REPORT OF THE MINISTER FOR THE ENVIRONMENT'S INFRASTRUCTURE TECHNICAL ADVISORY GROUP

AUGUST 2010

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Executive Summary & Recommendations

EXECUTIVE SUMMARY AND RECOMMENDATIONS

Executive Summary

This report of the Infrastructure Technical Advisory Group (ITAG) is the outcome of a series of investigations over six months around major infrastructure consenting issues under both the Resource Management Act (RMA) and the Public Works Act (PWA) in accordance with the terms of reference issued by the Minister for the Environment in January 2010 and endorsed by Cabinet.

The scope of the ITAG's investigations included:

- A review of the role of designations in facilitating infrastructure development and an examination of options for reviewing and streamlining the designation mechanism.

- An investigation of alternatives to designations for planning for and managing the effects of activities on network infrastructure.

- Streamlining and integrating processes, including for acquisition and compensation, under the Public Works Act 1981 and other legislation.

In undertaking our investigations we have carefully taken account of the Phase II primary objective which is:

> "to achieve least cost delivery of good environmental outcomes, including:
>
> - Providing greater central government direction on resource management
> - Improving economic efficiency of implementation without compromising underlying environmental integrity.
> - Avoiding duplication of processes under the RMA and other statutes.
> - Achieving efficient and improved participation of Maori in resource management processes".

In terms of our overall philosophical approach we collectively agreed the following:

- The current public participatory principles contained in the RMA are sound and our review should seek to protect and enhance public participation where it is most suited.

- Our approach should also seek to identify and promote efficient and fair outcomes for infrastructure project delivery.

- Efficiency enhancements should focus upon improved mechanisms and a reduction in duplication of procedures. To this end we hope to identify further amendments to the RMA and improvements in practice under it that will simplify the consenting path without removing checks on possible adverse environmental effects. and

- In recommending possible reforms we need to respect the Crown's obligations under the Treaty of Waitangi.

We were assisted in our deliberations by comprehensive background documentation provided by Government Officials.

The results of our investigations conclude that there are a number of significant alterations to the provisions of both the RMA and the PWA that will materially assist in both the consenting and timely delivery of major infrastructure projects in New Zealand into the future. The alterations we consider necessary to deliver improved infrastructure outcomes are set out in the 49 recommendations we make below.

Our principle recommendations are:

- Removal of the confusion between what constitutes "infrastructure" and what a network utility provider does;
- Deletion of a requiring authority's role as "poacher and gamekeeper" by removing section 172 of the RMA;
- A "concept designation" consenting path be established in the RMA;
- Section 6 of the RMA be amended by adding a clause specifically referencing the development and operation of regionally and nationally significant infrastructure;
- A new process for consent renewals be put in place;
- A new all encompassing "project consent process" be introduced in the RMA;
- A definition of "major infrastructure" be included in section 2 of the RMA;
- The RMA be amended to clarify issues surrounding the meaning of reverse sensitivity;
- The PWA compensation provisions be incentivised by:
    i. increasing solatium payments
    ii. introducing a 5% premium payable over market value
    iii. introducing early agreement percentage increases over market value in return for early settlement
    iv. reducing the extent to which requiring authorities are liable for all compensation costs, and
    v. allowing a requiring authority to offer additional payment in return for relinquishment of 'offer back' rights.
- Both the RMA and the PWA be amended to allow joint hearings of proposed designation and compulsory acquisition issues

We consider that the principal recommendations we have set out above, together with the more detailed ones set out below, will satisfy the primary objective set for ITAG by the Government for our review, contribute significantly and positively to the delivery of major infrastructure in New Zealand over the next 20 years and assist in underpinning the ongoing development and evolution of New Zealand's national infrastructure strategy.

The changes we recommend are deliberately innovative and evolutionary.

Recommendations

Infrastructure provider

1. Align the definition of infrastructure (5.2) and network utility operator (section 166).
2. Delete all reference to "network utility provider" and replace with "infrastructure provider."
3. Amend section 166 definition of "network utility operator" to include electricity generators and port companies.
4. Amend the RMA so that the Minister only approves a requiring authority (other than a territorial authority or crown agency) in respect of a particular project or work.
5. Develop non-statutory guidance to inform the requiring authority approval process.

Section 172

6. That section 172 of the RMA be deleted and consequential amendments be made to other clauses to make it clear that the local authority (or the board of inquiry where an application is called in) is the decision maker on designations.
7. That remuneration for Boards of Inquiry members be reviewed urgently and de-coupled from the State Services Commission standing rules.
8. That MfE develop non-statutory guidelines around the NOR and Outline Plan processes and content.

Section 176A

9. That clause 176A(3)(c)(f) be deleted and replace with "(f) Any other matter specified in the designation to be addressed in the outline plan."
10. That section 176A be further amended by adding a new subclause as follows: "s176A(3a) Any requests for changes to the outline plan by the territorial authority shall only have regard to the matters set out in section 176A(3) in relation to the designation and any associated conditions.

First Schedule

11. That clause 4 of the first Schedule to the Act be amended to allow a territorial authority to request appropriate conditions of consent for a designation being "rolled over" where the designation does not currently have any. Refusal by a requiring authority would trigger non inclusion of the designation in the proposed plan.

