with fairness and reasonably, in administrative law terms.

The problems of the design of suitable rates and the possibility of challenge should not be overlooked, but the power to rate is always there.

So, let's avoid civil war.

Councils and network utility operators can surely address these problems together and negotiate peace for prosperity.

If they don't and war breaks out, then I suspect that the Crown will step in like the United Nations with an imposed legislative framework.

As those in the Balkans would testify, that is barely better.

Persuade each other of the long-term advantages of understanding and working together; take responsibility.

As Peter Bielby has just explained before me, England has a relatively recent statute, which, with regulations and policy protocols, addresses the relationship of the utility operators, local government and the Crown.

So finally, it appears to me that both network utility operators and councils are addressing the relationship in a limited fashion on an item by item basis.

Is it being seen solely as a resource management issue?

Worse, the parties seem to be adopting an adversarial approach too often, to their cost and the lawyer's delight.

Long term relationships, such as those that are inherent between utility operators and councils, are not improved by being the result of legal wars.

If there is one thing to do- it is mediation to avoid warfare.