

**NETWORK UTILITIES, THE ROAD CORRIDOR,
AND THE RESOURCE MANAGEMENT ACT 1991**

A LEGAL ANALYSIS



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1. INTRODUCTION

1.1 The purpose of this analysis is *not* to address the legal issues as to whether there should be consistency between the various statutory regimes which enable utilities to locate within roading corridors (or indeed a "Utilities Act"), nor is its purpose to highlight the variance in approach between those statutory regimes. Those matters are relatively well known and work is progressing with a view to harmonising the different statutory regimes relating to utilities in the roading corridor.

1.2 Rather, the purpose of this analysis is to address the extent to which road controlling authorities can or should properly address matters such as amenity values and community interests through use of the legislation which authorises utilities to locate within the roading corridor, and therefore the extent to which it is appropriate for district plans under the Resource Management Act 1991 ("RMA") to be used to regulate utilities within roading corridors.

1.3 This analysis is stage one of three in this project, and it is anticipated that it will provide a framework and direction for the following two stages: namely a review of existing district plan practice and the development of best practice guidelines and/or model provisions. As a preliminary comment, "best practice" from a legal perspective would require use of legal powers consistent with the relevant statutory purposes and not for an ulterior purpose, and not unnecessarily duplicating or confusing the powers available under different statutory processes.

2. STRUCTURE OF ANALYSIS

2.1 It is proposed to structure the legal analysis in the following way:

- (a)** Examining the control and ownership of roads, and the nature of the property rights that attach to ownership or control of a road;
- (b)** Reviewing potentially relevant common law rights relating to placement of utilities in roads;
- (c)** Analysing the various statutory provisions that empower network utilities to locate within the roading corridor and the standards that they impose;

- (d) Considering the relationship between the RMA and the utilities legislation;
- (e) Commenting on the extent to which "reasonable conditions" should appropriately be used to attain amenity or community goals;
- (f) Analysing statutory provisions and environmental effects which may be relevant to network utilities under the RMA;
- (g) Identifying practical difficulties arising from different functions of road controlling authorities (i.e. asset ownership of utilities, road ownership/maintenance vs. environmental regulation); and
- (h) In light of the above, summarising the situations in which district plans and the RMA should be employed in regulating utilities within the roading corridor.

2.2 Statutory provisions which are particularly relevant, and which are not set out in the body of the legal analysis, have been included in Appendix A.

3. OWNERSHIP AND CONTROL OF ROADS

3.1 The two main pieces of legislation that define the ownership, rights, and powers of road controlling authorities in relation to roads are the Local Government Act 1974 and the Transit New Zealand Act 1989. It is useful to examine the nature of the rights and powers in order to put the exercise of controls under utilities legislation into context.

Local Government Act 1974

3.2 The Local Government Act 2002 ("LGA2002") has been passed, and Schedule 18 to that Act provides that all provisions of the Local Government Act 1974 ("LGA74") are repealed except for certain specified provisions, including Part XXI which relates to roads. Accordingly, the majority of statutory powers and rights relating to the ownership and control of local roads continue to be those set out in Part XXI of the LGA74. For the purpose of the LGA74, roads are legally defined in section 315 as follows:

"Road" means the whole of any land which is within a district, and which—

- (a) *Immediately before the commencement of this Part of this Act was a road or street or public highway; or*
- (b) *Immediately before the inclusion of any area in the district was a public highway within that area; or*
- (c) *Is laid out by the council as a road or street after the commencement of this Part of this Act; or*
- (d) *Is vested in the council for the purpose of a road as shown on a deposited survey plan; or*
- (e) *Is vested in the council as a road or street pursuant to any other enactment;—*
and includes—
- (f) *Except where elsewhere provided in this Part of this Act, any access way or service lane which before the commencement of this Part of this Act was under the control of any council or is laid out or constructed by or vested in any council as an access way or service lane or is declared by the Minister of Works and Development as an access way or service lane after the commencement of this Part of this Act or is declared by the Minister of Lands as an access way or service lane on or after the 1st day of April 1988:*
- (g) *Every square or place intended for use of the public generally, and every bridge, culvert, drain, ford, gate, building, or other thing belonging thereto or lying upon the line or within the limits thereof;—*
but, except as provided in the Public Works Act 1981 or in any regulations under that Act, does not include a motorway within the meaning of that Act:

3.3 Section 316 of the LGA74 sets out the property rights which attach to roads and essentially vests all roads in the council of the district in which they are located, except for State highways in existence prior to the formation of a district or for which a local authority has relinquished control in accordance with subsection (2). It is important to note that the ownership extends under section 316(1) to "*all materials placed or laid on any road in order to be used for the purposes thereof*". This suggests that utilities placed within roads do not automatically become part of the road and are not therefore an asset of the road owner. This also tends to be confirmed by other specific legislation relating to access for utilities to roads.

3.4 It is also important to note that ownership of a road also includes, by implication, the ownership of the airspace and subsoil within the confines of the road boundaries. This is particularly important in the present context, as one of the key issues which will be addressed as part of this project is the use and control of the three-dimensional physical space created by the road corridor.

3.5 For the purposes of allowing access to roads for utilities however, it is *control* of the road rather than *ownership* which is important. Section 317 of the LGA74 prescribes control over roads and provides that the basic position is that all roads in the district shall be under the control of the council, except State highways which are under the control of Transit New Zealand.

3.6 The general powers of a local authority in respect of roads under their control are relatively broad. These powers are set out in section 319 of the LGA74, and include the power to:

- Construct, upgrade and repair roads as councils see fit;
- Lay out new roads, divert or alter the course of any road, or alter the level of a road;
- Increase or diminish the width of a road; and
- Determine which parts of a road are carriageway and footpath/cycle track.

3.7 It can be seen that the powers under section 319 of the LGA74 which are available to local authorities with regard to roads under their control or ownership have the potential to infringe upon both access to, and the operation of, utilities within roading corridors. Such matters are, however, typically dealt with under the relevant utilities legislation.

Transit New Zealand Act 1989

3.8 In essence, the Transit New Zealand Act 1989 ("Transit Act") relates to roads owned or controlled by the Crown, and in particular major strategic roads such as State highways and motorways. Given the potentially greater strategic importance of these roads in comparison to most local roads, the Transit Act has an increased level of prescription, providing the road controlling authority with wider powers than those that apply to roads under the LGA74. The implications of this for utility operators will be examined later in this analysis.

3.9 For the purposes of the Transit Act, "road" is defined in section 43 as follows:

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

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

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

- 3.10** A motorway is deemed by section 85 of the Transit Act to be a "road".
- 3.11** Section 44 of the Transit Act vests State highways and Government roads in the Crown and, as in the case of the definition of "road" in the LGA74, the inference can be drawn that network utilities located within roads do not form part of a road for the purposes of the Transit Act and remain in the ownership of the relevant utility operator.
- 3.12** Section 48 of the Transit Act sets out the powers of the Minister of Transport over roads in the Minister's control. The powers set out in section 48 are similar to those in section 319 of the LGA74, and differ principally in their increased breadth and in that they provide a power of entry onto adjacent land to carry out certain works. Importantly, section 48(8) of the Transit Act provides:

"Nothing in this section (other than any provision of this section that is relied on in an emergency) shall derogate from the provisions of the Resource Management Act 1991."

- 3.13** Section 61 of the Transit Act prescribes the powers of the Transit Authority in respect of State highways, which are very similar to those set out in section 48 of the same Act. In relation to motorways, section 73(k) states that the Transit Authority may exercise the powers, rights, duties, and liabilities as if the motorway were a Government road for the purposes of section 48 of the Act.

Extensions to the definition of "road"

- 3.14** There are other definitions of "road" (which differ to varying degrees) set out in the relevant utilities legislation and which tend to be wider than the definitions of road under the LGA74 and the Transit Act (i.e. can extend to areas beyond what is dedicated as "legal" road). This is illustrated in the Court of Appeal case of *Morrison v Clear Communications Limited*, CA 161/93, 15 November 1993, which involved access to roads and giving of notice under section 15 of the Telecommunications Act 1987 (the predecessor to section 136 of the Telecommunications Act 2001).

- 3.15** In the *Morrison* case, the Court of Appeal held that a strip of State highway which had encroached onto Morrison's private land fell within the definition of "road" under section 2 of the Telecommunications Act 1987, and that accordingly Clear was required to give notice to Morrison of its intention to lay underground cable within that strip rather than to Transit New Zealand. This case essentially involved a question of jurisdiction and does not materially affect the rights and powers of road controlling authorities over areas of legal road that they control.