Concept Designations

12. That the lapse period for a "concept designation" cannot exceed 10 years.
13. That a "concept designation" shall be accompanied by a level of preliminary design sufficient to allow detailed design details to be reserved to the outline plan stage where any consents required to give effect to it are relatively minor.
14. That any subsequent resource consents required to give effect to a "concept designation" are deemed to have controlled activity status irrespective of objectives, policies and rules otherwise contained in a regional or district plan.

Outline Plans

15. That clause 149ZB of the RMA be amended to allow the EPA to make decisions on minor alterations and additions to designations and resource consents required thereto.
16. That MfE develop non-statutory guidance to inform what is expected to be in an outline plan, when they are required and how these provisions in the RMA should be applied.

Lapse Period

17. That MfE develop non-statutory criteria to confirm / inform circumstances where extensions to the statutory lapse period may be considered.

Co-location of Infrastructure

18. That sections 168 and 171 of the RMA be amended to provide for the co-location of infrastructure by requiring authorities without the need to determine which requiring authority has first priority.
19. That MfE and LGNZ develop non-statutory procedures under the Local Government Act to indicate and illustrate areas where improved infrastructure co-ordination could be achieved.

Section 6

21. That section 6 of the RMA be amended to add an additional clause which states: "The development and operation of regionally and nationally significant infrastructure."

Consent renewals

22. That a new process for consent renewals be introduced where its key features would be:
    - Conferring rights to apply by an existing consent holder;
    - Expressly allowing renewal applications well within the existing consent term;
    - Providing for the consented scale of activity to continue while the reconsenting application is being processed;
    - Constraining the scope of the new consent to the existing scale of activity within the same "effects envelope" where practical;
    - Constraining the information requirements to the effects of the existing operation as opposed to the actual occupation, emerging / new effects or emerging values or expectations;
    - Requiring consent agencies to confine their concerns to the matters listed above;
    - Constraining notification and consultation requirements to directly affected parties rather than the public at large;
    - To take account of Treaty settlement issues where they are relevant; and
    - To require the reconsenting process to take reasonable and realistic account of an "efficient use of resources".
23. That Schedule 4 of the RMA be amended to include the particular information requirements for reconsenting existing infrastructure including what the existing infrastructure baseline is and the scope of information required to support a renewal application.

Project Consent Process

24. That a new project consent process be included in the RMA to be called the 'Project Consent Process' incorporating the procedural steps set out in the Project Consent Approval diagram contained on page 32 of our report.

Expertise

25. That MfE investigate the means and manner in which a cadre of experts with particular knowledge of infrastructure requirements can be established to support and serve of Boards of Inquiry.
26. That section 149G(3) be amended by deleting the words "the key issues in relation to the matter that includes."

Major Infrastructure defined

27. That a definition of "major infrastructure" be added to section 2 of the RMA. Such a definition to mean 'any type of infrastructure described in the National Infrastructure Plan, regional policy statements and regional spatial plans.'

Guidance, Programmes & Review

20. That MfE develop strategic guidance and direction for central government agencies for infrastructure.

28. That MfE develop an agreed inter-departmental programme of national instruments which reflects the wishes of Cabinet.

29. That MfE prepare a guidance note on how the requirements of section 30(1)(gb) are anticipated to be implemented.
30. That MfE set up an ongoing review process to consider how second generation plans are meeting the requirements of section 30(1)(gb) and to then report to Government on whether further action is required.
31. That a review of Cabinet Office Circular (CO(06)7) be undertaken by MfE with inputs from other appropriate government departments for a report back to Government as to whether further action is required.

Reverse Sensitivity

32. That future National Policy Statements on infrastructure issues be required to identify where reverse sensitivity issues are, or could be, an issue.
33. That section 3 of the RMA be amended to record that reverse sensitivity is an effect that is required to be taken into account.
34. That a definition of "reverse sensitivity" be included in Section 2 of the RMA.
35. That Section 31 of the RMA be amended to make it clear that addressing reverse sensitivity issues is a territorial authority function with respect to district plan issues and resource consents being sought.

Public Works Act & Compulsory Acquisition

36. That the PWA be amended to allow a requiring authority to pay the authority's valuation figure to secure early acquisition and access for the works to commence and where the balance and interest (if any) to be paid shall take place after determination by the Land Valuation Tribunal.
37. That the PWA be amended to increase the solatium payment from $2000 set in 1981 to the appropriate indexed amount as of today and be further amended by annual indexing into the future. In addition it be amended by $5000 if the property has been in the same ownership for the last five years, $10,000 if in the same ownership for 10 years, $15,000 after 15 years and $20,000 for 20 years or more.
38. That LINZ / MfE and NZTA undertake further research into the veracity, objectivity and reliability of current valuation practices within New Zealand used to determine 'fair market value', that is, the average 'willing purchaser willing seller' price settlement outcome as a pre-requisite to the implementation of recommendations 40 and 41. The research period to be no more than six months.
39. That LINZ in response to the outcomes of recommendation 38 redraft its compulsory acquisition guidelines.
40. That upon determination of 'fair market value' (as set out in recommendations 38 and 39) in the requiring authority acquisition process under the PWA that a 5% premium be payable as a matter of course.
41. That requiring authorities be authorise to pay a premium of up to 10% in addition to the 5% payable under recommendation 40 where there is a demonstrable benefit to the requiring authority in securing early settlement. The percentage premium to be paid and the required time limits for early settlement would be at the discretion of the requiring authority taking account of the urgency and immediacy of the infrastructure project.
42. That any ongoing objection to the taking of land after four months, in terms of recommendations 40 and 41, will mean that legal and valuation fees otherwise payable by the requiring authority are not payable by the requiring authority. The first four months would still be paid.
43. That any fees or costs associated with disputes as to the valuation of land should follow the event, as in normal litigation.

