

RMA reform: a contractor's perspective



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RMA reform: a contractor's perspective

Introduction

New Zealand's environment is under pressure and the reform of our resource management system presents an opportunity to do more to enhance the natural environment, alongside social, economic, and cultural outcomes for New Zealanders.

This paper provides insights into the Resource Management Act (RMA) journey to date, including our experience implementing and working within the realities of the legislation and our vision for the future. It draws on a selection of case studies of infrastructure projects delivered in a variety of regions and receiving environments, and with varied success.



Downtown Programme, Auckland

History of the RMA

The RMA was enacted in 1991, with an overarching purpose to promote the sustainable management of resources of New Zealand. It brought together several pieces of legislation that existed to manage the natural and physical environment and paired environmental legislation with planning legislation.

The RMA introduced a regime of environmental legislation that included mandates for regional, city, and district councils – local government was going to take a much greater role in the environment:

- Regional councils – a focus on developing regional policy statements and regional plans that guide the use and development of natural resources

- City and district councils – a focus on land use and its impacts on communities
- Unitary authorities – a combination of regional and district / city council roles where, for a variety of reasons, greater efficiencies can be realised.

In the RMA, the word 'environment' encompasses the four well-beings: social, natural / physical, economic, and cultural. However, there has been more focus on the natural and physical environment (lakes, seas, land etc.), while the other well-beings (social, cultural, and economic) have not always been given the same level of importance. There's a delicate balance to be struck.



What is being reformed

The reform of our resource management system extends beyond the RMA to include how it interfaces with the Local Government Act (LGA), the Land Transport Management Act (LTMA), and the Climate Change Response Act. This includes spatial planning, which works at the intersection of the RMA, the LGA, and the LTMA.

Why is the RMA being reformed?

The RMA is being reformed because it is not working as it was intended. It is not fit-for-purpose, particularly in the context of current local/global issues such as climate change and housing shortages, as well as and the Government's aspirations for net carbon zero by 2050.

Key issues that have led to its current form are detailed below and include:

- Inconsistency in application and expertise
- Ballooning costs of consenting and compliance
- Impractical conditions
- Poor recognition of Māori values and tikanga.

Inconsistency in application and expertise

There has been inconsistency in the implementation and interpretation of the RMA – different councils have different perspectives, expertise, and rating bases (and funding to manage resources), which has contributed to inconsistencies and inequities.

There is also a shortage of skilled and experienced decision-makers. Ongoing capability and capacity issues have contributed to problems with the robustness and durability of decision-making at all levels under the RMA .

Effective decision-making requires holistic thinking and an understanding of the science behind impacts, the policy framework, as well as a degree of empathy and awareness of impacts of our activities on communities. The requisite combination of hard and soft skills is unusual (particularly in construction).

Te Ara o Te Ata: Mt Messenger Bypass

Ecological skills and values are paramount on this State Highway project that has been described as an “environmental project with a road running through it”. The delivery team is drawing on the expertise of up to 26 ecologists – all with specialist skills to protect and enhance the natural and physical environment which is home to kiwi, bats, and lizards. The availability of resource is a real constraint on construction, with 300,000m² of vegetation clearance required. Due to capacity constraints, the project team can only clear 1,000m² per day, with four ecologists required at each of the three work fronts. Having enough trained “kiwi dogs” to check kiwi are not in the danger zone, adds a new dimension to resource constraints!

The demands of the project's programme compete with the cautious approach needed to protect our taonga, including unique native flora and fauna. This situation has resulted in an interesting team dynamic due to the different value sets and conflicting drivers across the team. It creates a healthy tension which must be talked about in a collaborative way, respecting the differing perspectives, and searching for “best for project” solutions. It underscores the importance of collaborative contracting models and early alignment of values between the many disciplines involved in delivering a project of this nature.

Ballooning costs of consenting

Inconsistent implementation of the RMA across the country has added considerable cost to infrastructure delivery in the consenting, monitoring, and compliance phases. There is often no improved practice captured or real benefit to the environment.

There are a number of things we can do to improve this situation, including:

- Achieving greater consistency and standardisation of district and regional council plans and their implementation
- Reducing the number of regional and district plans
- Supporting guidance for complementary management plans, e.g. stormwater management, and RMA conditions (permitted activity, designation and resource consent)
- Reviewing allied legislation including the Public Works Act, Wild Life Act, and Conservation Act to bring them into this century with a focus on efficiency of process and natural justice!

