

**HANDBOOK FOR OPTIMAL DEPRIVAL
VALUATION OF SYSTEM FIXED ASSETS OF
ELECTRICITY LINES BUSINESSES**

**Paper Prepared on Behalf of Powerco Limited
(Definition of System Fixed Assets)**

15 April 2004

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INTRODUCTION

1. This paper has been prepared on behalf of Powerco Limited for the purposes of the Commerce Commission's ODV Handbook Conference. The paper considers the legal definition of "System Fixed Assets", particularly as that definition pertains to statutory rights or easements.
2. The current MED ODV Handbook maintains a distinction between pre-1993 easements, which were acquired pursuant to statute, and post-1993 easements, which are a product of private bargain and registered against the legal title. The Commission's Draft Handbook proposes adopting the same approach.
3. This paper submits that when the origin and nature of the pre-1993 easements is considered, then the distinction drawn between the two forms of easements is not maintainable. The nature of the pre-1993 easements is such that they fall within the definition of system fixed assets, and should form part of the regulated asset base.

APPROACH IN HANDBOOKS

4. The Commission has indicated in earlier papers¹ that it has an open mind as to the extent to which it should differ in its approach from that in the MED ODV Handbook. It notes that any changes are likely to be driven by the extended scope and wider application of an ODV Handbook in the context of Part 4A.
5. The Commission also properly acknowledges that its choice of valuation methodology must be that which best ensures that the regulatory mechanisms achieve the statutory purpose of Part 4A.²
6. The current MED ODV Handbook states in paragraphs B28 – B29:

Easements

B.28 The "existing works" provisions in the Electricity Act 1992 protect the ownership of lines (both ELBs and Transpower) constructed or commenced prior to January 1993. They also provide for line owner access to the land

¹ Para 7 "Issues Paper: Regulation of Electricity Lines Businesses: Development of Handbook for Optimised Deprival Valuation of Electricity Lines Businesses System Fixed Assets" 11 September 2003.

² Para 3.1 "Discussion Paper: Review of Asset Valuation Methodologies: Electricity Lines Businesses' System Fixed Assets" 1 October 2002.

the works are on, to inspect, maintain and operate them. Under previous legislation the Crown and ESAs had virtually unlimited rights of access to land to build works. Easements were not required. Easements are not explicitly required by the Electricity Act 1992, but are expected to be the normal means of registering rights.

B.29 Only easement rights obtained and registered against a land title after 1 January 1993, (or in the case of Transpower, additionally between 1 January 1988 and 1 January 1993), and paid for, can be valued provided that the sum paid has not already been expensed.

7. The Handbook therefore makes a clear distinction between pre-1993 easements and post-1993 easements. The Commission proposes to adopt this approach in its draft Handbook.
8. The basis upon which the MED Handbook draws this distinction is not specified by MED. Powerco believes that it may be based on the view that:
 - (a) the pre-1993 easements are “intangible” and so fall outside the definition of system fixed assets; and/or
 - (b) the pre-1993 easements were not purchased but were simply derived from statute.
9. For reasons which follow, it is submitted that neither of these rationales are correct.

THE ORIGIN AND NATURE OF THE STATUTORY RIGHTS

10. This part of the Paper reviews the origin and nature of the statutory rights in question. The legislation provided variously for electric power boards, electricity supply authorities (which included municipal electricity departments), and the Crown to enter private land for the purposes of distribution. These rights were not, however, unlimited. The consent of landowners was generally required. More significantly, the legislation required the payment of compensation under the Public Works legislation.

Electric Power Boards Act 1925

11. The genesis of the statutory rights under discussion was the Electric Power Boards Act 1925. Under Section 76 of that Act a Board³ could not undertake, *inter alia*, electric works⁴ except with the authority of the Governor-General by Order in Council⁵.

12. Section 81 provides that, subject to the provisions of the Act, the :

Board may exercise all or any of the powers hereby conferred by this Act for the purchase or construction of the electric works, and **may enter upon or cause to be entered upon all lands** which it is authorised to use or acquire under this Act for the purpose of making such surveys as may be necessary, and subject as foresaid, **may take and hold all the lands required for the electric works**, and **may from time to time temporarily occupy and use such lands** as may be necessary on either side of the electric works during the construction thereof, and for the purposes of maintenance thereof.