44. That requiring authorities give consideration to alternative acquisition mechanisms for collectively owned Maori land including non-alienable perpetual leases, replacement with like for like and partnership opportunities associated with long term / permanent occupation.
45. That the PWA be amended to allow a requiring authority, at its discretion, to offer an additional 5% above market value in return for land owner relinquishment of the section 40 offer back obligations.

Efficiency

46. That Officials explore the extent to which more efficiency in the OTS administered Maori Protection Mechanism review / decision process can be achieved.

Appeals under the RMA and PWA

47. That both the RMA and the PWA be appropriately amended to allow a requiring authority to apply to the Court (or Board of Inquiry) for an order that appeals against a proposed designation and compulsory acquisition be heard together. Such an order to be conditional upon the requiring authority pursuing a pro-active purchase policy pre-lodgement of the NOR.
48. That during the compulsory acquisition process an affected landowners legal and valuation expenses in the first four months of the issue of the Notice of Intention will be paid by the requiring authority, thereafter costs are to follow the event.
49. That MfE undertake some research on the adequacy of the information provided by requiring authorities during the acquisition and compensation process.

Next Steps

Our report has been prepared for further discussion.

1. INTRODUCTION

1.1 Background

The Government remains concerned at the widely reported concerns about costs and delays associated with process under the Resource Management Act (RMA) and with respect to the planning of urban development and associated infrastructure notwithstanding the fact that the Phase One reforms of the RMA have been completed.

The Hon Dr Nick Smith, Minister for the Environment in his press release dated 28 January 2010 stated:

> "There are major question marks over the way the Resource Management Act is working in urban areas, "Dr Smith said "I don't think we have the incentives right for developers to do the best urban design in our largest cities. There are also questions about the policy of metropolitan urban limits, the effect they have on section prices and the negative flow-on-effects to the broader economy. Nor do we have a good track record of having the right infrastructure in place at the right time for supporting urban development.
>
> These are complex issues that require careful deliberation and expert input. That is why the Cabinet has appointed Urban and Infrastructure Technical Advisory Groups to work with the Ministry for the Environment to report on these issues this year".

We also note that the National Infrastructure Report, March 2010, sets out the Government's approach to infrastructure as follows:

- "a step change in the level of government investment with expenditure targeted at key infrastructure projects,
- Improving decision-making and management of the Government's infrastructure assets, and
- Improving the regulatory environment to facilitate the private sectors investment in infrastructure."[1]

These stated positions are clearly based on the recognition that infrastructure is fundamentally connected to community development and well-being, economic prosperity and the comparable living standards within the nation.

This report, currently in draft for public consultation purposes has been prepared by the Infrastructure Technical Advisory Group (ITAG). A sister report by the Urban Technical Advisory Group (UTAG) will be completed in July 2010.

It should be noted that both the UTAG report and the outcomes of the proposed public [check]consultation process are expected to have a potential bearing on the infrastructure based recommendations contained in this draft report.

1.2 ITAG Terms of Reference

ITAG has been appointed to provide independent advice to the Minister for the Environment on possible proposals for the reform of the Infrastructure provisions

[1] Page 3 Foreword by Hon. Bill English

of the RMA and related legislation such as the Public Works Act (PWA). ITAG's terms of reference are as follows:

The scope of the TAG's investigation of infrastructure work will include:

> A review of the role of designations in facilitating infrastructure development and an examination of options for reviewing and streamlining the designation mechanism.
>
> An investigation of alternatives to designations for planning for and managing the effects of activities on network infrastructure.
>
> Streamlining and integrating processes, including for acquisition and compensation, under the Public Works Act 1981 and other legislation.

In providing advice the ITAG will have regard to the following primary objective of Phase II of the resource management reforms:

> "to achieve least cost delivery of good environmental outcomes, including:
>
> Providing greater central government direction on resource management
>
> Improving economic efficiency of implementation without compromising underlying environmental integrity.
>
> Avoiding duplication of processes under the RMA and other statutes.
>
> Achieving efficient and improved participation of Maori in resource management processes".

The composition and short biographies of ITAG are contained in Appendix I of this report.

1.3 Overview of ITAG Approach

ITAG gave careful consideration to the overall philosophical approach that it, as a group, should take to the Government's primary objective for the Phase II resource management reforms. We collectively agreed the following:

- The current public participatory principles contained in the RMA are sound and our review should seek to protect and enhance public participation where it is most suited;
- Our approach should also seek to identify and promote efficient and fair outcomes for infrastructure project delivery;
- Efficiency enhancements should focus on improved mechanisms and a reduction in duplication of procedures. To this end we hope to identify further amendments to the RMA and improvements in practice under it that will simplify the consenting path without removing checks on possible adverse environmental effects; and
- In recommending possible reforms we need to respect the Crown's obligations under the Treaty of Waitangi.

