



Infrastructure



beyond the RMA conference

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May 2007

Beyond the RMA

Our country is judged by the reliability of our infrastructure and it shapes our everyday prosperity. Sustainable infrastructure is the foundation of any prosperous community. Without it we cannot ultimately maintain the quality of life to which all New Zealanders aspire.

Following decades of underinvestment, the nation now faces a step change in investment in strategic infrastructure. We are grappling with unresolved issues of security in energy supply and transmission. \$22 billion investment is required over the next 10 years to bring existing water infrastructure up to scratch. 22% of us have uncertain water quality and 4% have contaminated water supply. Nationally the transport funding gap stands at \$6-8 billion. The cost of traffic congestion in Auckland alone is over \$1 billion per year. 25% of this is carried by the manufacturing and distribution sectors. We rank second in the world for internet use. Yet less than half of us (37%) have access at home and we are at the bottom of OECD world rankings for high speed broadband connection uptake.

Past experience has show that with good long term asset management planning, and with extensive and robust consultation processes, well developed infrastructure proposals can and do proceed successfully through the RMA process. But the costs are often extremely high, and, in some cases, projects can take up to a decade or more before they are finally approved. The key question is whether existing processes are adequate to deal with the level of national infrastructural investment that is now required.

This paper looks challenges the RMA and other legislation pose for sustainable infrastructure development in New Zealand. It canvasses the approach taken in Ireland and some of the Australian states, each of whom are addressing the same infrastructural challenges as New Zealand. Finally the paper set outs some options "Beyond the RMA" to enable timely investment in infrastructure of national importance.

The infrastructural life cycle

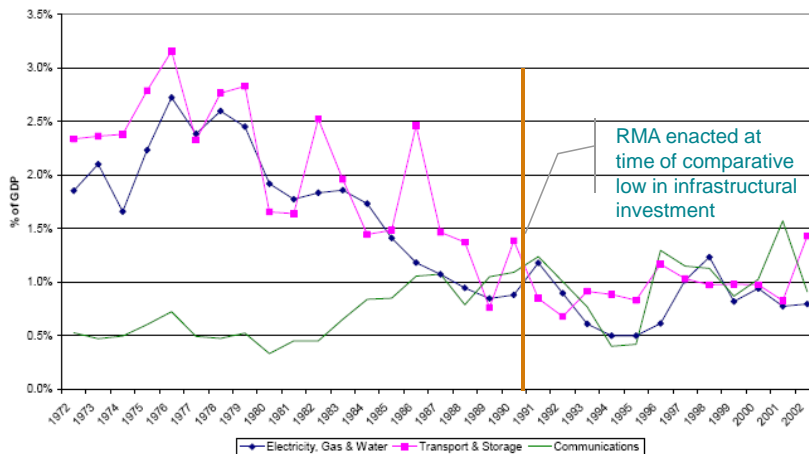
The RMA was enacted at a time in New Zealand's infrastructural life cycle when there was a comparatively low level of investment in infrastructure across the country. New Zealand had made substantial investment in during the 1970s. This declined significantly during the 1980s and has been at a relative low level since that time. By 1991 when the RMA was enacted New Zealand was focused on reduction of its national debt and the level of infrastructural investment was at an historically low level.

RMA enacted at a time of low level investment in infrastructure



- Gross fixed capital formation in NZ infrastructure Industries 1972 - 2002 as a percentage of GDP

Sources: NZIER, Statistics NZ



While this trend towards infrastructure decline has been felt internationally since the seventies, NZ Council for Infrastructure Development (NZCID) research shows that New Zealand has felt this infrastructure decline more acutely and has been slower to redress past infrastructural under investment than comparative OECD nations. Investment in critical infrastructure is now a pressing issue. The need to streamline decision making processes for critical infrastructure projects of national significance will become a pressing issue as well.

So what's the problem with the RMA?