13. Section 82 sets out the “general powers” of the Board with respect to electric works authorised under the Act. They are extensive.⁶

14. Section 84 provides for the powers of the Board in respect of private lands. It states:

In further addition to the powers conferred by section eighty-two hereof the Board may construct tunnels under any private land, or aqueducts or flumes over the same, and may erect poles thereon, **and carry wires over or along any such land** without being bound to acquire the same with right of way by the best available route to and along all such works and erections for the Board’s servants, workmen, an agents, from time to time and at all times...; and may also deposit

³ “Board” means an Electric Power Board of an electric power district.

⁴ “Electric works” includes generating works, transmission lines, transformer stationers, and all other works authorised to be constructed or carried out under this Act. Various *Gazette* Notices were published which authorised power boards to construct electric works, including electric lines for distribution.

⁵ The original section 76 was amended in 1961 and 1969 but remained of broadly similar effect.

⁶ For example the Board

(a) may erect generating works, transmission lines, transformer stations, and all other works authorised by this Act on, over, or under any land necessary for the construction thereof, and for this purpose may construct works of every description and of every material necessary to the working thereof;

(p) may make such arrangements as it may deem expedient to consumers, either individually or collectively, whose point of consumption is within the outer area, for the erection and maintenance of a transmission line or transmission lines, and supply of electric power;

(r) generally may do all acts necessary for constructing, maintaining, altering, repairing and using the works and all the other undertakings of the Board.

and store from time to time upon any lands adjoining such works all such machinery and material of any kind as may be used in the construction or repairing of such works:

Provided that nothing in this section shall abrogate the right of the owner or occupier to have all the rights to compensation given by section ninety-four hereof.

15. Section 94 provides for compensation under the Public Works Act 1928 for lands taken or injuriously affected:

Every person having **any estate or interest in any land** taken under the authority of this Act, or injuriously affected thereby, [and every person suffering any damage whatever from the exercise of any of the powers conferred by this Act], shall be **entitled to full compensation** for the same from the Board... [under the Public Works Act 1928].

Electricity Act 1968

16. The major purpose of the Electricity Act 1968 was to consolidate and amend certain enactments relating to the generation and sale of electricity. It further defined the functions of the New Zealand Electricity Department (“**the Electricity Department**”). It did not repeal the Electric Power Boards Act 1925, the provisions of which continued to apply.
17. The Electricity Department, under control of the Minister of Electricity, was intended to oversee the production, transmission and supply of electricity. Its principal functions were set out in section 6 of the Electricity Act 1968:
- (a) To promote, organise, co-ordinate, continue, and maintain the production, transmission, and supply of electricity;
 - (b) To encourage the development and improvement of systems of supply of electricity;
 - (c) To seek to ensure standards of safety, efficiency, and transmission, and supply of electricity;
 - (d) To initiate and carry out surveys in respect of the supply and use of electricity;
 - (e) To advise Government Departments on all matters affecting electricity;
 - (f) To carry out such functions and duties in respect of or incidental to the production, transmission, and supply of electricity as the Minister may from time to time direct.

18. Part II dealt with the powers of the Minister in respect of the provision and supply of electricity. Section 11 is comparable with section 82 of the Electric Power Boards Act 1925. It provides that the Minister of Electricity may construct and maintain works for the generation and supply of electricity. Works are defined as “any works for the generation, transmission, or supply of electricity”. Thus, the Minister may from time to time:

...

(d) Construct tunnels under private land, or aqueducts and flumes over the same, erect towers, pylons, and poles thereon, **and carry wires over or along any such land, without being bound to acquire the same; and for these purposes the Minister shall have a right of way to and along all such works and erections.**

...

19. In addition, the Act also provides for general rights of entry by the Minister, and compensation for damage resulting from that entry. Section 15 reads:

15. Right of entry – For the purpose of carrying out any works authorised by this Act the Minister shall have the right at any time or times to enter upon *any road, street, railway, or other land* (whether vested in or occupied by the Crown or any other person or body corporate), and there to survey, construct, erect, lay down, maintain, renew, or repair all such cables, wires, and other things as are required for or in connection with any such works.⁷

16. Compensation for damage – (1) Every person having any right, title, estate, or interest in any land or property injuriously affected by the exercise from time to time of any powers conferred by this Act **shall be entitled to full compensation** for all loss, injury, or damage suffered by him.