Our approach to our terms of reference has been to review the background documentation provided by the Officials (Appendix 2), discuss a range of

infrastructure related issues at a series of ITAG meetings over a five-month period, seek additional reports and information from government and other agencies, trial possible changes with appropriate agencies, test the concept plan and compensation options and prepare this report as a draft.

1.4 Structure of ITAG Report

This report is structured as follows:

Executive Summary and Recommendations

Chapter 1: Introduction, background to, reasons for and nature of this report

Chapter 2: A brief description of the comprehensive officials briefing report provided to ITAG

Chapter 3: Describes the designation issues addressed by ITAG

Chapter 4: Contains infrastructure related issues we have addressed

Chapter 5: Contains the range of PWA compensation related issues addressed by ITAG

Chapter 6: Identifies/describes the infrastructure related work streams that will be addressed by UTAG

Chapter 7: Outlines what ITAG considers the next steps should be.

1.5 Acknowledgements

We wish to record our thanks and appreciation to those staff at Ministry for the Environment and Land Information New Zealand for thoroughly professional and unstinting assistance. We had the benefit of high quality research papers and briefings which were most helpful. We also acknowledge commentaries from a number of groups within New Zealand during the five-month period of our investigations. Finally we acknowledge the editorial assistance from Jane Douglas.

Mike Foster
Chairman

2. THE OFFICIALS REPORT TO ITAG

2.1 The Officials Report

This comprehensive report prepared by Ministry for the Environment (MfE) and Land Information New Zealand (LINZ) with inputs from Treasury, MED, other government departments and key stakeholders provided a well researched and technically sound basis upon which ITAG could address its 'terms of reference'.

This report attached as Appendix 2 is used as a reference throughout the balance of our Report. We do not quote or repeat significant sections of it but where necessary invite the reader to refer to it for background information purposes.

During the course of our review additional working papers were prepared by Officials at our request, as necessary, these are referenced and included as additional appendices in our report.

2.2 Summary of Issues Raised

The Officials Report focused on four areas of interest:

- Designations
- Government direction
- Compensation provisions, and
- Legislative alignment.

In ITAG's view these areas of interest are appropriate and our report is generally structured in accordance with those areas of interest. We note that these were approved by Cabinet in September 2009 together with the following recommendations:

> "Direct the Ministry for the Environment, in consultation with the Ministry of Economic Development (MRD), Ministry of Transport (MoT) and Treasury to:
>
> 1. identify options for improving RMA designation provisions,
> 2. identify options for improving central government direction on infrastructure proposals,
>
> Direct the Ministry for the Environment and Land Information New Zealand (LINZ) to:
>
> 3. identify options for improving compensation provisions under the RMA and PWA,
> 4. identify options for improving the interface between the RMA and PWA, and other Acts."

From October to December 2009 the Officials identified a range of specific problem statements, options and where appropriate potential options and addressed them in their report. For reasons that will be apparent later in our report a number of the so called problems are "practice" related rather than legislative in origin. Further some issues addressed in 2009 amendments are anecdotal and not readily supportable by reliable and measurable evidence in the marketplace.

In ITAG's view any further amendments to the RMA and associated legislation such as the PWA must be based around sound, pragmatic and realistic outcomes achievable through legislative change. It is not possible to legislate for performance.

In this respect ITAG fully endorses and adopts the goals established by the Officials for their report. These are repeated as follows:

> "RMII Infrastructure Goal:
>
> 'Efficient, timely and high-quality infrastructure that contributes to quality of life and economic productivity, and minimises environmental impacts'.
>
> RMII Designations Goal:
>
> 'A fair, equitable and efficient designation process that facilitates infrastructure development and promotes investment certainty'.

We also fully support the September 2009 Cabinet directive that Officials need to:

> "identify options for improving RMA designation provisions".

In our view the key issues are:

- the manner in which the current legislation successfully or otherwise currently delivers infrastructure projects, irrespective of type,
- whether associated legislation delivers infrastructure in a timely, fair and cost effective manner; and
- how successfully the legislation enables innovation in infrastructure projects.

2.3 ITAG Generated Issues in Response

As stated previously we consider the Officials Report to be well researched and technically sound. In reviewing that report and from our own experience and research there are nine areas in our view that need particular attention. These are:

- The extent to which the current legislation recognises the range of project delivery mechanisms that can be used to deliver infrastructure projects. For example the current "major project enquiry" (call in process) as a "one stop shop" significantly inhibits opportunities for innovation and economies that might be achieved through application of alternative project delivery methods such as the "project alliance," "design and construct" and public-private partnerships;

- The extent to which requiring authorities should continue with a "poacher and gamekeeper role" in the statutory process. We note that this issue was raised in the Phase I RM reform process stage and rejected at the Select Committee stage. ITAG consider that this issue should be revisited for reasons set out later in this report;

- The extent to which the interplay between the RMA and other statutes facilitates or impedes integrated and timely decision making;

- The extent to which the distinct rights, interests and values of tangata whenua are given enhanced practical recognition. It is emphasised that many of the criticisms pertaining to the RMA and the effective provision for tangata whenua values are beyond the scope of this inquiry, therefore those concerns with practice, policy, planning and more considered reform, while they inform the analysis, are not squarely addressed in this report;

- The manner in which the compensation provisions of the Public Works Act deliver timely and cost effective outcomes in order to facilitate the delivery of major infrastructure projects and fairly respect private property rights;

- Whether the legislative / consenting timeframes for major infrastructure delivery do, or will, deliver the stated statutory timeframes and whether, by association, the current compulsory acquisition timeframes will or are even capable of delivering timely major project outcomes;

- Whether the RMA focus on environmental effects actually enables or inhibits meaningful public participation in key decisions about infrastructure;

- Whether the current major project consenting paths are fit for purpose or unnecessarily complex; and

- Whether in view of the foregoing some consent paths should be dropped, added to or significantly modified.