Land Transport Management Act 2003 – toll roads

- 3.16** One of the main concerns of the Land Transport Management Act ("LTMA") relates to new land transport infrastructure. It has the potential to impact upon the

activities of utility operators particularly with regard to "*concession agreement roads*" (toll roads).

- 3.17** In the Land Transport Management Bill, no provision was made for the construction of new utility works along toll roads, and the effect of clause 65 of the Bill was that utility operators would have to obtain the consent of the public road controlling authority before any such works were constructed (similar to the situation under the Transit Act). This clause was struck out before the LTMA was passed, and such roads will now, similar to local roads, be subject to the various utilities legislation.

Summary

- 3.18** While the statutory powers and rights which attach to ownership and control of roads are relatively broad, they are constrained in two key respects for the purposes of this analysis – they are subject to the RMA and, as will be addressed later, they are subject to the power of utility operators to locate within roads. This latter power is itself constrained, particularly with regard to the carriageway of roads which are subject to the Transit Act.

4. RELEVANT COMMON LAW RIGHTS

- 4.1** While the various utilities statutes provide powers to utility operators to access roads, these powers do not necessarily override or extinguish common law rights which may influence the ability of utility operators to locate equipment within a road. This is particularly relevant in relation to above-ground utilities which have the potential to interfere with common law rights of property owners adjacent to roads.

- 4.2** Accordingly, it is useful to consider the potential application of the well established common law right that property owners are entitled to access to a road from all points on their frontage. The nature and extent of the common law rights were comprehensively stated by Lord Atkin in *Marshall v Blackpool Corporation* [1935] AC 16. It was held that:

- (a) a frontager has the right of egress and ingress at all points on their street boundary;
- (b) the right of access encompasses access of pedestrians to the footpath and of vehicles to the carriageway;
- (c) the rights of the frontager arise from their ownership of the land abutting the street and are not dependent on any prior dedication of the land comprised in the street or the ownership of the subsoil; and
- (d) the rights of the frontager are not absolute and involve an accommodation of their private rights with the rights of passage of the public.

4.3 The decision of the Supreme Court in *Middleton v Takapuna Borough* [1945] NZLR 434, was the first New Zealand case to clearly establish that the English common law rights of access to and from the street by property owners fronting onto the street were applicable in New Zealand. In that case, a bus stop had been built on the footpath one foot from the plaintiff's adjoining front boundary, and the plaintiff had not consented to its erection. The court granted an injunction requiring the removal of the bus stop. Callan J held at page 434 that:

*“... according to the common law a frontager is not to be obstructed as to **any part of his frontage**, and it is not necessary for him to show that any access of which he actually makes use, or had intended to make use, has been denied him; that it **suffices if access which he or his successor might hereafter desire to use** has now been prevented by some erection of a permanent nature, or of whose permanence some one else claims to be the judge.”*

4.4 The New Zealand position was further confirmed by the Court of Appeal in *Fuller v MacLeod* [1981] 1 NZLR 390. In that case, the MacLeods wanted to construct a driveway to their property using the road reserve in front of the Fullers' property. This would have involved the removal of trees and other vegetation which the Fullers had planted there over the years.

4.5 The Council formally approved the MacLeod's proposal. The Fullers then sought a permanent injunction preventing the work from proceeding and this was granted. The MacLeods and the Council appealed. The Court considered the English and New Zealand case law, and confirmed that the English common law rights of

frontagers were applicable in New Zealand. The Court drew a clear distinction between the public right of passage which is essentially a right to pass along the street, and the right of access which is a private right but noted that these rights are interdependent. McMullin J said at page 390:

“The common law rights of the frontager to enjoy access to the road from his boundary and of the public to pass and repass on the highway apply in New Zealand except where a statute has expressly or implicitly provided otherwise.”

- 4.6** The Court dismissed the appeal and upheld the injunction preventing the driveway from being constructed.

Statutory restrictions on common law rights

- 4.7** In the *Middleton* and *Fuller* cases, the argument was made that the Municipal Corporations Act (1933 and 1954 respectively) authorised the Council to give approval for the proposed work despite the effect on frontager's rights. The relevant statutory provisions gave wide powers to the council. However, in each case the Court decided that as they did not *specifically* allow the work proposed, the councils could not authorise work which would affect the respective rights of access. The relevant legislation is no longer in force but has been superseded by similar provisions in subsequent legislation. It seems well established from case law that a statute would have to explicitly extinguish common law rights of frontagers or do so by a similarly clear implication.

- 4.8** It is potentially arguable that the common law rights of a frontager has been modified or extinguished by the various provisions of utilities legislation relating to placement or siting of utilities *on* or *above* roads. (From our reading of the relevant legislation there is in general no *express* statutory removal of the common law right).

5. RIGHTS, POWERS & LIMITATIONS UNDER UTILITIES LEGISLATION

5.1 There is a substantial body of work comparing the rights and powers available to both road controlling authorities and utility operators under utilities legislation which has either been completed or is currently work in progress.

5.2 Accordingly, there is little value in duplicating that work, which has revolved around identifying the *differences* between the different statutory mechanisms and suggesting amendments to those statutes with a view to providing consistency and a "level playing field" for all utility operators. There appears to be little dispute that harmonisation of the various statutes has merit, and for reasons of greater consistency, certainty, and workability for all interested parties, this outcome is supported from a legal perspective.

Relevant legislation

5.3 The legislation which is most relevant to utilities in roads, and the relevant coverage of those statutes for present purposes, is summarised below:

- Local Government Act 2002 – in this context, provides wide powers for local authorities to carry out "water services" works, including works on private land;
- Transit New Zealand Act 1989 – sets out powers and restrictions relating to use of State highways and motorways;
- Telecommunications Act 2001 – relates to works of telecommunications operators within roads;
- Gas Act 1992 – relates to works of gas operators within roads;
- Electricity Act 1992 – relates to works of electricity operators within roads;
- Railway Safety and Corridor Management Act 1992 – relates to works of rail service operators within roads; and
- Resource Management Act 1991 – requires sustainable management of natural and physical resources, which include roads and network utilities.

5.4 The rights, powers, and duties, of utility operators and road controlling authorities vary under these different statutes. Nevertheless, the basic statutory presumption which applies to gas, electricity, telecommunications, rail and drainage/water

supply is that they have a power to access road corridors, free of charge, to install and maintain utility infrastructure. This power is not absolute, and is limited in two main ways:

- the power does not equate to an RMA right and is subject to rules in district plans; and
- in relation to local authority works (i.e. in respect of water, wastewater and drainage), for roads administered under the Transit Act, the power can only be exercised subject to the consent of the road owner. There is a need to obtain consent for all utility works in motorways.

5.5 It is noted that in the current Railways Bill, clause 87 of that Bill proposes that there be no power to *construct* new railway infrastructure, but that the power and notice provisions) only apply to *maintenance* of existing lines in the same manner as currently applies under the Railway Safety and Corridor Management Act 1992.

Limits on the presumption of utility access under the Transit Act

5.6 Section 52(1) of the Transit Act refers to "works" within roads by a local authority or any other person having lawful power to execute or maintain works, and provides that these works shall not be commenced unless the consent of the road controlling authority is obtained. The term "work" is defined in section 43 of the Transit Act, as follows:

"Public work" and "work" mean every Government work or local work that the Crown or any local authority is authorised to construct, undertake, establish, manage, operate, or maintain, and every use of land for any Government work or local work which the Crown or any local authority is authorised to construct, undertake, establish, manage, operate, or maintain by or under this or any other Act; and include anything required directly or indirectly for any such Government work or local work or use:

5.7 This would appear to be most relevant for works carried out by local authorities in relation to water and wastewater services and drainage. Section 52(2) provides that consent for such works may be given subject to such conditions as the road controlling authority thinks fit *for the protection and safety of the public or of the*

State highway, Government road, or road. Section 52(3) states that the requirement to obtain specific consent does not apply to maintenance of works outside the carriageway of the road or to repairs or reconstruction in the event of an emergency. Where any other utilities works are proposed on roads administered under the Transit Act, the relevant statutory controls under utilities legislation would continue to apply.