The RMA is often cited as a major impediment to infrastructure delivery in New Zealand. The following factors contribute to this perception:

- Lack of express recognition of the national significance of essential infrastructure and/or the importance providing critical infrastructure supporting community needs within the RMA purpose and principles section (particularly under Section 6 - Matters of National Importance);

- The emphasis in the Act on adverse environmental effects needs to be better balanced with the positive wider economic, social and environmental effects of improved infrastructure provision.
- Lack of sufficient leadership at the national and regional level to promote infrastructure development. Regional Policy Statements generally reference the importance of infrastructure but concentrate on avoiding adverse effects rather than giving specific direction to address trade-offs between the economic, social and environmental outcomes. The 2005 Amendment Act now enables Regional Councils to take greater responsibility for the integration of essential infrastructure with land use. This is an important step, but it remains to be seen how this function will be transferred to regional leadership through Regional Councils through second generation Regional Policy Statements;
- While the provision exists, historically the Minister appears to have been reluctant to 'call in' major projects. The inclusion of Boards of Inquiry in addition to Ministerial call provides for a more extensive range of consenting processes with the 2005 Amendment Act (although this provision has only been exercised once);
- The lack of national guidance or standards on issues such as noise, storm water, run off, erosion and sediment control, construction-dust controls or vibration, electricity transmission. The Ministries of Economic Development, Transport and the Ministry for the Environment are aware of these matters and are working on improvements, especially in relation to electricity transmission, noise and storm water quality, but progress has been tortuously slow.
- The need for RMA consents to be approved by both regional and territorial authorities for most major infrastructure projects, and the consequent inevitable overlapping of the effects considered by each authority. In addition, regional resource consents must be considered against the adverse effects criteria, instead of being counterbalanced by consideration of the broader objectives of the public work;
- Inconsistencies in approach and interpretation across different local authorities. There remains insufficient resourcing and experience within some territorial and regional authorities to enable effective management and development of major infrastructure;
- Carrying out consultation in relation to preparation of applications and assessments of environmental effects can be costly. While it is important to ensure that a project proponent meets its wider environmental responsibilities, often, complex issues need to be assessed, reported on, and resolved before environmental approvals can be gained. In addition, a two-stage process involving consideration by Council following by a Court process can add large costs as well as delays;
- The role of often-vociferous public interest groups and "nimbys" using environmental concerns as a proxy for self interest;

- Time delays. An urban project such as the Wellington Inner City Bypass took more than a decade to progress from inception (in 1993) through to construction in 2004. A significant proportion of the time was expended in the two-stage RMA process involving consideration by Council following by a Court process can add large costs as well as delays;
- Lack of monitoring of RMA effectiveness (particularly for major projects);

Being well aware of frustrations with process and potential issues with consenting major infrastructure under the RMA the Government responded with amendments to the Act in 2005. To date major infrastructure providers have been somewhat risk averse in using the new processes at their disposal and the new provisions have yet to be tested in any substantive way. It remains to be seen whether the changes will be adequate for critical infrastructure projects. Moreover, resolving issues with the RMA is not the only matter that affects timely delivery of key infrastructure projects, so are the plethora of other legislation that affects infrastructure development.

It's not just the RMA that's the problem

Unlike other jurisdictions that have implemented one stop shop approval processes for critical infrastructure, New Zealand has a literal plethora of laws in addition to the RMA that often must be traversed. These include:

- **The Historic Places Act 1989 (HPA).** Archaeological Authorities are required under the HPA for a number of projects. These are normally sought after RMA approvals. The Wellington Inner City Bypass for example required two Environment Court processes, one under the RMA and one under the HPA. It is proposed that approval in principle should be given to archaeological matters at the same time as other environmental issues are considered;
- **The Reserves Act 1981.** Where a project requires land from a Reserve under the Reserves Act, the specific approval of the Minister of Conservation is required. This effectively could prevent implementation of a project, even though consents may have been gained through the RMA;
- **Local Government Act 2002.** Often a road needs to be stopped in order to implement another transport solution. Where the road to be stopped lies outside of the designation, a road-stopping process under the Local Government Act is required. This process has an appeal right to the Environment Court;
- **The Public Works Act 1981.** Often one of the key issues of project delay is land assembly. With the relevant Minister's consent, certain authorities have the ability to compulsorily acquire land. Even though the designation may be in place, there is still an appeal right to the Environment Court over the process;

- **Foreshore and Seabed Act 2004.** Where foreshore or seabed is required, there may be specific approvals required;
- **Reserves and Other Land Disposal and Public Bodies Empowering Act 1915,** In the case of the SH20 Mount Roskill extension currently under construction, it was found that this Historical Act, was relevant to implementation. Further cost and delay was added to the project in order to resolve this anomaly;
- **The Land Transport Management Act 2003.** In the case of recent major projects, further assessment had to be carried out after other approvals were in place, to ensure that projects contribute to the purposes and principles of this Act. Theoretically a project can be further delayed by judicial review if this process is not carried out.