Our report addresses these issues.

3. DESIGNATION ISSUES ADDRESSED BY ITAG

3.1 Requiring Authority Eligibility

For some time concerns have been expressed over the extent to which private and commercial entities can obtain access to requiring authority status. There is little doubt that an ability to issue a designation for a public or private work is a very powerful tool under the RMA. This is because a confirmed notice of requirement (designation), subject to other processes, consents and Acts, confer a right on the requiring authority either directly or through other processes, to compulsorily acquire private land for its work. It is also because the designation provides the requiring authority with significant rights over the land designated, whether or not acquired, under section 176 of the RMA – no person including the landowner may use the land, subdivide the land or change the use of the land without the written consent of the Requiring Authority.

Designating authorities include a Minister of the Crown, a local authority or a network utility operator approved as a requiring authority by the Minister for the Environment. We note that there are currently over 100 network utility operators approved as requiring authorities. Almost all are limited liability companies owned by community trusts, councils, the Government, and a number are privately owned. Sectors covered include water and wastewater, electricity transmission, telecommunications, irrigation, oil and gas lines and airports.

The procedure for becoming a requiring authority is clearly defined in the RMA and the Minister has discretion to limit requiring authority status on a project by project basis.

We note that "public works" emphasis that traditionally underpinned the rationale for requiring authority status has been significantly diluted since the repeal of the 1977 Town and Country Planning Act. There is little doubt that the notion of "essential service" or "public work" is not an essential prerequisite to support a notice of requirement.

Notwithstanding the foregoing comments ITAG is not convinced that existing requiring authorities have been able to abuse the system (or indeed have) to such an extent that major change to the current legislative provisions is warranted. To date from our research and enquiries requiring authorities have been generally using their powers responsibly. It is considered that the reason for this is the manner in which the justification tests contained in S171 (1) have been applied by consent authorities and the courts.

Some changes to the existing legislation are considered by ITAG to have merit in order to widen eligibility and scrutiny and are recommended:

(a) Align the definition of infrastructure (5.2) and network utility operator (section 166)
(b) Delete all reference to "network utility provider" and replace with 'infrastructure provider.'
(c) Amend section 166 - definition of network utility operator – to include electricity generators and port companies

(d) Amend the RMA so that the Minister only approves a requiring authority (other than a territorial authority or crown agency) in respect of a particular project or work.
(e) Develop non-statutory guidance to inform the requiring authority approval process.

These amendments will remove ambiguity and improve consistency between these closely related matters. We made extensive enquiries of officials and others as to why port companies and electricity generators were not able to seek requiring authority status, and could find no principled reason for exclusion. Like airports, port companies are fixed assets generally of significant value to regional and national communities. Airports and sea ports both have specific requirements to expand or protect their essential infrastructure. They also have locational and operational constraints that limit options for operating solely in the private land market. Likewise electricity generators have similar essential work elements and constrained options as many other existing network utility operators who enjoy requiring authority status.

We are of the firm view that the RMA should be amended so that requiring authority status can only be given by the Minister for a specified project or projects and that this will enable the Minister to exercise tighter control over the use of designations by single purpose network utility operators. Because of the considerable powers associated with requiring authority status and designations already discussed we do not support general requiring authority status being given to infrastructure providers. We acknowledge that such amendments could increase the Minister's workload and the possibility of legal challenge. However we consider the improved credibility benefits outweigh any disbenefits.

Irrigation companies have been eligible to apply to become requiring authorities for many years and of the current list of approved requiring authorities many are responsible for irrigation infrastructure. Access to the designation process under the RMA provides an important mechanism to protect critical existing infrastructure and to facilitate potential development of new projects.

We note that there has been some comment at the appropriateness of new irrigation projects having access to the compulsory acquisition provisions of the Public Works Act. In our view the changes we have suggested to the decision making process set out above should address these concerns.

We are of the view that MfE developing more extensive guidance information will help to improve the quality and comprehensiveness of applications received.

ITAG is of the view that none of the other options canvassed in the Officials Report (pages 13-14) are worthy of further consideration. In particular reintroduction of the "public benefit" test because of interpretive uncertainty and the increased risk of legal challenge.

RECOMMENDATIONS

1. Align the definition of infrastructure (5.2) and network utility operator (section 166).
2. Delete all reference to "network utility provider" and replace with

"infrastructure provider."
3. Amend section 166 definition of "network utility operator" to include electricity generators and port companies.
4. Amend the RMA so that the Minister only approves a requiring authority (other than a territorial authority or crown agency) in respect of a particular project or work.
5. Develop non-statutory guidance to inform the requiring authority approval process.

3.2 Decision Making on Designations

3.2.1 Decision Making by Requiring Authorities

As noted in the Phase I 2009 TAG report there is a significant tension between the principles of natural justice and requiring authorities' right under section 172 of the RMA, which in effect provide it with the right to decide in favour of their own project, whether or not that decision is consistent with the recommendation of body which has heard the application and submissions – the territorial or unitary authority. .