...

(3) This section shall apply to claims on behalf of the Crown, as well as to claims by or on behalf of other persons.

20. This legislation also set up a licensing regime for “Electrical Supply Authorities.”
21. As part of carrying out his functions under the Act, the Minister was responsible for issuing licences to “Electrical Supply Authorities”, which were “any person or body licensed under Part III of this Act, or otherwise authorised to supply

⁷ Note that the words in italics were omitted by the Electricity Amendment Act 1976.

electricity, and, in respect of any supply of electricity undertaken by the Crown, includes the Crown”. The Electrical Supply Authorities consisted of the Electric Power Boards together with certain municipal electricity departments and government owned authorities.

22. Electrical Supply Authorities were entitled as licence holders under section 20 to:

“lay, construct, put up, place, or use all electric lines and works which may from time to time be required for the distribution and supply of electricity within the area specified by the licence.”

23. They were also subject to the compensation provisions in section 16.

Electricity Amendment Act 1983

24. This Act inserted Section 15A into the Electricity Act 1968.
25. Section 15A created a requirement that persons empowered to enter onto private land must obtain the consent of the owner or occupier of the land before entry. The section provided that in situations where the consent of the owner or occupier had *not* been granted, certain conditions had to be fulfilled for entry onto the private land to be lawful:

Notwithstanding any other provision of this Act, any provision in this Act or in any regulations made under this Act giving any person the power to enter any land or premises **without the consent of the owner or occupier shall be subject to the following conditions –**

- (a) Entry to the land or premises shall only be made by the person specified in the relevant provision...
- (b) Reasonable notice of the intention to enter shall be given unless the giving of the notice would defeat the purpose of the entry;
- (c) Entry shall be made at reasonable times;
- (d) The person entering shall carry a warrant of authority...

...

Provided that these conditions shall not apply where the entry is necessary in the circumstances of probable danger...

Provided also that nothing in this section shall restrict the rights of access in order to obtain consent to enter the land or premises for the authorised purposes in respect of which the entry is required.

26. The provisions with respect to the requirement for compensation remained.

Electricity Amendment Act 1987

27. This Act repealed section 15 of the Electricity Act 1968 and substituted a new section 15. Under the new section 15(1) the need for consent by the land owner or occupier to entry by an “electricity operator” is made more explicit:

Subject to section 15A of this Act, an electricity operator may –

- (a) **Enter upon any land for the purpose of gaining access to any works** that are owned or operated by the electricity operator and that were constructed, erected or laid in whole or in part on, under, or over that land before the 1st day of January 1988 under the authority of the Electricity Act 1968 (or any Act repealed by that Act); and
- (b) Inspect, maintain, repair, or operate any such works.

...

28. An “electricity operator” was defined as the Electricity Corporation of New Zealand Limited “or any person, or person of a class, declared by the Governor-General by Order in Council to be an electricity operator or class of electricity operators for the purposes of this Act”.⁸ An Electricity Supply Authority, as defined in the 1968 Act, was an electricity operator.

Electricity Act 1992

29. The Electricity Act 1992 repealed the Electricity Act 1968. Section 23 of the 1992 Act replaced sections 15 and 15A of the 1968 Act. Section 23 provided:

23. Rights of entry in respect of existing works—

- (1) Any person that **owns any existing works** may enter upon land for the purpose of gaining access to those works and may perform any act or operation necessary for the purpose of—
 - (a) Inspecting, maintaining⁹, or operating the works;
 - (b) In the case of works the construction of which had not been completed before the 1st day of January 1988 (in the case of works owned by the

⁸ Note that this Act also amends the definition of “works”; it now includes, “generating works, transmission lines, transformer stations, and all other works authorised to be constructed or carried out under this Act and, without limiting the generality of the foregoing, includes electric lines, tunnels, aqueducts, and flumes”.

⁹ In this section of the Act, “maintenance” includes “any repairs and any other activities for the purpose of maintaining, or that have the effect of maintaining, existing works, the carrying out of any replacement or upgrade of existing works as long as the land will not be injuriously affected as a result of the replacement or upgrade.