As the preceding list clearly demonstrates, the RMA is but one of the statutes that affect project delivery. Consideration of a single consenting process, incorporating one dominant set of provisions governing essential infrastructure, would streamline the consent process and remove duplicity.

Lessons from International Experience

The length of time projects take to go through the planning and consenting process, the complexity of the process, and the impact delays can have on infrastructure projects are not unique to New Zealand. Comparative nations such as Ireland and Australia have adopted a number of methods to address these challenges that provide useful lessons for New Zealand.

Ireland

In Ireland the Environmental Protection Agency (EPA) is responsible for protecting the environment. It is a statutory body funded by the Department of the Environment. Its mission is to protect and improve the environment taking into account the environmental, social and economic principles of sustainable development. It licenses and controls large scale waste and industrial activities, oversees local authority environmental protection responsibilities, is responsible for compliance and assesses the impact of proposed major developments on Ireland's environment.

The Irish counties themselves have responsibility for the environmental services in their particular areas. These are primarily community services, certain waste and water services, and planning. If building or construction is required an application is made to the relevant local authority, with there being a right of appeal to An Bord Pleanála (the National Appeal Board in Ireland for planning applications). There are also appeal rights to the Irish Courts, but only on procedural matters.

The Irish also have to address the complex issue of old Viking archaeological sites, which may be historically important, but which have the potential to hold up projects for significant periods of time.

Streamlining approvals for strategic infrastructure

To overcome the delays being encountered for obtaining planning approval and to streamline the consent framework for infrastructure of public importance (defined as projects of strategic, economic or social importance, which contribute to national or regional strategies) the Irish Government introduced the Planning and Development Strategic Infrastructure Act 2006.

The Act provides for the establishment of a new Strategic Infrastructure Division of An Bord Plenala which provides a one-step consent process (with provision for consultation with the decision makers) for energy, transport, waste and water infrastructure projects. This allows projects to go straight to the Planning Board, rather than first having to get local authority approval, thus reducing the length of time it takes to get development consent planning permission.

The process for judicial review applications and appeals has also been reviewed to try and reduce the time delays associated with judicial review challenges. To improve the process a designated Planning Judicial Review Division in the High Court, or at least a designated Judge is used to hear such cases. Other amendments to the process include such matters as leave being required before an application can be brought, a "substantial" ground having to be relied on, the possibility of an undertaking as to damages being required, the outcome of the application being final (unless there is a matter of exceptional public importance), and the requirement to deal with matters expeditiously.

New South Wales

In New South Wales planning reforms (the Major Projects State Environmental Planning Policy (SEPP)) have been passed to improve the assessment of major projects.¹ The purpose of the reforms, which were passed in 2005, is to remove unnecessary red tape and clarify the assessment of major or significant projects. A project's significance may be due to its economic importance to the State, its potential environmental impact, strategic location or because it will provide essential infrastructure. The legislation also replaces approvals under eight Acts with a single integrated assessment and approval process.

Planning and assessment responsibilities are dealt with by local authorities in areas where the State planning objectives have been achieved. However, this was not deemed as appropriate for major projects. Previously the NSW Planning Minister had the power to "call-in" development applications from local authorities. One of the major aims of the Major Projects SEPP is to consolidate major projects under one instrument and make the Minister the determining authority. The intention is to make it easier for proponents, the community, and interest groups to understand the regime for these projects and to facilitate the speedy and effective delivery of infrastructure.

¹ An excellent guide on the situation in NSW is set out in the NSW Government, Department of Planning Community Guide on NSW Major Projects Assessment, March 2006. See also the website at www.planning.nsw.gov.au. SEPP can be found at www.legislation.nsw.gov.au.

In addition to major projects the legislation provides the Minister with the power to declare a project as “critical infrastructure” if it is essential to the State for economic, environmental or social reasons. Special provisions apply in respect of such critical infrastructure.

Procedures for the declaration of a critical infrastructure project

The amendments to the Environmental Planning and Assessment Act provide for any project to which the new Part 3A applies to be declared a critical infrastructure project.

An application to declare a project to be critical infrastructure will be evaluated on a case-by-case basis. A guideline will be gazetted by the Minister setting out the procedures and the preliminary assessment required before a project can be declared to be a critical infrastructure project.

