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INFRASTRUCTURE BILL

SUBMISSION TO THE TRANSPORT AND INDUSTRIAL RELATIONS COMMITTEE

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1. BACKGROUND TO IPENZ

The Institution of Professional Engineers New Zealand (IPENZ) is the lead national professional body representing the engineering profession in New Zealand. It has approximately 10,000 Members, including a cross-section from engineering students, to practising engineers, to senior Members in positions of responsibility in business. IPENZ is non-aligned and seeks to contribute to the community in matters of national interest giving a learned view on important issues, independent of any commercial interest.

2. CONSULTATION

A draft version of this submission was available to all IPENZ Members via the IPENZ web site. In addition, interested Members were sent the draft submission directly. All IPENZ Members were able to comment on the submission and Members' comments were included in this final version of the submission.

3. EXECUTIVE SUMMARY

IPENZ believes that the Bill should be based on the principles of consistency, reciprocal rights, and causer pays. In addition the “commons” approach and continuation of all parties having an absolute right of access to transport corridors without charge is supported – with the exception of motorways and rail corridors.

Regarding the Code, while IPENZ supports the approach, we are concerned about regulating a best practice guideline and the implications this would have for referenced standards and guidelines.

There is a need to provide much more consistency in the notification provisions – notification to undertake work, notification exemptions for emergency work, and response times to notifications. Similarly, on the reasonable conditions issue and reciprocal rights, the Bill needs to be amended to ensure that, in generic terms, when one party alters their assets (whether a utility or a corridor manager) and this has implications for another party, that responding party should have the power to impose reasonable conditions.

To ensure that the principle of causer pays is followed, the Bill needs to be amended to ensure that this approach applies to the NZ Transport Agency in the case of local authority utilities, and between all corridor managers.

For rail, amendments are required to the Railways Act 2005 to ensure consistency of the notification provisions, and to ensure the principle of causer pays applies to the rail corridor and its interaction with utilities and roads.

4. GENERAL COMMENTS

IPENZ notes that the purpose of this Bill is to “progress a broad suite of amendments, across several Acts, to facilitate infrastructure development by removing unnecessary barriers and improving the consistency of regulatory arrangements”. IPENZ strongly supports this objective.

This submission is based on three key principles – consistency, reciprocal rights, and causer pays, and evaluates the provisions of the Bill against these principles.

4.1 PRINCIPLES

The three key principles are:

- consistency – all utilities, road controlling authorities, and rail corridors should be treated in the same way and their relevant legislation should be amended to achieve this consistency
- reciprocal rights – what one utility is able to require of another utility should allow reciprocal rights for each utility, and this should apply with and between transport corridor managers
- causer pays – the party that causes a cost to be imposed on another party should pay that cost.

It needs to be recognised that road controlling authorities have responsibilities to both road users and communities, and therefore have different responsibilities than utilities. The two main road controlling authorities are territorial authorities and the NZ Transport Agency. However territorial authorities also have utility functions (water, wastewater and stormwater), and care needs to be taken that these two different responsibilities of territorial authorities are recognised in the Bill.

4.2 TRANSPORT CORRIDORS – THE COMMONS

The basis of the current arrangement is that the roading corridor is effectively a “commons” – all parties have an absolute right of access without charge, subject to conditions. IPENZ supports continuing this right of access without charge.

However, currently motorways and rail corridors are in a different category, as their overriding function is that of a specialised transport corridor and as such they are not “commons”. In these two cases, IPENZ believes that the corridor manager should continue to have the right to veto access by others. However, once utilities are installed in these corridors, the causer pays principle should apply. This is discussed further below.

5. PART 1 – UTILITIES ACCESS (CLAUSES 3 TO 18)

Part 1 introduces a national code of practice that governs how utility operators and corridor managers co-ordinate their activities. The code is to be approved by the Minister, and utility operators and corridor managers will be obliged to comply with it.

5.1 THE CODE

IPENZ generally supports that the Code will have the support and enforcement of legislation. It is also noted that Clause 10 (3) provides for variations to the Code. However there are two concerns with the implications of a legally enforceable Code.

- The current Code provides best-practice guidance – is it feasible to legislate for “guidance”?
- The current Code refers to other non-statutory standards and guidelines – what are the implications for those standards and guidelines of this Bill?