Corporation) or before the 1st day of January 1993 (in the case of works owned by any other electricity operator), completing the works.

(2) A certificate signed by the owner of any existing works containing a statement that any specified works were constructed (in whole or in part) before the 1st day of January 1988 (in relation to works owned by the Corporation) or before the 1st day of January 1993 (in the case of works owned by any other person) under the authority of the Electricity Act 1968 (or any Act repealed by that Act) or the Electric Power Boards Act 1925 or the Local Government Act 1974 or the Public Works Act 1981 or any local or private Act shall be admissible in evidence in any proceedings and shall, in the absence of proof to the contrary, constitute proof of that statement.

30. Furthermore, the line owner was required to give reasonable notice of its intention to maintain or complete existing works (section 23A) and to inspect or operate existing works (section 23B). However, the requirement to give notice in these instances is excused where entry is necessary because of probable danger to life or property, or where it is necessary to maintain the continuity or safety of the supply or distribution of electricity (section 23C).
31. Under section 23D the land owner or occupier can set conditions relating to the entry on to his or her land. However, these conditions can relate only to the timing of entry and the access route, and may not:
- (a) Delay the entry by more than 15 working days; or
 - (b) Require monetary or other consideration; or
 - (c) Otherwise defeat the ability of the owner of the works to exercise effectively the powers in section 23.¹⁰
32. Notwithstanding this, a provision for compensation did remain. Section 16 of the 1968 Act was replaced by section 57 which provides that:

57. Compensation for damage—

(1) Every person having any right, title, estate, or interest in any land or property injuriously affected by the exercise from time to time of any powers conferred by Part 2 or Part 3 of this Act on the Secretary or an electricity operator or any other owner of existing works shall be entitled to **full compensation** for all loss, injury, or damage suffered by that person.

(2) **In default of agreement between the parties**, claims for compensation under this section shall be made and determined within the time and in the manner provided by the **Public Works Act 1981**, and the provisions of that Act shall, as

¹⁰ Note that sections 23A, 23B, 23C, and 23D were inserted by section 11(1) of the Electricity Amendment Act 2001.

far as they are applicable and with all necessary modifications, apply with respect to claims under this section.

(3) Notwithstanding the provisions of any enactment or any rule of law, the exercise of any power conferred by this Act on the Secretary shall not be curtailed, suspended, or delayed by reason of the fact that any claim for compensation under this section has been made but not determined.

Compensation

33. While there were minor variations in the legislation, all provided for compensation to be paid by the person seeking access over the land. *Laws of New Zealand (Compulsory Acquisition and Compensation)*, Peter Salmond QC, has a useful discussion of the relevant principles. It is apparent that there were a huge range of situations in which compensation was deemed payable for the exercise of rights to construct public works of various forms.
34. *Laws of New Zealand* notes the range of empowering enactments which confer powers of acquisition but require that these be exercised in the manner provided by the Public Works Act. The Electric Power Boards Act 1925 is given as an example.
35. The basic principles are that the object is to restore the persons from whom land or an interest in land was taken, as far as possible to the position in monetary terms they would have been prior to the land being taken. It is important to stress that the entitlement to compensation is not limited to damage suffered through the exercise of the powers, but extends to injurious affection resulting from the acquisition of taking of the land or interest in the land.
36. For example, *Wood v Taranaki Electric Power Board* [1927] NZLR 392 concerned a claim for compensation in respect of lines constructed through adjoining land under the Electric Power Boards Act 1925. The claimants alleged that they were entitled to compensation on the basis that physical proximity of the lines reduced the value of the property and prevented clearing out of a drain situated on the boundary. The Supreme Court held that the claimants were not entitled to damage for injurious affection because they had not proved that there was a real risk of harm or injury to their land because of the wires situated over the neighbour's property. The possibility of that was "speculative". Implicitly, however, the Court recognised that had the risk of harm from the presence of

lines been proved, then compensation would have arisen and that this was a separate matter to a claim for damages arising from any negligence.