The preliminary assessment will need to include a justification for the project being declared critical infrastructure taking into consideration social, economic and environmental factors, infrastructure and land use planning considerations, and the likely risks and benefits of the project proceeding, including:

- financial risks to the Government and the likely economic costs or benefits to the region or the State of delivering or not delivering the project in a timely manner
- community implications of delivering or not delivering the project in a timely manner, including the extent of social dislocation, benefits in terms of significantly improved services, or hardship or cost to the community if the project is not delivered quickly
- environmental risks of streamlining the project’s delivery, for example:
 - How will the environment benefit from the timely delivery of the project?
 - What are the risks, and are any adverse changes likely to be reversible?

The Minister will consult with the relevant portfolio Minister prior to declaring a project to be critical infrastructure.

Approval for critical infrastructure projects

Before a critical infrastructure project can proceed, an application must be lodged for an approval under Part 3A of the Environmental Planning and Assessment Act. The emphasis of the assessment will be on how the project can be delivered in an environmentally sound manner. It may include the consideration of alternative solutions to achieve the required outcome. The assessment process will ensure that a focused, integrated assessment and consultation regime is undertaken prior to recommendations being made to the Minister for determination.

In most circumstances, a concept approval will be obtained to establish the environmental performance requirements for the implementation of the subsequent stages of the project(s), and consultation requirements. The project will be carried out in accordance with that approval. As with other approvals under Part 3A, the need for additional approvals under eight other Acts has been replaced by a single integrated assessment and approval. Where a licence however is required under the Protection of the Environment Operations Act, such a licence will still be required.

The decision is not appealable except if the appeal is initiated or approved by the Minister.

These provisions provide for a streamlined assessment and approval process without compromising environmental outcomes.

These reforms:

- ensure timely and efficient delivery of critical infrastructure projects when required
- provide certainty in the delivery of key infrastructure projects
- provide for adequate environmental scrutiny with provisions to ensure environmental outcomes are appropriate
- focus on outcomes rather than process.

Major Projects

There are two ways that a major project can be undertaken in New South Wales. One is to lodge a project application that contains detailed information about the project. Another is to submit a concept plan which provides a broader overview of what is proposed. Approval of the concept plan establishes the framework for a more detailed development of the proposal, which may include the need for further approvals.

With regard to the project application, the proponent must prepare an environmental assessment of the proposal. Under the new regime the Department of Planning in New South Wales prepares and makes available the key issues that the proponent must address. State agencies, local authorities and other relevant authorities are consulted in developing these requirements.

The proponent is also encouraged to consult with the community. Usually there must be a written statement of commitments outlining how the projects likely environmental impacts will be minimised or managed.

Once the proponent prepares the environmental assessment it is checked that it addresses the necessary requirements and, if satisfactory, the Department will arrange for it to go for public comment for a minimum of 30 days. Under the new laws, the proponent can be required to respond in writing to any issues raised and outline any proposed changes to minimize its environmental impact. The matter then goes to the Minister.

As part of the planning reforms, provisions have also been made for the use of Independent Hearings and Assessment Panels (IHAPs) to strengthen (and shorten) the assessment process. The Minister can decide to convene an IHAP and appoint panel members to assess a project at any stage in the assessment process to provide advice on issues of concern. Public hearings may also be undertaken to provide input into the panel's assessment if the IHAP considers it appropriate. The IHAP then produces a report outlining the issues and making recommendations.

Both proponents and objectors can appeal the Minister's decisions in certain *limited* circumstances. A proponent of a major project who is dissatisfied with the determination of the Minister can within 3 months appeal to the Land and Environment Court. Objectors may also have appeal rights. Any appeal by them must be commenced within 28 days of the notice of determination being issued. Objectors do not have a right of appeal where a concept plan has been approved. Proponent and objector appeals cannot be pursued where projects have been subject of a report prepared by a panel of experts, or where the project has been declared critical infrastructure.

Victoria

In Victoria, the Environmental Protection Agency (EPA) is the regulatory agency. The EPA has identified the need to get involved in projects as early as possible during the planning phase and to identify requirements that need to be addressed up front. Environmental effects statements are prepared by proponents for projects under the Victorian Environmental Effects Act.

Community consultation occurs during the preparation of the statement. Local government and the EPA are also heavily involved in the environmental effects process. The environmental effects statement is assessed by an independent panel. A report is prepared which goes to the Minister for the Environment who either accepts or rejects the proposal. There are limited rights of appeal.

The Victorian Government has also identified the need for specific legislation. Such legislation was used for Citilink (the link between Melbourne Airport and the City). It is also being used for the Eastlink Project in Melbourne. The legislation for the project is aimed at streamlining the planning process rather than overriding it. One of its aims is to provide the best tailored mechanism for managing risks. Specific legislation is also proposed for the Channel Deepening Project with the Port of Melbourne.