5.8 Section 78 of the Transit Act sets out an absolute limit on the presumption of access with regard to roads designated as *motorways*. It provides that:

5.9

5.10 *"Neither the Crown nor any local authority **nor any other person** shall place any wire, cable, pipe, tower, pole, or other structure or thing on, over, or under any motorway or on, over, or under any land that has been taken, purchased, set apart, or acquired for the purpose of constructing a motorway, **without the prior written consent** of the Authority."*

5.11 It is not expressly stated in the Transit Act, but presumably the Transit Authority would be able to impose whatever conditions, consistent with the statutory context, that it saw fit on granting such access. Finally, we note that access for utilities to roads administered under the Transit Act is also subject to section 54, which empowers the road controlling authority at any time to give notice to the owner of the utility structure to remove that structure for any of the reasons specified in section 54(2). There are dispute resolution provisions in this section, but none relate to the decision of the road controlling authority to seek removal of the utility from the road.

Other legal constraints on utility works within roads

5.12 In addition to the common law principles which may affect the placement of utilities in roads, certain constraints and minimum legal requirements are also prescribed in legislation. In particular, the Telecommunications Act 2001 provides two key constraints relating to the placement of lines and cabinets in roads.

- 5.13** Section 142 of the Telecommunications Act gives network operators powers to place cabinets and other similar appliances in the road, and provides that they shall not be intentionally placed so as to interfere with *ordinary* traffic. While the meaning of this term is not further clarified within the legislation, in our view "ordinary" traffic would generally mean both vehicular and pedestrian traffic travelling within the carriageway of a road or obtaining access to an adjacent property.
- 5.14** Section 149(1) relates to the placement of lines and provides that network operators shall not intentionally place lines so that they interfere with *lawful* traffic on a road. While section 149(2) deems lines not to be interfering with lawful traffic if they are placed 5.5 metres above the surface of a road where they cross a road, or at 4.25 metres elsewhere, traffic which is above 4.25 metres in height is not "lawful" unless it has an over-dimension permit under the Traffic Regulations 1976.
- 5.15** Accordingly, in the absence of other legal requirements specifying higher minimum heights, lines may generally be placed across roads at heights of greater than 4.25 metres.
- 5.16** The other utilities legislation does not contain similar provisions, although there are detailed electricity regulations and codes of practice relating to cable separation distances and ground clearances which need to be complied with by electricity operators. (See Regulation 93 of the Electricity Regulations 1997 and NZECP 34/2001.)

Water services regime

- 5.17** It is worth summarising the water supply and drainage regime separately, given that it applies in a wider context than simply access to roads (i.e. it also applies to private land), and given that it has been amended as part of the LGA2002. Under section 130 of the LGA2002, local authorities are required to continue providing "*water services*", which is defined in section 124 as meaning water supply, sewerage, sewage treatment and disposal, and stormwater drainage. In general,

local authorities are not entitled to divest their ownership or interest in a water service except to another local authority, nor dispose of the significant infrastructure which is necessary for providing water services in their district or region.

- 5.18** By virtue of Schedule 18 to the LGA2002, *some* of the operational powers and duties in relation to water supply and drainage works remain from the LGA74 (including the giving of notice under the 14th Schedule to the LGA74 in respect of works within roads *not* owned by a local authority). There is however no express power in the LGA2002 for a local authority to undertake water supply and drainage works in roads, although by necessary implication this power must exist given that local authorities have powers under section 181 of the LGA2002 to construct water supply or drainage works on *private land*, subject to the notice requirements of the 12th Schedule to the LGA2002.
- 5.19** The LGA2002 therefore contemplates that no specific notice is required in respect of works for "water services" within *local roads*, as the body carrying out the works will generally be the same body that owns the road. If those works are not being carried out by the body that owns the road, then notice would be required in accordance with the 14th Schedule to the LGA74. Presumably however, a local authority carrying out such works (even in roads that they own) would still be required to give notice of works in roads to owners of other utility works that might be affected (e.g. telecommunications, gas), in accordance with the 14th Schedule to the LGA74.
- 5.20** This is similar to the situation that applied under the former legislation, except for the fact that there were explicit powers for local authorities to access roads for water supply (under the former section 379), and sewerage and stormwater drainage (under the former section 445). The absence of this express power is probably a reflection of the generally less prescriptive approach which is evident throughout the LGA2002.

Summary

5.21 It is useful at this point to attempt to isolate some themes or consistent direction from the various statutes, in order to provide some direction to the remainder of this analysis. In our view, one key theme that can be drawn from the legislation is that while utility operators have certain rights to obtain access to roads, those rights are limited and should be exercised in a manner which does not detract from the primary function of the road – which is itself a network utility, with the primary purpose of facilitating the transport of people and vehicles.

5.22 Furthermore, it is clear that the legislation regards roads as having a significant strategic function and also as valuable assets. In our view, these characteristics and functions should be influential in terms of what types of conditions on access to roads should be imposed on network utility operators under utilities legislation.

6. GIVING NOTICE AND IMPOSING REASONABLE CONDITIONS

6.1 It is a legal prerequisite for a network utility operator, before they wish to install network utilities in, on, or over roads, to give notice of their intention to do so to the relevant road controlling authority (note also the effect of the *Morrison* case referred to earlier, which does not appear to have been overruled by the passage of the Telecommunications Act 2001).

6.2 As noted earlier, the main variation on this requirement is with regard to water services works, which are in most instances under the control of local authorities. By virtue of Schedule 18 to the LGA2002, the 14th Schedule to the LGA74 remains in force and provides that local authorities undertaking these works need only give notice to the owner of the road where it does not own the road itself (and would most likely need to give notice to the owners of other utility works in the road that might be affected). In addition, and as noted earlier, consent for these works is required in respect of Transit roads.

6.3 Furthermore, there is no explicit ability in the LGA74 for the road owner or owner of other work to impose conditions (only an ability to object to the District Court), although it is in our view consistent with the statutory context to imply an ability for a road owner to impose reasonable conditions.

Notice of intention to carry out utility works in roads

- 6.4 Generally, a notice given by the utility operator must identify the location of the proposed work, the nature of the proposed work, and the reasons for it.
- 6.5 All of the utilities statutes set out in the table below provide dispute resolution procedures whereby matters relating imposing reasonable conditions on access to roads can be referred to the District Court for determination (the LGA74 only allows a road owner and/or owner of another work to *object* to the proposed works). Rights of appeal to the High Court on points of law from District Court decisions are available under the Gas Act, Electricity Act, and Railway Safety and Corridor Management Act, but are not available under the Telecommunications Act (nor it appears under the LGA74). It is understood that a legislative amendment to the Telecommunications Act may be pursued to provide for point of law appeals to the High Court.
- 6.6 It is also understood that legislative amendments may be pursued in order to standardise notice requirements for all utilities legislation in terms of who should be notified, and to introduce a standard notice period of 15 working days.
- 6.7 A table setting out the relevant utilities legislation and the notice provisions relating to access of utilities to roads which currently apply is set out below.

Legislation	Relevant section	Parties that notice is required to be given to	Notice period for conditions/before works may commence
Telecommunications Act 2001	s136 (lines)	Road owner	20 working days from receipt
	s142(cabinets)	Road owner	20 working days from receipt
Electricity Act 1992	s24/25	Road owner <i>and</i> owner of other utility works that might be affected	15 working days

Local Government Act 2002 (water services)	No express provision 14th Schedule to the 1974 Act (notice)	No notice required for works in local roads where Council owns road Road owner <i>and/or</i> owner of another work only where this is <i>not</i> the Council	1 month for road owner/owner of another work to <i>object</i>
Gas Act 1992	s25/26	Road owner <i>and</i> owner of other utility works that might be affected	15 working days
Railway Safety and Corridor Management Act 1992	s17/18	Road owner <i>and</i> owner of other utility works that might be affected *note: under clause 87 of Railways Bill, presumption of access relates only to <i>maintenance</i> of existing lines	15 working days from receipt

6.8 Where notice is required to be given under each of these statutes, in general the road owner (and in some cases the owners of other utilities that may be affected) has the opportunity to impose "reasonable" conditions on the works. In considering the approach of the utilities statutes, there appears to be no explicit ability (except, as noted earlier, under the Transit Act in respect of local authority works and any utility works in motorways) for a road owner to refuse to allow access *at all*. If the proposed works were likely to interfere with lawful traffic or common law rights, then in our view it would be reasonable for conditions on the works to be imposed to ensure that such interference did not occur.

6.9 Despite the various utilities statutes having been in place for some time, there is an almost complete absence of case law on what conditions are considered "reasonable". Only the Telecommunications Act 2001 gives explicit guidance regarding the potential subject matter of conditions.