- Recognising and reinforcing that the environment includes consideration of the social, cultural, and economic well-beings, as well as the natural and physical environment
- Providing the fairest mechanism at the consent phase to internalise social impacts, particularly to small businesses “caught in the cross fire” later during construction
- Sense checking RMA conditions to ensure they can:
 - Be fairly and practically implemented and measured
 - Relate directly to the effects of consent holder activity rather than a project that may be more appropriately funded, fully, or partly, by a council or research provider
 - Require monitoring data that can be used for more than just “box ticking” and “composting” in a regulatory file and can be in a format that can be usefully “mined” to refine best practice.

Impractical conditions

Long-winded appeals, objections, and litigation reduce certainty for resource users, undermine the planning process, and contribute to risk averse decision-making. If the contractor is not involved up-front, it is sometimes difficult to deliver on conditions during construction. Clients often think that once they have obtained the consent it is up to the contractor to deliver – and are often not open to changes in conditions that enable time or cost savings and will achieve at least the same, if not better environmental outcome. It is important to rigorously test the appropriateness of RMA conditions against the proposed construction methodology. There are occasions where it is better for the environment to seek to vary RMA conditions than adopt a sub-optimal construction methodology.

Learnings from CRL Enabling Works

The CRL enabling works delivered in Auckland's CBD is a high profile case of a consent process where many local businesses have borne often significant impact through the construction phase. Albert Street contains a number of sensitive stakeholders such as the Auckland District Court, AA Building, chambers and offices of Auckland Council, and Sky City. Some of these businesses are destinations in their own right. However, there are also numerous small businesses that rely on walk-in traffic for custom and are vulnerable, especially where the construction period lasts several years. The cumulative effects of all the projects operating in the central city often made it difficult for stakeholders and regulators to distinguish which project was causing disruption. By 2019 this had stretched the social license of CRL, even though disruptive works on C2 had long since finished.

Clearly there are external factors impacting smaller businesses. If these impacts are not addressed and valued at the consenting phase, the burden falls on the contractor, who is seen as imposing these impacts. This situation adds complexity and more cost for the contractor (e.g. contractor stakeholder management resource). It also impacts on the on the reputation of the project and the social legacy it leaves.

We can minimise some of these social impacts through the consenting phase by establishing processes where fair and reasonable compensation can be determined for those bearing a disproportionate impact. This principle is often applied for impacts on the natural and physical environment (e.g. riparian enhancements for loss of stream values), but less so for mitigating social impacts. There will undoubtedly be challenges in determining what might be “fair and reasonable compensation” which is commensurate to the social impact to be borne. However, in the words of Sir Peter Blake: “If it isn't hard, it isn't worth doing!”



Poor recognition of Māori values and tikanga

The traditional Māori system of environmental management is holistic. The concept of kaitiakitanga has been given a statutory definition under the RMA (redefined in 1997 amendments): “The exercise of guardianship; and in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself.” The implementation of kaitiakitanga within the RMA has been challenging. However, there have been numerous success stories across the country. There is a refreshing trend of increasing the recognition of the principles of Te Tiriti o Waitangi into the governance and management of major infrastructure projects.

Auckland Council set a benchmark for mana whenua engagement through America’s Cup 36 (AC36) infrastructure delivery

The AC36 Kaitiaki Engagement Forum was set up prior to design and constructability finalisation. This early involvement enabled stronger mana whenua relationships to form, which proved critical as the project progressed.

The result of this early engagement was a strong and enduring partnership which enabled sound technical solutions to overcome environmental challenges, while delivering a project that was sensitive to and celebrated the cultural significance of this important maritime space. The design of Silo Park extension incorporated mana whenua narratives in clear and permanent display. Additional artistic design features developed in partnership with mana whenua were added to Hamer Street footpaths, Wynyard pedestrian bridge, and wave breaks 1 and 2.



Where the RMA worked well

The RMA has delivered an improvement on pre-RMA legislative framework and has encouraged more holistic management of the environment based on the four well-beings. Consideration of social impacts has taken on greater emphasis than in the past. However, the implementation has more often than not fallen down.

Consenting process

The traditional consent process involves two steps:

1. Engage the Council regulatory team and notify affected stakeholders
2. Proceed to the Environment Court on appeal points.