The 2009 TAG report stated:

> "At present when a designating authority, such as a network utility operator, highway agency or airport company, serves notice of a proposed designation on a local authority, it is the local authority which hears the submissions on the proposed designation. However it is not given the task of making a decision, merely a recommendation to the designating authority. The designating authority then makes a decision. That is to say, the designating authority makes a decision on its own designation.
>
> In today's environment where many designating authorities are private entities as distinct from Crown agencies; such a procedure is even more lacking in theoretical justification than may have been the case when designation powers were confined to the latter.
>
> In addition, this extra stage in the process adds a short period, usually about a month, to the time taken to finalise the proposed designation.
>
> We therefore recommend that as part of Phase I of the Government's endeavours to simplify and streamline the RMA, that the power of decision making on their own designation be denied to designating authorities, and that the council's recommendation be the decision on the proposal".

We note that almost all requiring authorities are companies, either owned by public bodies or owned privately, wholly or in part. In this environment it is difficult to see the theoretical justification for such bodies to have decision making powers under the RMA, particularly when they are clearly biased in favour of their own project.

The 2009 TAG recommendation to remove decision making power from requiring authorities was strenuously opposed by a number of requiring authorities, including representatives of Ministers of the Crown on the basis of "losing control" of important "public work" decisions to local authorities swayed by local public

opinion. This opposition was in considerable part inspired by an unfortunate drafting error which saw the Bill provide for local authorities to also have the final say on Outline Development Plan approvals, an outcome that was never contemplated by the 2009 TAG or, for that matter, discussed. That recommendation did not survive the Select Committee process for the 2009 Simplifying and Streamlining bill.

ITAG considers such an outcome to be unfortunate and that this matter should be revisited especially in the light of significant changes to the RMA under the Streamlining and Simplifying amendments to the Act last year.

Under changed provisions of the RMA an applicant has the right to request that the application (including a notice of requirement) is heard and decided by hearing commissioners who are not members of the local authority (section 100A). In addition there are powers under Part 6AA of the RMA with respect to proposals of national significance. The Minister decides on the basis of criteria in section 142 of the RMA whether the application is a proposal of national significance. Proposals of national significance can essentially be fast-tracked through the Environmental Protection Agency (EPA) as a result of an application made directly by the requiring authority to the EPA or as a result of a call-in initiated by the Minister.

The concerns of infrastructure providers that they will not get a fair hearing before a Council hearing body do not stand scrutiny especially under the changed provisions of the RMA. In any case rights of appeals to the Environment Court for requiring authorities' applications heard at territorial authority level provide appropriate protections.

In the experience of a number of members of ITAG it is rare for an NOR to be recommended for decline by a territorial authority hearing body, rather it is common for there to be recommendations on conditions to be imposed, and this is where disagreement between the hearing body and requiring authorities is more common. In reality the requiring authority rejects or modifies conditions of approval during the 30 working day period available to it to accept, modify or reject the local authority decision. If the local authority or any submitter are not satisfied with the decision of the requiring authority then they have the right to take the matter to appeal before the Environment Court. Appeals frequently settle as a result of negotiation and mediation.

Concerns about a territorial authority having the power to be a requiring authority and hearing body in its own cause are addressed in section 100A already discussed above, which allows any submitter to request the hearing and decision by independent commissioners. In any case it is the experience of ITAG members that this "best practice" to ensure independence of decision making for its own projects is standard practice for most local authorities.

Another possibility would be to use the EPA process where the local authority is also the requiring authority. The real issue is the appearance of independence.

ITAG accept that while there is currently no evidential base to suggest that the 'poacher and gamekeeper' power is being used inappropriately or irresponsibly by requiring authorities, there is an inherent balance of power associated with requiring authority status over many other parties. In addition the time savings for

major infrastructure projects if this decision step by requiring authorities is removed are considered to outweigh any residual concerns of some requiring authorities. Retention of decision making power by requiring authorities is difficult to justify when successive amendments to the RMA over many years have reinforced independent decision making and options for fast-tracking RMA approvals processes.

We also note that some requiring authorities have suggested that any changes to current arrangements for requiring authorities to decide their own projects would need to be balanced against the level of technical expertise required to make informed decisions on notices of requirement. ITAG rejects that claim. Our review of a range of recent NOR applications and outcomes together with the experience of its members over a long period of time discloses that most NORs are well supported by competent technical documentation and that consent agencies, almost without exception, engage appropriate technical support to assist their deliberations.

We also note that the EPA process for a designation has the Board of Inquiry making a decision and not a recommendation.

We further note that requiring authorities upon lodgement of an NOR are entitled to question/challenge the level of expertise proposed to be employed by the local authority. We have already commented on the right to request independent commissioners. After all the requiring authority, without exception, is expected to "pick up the bill" for the statutory consenting process. If requiring authorities fail to raise concerns about how the subsequent process is to be conducted then they only have themselves to blame.

RECOMMENDATION

6. That section 172 of the RMA be deleted and consequential amendments be made to other clauses to make it clear that the local authority (or the Board of Inquiry where an application is called in) is the decision maker on designations.

