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ICT Policy & Programmes
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By email: landaccess2015@mbie.govt.nz

Land Access for Telecommunications, June 2015

Introduction

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the proposals outlined in the Ministry of Business, Innovation and Employment's (MBIE) *Land Access for Telecommunications discussion document* (discussion document).

The objective of the public consultation is to inform the government "on how the right balance can be struck between protecting property rights on the one hand, while allowing more New Zealanders to realise the benefits of UFB [Ultra-Fast Broadband] on the other" (discussion document at [6]). The Law Society's Property Law Section has considered the discussion document, and the Law Society has responded below to specific questions on which it has relevant expertise and information.

Proposal 1 – Options to facilitate FTTP (fibre to the premises) connections

Q6. *Would you prefer the deemed consent approach or the low impact facilities approach or some combination of the two? Please state your reasons for your preference.*

Option 1, the Deemed Consent approach, would amend the process of third party permission to enter land for the purpose of installing fibre: the current process of requiring all parties to actively opt-in would change to one that allows the installation to go ahead *unless* a party actively opts-out. Under this approach, a party who does not respond is deemed to have consented to the activity. If a party actively objects, the third party is not authorised to install the UFB cables until an agreement has been reached and consent is given.

Option 2, the Low Impact Telecommunications Facility, would provide an automatic right to install infrastructure where the impact on land/affected property owners is very low, based on a strict definition of "Low Impact".

The Law Society recommends a combination of the two approaches in order to strike the right balance between property owners' rights and interests and the objectives (including efficiency) of the UFB infrastructure roll-out.

The combined approach could operate as follows:

- a. Affected property owners would be sent notices of a network operator's intention to enter the land and install a UFB connection, subject to meeting certain conditions. The activity would be either low impact or high impact.
- b. If the affected property owners actively give permission in response to the notice, the installation can go ahead without delay.
- c. Where the activity is a "low impact" activity and no response is received, provided certain conditions were met, network operators would have the right of access for installation.
- d. Where the activity is a "high impact" activity, property owners must actively consent or object to the installation. Failure to reply should not be deemed consent.
- e. In either case, where objections are raised and issues cannot be worked through, the matter would be addressed through a dispute resolution process (as outlined in the discussion document at [29]).

Q7. *Would you support a move away from requiring written consent from affected property owners to a request to connect UFB to an approach that assumed consent is implied but provides a mechanism to opt-out?*

The key question is the nature and impact of the activity. Where an activity has a "high impact" it would be unfair to say a property owner has "consented" to that activity when he or she has simply omitted to object.

On the other hand it may be reasonable to say the property owner has "consented" to a low or medium impact activity where he or she has not actively consented or objected.

Q8. *If the requirement for written permission for access is changed, what conditions or safeguards should be applied?*

The discussion paper (at [20]) outlines a number of safeguards and conditions that would apply if either Option 1 or Option 2 proceeds. The Law Society comments on these as follows.

Identifying and contacting affected property owners

It is proposed (at [20]) that property owners should be identified and contacted using information from the ratepayer database. It would be advisable to supplement this with additional forms of communication (such as telephone or email contact) as rates information may be out of date. Advertising the changes in some form may also be appropriate especially in the case of Multi-Unit Complexes.

Notification period and requirements

As the discussion document notes, the length of the notice period needs to be balanced between giving sufficient notice to affected property owners and efficiency. The current process requires two notices of 20 working days each.

Use of existing corridors

Network operators will only be able to install connections in existing access corridors such as vehicular access ways. This is an important safeguard as it ensures control and autonomy over private land.

Opt out or objection processes

The discussion document states that network operators will be required to provide clear and accessible processes for affected property owners to opt-out or object to an installation. The Law

Society agrees that efficient processes for addressing property owners' concerns and resolving disputes will be an important part of facilitating network operators' access to properties.

Responsibility for reinstatement

The Law Society agrees that responsibility for reinstatement of the land and any damage, on a like for like basis and to the property owner's satisfaction, should fall on network operators.

- Q9. *In what circumstances should an affected property owner be allowed to object to a network operator accessing land they share with a neighbour to install a connection?*

As stated above in response to Q7, rights to object should depend on the impact of the activity. Where an activity is defined as "low impact" the objection to accessing shared land might be limited to negotiating the terms of access, whereas a "high impact" activity might warrant a right to object to the entire activity.