37. Powerco understands that in practice the approach differed between individual Power Boards or Electricity Departments. In the case of Taranaki Electric Power Board, a signed agreement from the land owner to the lines being erected across the property was sought and in return the Power Board agreed to make good any damage caused during construction or future access. While no formal ex gratia payment for loss of land use or consequential loss was made, in most cases there was a form of payment in kind such as access tracks, fencing, and so forth.
38. What is important, however, is that access to the statutory rights was not without cost to the suppliers. In that sense, the treatment of statutory rights is indistinguishable from the post-1993 easements whereby formal agreements are negotiated in return for payment.

EASEMENTS ARE FIXED SYSTEMS ASSETS

39. It is submitted that the above examination of the electricity legislation shows that the statutory rights of access and easements granted before 1 January 1993 were not unlimited in scope, were vital to the operations of electricity suppliers, and came at a cost or potential cost to those suppliers in the form of compensation.
40. The current definition of fixed systems assets in the ODV Handbook purports to exclude such assets from the definition of system fixed assets, presumably on the basis that they are intangible. It is submitted for the following reasons that this is not a correct characterisation of the rights in question.

Statutory Framework

41. Under section 57ZD of the Commerce Act, the Commission is required “as soon as practicable” to review the valuation methodologies applicable to “system fixed assets” of large electricity lines businesses.

42. “System fixed assets” have the same meaning as in the Electricity (Information Disclosure) Regulations 1999.¹¹ Under Regulation 2, “system fixed assets” mean:

All fixed assets of a line owner that are used or intended to be used for the conveyance or supply of electricity; but does not include –

- (a) Stores and spares over and above any levels prescribed in the ODV Handbook; or
- (b) Works that are under construction.

43. “Fixed assets” are defined as:

...in relation to the business of a line owner –

- (a) (i) those line business assets of the business that are **tangible in nature** and have a relatively long useful life; and
- (ii) the capitalised value of any line business assets of the business that are subject to a finance lease; and
- (iii) any works that are under construction and will be used for the purposes of any line business activity of that line owner; but
- (b) **does not include** –
 - (i) any intangible asset; or
 - (ii) any security:

44. “Line business assets” mean “any asset of a line owner that is used for any line business activity of that line owner”. “Line business activity” means any of the following:

- (a) the provision and operation of works for the conveyance of electricity, including the control of voltage; or
- (b) the conveyance of electricity; or
- (c) the ownership of works used for the conveyance of electricity, including the control of voltage:

45. The issue therefore arises as to whether the pre-1993 easements fall within the definition of “system fixed assets.”

Statutory Rights Constitute an Interest in Land

46. An easement is a right annexed to land to utilise other land of different ownership in a particular manner. Commonly, easements are a burden on a

¹¹ Section 57Y Commerce Act 1986.

proprietary right, and as such they are an interest in land, which grants certain rights. For example, a right of way, or rights to water and light.

47. The creation of rights affecting land by statute was not uncommon. In his text entitled *The Law of Easements and Profits*¹², Paul Jackson writes:

The phrase “statutory easement” is not a term of art but provides a convenient label under which to discuss various types of rights which owe their origins to statute and can be conveniently described as easements – whether because of their more or less close resemblance to easements arising from the acts of parties or because they are, whatever their lack of such resemblance, called ‘easements’ by the statutes which create them.

48. Statutory easements prevail over the title of the registered proprietor under the Land Transfer Act 1952.¹³ A number of cases have recognised that statutory easements are interests in land.
49. In *Auckland City Corporation v Auckland Gas Company Limited* [1919] NZLR 561, the Court of Appeal considered whether the use of land in which pipes were laid were tenements or hereditaments.
50. Real property comprises both corporeal and incorporeal hereditaments.¹⁴ The word hereditament simply means real property as opposed to personal property. Corporeal hereditaments, as the name implies, are those hereditaments which are actual physical things over which rights of ownership may be exercised e.g. land, buildings, minerals, trees, and indeed everything which is either a part of the piece of land or else affixed to it. Incorporeal hereditaments, by contrast, are not physical things but rights affecting land which the common law treated as real property.
51. The statutory rights to lay mains and pipes referred to in that case under the Auckland Gas Company’s Act 1871 are analogous to the statutory rights to erect, maintain, etc. electric works under the relevant pieces of electricity legislation. The Auckland Gas Company’s Act 1871 provided:

¹² (London: Butterworths, 1978), 189.