3.2.2 The Role of the EPA

The Officials Report on pages 17-19 sets out five options for consideration. While ITAG supports option 3 – transfer of decision making powers on NOR's to territorial authorities (the option recommended by the 2009 TAG) there is some merit in option 5 – decision making for all NOR's and/or outline plans being made by a single independent agency e.g. EPA. The EPA could establish a specialist function within it for infrastructure decisions. This approach would be similar to the manner in which the UK Planning Commission functions. We have more to say about this option in section 4.3 of our report. On balance ITAG does not support the EPA as the one and only consent path for the processing of notices of requirement as this does not retain the flexibility and choice available to requiring authorities in the current system. NOR can deal with many different types and scales of activity, many of which are not of national or even regional significance. Outline plans of works are a detailed RMA process often best dealt with at territorial authority level.

A concern could be that if EPA was provided with this function how and could it be appropriately resourced and by association what are the financial implications? However, regardless of whether or not the EPA, a local authority, board of inquiry or the Environment Court considers NOR infrastructure decisions, there is a cost incurred. While having the EPA regularly undertake such work may have the advantage of improved standardisation across New Zealand, the benefits may not justify the relatively heavy hand of a national consenting agency having sole responsibility for processing and hearing infrastructure NOR. By comparison the current system provides the requiring authority with choices as to processing hearing body and consent track depending on the scale and significance of the project, the scale of issues raised and perceived efficiency, cost factors and appropriate decision making levels. .

No recommendations as to changes to the role of the EPA are made by the ITAG.

3.2.3 Board of Inquiry Remuneration

Our one concern with the EPA option and indeed the board of inquiry path for major infrastructure in general is that the Cabinet Circular on fees for boards of inquiry (which includes a range of other government appointments and bodies) does not reflect appropriate and sustainable remuneration for the calibre of legal and technical experts required for what will be an increasing and enduring workload for the EPA. In our view the remuneration issue for boards of inquiry needs urgent attention by the Government. After all, in the current consenting environment the applicant/requiring authority pays all actual and reasonable costs of the statutory process and should continue to do so. Therefore it is hard to justify a fees regime where highly skilled board of inquiry members are asked to sit for many weeks or months, at remuneration levels that fall well short of any comparable remuneration in the market place.

The current remuneration levels are set so low as to cancel out the practicality of developing a cadre of experts skilled at conducting major hearings for infrastructure projects of national significance processed by the EPA. Such a simple matter should be addressed with urgency as use of the EPA and boards of inquiry ramp up. Later recommendations of this report would see significantly greater use of the EPA as a consenting agency and underlines the importance of addressing remuneration levels.

Provided remuneration issues/concerns raised above can be addressed ITAG supports the emerging regime under existing provisions of the RMA where many major infrastructure NOR would be processed by the EPA.

RECOMMENDATION

7. That remuneration for Boards of Inquiry members be reviewed urgently and de-coupled from the State Services Commission standing rules.

3.3 Workability of Designation Provisions

3.3.1 NOR's and Outline Plans

It is claimed by some requiring authorities that there is a lack of clarity concerning the distinction between a NOR and the subsequent need for an outline plan under section 176A. Although the scope of the content of NOR's and outline plans is statutorily prescribed we accept that there is some ambiguity that could be rectified. However, ITAG does not consider significant statutory amendment is necessary; rather MfE should develop non-statutory guidance to raise territorial and requiring authority awareness.

Our reasoning for this recommendation is that requiring authority practice and approach to NOR supporting documentation is variable around the country. Also requiring authorities sometimes deliberately approach a NOR at a more conceptual level, leaving detailed design to the outline plan stage; or in the alternative a NOR is prepared at such detail no subsequent outline plan is required; the point being that the actual interface between NORs and outline plans depends on the nature of the project in the first instance, whether resource consents are being sought at the same time and the level of detail provided at the NOR stage.

We do not consider it possible to legislate for all circumstances. However we note that section 176A contains the phrase "Any other matters to avoid, remedy, or mitigate any adverse effects on the environment" (176A (3) (c). We consider this sub clause is too broad and discretionary and should be deleted and a replacement clause something along the lines of :

"*(f) Any other matter specified in the designation to be addressed in the outline plan"*

The tests imposed by s. 171 on a NOR require the adverse effects of a proposed work to be addressed at the time of consideration of the NOR. Re-litigation of adverse effects at the more detailed stage of the outline plan is not conducive to good decision making or to certainty for the requiring authority as to detailed requirements at the stage of detailed design which supports an outline plan.

ITAG is aware of situations where consent authorities have attempted to have an outline plan approval process conducted via a public hearing process, effectively to relitigate the original NOR statutory process and associated decision. There is no statutory basis for a hearing of the outline plan. The outline plan is clearly a two party procedure between the requiring authority and the territorial authority. This matter could be addressed in non-statutory guidance on the relationship between NOR and outline plans referred to above.

We note that the current procedure for an outline plan requires its submission to the territorial authority, who may request changes to the outline plan. If the requiring authority decides not to accept all or any of the requested changes, then it is the territorial authority that must appeal the outline plan to the Environment Court.

We also consider that there is considerable merit in restricting matters to be considered at the outline plan stage to those set out in section 176A(3) as

proposed to be amended as set out above. A further amendment to section 176A would be required something along the lines of:

"176A(3a) Any requests for changes to the outline plan by the territorial authority shall only have regard to the matters set out in section 176A(3) in relation to the designation and any associated conditions. "

Such a restriction would define and constrain the scope of changes to the outline plan that the territorial authority could request and reduce opportunities for the territorial authority to raise matters that have already been dealt with in the NOR, or to raise matters outside of the scope of the designation.