In considering submissions, there is a need to separate the provisions of the Bill from the provisions of the Code and decide where issues should be addressed. It is expected that a number of submissions will raise detailed issues that need to be resolved during the development and agreement of the Code – not the Bill. Similarly, the issue of co-ordination is very significant but IPENZ believes this is best addressed through detailed provisions in the Code and other initiatives of the New Zealand Utilities Advisory Group. Legislation is limited on the extent to which it can address the co-ordination issue.

It is noted that local authorities, the NZ Transport Agency, and rail licensed access providers are all corridor managers (Clause 4) and therefore have an obligation to comply with the Code (Clause 6).

6. PART 2 – AMENDMENTS RELATING TO UTILITY ACCESS TO TRANSPORT CORRIDORS (CLAUSES 19 TO 40)

6.1 NOTIFICATION ISSUES

6.1.1 Notification to undertake work that may interfere with other utilities

It is noted that 10 days notice is already required in the case of motorways (S77 of the Government Roadway Powers Act 1989) and the Bill adds a requirement for 10 days notice for State Highways (Clause 34). A requirement to give 10 days notice is added for local authorities in the Bill (Clause 39), and for rail, the obligation exists to give 10 days response time in Section 88 of the Railways Act 2005. The rail issue is discussed further below in comments on Part 3.

However, under the Electricity Act 1992, there is no notification time specified under Section 25. Similarly, there is no notification time specified under Section 26 of the Gas Act 1992. These necessary amendments are not provided for in this Bill.

For telecommunications, similarly there is no provision in the Telecommunications Act 2001 for a notification to undertake works that may interfere with other utilities. It is noted that Section 142 of this Act does provide 10 working days notification to a local authority for the installation of cabinets, and under Clause 25 of this Bill, this is extended to utility operators.

Similarly, in the Local Government Act 1974, and in Sections 52 and 54 of the Government Roadway Powers Act 1989, there are no provisions for 10 days notice between a local authority and NZ Transport Agency (there is a 10-day failure to act provision in Section 54, but this is different).

To meet the consistency principle it is recommended that the Electricity Act 1992, the Gas Act 1992, Telecommunications Act 2001, the Local Government Act 1974, and the Government Roadway Powers Act 1989 be amended to provide 10 days notice to undertake work that may interfere with and between utilities and corridor managers.

6.1.2 Notification to undertake work – exemption for emergency work

The amendment to the Government Roving Powers Act 1989 (Clause 36) provides an exemption to the 10 days notice in the case of emergency work or danger. However, this provision is not in Clause 39 for local authorities, and as discussed above, there are no notification provisions for utilities. It is noted that Section 88 of the Railways Act 2005 does provided an exemption to notification for emergencies.

To meet the consistency principle, there should be exemptions to notification provisions for emergency work or danger in the Local Government Act 1974, the Electricity Act 1992, the Gas Act 1992 and the Telecommunications Act 2001.

6.1.3 Notification of conditions when given notice (response time)

For telecommunications, we note that the Bill reduces the time within which local authorities and the NZ Transport Agency (but not utilities) have to respond from 20 days to 15 days (Clause 23). The Electricity Act 1992 (Section 25) and the Gas Act 1992 (Section 26) already require local authorities, the NZ Transport Agency and utilities to respond within 15 days of notification.

Also there are no response times applicable between local authorities and NZ Transport Agency. It is noted that Clause 37 of the Bill provides for the NZ Transport Agency to respond within 30 working days.

To meet the consistency principle, it is recommended that there be a consistent period of 15 days for a response time to notify conditions, between utilities and between corridor managers.

6.2 DIFFERENT SECTIONS FOR OPENING AND CONSTRUCTION

It is noted that the Telecommunications Act 2001 is the only legislation with a separate section on opening a road (Clause 22) and one for construction of cabinets on roads (Clause 25). The Gas Act 1992 (Section 25) and the Electricity Act (Section 24) have one generic section dealing with opening or altering works in, on, along, or over a road.

To meet the consistency principle, the Telecommunications Act 2001 should have one section dealing with opening roads and construction on roads.

6.3 REASONABLE CONDITIONS PROVISIONS

IPENZ fully supports the intention for consistency in reasonable conditions and using the criteria approach, as per the Telecommunications Act 2001. IPENZ also supports amending the Gas Act 1992 and the Electricity Act 1992 to incorporate this approach. These provisions provide powers for local authorities to impose reasonable conditions.

