

Chair
Finance & Expenditure Committee
New Zealand Parliament

NZUAG Submission on the Water Services Legislation Bill

Thank you for the opportunity to make a submission by the New Zealand Utilities Advisory Group Inc. (NZUAG) regarding the Water Services Legislation Bill (the Bill).

Introduction

The Water Services Legislation Bill (especially clause 22 amending the Water Services Entities Act 2022) proposes various provisions which are already the subject of existing legislation and regulation, in particular the *Utilities Access Act 2010* which -

- requires utility operators and transport corridor managers to comply with the *National Code of Practice for Utility Operators' Access to Transport Corridors* (the Code); and
- provides for the making and administration of that Code.

NZUAG was established by agreement between the Government and the infrastructure sector (including utility operators and corridor managers) to develop the Code for approval by the responsible Minister, conduct periodic reviews, and recommend changes for approval by the responsible Minister (currently the Minister for Infrastructure). NZUAG is an incorporated society whose membership and governance is drawn from across the infrastructure sector, with an independent chair. In effect, NZUAG is the forum for the various parties involved to collaboratively develop and agree the rules by which they will interact operationally within the transport corridors.

Purpose and content of the Code

The statutory purpose of the Code is to enable access by utility operators to transport corridors to be managed in a way that -

- maximises the benefit to the public while ensuring that all utility operators are treated fairly; and
- ensures that disruptions to roads, motorways, and railways caused by work by utility operators are kept to a minimum, while maintaining safety; and
- provides a nationally consistent approach to managing access to transport corridors.

The Code must set out the following:

- who it applies to;
- the principles governing how corridor managers deal with utility operators, and how utility operators deal with corridor managers and other utility operators, on issues relating to access to transport corridors;
- the processes and rules for coordinating work done in transport corridors by utility operators, or that affects utility operators' assets:

- processes for dealing with conflicts of interest arising from the same person being both a corridor manager and a utility operator, or being the operator of different utilities:
- how the statutory criteria for setting reasonable conditions, when utility operators have a right of access, are to be applied:
- whether, what, and how any other conditions relating to access may be imposed by corridor managers when utility operators have a right of access:
- how the criteria (published in accordance with a statutory requirement) for granting access are to be applied when utility operators request access:
- processes and rules for utility operators and corridor managers to share information:
- how compliance with the provisions of the Code is to be encouraged and provided for, including 1 or more dispute resolution procedures:
- operational processes and rules about work done by utility operators within transport corridors.

The Code may also -

- refer to standards, guidelines, or other documents that are not set out in the Code;
- provide for its provisions to be applied differently in different geographic locations, provided those provisions fulfil criteria of economy, efficiency, fairness, and acceptance by the affected utility operators and corridor managers;
- include any other matter that is consistent with the purpose of the Code and not inconsistent with any enactment.

In summary, the Code comprehensively covers how utility operators and transport corridor owners will fairly and equitably interact with each other in the transport corridor. The Code is subject to periodic review; indeed, such a review is due for completion later this year. That review is also likely to call for a broader mandate for the Code and its administration in the light of:

- many years of successful pre- and post-legislative consultation and agreement between infrastructure entities and government agencies to develop and renew the Code;
- over 10 years of practical experience of the Code's operation; and
- evolving opportunities for greater collaboration and efficiencies in operational processes, information provision, asset management, and extended coverage beyond the transport corridors.

Water Services Legislation Bill

We have not assumed any outcomes from Cabinet's decision to review the 3 Waters reform programme. We address ourselves to the Bill currently being considered by the Committee. We do not propose to provide a point by point submission on the Bill, but highlight a number of topics to illustrate a more general case.

Designation as Utility Operators

We strongly commend the amendment to the Utilities Access Act designating Water Services Entities as Utility Operators. This means the Code will continue to apply to the installation and maintenance of water infrastructure.

Notice Periods and Dispute Resolution

The Bill sets a time to process work notices which is irrespective of the scale, nature, and location of the work. This is unrealistic and unfair to corridor managers (and other utility operators), and has the potential for abuse of process. The Code anticipates that significant coordination and collaboration will be required to efficiently and effectively install, maintain, upgrade, and replace infrastructure. The Code recognises that disputes will arise between parties and provides that this is something that must be resolved through communication and negotiation. Where agreement cannot be reached, the Code provides for a dispute resolution process to be instigated by one of the parties (including mediation, arbitration, and a right of appeal to the District Court). In contrast to the Code, the Bill routinely relies on the District Court to resolve disputes and order access; this is unrealistic and impractical, especially when short notice periods apply. The District Court is already under severe caseload pressure and would be unlikely to provide timely resolution. In any case, the financial and executive costs of litigation relative to the scale and cost of most infrastructure work projects and the damage to ongoing cooperative operating relationships means litigation is rarely, if ever, invoked, rendering such provisions largely ineffective in their intentions.

Relocation

Requiring utility assets to be relocated is a routine operational procedure which is covered by various existing pieces of legislation for road corridor managers and utility owners. For example, the Code contains processes for relocation approvals, principles for cost sharing and “betterment” (replacing aging but still useful assets with newer or higher capacity assets), and a resolution process for disputes.

The Bill does not provide conditions and jurisdiction consistent with other legislation and other utilities. There is wide scope for legal dispute and conflict over legislative relevance and application. The provisions in clauses 32, 33 and 34 of the Electricity Act 1992, clauses 33, 34 and 35 of the Gas Act 1992 and clauses 147A, 147B and 147C of the Telecommunications Act 2001 have been standardised and should be copied to avoid claims of preferential treatment and potential conflicts with other legislation. The Code operationalises the existing legislation for general use with a standardised approach.

Railway Corridor

In respect of rights of entry in level crossings, there is a conflict between the Bill and the Railways Act 2005. Working in and around rail corridors is fraught with danger and the Railways Act has strong provisions regarding any uncontrolled access. The Railways Act gives control over level crossings to the rail corridor manager, even if a road is formed across it. However, both corridor managers will have an interest in any work, its quality and outcome, and both will need to have input to the process.

Stormwater

Roads are the major collection system for urban stormwater and direct all collected water into the enclosed urban stormwater systems. Less than a quarter of the water collected on a road comes from the road itself. Most of the water is collected by the properties adjoining the road and reaches the road by both enclosed and overland flow paths. The Water Services Entities will need the support and collaboration of the road corridor managers to manage stormwater,

but the Bill's overly bureaucratic and high-handed mechanisms are likely to be counterproductive to such cooperation. The operational and consultative approach adopted in the Code is a better mechanism based on practical working relationships, even more so when funding and delivering extensive infrastructure development and renewal are pressing economic, social, and financial issues.

Conclusion

Our principal concern is that the proposed Bill cuts across (and is inconsistent with) several well-established areas of legislation and regulation, in particular the *National Code of Practice for Utility Operators' Access to Transport Corridors*, which is a functioning and evolving mechanism. We strongly recommend the removal of those provisions in the Bill that relegislate matters already covered by other legislation, and replacing those provisions with a general provision recognising the *Utilities Access Act 2010* and its application to the new Water Services Entities.

Should there be matters in which Water Services Entities seek changes to the Code, there is an existing review process in place (in which the water sector is already strongly engaged).

We will be happy to respond to any queries you have on our submission, and would welcome the opportunity to present our submission in person to the Committee.

New Zealand Utilities Advisory Group

10 February 2023