

LEGAL UPDATE ON INFRASTRUCTURE LEGISLATION

Another significant milestone has been reached as the government moves to better manage the use of road, motorway and rail corridors by utilities with the passage through Parliament of 3 separate Acts of Parliament that will shortly come into force.

These Acts were introduced as 3 of 4 parts of the National-led government's omnibus Infrastructure Bill in August 2009. The Infrastructure Bill, except for the fourth part which repeals the largely unrelated "affordable housing" legislation (discussed below), was the culmination of government policy developments and consultations involving sector stakeholders dating back to 2004.

Although most of the measures had their origin under previous Labour governments, they are being promoted by the National-led government as consistent with its own regulatory reform and infrastructure development initiatives. Most particularly, the government envisages that the legislation will facilitate the roll-out of its ultra-fast broadband co-investment initiative and its rural broadband initiative. We also cover in this update the government's further planned steps to reduce impediments to infrastructure development.

Utilities Access Act 2010

This Act establishes a framework for a national code of practice to govern how utility operators (notably electricity lines companies, gas companies, telecommunications network companies and water and wastewater operators) and corridor managers (notably local councils, regional councils, New Zealand Transport Agency and New Zealand Railways Corporation (the KiwiRail Group)) co-ordinate their activities regarding access to transport corridors.

The code (and any code variations) is required to meet purpose provisions and must include principles, rules and operational and dispute resolution processes. These include content requirements which were beefed up on the recommendation of the Transport and Industrial Relations Select Committee. The code must have broad agreement between stakeholders.

The code must be approved in advance by the Minister responsible for the Act (anticipated to be the Minister of Infrastructure). The approved code will be deemed a regulation that utility operators and corridor managers will need to comply with. Exceptions include where the code conflicts with another enactment or standard or instrument that is binding on the operator or corridor manager and where non-compliance is agreed between the corridor manager and affected operators. However, such agreement must not affect the obligations of the corridor manager or utility operator under any other enactment or binding standard or instrument.

Enforcement of the code is also provided for in the Act. Subject to having first to use the appropriate dispute resolution procedures in the code, application may be made by any utility operator or corridor manager to the District Court for an order for compliance with the code by another utility operator or corridor manager. Non-compliance with a Court Order may attract a fine up to NZ\$200,000.

As a back-up option to the code, regulations may be made. This will occur only if no code has taken effect, or is unlikely to, or an existing code is cancelled.

The Act does not mandate a particular body to develop and manage the code. Either the responsible Ministry or any other person may prepare the code subject to mandatory consultation requirements. However, the New Zealand Utilities Access Group (NZUAG), a joint consultative group involving network operators, territorial authorities, New Zealand Transport Agency and industry bodies, led the development of an industry code for this purpose since 2007. This initiative followed the Labour/Progressive government conceding to concerns expressed by major stakeholders about its original proposal to give local authorities a role in managing access to transport corridors.

NZUAG's code, the "*National Code of Practice for Utilities' Access to the Transport Corridors*" was released in March 2009 for voluntary implementation. NZUAG has said that, once the Act is passed, it will hold a further round of consultation on the code (a requirement of the Act) before applying for approval by the Minister to its mandatory use by 1 July 2011. The current implementation version may be found [here](#). NZUAG also foreshadowed that before consulting further, the current version of its code and the consultation plan will be reviewed by Treasury officials to ensure full compliance with the new Act. It also anticipates reforming as an incorporated society to facilitate the funding of its activities including maintenance of the code.

Infrastructure (Amendments Relating to Utilities Access) Act 2010

This Act amends 6 other Acts that relate to utilities: the Telecommunications Act 2001, Electricity Act 1992, Gas Act 1992, Government Road Powers Act 1989, Railways Act 2005, and Local Government Act 1974. The amendments are intended to achieve greater certainty and consistency in the rights and obligations of utility operators and corridor managers under these statutes.

Notice requirements for access under the **Telecommunications Act** have been amended and provisions are inserted for dealing with situations where telecommunications network operators are required by road authorities to alter an operator's lines etc.

The **Electricity Act** and **Gas Act** are amended to list criteria for road authorities to consider when setting reasonable conditions for work carried out on roads by electricity operators and gas operators respectively.

Amendments to all 3 of those Acts, as modified by the Select Committee and a second government Supplementary Order Paper (SOP) introduced at the later Committee stages, prohibit road authorities from imposing conditions on utility operators that require them to increase amenity values unless the area in which work is to be done is identified in district plans. The areas must be ones where there are particular considerations, or rules or requirements relating to amenity values.