IPENZ is unable to identify any ability for utilities to impose reasonable conditions on another utility or on a local authority for its utilities. For example, if an electricity utility wants to alter an electricity cable, and these affect a gas pipe – the gas utility might want to set conditions relating to safety, excavation techniques, proximity of the other services, or backfill techniques.

IPENZ is also unsure whether there is any ability for local authorities to impose reasonable conditions on the NZ Transport Agency for impacts on its roads or utilities, although Section 77 of the Government Roving Powers Act 1989 does provide for a local authority to object. Similarly, IPENZ is uncertain where the NZ Transport Agency has powers to impose reasonable conditions on local authorities for an impact on its roads.

To meet the reciprocal rights principle, the Bill should be amended to ensure that when one party alters their assets (whether a utility or a corridor manager) and this has implications for another party, the responding party should have the power to impose reasonable conditions.

6.4 CAUSER PAYS

IPENZ supports the principle of causer pays – if one party imposes a cost on another party then the causer (initiator) should pay that cost. Clause 28, which amends the Telecommunications Act 2001 by inserting Section 147C, provides for a controlling authority to pay costs if altering a telecommunications cable, and there are similar provisions in Clause 30 (Electricity Act 1992) and Clause 32 (Gas Act 1992) relating to the person requiring an increase in amenity values to pay the increased cost. Both of these Acts have a provision that overrides the “equal shares” provisions of Section 54 of the Government Roothing Powers Act 1989. These provisions follow the principle of causer pays.

IPENZ believes that these provisions should apply between the corridor managers – the NZ Transport Agency and a local authority – whether the local authority is acting as a corridor manager or a utility. Section 54 of the Government Roothing Powers Act 1989 provides that where the NZ Transport Agency alters a State Highway, the local authority has to pay equal shares (50-50) to shift its services. A real world example was when Transit NZ installed a new roundabout and the local authority had to pay \$0.5 million to pay half of the cost of shifting one of its pump stations.

Similarly, if the NZ Transport Agency alters a State Highway or a motorway and this requires a local road to be altered, then the causer pays principle should apply. There should be a similar provision for rail.

In the discussion on the “commons” above for rail and motorways it was indicated that the corridor manager should continue to have the right to veto access by others. These veto provisions are in Section 78 of the Government Roothing Powers Act 1989 and Section 75 of the Railways Act 2005. However, once services are installed in these specialised transport corridors, then the causer pays principle should apply. Section 54 of the Government Roothing Powers Act 1989 and the relevant overriding clauses in the other utility legislation appear to apply to motorways. However, IPENZ has been unable to identify any sections in the Railways Act 2005 that apply the causer pays principle. This is referred to in the next section.

To meet the causer pays principle, the Bill should be amended to ensure that the causer pays approach applies to the NZ Transport Agency in the case of local authority utilities, and between all corridor managers.

7. PART 3 - AMENDMENTS RELATING TO NEW ZEALAND RAILWAYS CORPORATION (CLAUSES 41 TO 48)

IPENZ has reviewed the Bill to consider if the New Zealand Railways Corporation is covered by the provisions of Part 1 and Part 2. These relate to application of the Code, and the 10 days notification to undertake work. For rail, Section 88 of the Railways Act 2005 already contains the obligation to give 10 days (not 15 days) response time.

It is noted that for rail, the licensed access provider is a corridor manager (Clause 4) and therefore has an obligation to comply with the Code (Clause 6). It is noted that the term “controlling authority” used in the Government Roothing Powers Act 1989 does not include rail.

It is also noted that the Railways Act 2005 includes reasonable condition provisions – although it does not use the term “criteria” but “must have regard to”. However, as explained above in the discussion on causer pays, there appears to be no provisions in the Railways Act 2005 that apply the causer pays principle.

To meet the consistency principle, the Bill should be amended to include a 10-day notification period for work that may affect utilities, and amend the 10 days to 15 days for the response time.

To meet the causer pays principle, the Bill should be amended to ensure the causer pays principle applies to the rail corridor and its interaction with utilities and roads.

8. PART 4 - AMENDMENTS RELATING TO AFFORDABLE HOUSING (CLAUSES 49 TO 54)

Repeals Affordable Housing: Enabling Territorial Authorities Act 2008 – no comment.

9. CONCLUSION

IPENZ appreciates the opportunity to make this submission and is able to provide further clarification if required.

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