Reasonable conditions

6.10 Given the absence of case law on reasonableness of conditions, we consider that the matters set out in the Telecommunications Act and the functions being

exercised by the relevant road controlling authority provide some assistance in determining what conditions might be "reasonable". Section 119 of the Telecommunications Act 2001 sets out the following criteria which may be considered when setting conditions under sections 135(2) or 142(2)(b):

- the safe and efficient flow of traffic (whether pedestrian or vehicular);
- the health and safety of any person who is, or class of persons who are, likely to be directly affected by the work on the road;
- the need to lessen the damage that is likely to be caused to property (including structural integrity of the roads) as a result of work on the road;
- the compensation that may be payable under section 154 for property that is likely to be damaged as a result of work on the road;
- the need to lessen disruption to the local community (including businesses);
- the co-ordination of installation of other networks;
- the co-ordination with road construction work by the local authority or other person who has jurisdiction over that road; and
- the need of a network operator to establish a telecommunications network in a timely manner.

6.11 Section 119(2) emphasises that these criteria are not exhaustive, and that the limit of a condition is ultimately its "reasonableness" or otherwise. It is understood that amendments to utilities legislation may be pursued to ensure that these criteria apply in respect of all utility works.

6.12 Regardless of section 119(2), we consider that the section 119 criteria support our view that "reasonable conditions" imposed by road owners should be related to their operational and asset management role, rather than as part of some wider regulatory role. In our view, it is clear from the utilities statutes that the functions being exercised by a council or road controlling authority in imposing conditions should be related to their ownership or control of the road as an asset, and to the primary function of the road as a transport resource.

6.13 Accordingly, if the issue is approached from that perspective, reasonable conditions may potentially relate to (*inter alia*):

- (a) the location of works in roads (e.g. to avoid conflict with other utilities, to facilitate maintenance etc);
- (b) interference with or damage to council assets within the road such as street trees or furniture;
- (c) timing of works (e.g. outside peak traffic periods);
- (d) requiring that works not unduly interfere with vehicular and pedestrian traffic movement and safety, and access to private land from a road;
- (e) public safety generally (e.g. placing cones or barriers to restrict access to work areas); and
- (f) requiring reinstatement of roads or berms where the surface is broken up and/or plants disturbed.

6.14 There are express provisions in the Electricity Act 1992 and the Gas Act 1992 which allow road owners to charge for processing notices and supervising work, and it is possible that such conditions *might* be also reasonable in respect of notices for telecommunications and water supply/drainage works.

6.15 We consider that councils and road controlling authorities, when considering the imposition of conditions, are exercising a public law function and should only exercise those functions in accordance with the purpose for which they were conferred. Road controlling authorities should not impose conditions on matters which relate to private law commercial or contractual arrangements except to the extent that the subject matter is within the express scope of a council's statutory powers.

6.16 For example, conditions which would effectively frustrate the proposed works or which sought to change the essential character of what was proposed (e.g. by requiring proposed overhead utilities to be installed underground) would not be reasonable.

6.17 In our view, it would also not be reasonable for road owners to impose conditions on access to roads under utilities legislation which have an explicit focus on achieving amenity outcomes. Clearly however, imposition of certain types of

conditions may have the *consequential* effect of addressing amenity values if, for example, they precluded construction at night.

6.18 The RMA seeks to address the environmental effects of activities, and it is our view that it is appropriate that conditions designed to mitigate environmental effects (e.g. amenity, visual or landscape effects) should be imposed on resource consents or through district plans.

6.19 Clearly, while there may be some overlap in the type of controls which may be imposed through conditions on road access and potential controls under the RMA, conditions imposed by a road controlling authority under the utilities legislation which explicitly purport to address wider amenity and visual impact issues would in our opinion be unreasonable.

6.20 Problems will no doubt arise in situations where a council's district plan does not adequately control the actual and potential effects of utilities within roads (say for example it provides that all utilities within roads are permitted activities). In those circumstances, it may be tempting for councils (in their road controlling capacity) to seek to shore up actual or perceived deficiencies in their district plans by imposing amenity type conditions on road access under utilities legislation. However, this would not necessarily make those conditions *reasonable*.

6.21 In our view, the reverse should also hold true – matters which are best addressed through conditions on road access should not be duplicated through conditions on resource consents or district plan rules. To do so would lead to unnecessary duplication and the potential for inconsistency between the respective conditions. Furthermore, RMA restrictions relating to operational matters would need to be justified on the basis that they served a valid resource management purpose.

7. THE RMA AND UTILITIES

7.1 In terms of Part II of the RMA and section 5 in particular, the benefits to society of properly functioning utilities are widely known, and it is generally accepted that utilities contribute towards the social and economic wellbeing of people and communities, and to their health and safety. Indeed, utilities are in many instances

considered to provide services which are necessary for the functioning of a modern society.

- 7.2** Regulation of the environmental effects of utilities under planning legislation is a relatively recent concept, the impetus for which has no doubt been brought about by the privatisation of government departments and municipal authorities that were formerly responsible for utilities. The consequential introduction of increased competition and the need to deal with new technologies are also likely to have been important factors behind increased regulation.
- 7.3** Under section 64 of the Town and Country Planning Act 1977, specified public utilities were deemed to be a use *permitted as of right* throughout every district. Councils had no ability to impose rules in their district schemes which overrode this deeming provision, although owners of the public utilities were required to give 21 days notice to councils of the nature and location of the proposed works. Councils could appeal to the then Planning Tribunal, but only in respect of the proposed *location* of the utility.
- 7.4** This presumption was carried over into the transitional provisions of the RMA under section 375, which deemed all transitional district plans to include a rule that telecommunication lines, water and drainage pipes and associated equipment, industrial and household connections to gas, water and sewer pipes, electricity lines up to 110kV, gas transmissions and distribution pipes up to a gauge pressure of 2000 kilopascals, and lighthouses and navigational aids were *permitted activities* in every district. Other forms of utility required resource consents under section 375.
- 7.5** Accordingly, unless or until councils pursued plan changes to their transitional district plans, or notified proposed district plans which regulated network utilities, most were permitted throughout all districts (including roads).
- 7.6** Use of the designation procedure in respect of network utilities is a mechanism which has also been available and widely used under the RMA.

- 7.7** As has been noted earlier, regardless of the powers set out in utilities legislation to access roads, this does not equate to an RMA right. Accordingly, if a resource consent is required, from a practical perspective this will need to be obtained prior to giving notice to a road owner and its terms and restrictions may dictate the location and nature of the proposed works.

Common issues regarding utilities and the RMA

- 7.8** A number of territorial authorities took the opportunity afforded by the RMA to regulate the environmental effects of network utilities through rules in their proposed district plans, both in respect of roads and in general throughout the district.

- 7.9** While the following statement is anecdotal and based on our experience since the inception of the RMA, it appears that many councils have made a distinction between underground and above-ground utilities when considering what level of regulation (if any) is appropriate. Some councils have also made distinctions between utilities located within and beyond road corridors.

- 7.10** Almost across the board, it appears that there is a higher level of RMA regulation in respect of utilities that are above ground (and therefore visible). This is hardly surprising, given the utilitarian appearance of some utility works. For the purposes of this analysis, it is useful to draw a distinction between underground and above-ground utilities and consider potential reasons for and against RMA regulation of them within roads.

- 7.11** It is important when addressing these issues to bear in mind our earlier conclusions about the appropriate scope of "reasonable conditions" on access to roads. It is also important to bear in mind the fact that existing use rights will apply to existing lawful utilities in roads, and replacement or maintenance of those utilities which does not increase the character, intensity or scale of effects or increase the degree of non-compliance is likely to be permitted.

Underground utilities

7.12 Given that visual amenity is not ultimately a relevant RMA effect (except perhaps in the short term or during the construction phase) in relation to underground utilities within roads, then there must be other relevant RMA justifications for regulating underground placement of utilities. Potential reasons are:

- (a) where known archaeological sites, heritage or natural features within roads might be disturbed or affected (in the case of archaeological sites, archaeological authorities pursuant to the Historic Places Act 1993 would also be necessary);
- (b) where a road is of such strategic importance that placing of utilities underground and the resulting disruption will give rise to serious environmental effects (although, in general, roads of this nature are likely to be administered under the Transit Act and there is no "right" to access the road in any event);
- (c) where the noise effects of using the machinery will be significant (most district plans contain construction noise standards);
- (d) where underground installation of utilities will adversely affect listed trees (e.g. damage to root systems);
- (e) where the proposed works are within or adjacent to sensitive ecological sites or waterbodies, or habitats of native fauna, and special controls are accordingly required to ensure that those features are not adversely affected; and
- (f) where there are natural hazards issues and undergrounding of utilities may worsen or exacerbate risks.