Innovative Development Response on the Downtown Programme

The \$250M construction programme included a series of high-profile harbour-edge projects delivered via an accelerated construction programme. The Downtown Programme presented significant and unique challenges, including cross-organisational governance, complex construction, tight timeframes, and significant regulatory and stakeholder-related risk.

In mid-2018, a communications and engagement team was assembled to engage with a large number of stakeholders on design and construction issues. The team's focus was addressing stakeholder concerns prior to consent lodgement and minimising construction impacts through early engagement and an innovative Development Response approach.

The Downtown Programme budgeted for and embedded a Development Response workstream into the delivery structure - a first for Council that has since been replicated on other complex infrastructure projects. This approach integrated the resource consent, stakeholder engagement, traffic management, and social and cultural outcomes workstreams, resulting in optimal stakeholder outcomes, while de-risking the consenting process and construction programme.

Through a comprehensive Development Response approach, the team made it easy for people to participate in decision-making processes. The success of this engagement strategy can be measured by the success of the consenting strategy, with no delays to the construction programme.

The RMA needs to be fit for all these contexts.

Early contractor involvement in the AC36 consent process

The traditional, extended consent process would not allow AC36 infrastructure to be delivered in time for racing. There was no Government appetite to use special legislation to obtain AC36 consents, so the remaining option was a direct referral to the Environment Court. Based on previous applications (e.g. Waiheke Island Matiatia Wharf proposal) the direct referral pathway was a high-risk strategy with no known precedents of success.

As such, Panuku needed a rock-solid case to take to the Court. If the scope of AC36 works changed during proceedings, WEA risked losing the confidence of the Court and key stakeholders. Therefore, Panuku opted for a consent based on the project scope at the time of lodging.

The consenting of AC36 works was successful because it was a collaborative effort involving not only the consent holder, but those charged with designing and constructing the project. WEA's Construction Manager was directly involved in this process, negotiating with stakeholders and giving key evidence at the consent hearings. This collaborative effort reduced the risk of surprises in the consent documents, which could have affected design, construction details, and the delivery programme.

In parallel with the AC36 consenting, Auckland Council's Healthy Waters department seized the opportunity to include the upgrading of the Daldy Street stormwater outfall into the WEA's scope. The outfall had discharged stormwater and sewage overflows into the Wynyard basin impacting on the localised water quality. The outfall relocation was consented through a separate process to the AC36 consents. A collaborative and proactive approach was adopted by the WEA design and construction teams. This translated to a consenting path for the Daldy Street outfall relocation which resulted in consent being granted on a non-notified basis, enabling works on the outfall relocation to happen alongside the AC36 works. A key element to the Daldy Street outfall relocation consenting approach was to consider the relocated outfall as part of a broader scheme of works to improve the water quality of the Waitemata, including the significant benefits that will arise from the Watercare Service's Central Interceptor project.

Our vision to 2030

A successful outcome of the reform will be a legislative framework that achieves an optimal balance across all the well-beings, with well-defined and clearly articulated “bottom lines”. We will see more projects that leave a social legacy along with the built infrastructure. We will see projects that have positive outcomes for the environment and the communities they disrupt, leaving our land and people with a greater sense of belonging and connection with infrastructure than they would have had in the past. We will also see a sustainable quadruple bottom line approach to procurement that will allow us to meet our environmental, social, and economic needs within the unique cultural context of this country. We are hopeful for a legislative framework that enables all these outcomes to occur efficiently.





About the author

Hugh Leersnyder

Hugh has worked in the field of applied environmental management and planning for over 40 years. During this time, he has worked for local government (Auckland Regional Council, 17 years), consultancy (Beca, 13 years) and infrastructure construction (Downer, 4 years). In his current role with Downer, Hugh is the Environment, Sustainability and Planning Manager on the Link Alliance. The Link Alliance is building the largest portion of Auckland's City Rail Link project. As Hugh's role on the Link Alliance reduces he is applying himself to other infrastructure projects including the Mt Messenger Bypass in Taranaki and the IReX project to upgrade the inter-islander ferry terminals in Wellington and Picton in advance of the arrival of two new ferries in 2025. He has also been on the MfE panel of Independent Hearing Commissioners since 2009 and on Auckland Council's Hearing Commissioner Panel since 2011. Hugh has seen the issues from the side of the regulator, applicant, submitter and decision maker.