¹³ *Miller v Minister of Mines* [1961] NZLR 820 set down the rationale for this position, and the principles set down in this case are of general application. *Note* that the decision in this case was affirmed by the Privy Council.

¹⁴ Hinde, McMorland and Sim *Introduction to Land Law* (Third Edition, Butterworths) paragraph 1.003.

3. The company under such superintendence as is hereinafter specified may open and break up the soil and pavement of the several streets and bridges within the limits of this Act and may open and break up any sewers drains or tunnels within or under such streets and bridges and lay down and place pipes conduits service-pipes and other works and from time to time repair alter or remove any pipes conduits service-pipes or other works heretofore or hereafter to be laid down or placed and also make any sewers necessary for carrying off the washings and waste liquids which may arise in the making of the gas and for the purposes aforesaid may remove and use all earth and materials in an under such streets and bridges and may in such streets erect any pillars lamps and other works and do all other acts which the company shall from time to time deem necessary for supplying gas within the limits aforesaid doing as little damage as may be in the execution of the powers hereby granted and making compensation for any damage that may be done in the execution of such powers.

...

10. The Borough Council of the City of Auckland if they deem it necessary to raise sink or otherwise alter the situation of any gas-pipes or other works laid in any of the streets may from time to time by notice in writing require the company to cause forthwith or as soon as conveniently may be any such pipes or works to be raised sunk or otherwise altered in position in such a manner as the Council directs: Provided that such alteration be not such as permanently to injure such works or prevent the gas from flowing as freely and conveniently as before and the expenses attending such raising sinking or altering and full compensation for every damage done thereby shall be paid by the Council as well as to the company as to all other persons.

52. The Court held that the right in question was a “hereditament”. His Honour Chief Justice Stout stated at page 573 that “once the pipes have been laid, the ground in their vicinity and necessary for their support is, in my opinion, in the actual and exclusive occupation of the Gas Company; and no other person, not even the Corporation itself, has power to exercise any right except that provided by statute...”. The Court further held that if a statutory right is exercised by the local authority to alter the site of the Gas Company’s right, then “...the right by force of the statute attaches to the new area of space and soil occupied in virtue of the right” (per His Honour Justice Hosking at page 593).
53. *Auckland Gas* was followed in the electricity context in *Hutt Valley Electric Power Board v Lower Hutt City Corporation* [1949] NZLR 611 (CA). Both decisions were expressly approved by the Court of Appeal in *Telecom Auckland Ltd v Auckland City Council* [1999] 1 NZLR 426, in which it was held that occupation of an area of land resulting from the exercise of a statutory right constitutes an interest in that area of land. Once again, the relevant statutory regime applying to telecommunications is analogous to that of electricity. The owner of the lines has an exclusive right to occupy the portion of the soil where the lines lie, and thus that space is properly regarded as owned by the network operator. The Court stated:

An exclusive right of occupation of this kind, even for a limited purpose, is more than an easement because the owner of the rest of the soil is ousted. And since an easement in modern times is classified as an incorporeal hereditament, even that more limited interest would be within the definition of “Land” in the Rating Powers Act.¹⁵

54. Therefore, the Telecommunications Act 1987 provided for ownership of lines by the network operator when they were in the soil but, because their owner had an exclusive right to occupy the portion of soil where they lay, that area was properly also regarded as owned “for the time being” by the operator. It was to be entered onto the valuation roll as a separate property even though it was not contained as such on the certificate of title.
55. The fact that the right may exist for limited usages was not relevant. Nor did the Court see any significance in the inability of Telecom to assign its statutory rights. The Court also held that the inability to lease did not take Telecom outside the definition of owner since it would be the party entitled to receive the rack-rent if the land could be and was let. His Honour Justice Blanchard (who delivered the judgment of the Court) stated that ...“such an interpretation does not make the statute do more than is necessary to fulfil its purpose. It simply recognises the legal reality of what Parliament has done in the context of the settled law in this country relating to similar utilities” (at page 441).
56. The decision of Fisher J in *Rodney District Council v Attorney-General* [2000] 1 NZLR 101 is also of assistance. The Court held that separate entry in the valuation roll would normally be appropriate where the area concerned was both clearly defined in a formal document and was owned or occupied in one of three ways. One of those ways was that the area had to be the subject of other forms of separate occupation recognised by the Rating Powers Act.
57. This was affirmed by the Privy Council, which stated:

It [*Telecom Auckland Ltd v Auckland City Council*] supports the argument that the expression “separate property” was not tied to the existence of a certificate of title for rating purposes, as it demonstrated that the “owner” of land within the

¹⁵ *Ibid.* at 440. Note that the Court of Appeal explicitly found that telecommunications lines should be treated the same as gas and electricity lines (at 439).

meaning of s 2 of the RPA [Rating Powers Act 1988] did not have to be the owner of a freehold interest which a certificate of title had identified.¹⁶

58. The findings of the Courts in these cases are significant for the present issue of whether statutory easements are system fixed assets. It is clear from both cases that statutory easements are owned by the relevant business in which they are vested. The fact that they cannot be assigned, and are limited in their permitted use does not diminish their status. They amount to an interest in land which may be valued in the same manner as formal easements.
59. Therefore, it is submitted that the forms of occupation of areas of land as provided for by statutory easements under the electricity legislation examined above, do create separate and defined interests in land.

Definition of System Fixed Assets

60. In order for the pre-1993 easements to be system fixed assets, they must be tangible in nature and have a relatively long useful life (refer paragraph (a) of definition of fixed assets). The exclusion in paragraph (b) of the definition of intangible assets is arguably redundant if the assets in question are “tangible” within the meaning of paragraph (a).
61. It is submitted that the second limb of paragraph (a) is satisfied in that the statutory rights are perpetual, although the person holding the rights at any time may change from time to time. The Commission recognised the perpetual nature of easements in its October 2002 paper.¹⁷
62. It is submitted that the principal issue is whether these rights, insofar as they are interests in land, are “tangible”. There are two principal reasons why Powerco considers this to be the case.
63. **First**, implicitly the MED Handbook treats post-1993 easements as “tangible” because it includes them in the asset base. By definition therefore they must be “system fixed assets”. For the reasons previously given, there is no relevant distinction between the pre- and post-1993 easements. Both are an interest in

¹⁶ Rodney District Council v Attorney-General [2003] 3 NZLR 721, 734.

¹⁷ Paragraph 7.29.

land. Both came at a cost to the lines business. If post-1993 easements are to be treated as system fixed assets, then so should pre-1993 easements.

64. **Second**, this approach is also consistent with the meaning of the word “tangible”.
65. The New Shorter Oxford English Dictionary (1993) defines “tangible” as:
- adj* 1. able to be touched; discernable or perceptible by touch; having material form. 2. That can be grasped by the mind or dealt with as fact; definite, objective; substantial. 3. Able to be affected emotionally. ... **tangible assets**: physical and material assets which can be precisely valued or measured. (emphasis original)
66. Easements are definable and substantial assets, and are able to be valued. As such, they can be clearly distinguished from intangible assets, which cannot be precisely measured, such as goodwill. Unlike easements, goodwill is an ethereal concept, meaning different things to different people, and difficult if not impossible to value.
67. The word “intangible” has been used in several cases to describe something that is unable to be mentally grasped or precisely measured, rather than a physical object. For example, in *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406, McGechan J found that the proprietors of Tasman Bay Marine Pilots Ltd were not obtaining returns, directly by salary or otherwise through company profits or advantages, which equated with the returns to be expected from operating a ship piloting service. McGechan J qualified¹⁸ this finding with the observation “[t]here may be, of course, intangible factors of a lifestyle character involved.”¹⁹
68. Thus, indirect benefits such as profits or “other advantages” are tangible whereas benefits of a lifestyle character were considered intangible. The implication is that “tangibility” is based on the capability of the subject-matter in question to be discerned and measured.

¹⁸ At page 550.

¹⁹ *Ibid.*, at 450.