7.13 There *may* be very limited circumstances where the physical constraints of an individual road are such that the placement of underground utilities needs to be carefully controlled to ensure that the road corridor itself is sustainably managed (e.g. where there may be no physical space left within the corridor in which to place further utilities, or CBD streets where the demand for undergrounding of utilities is likely to be very high). In our view however, this issue would more properly fall under a road controlling authority's operational or asset management responsibilities and would not normally be regulated under the RMA.

- 7.14** While the examples given above are not exhaustive, their purpose is to provide examples of potential issues where there are *valid* RMA effects associated with underground utilities in roads which may need to be addressed. Other district plan controls not specifically directed to controlling underground utilities may also be relevant, such as standards relating depth and volume of earthworks.
- 7.15** In our view, it would usually be unnecessary for councils to regulate, through district plans, *operational* matters relating to the undergrounding of utilities which can be addressed through reasonable conditions on access to roads. It should be borne in mind that district plan rules must be justified in terms of section 32 of the RMA, which is essentially directed towards examining the necessity for and level of regulation being imposed.

Above-ground utilities

- 7.16** Utilities which are typically located above-ground in roads are electricity and telecommunications networks, predominantly lines and their support structures, and associated infrastructure such as cabinets, pedestals, and service leads to properties. As noted earlier it has been more common for above-ground utilities in roads to be subject to RMA regulation, usually for visual amenity reasons.
- 7.17** It has been common for standards to be included in district plans relating to the dimensions or location of above ground utilities structures. A commonly expressed concern of utility operators is that such standards are often arbitrary and do not pay sufficient regard to the operational requirements of utilities, or to the use of new technology.
- 7.18** Potentially relevant RMA reasons for regulating above ground utilities are:
- (a) for reasons related generally to adverse visual effects;
 - (b) in areas of identified landscape significance where actual or potential adverse effects may arise;

- (c) in identified heritage or character areas/buildings where above-ground utilities may conflict with the particular character of the area/buildings;
- (d) in new subdivisions, where all services are placed underground for amenity reasons;
- (e) where overhead utilities might affect listed trees (on roads or adjacent private properties) or council owned street trees;
- (f) in areas of high public amenity where there may be conflict with other amenity features (e.g. CBD areas, pedestrian malls, or adjacent to public open spaces/recreational areas); and
- (g) noise emitted by above ground utilities and electro-magnetic frequency/electro-magnetic radiation effects.

7.19 In limited circumstances, it is conceivable that RMA restrictions *could* be imposed on strategic or designated heavy traffic routes where the size or location of the utility has the potential to interfere with large vehicles. This would however appear to be a matter that falls under the asset management or operational role of a council and is more properly addressed through reasonable conditions on access to roads.

7.20 Again, the list above is not intended to be exhaustive and the examples illustrate the range of matters which might provide valid RMA reasons for regulating above-ground utilities.

Summary

7.21 The level and focus of RMA regulation of utilities in roads will vary from district to district, depending upon the individual circumstances of the district and the environmental outcomes that are sought. However, regardless of the level of regulation, best practice would require such regulation to be:

- for an RMA purpose;
- related to the actual or potential environmental effects of utilities; and
- justified in terms of section 32 of the RMA.

8. PRACTICAL ISSUES RELATING TO COUNCIL'S FUNCTIONS

8.1 A number of practical issues are apparent concerning the different functions of local authorities, particularly the tension between a council's asset management role and its RMA or regulatory functions. Ideally, these functions should be separate and indeed it is our view that best practice requires that the respective powers should be exercised in accordance with their statutory purpose.

8.2 Nevertheless, from a *practical* perspective, we consider that some degree of co-ordination and communication between the different departments of councils as to the scope of their respective responsibilities and powers would be sensible. This would assist in reducing unnecessary duplication of controls on utilities in roads, potential inconsistency between RMA and road access conditions, and would more clearly define (from an internal perspective) the respective responsibilities and/or legal jurisdiction of the council departments. It may therefore be useful for councils to review their statutory responsibilities and processes and establish protocols for defining when a council department has jurisdiction over utilities in roads.

8.3 From the perspective of utility operators, such an approach should increase investment certainty, reduce operational and compliance costs, and result in reduced processing times for RMA applications and road access notifications. Needless to say, a similar level of co-ordination and communication between the operational and environmental divisions of utility operators is also likely to have practical benefits.

8.4 An explicit outcome which has been signalled under the Telecommunications Act 2001 is better co-ordination between different utility operators regarding timing of works in roads so that there is reduced disruption to motorists and the general public. Regular meetings of utility operators and councils regarding proposed timing and location of utility works is one obvious way of addressing this issue.

9. SUMMARY - BEST PRACTICE

- 9.1** In light of the discussion above, what does best practice require? In our view it requires the appropriate use of statutory powers, avoidance of duplication of separate processes and/or conditions, and it requires conditions to be both lawful and reasonable. Essentially, from a legal perspective we consider that the key to best practice is recognising and defining the scope and extent of the roles that a council is fulfilling (i.e. asset owner vs regulatory authority).
- 9.2** In that respect, the RMA should only be used to regulate utilities in roads where "reasonable" conditions cannot lawfully be imposed *and* where there is a valid resource management justification for doing so.
- 9.3** Possible situations where RMA regulation of utilities in roads may be appropriate have been set out earlier in this analysis. Stage two of this project, which is a survey of district plans from throughout the country, may well reveal other situations where local authorities have considered it necessary to regulate utilities in roads – this will inevitably depend upon local circumstances but in our view that best practice requires that such RMA regulation should always be for a valid resource management purpose.

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December 2003

APPENDIX A – RELEVANT STATUTORY PROVISIONS

1. LOCAL GOVERNMENT ACT 1974

Section 316 – ownership of local roads

- (1) *Subject to section 318 of this Act, all roads and the soil thereof, and all materials of which they are composed, shall by force of this section vest in fee simple in the council of the district in which they are situated. There shall also vest in the council all materials placed or laid on any road in order to be used for the purposes thereof.*
- (2) *A council may, by special order, at the request of Transit New Zealand, accept or relinquish the property in any State highway or any part thereof in its district, and thereupon the property in that State highway or part shall, by virtue of that special order and without any instrument of transfer, vest in the council, or in the Crown, as the case may be.*
- (3) *On receipt of an authenticated copy of any such special order, the District Land Registrar shall note his records accordingly.*
- (4) ***In this section the term "road" does not include—***
 - (a) *Any Government road:*
 - (b) *Any State highway or part of a State highway situated in a county or in that part of the district of a district council which before the constitution of the district was or formed part of a county:*
 - (c) *Any road in respect of which the Minister of Local Government is the council:*
 - (d) *Any regional road or part thereof (as defined in Part 22 of this Act) which is vested in the regional or united council.*

Section 317 – control over local roads

- (1) *Subject to section 318 of this Act, all roads in the district shall be under the control of the council:*
Provided that—
 - (a) *A State highway or part thereof shall be under the control of the council only where Transit New Zealand has, under section 62 of the Transit New Zealand Act 1989, delegated that control to the council:*
 - (b) *A Government road shall be under the control of the Minister of Transport:*
- (2) *Any powers conferred on the council by this Part of this Act may be exercised—*
 - (a) *In relation to any State highway or part thereof, only if that State highway or part is under the control of the council or the exercise of that power by the council has been consented to by Transit New Zealand:*

Section 319 – powers in respect of local roads (relevant parts only)

The council shall have power in respect of roads to do the following things:

- (a) *To construct, upgrade, and repair all roads with such materials and in such manner as the council thinks fit:*
- ...
- (c) *To lay out new roads:*
- (d) *To divert or alter the course of any road:*

- (e) *To increase or diminish the width of any road subject to and in accordance with the provisions of the district plan, if any, and to this Act and any other Act:*
- (f) *To determine what part of a road shall be a carriageway, and what part a footpath or cycle track only:*
- (g) *To alter the level of any road or any part of any road:*
- (h) *To stop or close any road or part thereof in the manner and upon the conditions set out in section 342 and Schedule 10 to this Act:*
- (i) *To make and use a temporary road upon any unoccupied land while any road adjacent thereto is being constructed or repaired:*
- ...
- (l) *For the purpose of providing access from one road to another, or from one part of a road to another part of the same road, to construct on any road, or on land adjacent to any road, elevators, moving platforms, machinery, and overhead bridges for passengers or other traffic, and such subways, tunnels, shafts, and approaches as are required in connection therewith.*