Beyond the RMA - Measures to Enhance Implementation and Effectiveness of the Act

Based on lessons learned from overseas jurisdictions, consideration needs to be given to a series of initiatives to strengthen current processes. Options include:

- The development of new legislation specific to projects of national importance or amendments to the Resource Management Act (RMA) to allow for it. This would include changes to Part 2 of the Act to provide recognition of importance of essential infrastructure in achieving the sustainable management purpose of the Act. This change would provide a similar level of recognition provided for in Section 6 and 7 for outstanding landscapes, natural character, and amenity, etc. Amendments would ideally be structured in a way which assists with balancing these often competing matters of national significance;
- Ensure that the provisions of current National Strategies, Regional Growth Strategies and Regional Land Transport Strategies are expressly considered in the decision-making process.
- Further streamlining the Environment Court process along the lines set out in the Irish Planning and Development (Strategic Infrastructure) Bill

- Consolidation of approval processes where multiple statutes apply as with the New South Wales model.
- Adoption of outline or concept planning approvals which specify the environmental outcomes required of a project, rather than requiring detailed design. This will encourage innovative design approaches unconstrained by strict design parameters, potentially enhancing environmental outcomes,.
- Better use being made of the call in process under the RMA
- Improvements of the designation process, including direct reference to the Environmental Court for major projects
- Project consolidation—especially for contiguous transport projects (eg: electricity transmission, Waikato Expressway and Auckland's Western Ring Route). Funding constraints often result in major projects being staged over time and consents applied consecutively as funds for each project becomes available. This requires multiple consents – and consequently multiple delays. Consolidation of project consents and or outline consents for contiguous project s could avoid the need to re-litigate contiguous projects stage by stage.
- Review of Local Government RMA responsibilities. Local authority amalgamation may or may not be appropriate in terms of all council functions, but it would be beneficial for RMA jurisdiction. Fewer RMA authorities will reduce the number of consent agencies for applicants to deal with for individual projects, and will therefore reduce potential inconsistency with its application. The conversion of authorities into unitary authorities throughout New Zealand and/or the transferring of RMA functions to a single agency within a region/location could result in considerable streamlining of processing of applications for infrastructure projects. This could benefit both minor and major projects. For example, a major project of national importance would re automatically referred to the national planning board. A minor project involving the structural strengthening of a bridge over a river creates uncertainty as to whether regional or district/city council resource consents are needed for the project. Both authorities often have jurisdiction and both may attempt to assess the same issues (e.g. impact of new structures on flood flows). Consolidation of process into a single unitary authority would address such problems.
- Clarifying the role of third parties in the consent process. It is important to consider the definition of who has status to be involved. Parties with specific roles relevant to the project would generally be preferable to the current involvement of all organisations and individuals that can participate. The current provisions in the RMA enable any and all interest groups and unaffected individuals to participate at a council hearing and again at the Environment Court. This system encourages delays in decision making, particularly for major projects, as those parties who anticipate that the case will end up at the Environment Court do not engage in the first hearing to the level they intend to be involved in at the second hearing. The frustrations faced by applicants in dealing with objectors who present limited cases at council hearings - and then more detailed cases at the Environment Court, are, to a certain extent, caused by the funding available from MfE for community groups to participate in RMA processes. This funding is only available to those involved

in Environment Court proceedings;

- Monitoring the Effectiveness of the RMA. Establishing a national monitoring programme by the Ministry for the Environment (MFE) to determine at the effectiveness of the RMA in considering major infrastructure projects will enable an accurate and independent assessment of the situation, and provide a basis for future changes and funding for improvements;

Time to get moving

While past experience has shown that with good long term asset management planning, and with extensive and robust consultation processes, well developed infrastructure proposals can and do proceed successfully through the RMA process. But the costs are often extremely high and the delays unacceptably long. Given the infrastructural backlog we are now confronted with, New Zealand cannot afford the social environmental and economic opportunity cost of substantial delays in critical projects. International experience has shown that it is possible to achieve streamlined approvals for such projects without compromising the sustainability goals inherent in the RMA. What is certain is that New Zealand is facing an investment in national infrastructure that is unprecedented in our recent history since the introduction of the RMA. We need to start thinking beyond the existing paradigm and making sure that our consenting and decision making processes have the capacity to meet the wider social economic and environmental development needs of the nation as a whole.

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May 2007