69. The focus on whether or not the value of something was determinable as a defining characteristic of tangibility was continued in *Rugby Union Players Association v Commerce Commission* (1997) 7 TCLR 671. “Intangible” was interpreted as meaning unquantifiable or incapable of being valued, rather than unable to be touched. Smellie J noted²⁰ that, “[w]hile acknowledging that some of the benefits are intangible in nature the NZRFU puts a high monetary value on others.”²¹ He went on to state that:

There were a number of other benefits of an intangible nature which the commission also took into account. These included greater spectator enjoyment, potentially improved sponsorship, increased tourism especially during rugby tours, and the overall greater exposure of New Zealand internationally which helps New Zealand's trade and standing in the world. A number of these additional benefits are properly described as intangibles and therefore not susceptible of quantification.²²

70. As such, easements have the necessary quality of tangibility to be classified as system fixed assets, even if they cannot physically be touched. They clearly have inherent value capable of being quantified in monetary terms.
71. An analogy can be drawn with a fishing quota, which was considered to be a tangible asset in *Glaister v Amalgamated Dairies Ltd* [2003] 1 NZLR 829. The case concerned the interpretation of a clause 4.7.(a)(iii) in the Defendant's constitution, which prohibited a valuer from taking into account “goodwill and other assets of an intangible nature” when calculating the value of the company's assets. In deciding that the fishing quota was not of an intangible nature (i.e. it was tangible), Heath J said²³ that:

While, for financial reporting purposes, fishing quota may be defined as an intangible asset, that does not give it the characteristics of an asset falling within the rubric “goodwill or any other asset of an intangible nature”... The words “any other asset of an intangible nature” must take their colour from goodwill which, quite clearly, is an intangible asset and which can be difficult to value. Clause 4.7(a)(iii) focuses on exclusion of assets which are difficult to value; it does not focus on how assets should be treated for financial reporting (disclosure) purposes.

72. For those reasons, the interest in land created by the pre-1993 easements, is “tangible” and should be treated in the same way as the post-1993 easements.

²⁰ At page 692.

²¹ *Ibid.*, at 692.

²² *Ibid.*, at 697.

²³ At page 854.

The Relevance of Payment / Purchase

73. The MED Handbook appears to suggest that a distinction between the two forms of easement can be made on the basis that the statutory easements were not “purchased.”
74. This approach is erroneous for two reasons. First, the issue of payment or purchase is not relevant to whether or not a particular asset falls within the definition of system fixed assets. Payment or purchase, if relevant, is relevant to method of valuation not whether the asset should be included in the regulated asset base in the first place. It should not form part of the *a priori* question.
75. Secondly, even if the question of payment was relevant to what constitutes “system fixed assets” then while access to land may have been in the form of statutory right, payment for the exercise of that right was required to take place in the form of compensation. It is thus not correct to say that payment was not made for those rights.

Consistency with Part 4A

76. The valuation methodology which the Commission is required to review is that applicable to all fixed assets of a line owner that are used or intended to be used for the conveyance or supply of electricity. Subject to the definition of fixed assets, which has already been addressed, the statutory intention appears to be broad in nature. Easements present an essential part of the business of distribution companies. In Powerco’s case, for example, easements over private property represent 45% of the total network. They are critical and essential to the conveyance of electricity. Indeed, in the absence of such rights, distribution companies would be committing a trespass.
77. The approach contended for is consistent with the principles of ODV methodology. By definition, ODV is about deprivation value, i.e. what costs would be faced if an asset was somehow removed. In the case of statutory rights, if these were removed, then a lines company would need to purchase Land Transfer Act easements for all its line corridors other than those along road reserves. To not include these statutory rights in the asset base therefore undervalues existing distributors’ networks.

78. It is believed that there may be significant differences between lines companies, based on the age of their networks, as to the extent to which they have pre-1993 or post-1993 easements. The Commission has recognised in a number of its papers the importance of consistency of application of asset valuation methodology between businesses, thus enhancing the reliability and meaningfulness of performance measures.²⁴ Insofar as including all easements within the regulated asset base removes this inconsistency, then the approach should be preferred.

CONCLUSION

79. To conclude, it is submitted that, contrary to the position advanced in the MED ODV Handbook, pre-1993 easements should be treated the same way as post-1993 easements for the purposes of determining whether or not they fall within the regulated asset base. This would achieve consistency of approach. It is also consistent with the terms of the legislation, and the purpose and object of Part 4A.

Dated 15 April 2004

Victoria Heine
Chen Palmer & Partners

²⁴ "Discussion paper: Review of Asset Valuation Methodologies: Electricity Lines Businesses' System Fixed Assets" 1 October 2002 paragraph 6.6.