The Select Committee also amended the Infrastructure Bill, consistent with the Telecommunications Act, to ensure that under the Electricity and the Gas Acts only local authorities, and not other utilities, can impose conditions in relation to movements to their assets. This is seen by the government, in part, as avoiding the risk of anti-competitive behaviour by operators imposing disadvantageous conditions on competing operators.

The **Government Road Powers Act** has been amended and imposes new notice requirements on the Minister of Transport or other road authorities in respect of commencing work on roads under their control that could interfere with lines or pipes etc of utility operators.

Until now, utility operators had no general right of access to the rail corridor. The New Zealand Railways Corporation (KiwiRail Group) had powers under the New Zealand Railways Corporation Act to grant and revoke easements subject to onerous conditions. Utilities had a right of entry at level crossings only, where a unique regime applies, with application or access being determined by the District Court.

The Bill, as introduced and modified by the Select Committee, proposed amending the **Railways Act** to require the Corporation and "*licensed access providers*" (but only those gazetted by the Minister), in relation to railway land, to publish their criteria for access to corridors and to respond in writing within 30 days to an access request. The proposed national code under the Utilities Access Act (discussed above) was also seen by the government as facilitating greater co-operation between rail corridor managers and utility operators. As noted by the Associate Minister of Infrastructure, Hon Steven Joyce, at the Second Reading stage, submitters pointed out that the amendments to the Railways Act recognised the rail corridor was underutilised and that the amendments did not go far enough towards enabling greater use of the rail corridor by utilities. KiwiRail had cited fundamental differences between road and rail especially in the way that it operates - particularly its inability to divert traffic - and safety concerns as reasons why the original proposals were appropriate.

A late third government Supplementary Order Paper, introduced at the Committee stages of the Bill, addressed operator concerns in a limited way by an additional amendment to the New Zealand Railways Corporation Act. This amends existing provisions that make easements, privileges and concessions in respect of railway land subject to revocation without compensation, and to immediate revocation in case of a breach of conditions. The amendment will enable the Corporation to grant to utility operators (more) acceptable conditions for access to the rail corridor. However, existing easements etc will remain subject to the former statutory provisions.

New Zealand Railways Corporation Amendment Act 2010

Apart from the late SOP amendment regarding new easement conditions, this Act makes relatively minor amendments to the New Zealand Railways Corporation Act 1981 to bring it into line with the Crown Entities Act. The changes include normalising the appointment and dismissal of directors, changing to a simple majority the number of directors who can call meetings, establishing the power to appoint a deputy chairperson, and streamlining arrangements for changes to the Corporation's capital. It also removes the requirement to annually provide the Minister with a programme of capital works, removes the limit on how much the Corporation can expend in one year and permits the Corporation to effect insurance cover for, or give an indemnity to, a director or employee.

Affordable Housing: Enabling Territorial Authorities Act Repeal Act 2010

Part 4 of the Infrastructure Bill proposed repeal of the former 2008 Act. This created some political controversy about whether or not it was germane to and consistent with other provisions of the Bill. The now repealed Act, which was intended to provide local authorities with regulatory tools to address problems for housing affordability, was regarded by the National-led government as unduly complex, prescriptive and counterproductive. Nevertheless, the government has retained a more limited version of one provision of the repealed Act, namely the former statutory prohibition against land covenants which had a purpose of preventing affordable housing or social housing on the land. The revised prohibition, now an amendment to the Property Law Act, is confined to land covenants which have, as their principal purpose, restriction of social housing (a defined term in the amendment).

Further steps to reduce impediments to infrastructure development

Fibre development

The Ministry of Economic Development has been consulting on possible access improvement measures to facilitate the implementation of the UFB and rural broadband initiatives - see our [July 2010 legal update](#). The latest move comprises a proposed "Deployment Standards Initiative" involving pilot deployments to test proposed fibre deployment standards. Submissions on this proposal closed on 23 July 2010.

Infrastructure component of planned phase 2 RMA reforms

Scoping work being undertaken by the Ministry for the Environment for the government's planned Phase 2 of the reforms of the Resource Management Act includes work on ways of improving planning for infrastructure development. One of the work components is an investigation of alternatives to designations for planning for and managing the effects of activities on network infrastructure. The Ministry for the Environment has been working with 2 interrelated technical advisory groups (TAGs), the Infrastructure TAG and the Urban TAG, appointed by the Minister for the Environment, Hon Nick Smith, in January 2010. Their reports are intended to feed into Ministry for the Environment's work and eventually legislative proposals under the umbrella of the Phase 2 RMA Reforms. A paper is expected to go to Cabinet in August/September on the outcome of this work which may result in the release of a Ministry for the Environment discussion paper on urban and infrastructure planning issues for consultation with stakeholders.

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