Schedule 14 - provisions as to constructing or maintaining waterworks, drainage works, trade wastes systems, and drainage channels, and laying gas pipes or electricity cables, and erecting poles on roads and works not under the control of the council

1. *Before interfering with any road or other work that is not under the control of the council for the purposes of constructing or maintaining waterworks or drainage works or trade wastes systems or drainage channels, or laying gas pipes, or electricity cables, or erecting poles, the council shall give not less than 1 month's notice in writing to the local authority or body having control of the road or work.*
2. *If that local authority or body objects to the interference, the matter shall be referred to a District Court, and the decision of the Court shall be final.*
3. *The council may at any time interfere with the road or work, so far as may be necessary to effect all necessary repairs in the waterworks or drainage works or trade wastes systems or drainage channels or gas pipes or electricity cables or poles, on giving to that local authority or body not less than 3 days' previous notice in writing of its intention to do so.*
4. *In any sudden emergency or danger to the waterworks or drainage works or trade wastes systems or drainage channels or gas pipes or electricity cables or poles or property adjoining, the council may, without any previous notice, proceed to effect the necessary repairs, but shall as soon as practicable thereafter inform the local authority or body.*
5. *The provisions of this Schedule shall, in relation to any public work that is a Government work to which section 241 of this Act applies, be read subject to that section.*

11. TRANSIT NEW ZEALAND ACT 1989

Section 44 – ownership of State highways

All Government roads declared as such under this Act, the Public Works Act 1981, or any former Public Works Act and, subject to section 316 of the Local Government Act 1974, all roads outside urban areas declared as State highways under the National Roads Act 1953, and all roads outside urban areas declared as State highways under this Act, and the soil thereof, are hereby declared to be vested in the Crown, together with all materials and things of which such roads are composed, or which are capable of being used for the purposes thereof, and which are constructed, placed, or laid upon any such road.

Section 48 - powers of Minister over roads under Minister's control (relevant parts only)

- (1) *All rights and powers vested in any local authority under sections 331, 332, 334, 335, 337 to 341, and 353 of the Local Government Act 1974, and all rights and powers vested in any local authority in relation to roads under any other Act, may, in respect of any Government road, be exercised by the Minister.*
- (2) *The Minister may from time to time, by notice in the Gazette, make bylaws with respect to any Government road on the subject-matters referred to in paragraphs (13) to (20) and (38) to (41A) of section 684(1) of the Local Government Act 1974.*
- (3) *The Minister shall have power to do all things necessary to construct and maintain in good repair any road under the Minister's control, and in particular, but without limiting any power conferred on the Minister elsewhere in this Act, to do the following things:*
 - (a) *To alter the line of any road, but a new line of road shall not be laid out by the Minister without the written consent of those persons whose written consent would be required under section 114(2) of the Public Works Act 1981 if the land were to be declared to be a road:*
 - (b) *To increase or diminish the width of any road:*
 - (c) *To determine what part of a road shall be a carriageway and what part a cycle track or footpath only:*
 - (d) *To construct, erect, dig, or grow on any road or remove from it, such barriers, dividing strips, guide or sign posts, pillars, or other markers, trees, hedges, lawns, gardens, and other devices, as may in the opinion of the Minister be necessary or desirable:*
 - (e) *To place or construct temporarily or permanently on any carriageway any reasonable device or thing for the purpose of controlling vehicle speeds, if it is desirable for the safety of road workers, or users of the road or members of the public, or to protect any part of the road:*
 - (f) *To place or construct, or allow to be placed or constructed, on any road clear of the carriageway any road-making or maintenance materials, plant and equipment, traffic weigh stations, traffic control aids, and stations, facilities, and amenities for road users:*
 - (g) *To alter the level of any road:*
 - (h) *To stop, divert, or otherwise control the traffic upon any road temporarily while any work or investigation is being undertaken or for the structural protection of any part of the road:*
 - (i) *To close to traffic any road, or any part of a road, for such period as the Minister considers necessary to execute repairs or to remove any obstruction:*
 - (j) *To enter on any land and make such ditches, drains, and conduits as may be required to drain water from any road, and to keep such ditches, drains, and conduits open at all times for the flow of water; and to erect floodgates therein and to open or close them as the Minister thinks fit, doing as little damage as possible:*
 - (k) *To exercise the powers given by section 74 of this Act as if the road were a motorway:*
 - (l) *To enter on any land so as to gain access to other land for the purposes of this subsection:*
 - (m) *To enter on any land and to remove from any culvert, river, stream, lake, or other water, any material which may be lodged in its bed or against its banks or against any bridge, dam, ford, or weir, and which may impede the free flow of water in its natural channel whereby any part of a road under the Minister's control may be damaged.*

- (4) *Entry shall not be made under subsection (3) of this section without the consent of the owner or occupier, if the land is within the curtilage of a dwelling or other building, or is within a stockyard, orchard, vineyard, plant nursery, shelter belt, airstrip, garden, or shrubbery.*
- ...
- (8) *Nothing in this section (other than any provision of this section that is relied on in an emergency) shall derogate from the provisions of the Resource Management Act 1991.*

Section 52 - notice to be given of local authority works

- (1) *Any local authority or other person having lawful power to execute or maintain works on, under, or over any road shall not commence any works or maintenance—*
- (a) *On any State highway, without the consent of the Authority; or*
 - (b) *On any Government road, without the consent of the Minister; or*
 - (c) *On any road (including any State highway) under the control of a local authority, without the consent of the local authority.*
- (2) ***Any consent under subsection (1) of this section may be given subject to such conditions as the Authority or the Minister or the local authority thinks fit for the protection and safety of the public or of the State highway, Government road, or road.***
- (3) *Nothing in this section shall apply to—*
- (a) *The maintenance of any work on any part of the road other than the carriageway; or*
 - (b) *The immediate repair to or reconstruction of any work if that repair or reconstruction is required as a result of an earthquake, flood, landslide, or other emergency.*

Section 53 – poles, etc, on roads to be adjacent to boundaries

- (1) *Notwithstanding anything to the contrary in any Act or rule of law but subject to paragraph (d) of this subsection, a pole or tower (other than a lighting standard required solely for effective road illumination or a support for a traffic sign or signal) shall not be erected or re-erected on any road outside the urban area of a district of a territorial authority otherwise than adjacent to the frontage line of the land adjoining the road, or as near thereto as is practicable, having regard to—*
- (a) *The desirability of any cross-arms and wires not encroaching over the adjoining land:*
 - (b) *The necessity of ensuring that any telecommunications line or electricity transmission line is not susceptible to instability or to damage by, or interference from, natural causes, or trees or structures or other lines or transmission lines:*
 - (c) *The necessity of ensuring that any such line or transmission line is reasonably accessible for repair and maintenance:*
 - (d) *The necessity of complying with any other enactment by which express provision is made as to the distance of any pole or tower from any other thing, or as to the distance between poles or towers that support different lines or transmission lines.*
- (2) *Subsection (1) of this section shall not apply in any case—*
- (a) *When the Director of Land Transport Safety determines (after consultation with the authority having control of the road and the authority proposing to erect or re-erect a pole or tower) that the proposed position of any pole or tower, although not complying with*

- that subsection, is such that the pole or tower will not be dangerous to vehicles and persons in them using any road; or*
- (b) *If, in the public interest, it is essential that any pole or tower be re-erected without delay; or*
- (c) *If, because of technical difficulties or disproportionate costs, it is not practicable to re-erect a pole or tower otherwise than in its previous position.*