Proposal 2: Facilitating the deployment of fibre using existing utility infrastructure

- Q13. *Any right to deploy and maintain fibre with existing utilities needs to have a low impact for those affected. What matters should the Ministry take into account when setting the terms and conditions for access to private land to minimise the impact on owners?*

The right to install infrastructure on existing lines needs to be considered carefully as it raises the issues of access for ongoing repair and upgrade of the infrastructure. These issues have recently been subject to litigation. If the proposals proceed, there will need to be clarity about how owners will be compensated and what continuing rights of access would be granted.

Proposal 3: Ongoing rights of access to installed fibre infrastructure

- Q14. *Should the rights network operators have to access and maintain fibre networks be similar to rights they have to access and maintain legacy copper telecommunications networks? Please provide reasons for your answer.*

If network access operators are to be given rights to access existing infrastructure for fibre, these rights should be similar to the current rights for legacy copper networks. These rights represent a good balance between private property rights and infrastructure needs.

- Q15. *What factors should the Ministry take into account when setting conditions for access to installed infrastructure in order to minimise the impact on property owners and provide for an efficient access process in this context?*

As the discussion document makes clear, the objective of assisting the UFB roll-out needs to be balanced with respect for the rights of property owners. If the proposed regime is similar to the existing regime for legacy copper networks, property owners may not be too troubled by the new regime. The Ministry will need to assess the costs of accessing the infrastructure via a new or expanded easement against the benefits of an expedited UFB rollout.

Proposal 4: A fair, accessible and expanded disputes resolution process

- Q17. *Do you support the stated objectives for dispute resolution set out in this section? Please provide reasons for your answer.*

The objectives outlined at [30] are supported. The discussion document at [29] makes a clear case for a more accessible, informal and faster dispute resolution process. Property owners should not be able to delay or block UFB installation for spurious reasons.

The discussion document says (at [30]) that it is “desirable that network providers and property owners negotiate an agreement directly without the need for third party assistance or intervention”. The need for an informal process is acknowledged. However, there may be a significant inequality of arms. A process that excludes third party professionals and requires the parties to negotiate directly may put some property owners at a considerable disadvantage in dealing with network operators who will be well resourced and experienced in the dispute procedures. In considering this issue, the concept of indefeasibility of title needs to be considered against the commercial imperatives of the UFB roll-out.

Q18. *Do you support the proposed expanded scope for dispute resolution? Are there any grounds you would add or remove? Please provide reasons for your answer.*

The Law Society supports the proposed expanded scope of dispute resolution.

The criteria for design of the disputes resolution framework set out at [30] – fairness, transparency, efficiency, accessibility, and with appropriate mechanisms for resolving landowners’ complaints – are also supported.

The Law Society considers that compensation should not be the only remedy. Where compensation would not be an adequate remedy, the adjudicating body should have the ability to order the removal of the cabling.

In addition, the dispute resolution process could also consider whether alternative routes are available and the intended use of the land.

In relation to the question of disagreements between landlords and tenants, it is appropriate to have an accessible dispute service but that service should be required to consider the contractual arrangements between the landlord and tenant. In this instance it is likely that the disputes will involve penetration of buildings which will also bring into play water-tightness issues and reinstatement provisions.

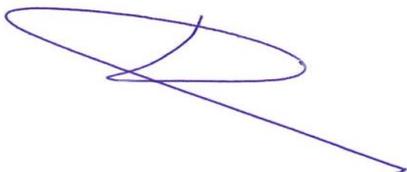
Q19. *What factors should the Ministry take into account when deciding on a body to hear or decide these disputes?*

Cost and availability of the service will be important factors to consider. The service should be free (or at low cost) and accessible (in geographical terms) to property owners throughout the country. The body hearing disputes will also need access to experts familiar with any land issues facing network operators in each area.

Conclusion

If you wish to discuss the above comments please do not hesitate to contact the Law Society’s Law Reform Manager Vicky Stanbridge (vicky.stanbridge@lawsociety.org.nz / 04 463 2912) in the first instance.

Yours sincerely,



Mark Wilton
Vice President