Section 54 - removal of roadside structures

- (1) *In this section, unless the context otherwise requires,—*
"Controlling authority", in relation to any road, means the authority in which is vested the control of the road; and includes the Minister or the Authority, as the case may be, where the control of the road is vested in the Minister or the Authority:
"Road" includes any motorway or service lane:
"Structure" means any tower, pole, or post lawfully upon or in or over a road or any pipes, cables, chambers, drains, or other services lawfully under a road; and includes any equipment that must be removed with the structure if the structure is removed; but does not include—
- (a) *Any part of a bridge or culvert:*
- (b) *Any fence, gate, or cattle stop erected in accordance with this Act or the Local Government Act 1974:*
- (c) *Anything provided for the assistance or control of traffic:*
- (d) *Any structure that was erected when the land was not a road:*
"Utility authority", in relation to any structure, means the Crown, or any Minister of the Crown, local authority, company, or person lawfully authorised to construct, maintain, utilise, or use the structure.
- (2) *Where any structure has been erected upon, in, over, or under any road by any utility authority, either before or after the commencement of this Act, and the controlling authority has by notice in writing to the utility authority or to a responsible officer of it required the removal of the structure because—*
- (a) *It is, or is likely to become, dangerous to vehicles and persons in them using the road; or*
- (b) *It is in the way of any work undertaken or proposed for the improvement of the road; or*
- (c) *The controlling authority desires its removal from under the road for the purposes of any work undertaken or proposed for the improvement of the road,—*
the utility authority shall remove the structure within such period as may be specified in the notice.
- (3) *Where any structure that has been erected upon, in, over, or under any road by any utility authority, either before or after the commencement of this Act, is unsafe or is likely to become unsafe because of any work undertaken or proposed to be undertaken for the improvement of the road as a public highway, the utility authority, after giving at least 5 working days' notice in writing to the controlling authority of its intention to do so, may remove the structure.*
- (4) *Subject to any agreement to the contrary, the reasonable costs incurred by a utility authority in so removing any structure and (where reasonably necessary) in re-erecting the structure (or an equivalent structure provided by the utility authority at its expense), including compensation payable to the owners and occupiers of the alternative site and a reasonable sum for proper overhead charges, shall, subject to subsection (5) of this section, be borne by the controlling authority and the utility authority in equal shares, and the amount payable to the utility authority may be recovered as a debt.*
- (5) *A controlling authority or a utility authority may apply to a District Court to vary the proportions in which the costs and compensation shall be borne; and,*

in exceptional circumstances where it is reasonable to do so, the District Court may, after hearing the parties, vary those proportions, and the decision of the District Court shall be final and binding on all parties.

- (6) *Any dispute as to—*
- (a) *The length of the period within which any structure is required to be so removed; or*
 - (b) *Whether any structure is or is likely to become dangerous to vehicles and persons in them using a road; or*
 - (c) *Whether any structure is unsafe or likely to become unsafe because of any work undertaken or proposed to be undertaken for the improvement of the road; or*
 - (d) *Where a structure removed under this section (or any equivalent structure) may be re-erected or placed in relation to the road—*
- shall be heard and determined by a District Court on application made to it in that behalf; and the decision of the District Court shall be final and binding on all parties. The costs and expenses of determining any dispute under this subsection shall be borne as the District Court may direct.*
- (7) *Notwithstanding anything to the contrary in subsection (6) of this section, the period within which any structure is required to be so removed may from time to time be extended by agreement between the parties or by a District Court on application made to it in that behalf.*
- (8) *If the utility authority, after receiving notice under subsection (2) of this section, fails within the period so determined to remove the structure that is the subject of the notice, the controlling authority, after giving 10 working days' further notice of its intention to do so, may apply to a District Court for an order requiring the utility authority to remove the structure within such period as may be specified in the order; and in any such case, if the District Court orders the removal of the structure, the whole cost of carrying out the removal and re-erection of the structure shall be borne by the utility authority and shall be recoverable from it by the controlling authority as a debt.*
- (9) *Nothing in the Limitation Act 1950 or in any other Act or any rule of law shall cause or be deemed to have caused the right or title of the controlling authority of the road or of the authority in which the road is vested to be extinguished by reason of the road being occupied by any structure, and nothing in this or in any other Act or any rule of law shall entitle any utility authority to compensation otherwise than under this section for the removal of any structure from any road or in respect of the re-erection of any such structure (or equivalent structure), or in respect of any alteration of any road that necessitates any such removal or re-erection.*

12. TELECOMMUNICATIONS ACT 2001

Section 136 - notice requirement

- (1) *Except as provided in section 139, before a network operator proceeds to open or break up any road, the network operator must give to the local authority or other person who has jurisdiction over the road written notice of the intention to carry out the work.*
- (2) *Every notice must specify the location of the proposed work, the nature of the work to be carried out, and the reasons for it.*

Section 137 - network operator to be notified of conditions

Not later than 20 working days after the receipt of the written notice of the intention to carry out work, the local authority or other person who has jurisdiction over the road must notify the network operator in writing of any conditions imposed under section 135 (2).

Section 138 - failure to notify conditions

If a local authority or other person who has jurisdiction over the road fails to notify the network operator of the conditions imposed under section 135(2) within the 20-working day period referred to in section 137, those conditions may not be imposed, and the network operator may commence work.

Section 142 - construction, etc, of telephone cabinets or other similar appliances

- (1) *Subject to subsection (2), a network operator may construct, place, and maintain public telephone cabinets, distribution cabinets, or any other similar appliances on a road.*
- (2) *A network operator must—*
 - (a) *give to the local authority or other person who has jurisdiction over that road at least 10 working days' notice of its intention to place a cabinet or appliance on the road; and*
 - (b) *comply with any reasonable conditions that are imposed by the local authority or other person who has jurisdiction over that road on which the cabinet or appliance is to be placed; and*
 - (c) *not intentionally place the cabinet or appliance on the road so that it interferes with the ordinary traffic.*
- (3) *Every notice under subsection (2)(a) must specify where the cabinet or appliance is to be placed on the road and the reasons for it.*

Section 143 - network operator to be notified of conditions

Not later than 20 working days after the receipt of the written notice of the network operator's intention to place a cabinet or appliance on a road under section 142, the local authority or other person who has jurisdiction over that road must notify the network operator in writing of any conditions imposed under section 142(2)(b).

Section 144 - failure to notify conditions

If a local authority or other person who has jurisdiction over a road fails to notify the network operator of the conditions imposed under section 142(2)(b) within the 20-working day period referred to in section 143, those conditions may not be imposed and the network operator may commence work.

Section 149 - lines must not interfere with public traffic

- (1) *A network operator must not intentionally place the wires of a line so that they interfere with the lawful traffic on a road.*
- (2) *However, wires of a line do not interfere with the lawful traffic on the road if the wires are placed at a height of 5.5 metres or more above the surface of the road where the wires cross a public road, or at a height of 4.25 metres or more elsewhere.*

Section 24 - construction or maintenance of works on roads

- (1) *Except as provided in subsection (2) of this section, an electricity operator may from time to time construct and maintain works in, on, along, over, across, or under any road, and for any of these purposes may—*
 - (a) *Open or break up any road:*
 - (b) *Alter the position of—*
 - (i) *Any pipe (not being a main) for the supply of water or gas; or*
 - (ii) *Any telecommunications line; or*
 - (iii) *Any works—*
that are constructed in, on, along, over, across, or under that road:
 - (c) *Alter, repair, or remove any works so constructed or maintained, or any part of any such works.*
- (2) *No electricity operator shall exercise the powers contained in subsection (1) of this section otherwise than in accordance with such reasonable conditions as may be prescribed by—*
 - (a) *The local authority or other body or person having jurisdiction over the road; and*
 - (b) *The owner of the pipe, telecommunications line, or works, as the case may require.*
- (3) *Without limiting the generality of subsection (2) of this section, a local authority or other body or person having jurisdiction over a road may impose under that subsection, in relation to any work undertaken by any electricity operator, a condition requiring the electricity operator to meet the reasonable costs and expenses of that local authority or other body or person—*
 - (a) *In processing any notice given under section 25(1) of this Act by the electricity operator in relation to the work:*
 - (b) *In supervising the carrying out of the work, where such supervision is necessary in the circumstances of the case.*
- (4) *Nothing in subsection (1) of this section applies in respect of the construction of any works intended to convey electricity at a voltage of more than 110 KV and a capacity of more than 100 MVA.*

Section 25 - notice to be given before work undertaken

- (1) *Except as provided in subsection (5) of this section, before an electricity operator proceeds to undertake any work pursuant to the powers contained in section 24(1) of this Act, the electricity operator shall give notice of its intention to undertake the work to—*
 - (a) *The local authority or other body or person having jurisdiction over the road to which the work relates; and*
 - (b) *The owner of any pipe, telecommunications line, or works that are constructed in, on, along, over, across, or under that road and that will be affected, or are likely to be affected, by the work.*
- (2) *Every such notice shall be in writing, and shall specify the location of the proposed work, the nature of the work to be undertaken, and the reasons for it.*
- (3) *Within 15 working days after the receipt of the written notice of the intention to undertake work, the persons who are given a notice pursuant to subsection (1) of this section shall notify the electricity operator, in writing, of any conditions imposed pursuant to section 24(2) of this Act.*
- (4) *Where a person who is given a notice pursuant to subsection (1) of this section fails to notify the electricity operator of the conditions imposed pursuant to section 24(2) of this Act within the period referred to in subsection (3) of this*

section, no such conditions may be imposed, and the electricity operator may commence work.

- (5) *Where any such work is rendered urgent and necessary by any defective equipment, or other emergency, the electricity operator shall be excused from complying with the requirements of subsection (1) of this section before commencing the work, but shall give the information required by subsection (2) of this section as soon as practicable thereafter.*

14. GAS ACT 1992

Section 25 - construction or maintenance of fittings on roads

- (1) *Except as provided in subsection (2) of this section, a gas operator may from time to time construct, place, and maintain fittings in, on, along, over, across, or under any road, and for any of these purposes may—*
- (a) *Open or break up any road:*
 - (b) *Alter the position of—*
 - (i) *Any pipe for the supply of gas; or*
 - (ii) *Any pipe (not being a main) for the supply of water; or*
 - (iii) *Any telecommunications line; or*
 - (iv) *Any electric works—*
that are laid or placed in, on, along, over, across, or under that road:
 - (c) *Alter, repair, or remove any fittings so constructed, placed, or maintained, or any part of any such fittings.*
- (2) *No gas operator shall exercise the powers contained in subsection (1) of this section otherwise than in accordance with such reasonable conditions as may be prescribed by—*
- (a) *The local authority or other body or person having jurisdiction over the road; and*
 - (b) *The owner of the pipe, telecommunications line, or electric works, as the case may be.*
- (3) *Without limiting the generality of subsection (2) of this section, a local authority or other body or person having jurisdiction over a road may impose under that subsection, in relation to any work undertaken by any gas operator, a condition requiring the gas operator to meet the reasonable costs and expenses of that local authority or other body or person—*
- (a) *In processing any notice given under section 26(1) of this Act by the gas operator in relation to the work:*
 - (b) *In supervising the carrying out of the work, where such supervision is necessary in the circumstances of the case.*
- (4) *Nothing in subsection (1) of this section applies in respect of the construction of fittings for the purposes of gas transmission.*

Section 26 - notice to be given before work undertaken

- (1) *Except as provided in subsection (5) of this section, before a gas operator proceeds to undertake any work pursuant to the powers contained in section 25 (1) of this Act, the gas operator shall give notice of its intention to undertake the work to—*
- (a) *The local authority or other body or person having jurisdiction over the road to which the work relates; and*
 - (b) *The owner of any pipe, telecommunications line, or electric works that are laid or placed in, on, along, over, across, or under that road and that will be affected, or are likely to be affected, by the work.*
- (2) *Every such notice shall be in writing, and shall specify the location of the proposed work, the nature of the work to be undertaken, and the reasons for it.*

- (3) *Within 15 working days after the receipt of the written notice of the intention to undertake work, the persons who are given a notice pursuant to subsection (1) of this section shall notify the gas operator in writing of any conditions imposed pursuant to section 25(2) of this Act.*
- (4) *Where a person who is given a notice pursuant to subsection (1) of this section fails to notify the gas operator of the conditions imposed pursuant to section 25 (2) of this Act within the period referred to in subsection (3) of this section, no such conditions may be imposed, and the gas operator may commence work.*
- (5) *Where any such work is rendered urgent and necessary by any defective equipment, or other emergency, the gas operator shall be excused from complying with the requirements of subsection (1) of this section before commencing the work, but shall give the information required by subsection (2) of this section as soon as practicable thereafter.*

15. RAILWAY SAFETY AND CORRIDOR MANAGEMENT ACT 1992

Section 17 - construction or repairing of lines on roads

- (1) *Except as provided in subsection (2) of this section, a rail service operator may from time to time construct and maintain railway works in, on, along, over, across, or under any road, and for any of these purposes may—*
 - (a) *Open or break up any road:*
 - (b) *Alter the position of—*
 - (i) *Any pipe (not being a main) for the supply of water or gas or the conveyance of waste or sewage; or*
 - (ii) *Any telecommunications line; or*
 - (iii) *Any electric line—*
that is constructed in, on, along, over, across, or under that road:
 - (c) *Alter, repair, or remove any works so constructed or maintained, or any part of any such works.*
- (2) *No rail service operator shall exercise the powers contained in subsection (1) of this section otherwise than in accordance with such reasonable conditions as may be prescribed by—*
 - (a) *The local authority or other body or person having jurisdiction over the road; and*
 - (b) *The owner of the pipe, telecommunications line, or electric line, as the case may require.*

Section 18 - notice to be given before alteration to lines on roads

- (1) *Except as provided in subsection (5) of this section, before a rail service operator proceeds to undertake any work pursuant to the powers contained in section 17(1) of this Act, the rail service operator shall give notice of its intention to undertake the work to—*
 - (a) *The local authority or other body or person having jurisdiction over the road to which the work relates; and*
 - (b) *The owner of any pipe, telecommunications line, or electric line that is constructed in, on, along, over, across, or under that road and that will be affected, or is likely to be affected by the work.*
- (2) *Every such notice shall be in writing, and shall specify the location of the proposed work, the nature of the work to be undertaken, and the reasons for it.*
- (3) *Within 15 working days after the receipt of the written notice of the intention to undertake work, the persons who are given a notice pursuant to subsection (1)*

of this section shall notify the rail service operator, in writing, of any conditions imposed pursuant to section 17(2) of this Act.

- (4) *Where a person who is given a notice pursuant to subsection (1) of this section fails to notify the rail service operator of the conditions imposed pursuant to section 17(2) of this Act within the period referred to in subsection (3) of this section, no such conditions may be imposed, and the rail service operator may commence work.*
- (5) *Where any such work is rendered urgent and necessary by any defective equipment, or other emergency, the rail service operator shall be excused from complying with the requirements of subsection (1) of this section before commencing the work, but shall give the information required by subsection (2) of this section as soon as practicable thereafter.*

16. RAILWAYS BILL

Clause 87 – maintenance of railway infrastructure on roads

- (1) *A licensed access provider may maintain railway infrastructure in, on, along, over, across, or under a road, and, for this purpose, may—*
 - (a) *open or break up that road:*
 - (b) *alter the position of—*
 - (i) *a pipe (not being a main) for the supply of water or gas or the conveyance of waste or sewage; or*
 - (ii) *a telecommunications line; or*
 - (iii) *an electric line:*
 - (c) *alter, repair, or remove any works, or any part of those works, that are constructed or maintained.*
- (2) *A licensed access provider must exercise the power to maintain railway infrastructure in accordance with any reasonable conditions that may be prescribed by—*
 - (a) *the local authority or other body or person that has jurisdiction over the road; and*
 - (b) *the owner of the pipe, telecommunications line, or electric line.*

17. RESOURCE MANAGEMENT ACT 1991

Section 375 - transitional provisions for public utilities

- (1) *Subject to subsection (2), every district plan or any proposed district plan constituted under section 373 shall be deemed to include—*
 - (a) *A rule that each of the following is a permitted activity throughout the district:*
 - (i) *Transformers and lines for conveying electricity at a voltage up to and including 110KV with a capacity up to and including 100MVA:*
 - (ii) *Household, commercial, and industrial connections to gas, water, drainage, and sewer pipes:*
 - (iii) *Water and irrigation races, drains, channels, and pipes and necessary incidental equipment:*
 - (iv) *Lines as defined by section 2(1A) of the Telecommunications Act 1987:*
 - (v) *Pipes for the distribution (but not transmission) of natural or manufactured gas at a gauge pressure not exceeding*

- 2,000 kilopascals and necessary incidental equipment, including household connections and compressor stations:*
- (vi) *Pipes for the conveyance or drainage of water or sewage, and necessary incidental equipment including household connections:*
 - (vii) *Lighthouses, navigational aids, and beacons; and*
- (b) *A rule that each of the following is a discretionary activity throughout the district and shall be allowed upon the condition that the territorial authority is satisfied that the proposed location is suitable, namely:*
- (i) *Transformers and lines for conveying electricity at a voltage exceeding 110KV and a capacity exceeding 100MVA:*
 - (ii) *Pipes for the transmission of natural or manufactured gas at a gauge pressure exceeding 2000 kilopascals and necessary incidental equipment, including compressor stations.*
- (2) *The application of this section may be excluded or modified at any time in accordance with Schedule 1.*
- (3) *This section shall cease to have effect in a district on the date that the proposed district plan for the district becomes operative, not being a proposed district plan constituted under section 373.*