Any suggestion that the outline plan provisions should be amended to enable territorial authorities to require an assessment of effects and to publicly notify is opposed by ITAG. The NOR is the appropriate time for assessment of effects and appropriate levels of notification (depending on the scale of the public work) to be exercised.

ITAG has identified an exception to this view where a designation for a public work is very general and has never been the subject of detailed evaluation including assessment of effects pursuant to the requirements of S171. We are aware that a number of requiring authorities have long standing designations that pre date current good practice that have rolled over in district plans with no detail as to future proposals including extensions, or appropriate conditions being placed on the existing public work . An example of this is a designation of "Defence Purposes" applying to significant coastal areas, with no further detail of proposals, existing works or conditions contained in the district plan. Another example is the presence of planned road widenings by territorial authorities that languish in district plans without the work being completed. In both cases the outline plan process would be used for the works in accordance with the designation with no third party rights (e.g. affected landowners or neighbours).

Accordingly, it would be appropriate in our view to amend clause 4 of the First Schedule to the RMA to allow a territorial authority to request that a requiring authority provide appropriate conditions on designations proposed to be 'rolled over' where the designation currently doesn't have any. Refusal by a requiring authority to such a request would trigger non-inclusion of the designation in the proposed plan.

RECOMMENDATIONS

8. That MfE develop non-statutory guidelines around the NOR and Outline Plan processes and content.
9. That clause 176A(3)(c) (f) be deleted and replaced with "(f) Any other matter specified in the designation to be addressed in the outline plan."
10. That section 176A be further amended by adding a new subclause as follows: "176A(3a) Any requests for changes to the outline plan by the territorial authority shall only have regard to the matters set out in section 176A(3) in relation to the designation and any associated conditions."
11. That clause 4 of the First Schedule to the Act be amended to allow a territorial authority to request appropriate conditions of consent for a designation being "rolled over" where the designation does not currently have any. Refusal by a requiring authority would trigger non inclusion of the designation in the proposed plan.

3.3.2 The Merits of the "Concept Designation" for near term Major Infrastructure Projects and Issues with the "One-Stop-Shop

As part of the Official review of the options available for the manner in which NORs are promulgated and relationship with the outline plan process their report discusses the option of "providing for initial concept approval at NOR stage followed by more detailed effects assessment prior to construction of a work (that is at the outline plan stage)" (page 23). This issue was also addressed in part in the 2009 TAG report where it stated:

> "In our view, once a designation is approved, any consequential consent required should be deemed to be a controlled activity where the focus of conditions is avoiding, remedying and/or mitigating any adverse effects".

The ITAG discussed the merits of a "concept designation" where a project is planned in the near future (within a 10 year period for example) , but detailed design is not available. This can be for a number of reasons, but is often linked to a desirable and common procurement methodology where parties propose to deliver a project on a design and build basis – often on a competitive basis and encouraging innovation, better design outcomes, shorter time to project commencement, reduced project risk and reduced cost.

We are supportive of a "concept designation" whether consented by the EPA/ board of inquiry consent path or a territorial authority, where detailed design is addressed at the stage of the outline plan.

The major project consenting path either by direct application by the infrastructure provider to the EPA, or Ministerial call-in even with the amendments included in the 2009 Amendment Act is still fundamentally a "one-stop last-chance shop" approach. If the applicant fails to identify minor resource consents or as a result of submissions and consultation project routes, site footprint or design is altered then there is a risk that the notification and hearing process has to be recommenced. ITAG also notes that large projects by their very nature are complex and tend to affect a range of resources. As a result many resource consent applications can be required, as well as a designation for land use. We have reached the view, based on our experience, previous studies on the complexity or the RMA and as a result of international studies and research that there is merit in developing a new project consent type and consent path for major infrastructure projects which we have termed "project consent". In the view of ITAG only projects which qualify under Part 6AA – proposals of national significance should have the "project consent" path available to them. This new type of resource consent is explained further in section 4.3 of our report. .

The need to recognise the variety of project delivery methods that NZTA, for example, currently employs for major projects and we understand would like to use for the RONS, is important. These delivery methods might include:

1. **Traditional**

   The project is fully consented, designed and specified, then tendered on the basis of schedule rates, lump sum (where moderate risk in transferred) or cost plus (where risk is taken by the owner). This formal contract style does not permit flexibility for innovation and value addition.

2. **Design and Construct**

   The project is fully consented and developed to a stage of specimen design before tendering. The tender and construct procurement involves design by the constructor with value adding innovation and risk refinement to suit the constructor's methods. Pricing is on a competitive lump sum outcome basis for award of contract. The constructor has scope to moderately add value and mitigate risk.

3. **Early Contractor Involvement**

   For projects which are only partially consented, selection of designer and contractor at an early stage enables collaborative involvement in project, design and construction methodology which is used to assist in final consenting before construction. This maximises value outcomes for projects which have difficult consent requirements or require to be advanced quicker than the conventional phased procurement process permits.

4. **Project Alliance**

   This is a totally collaborative procurement and execution arrangement which is applicable for projects which have consent variables, unpredictable construction risks, time advancement opportunities and opportunities to create significant added value. The alliance is an integrated business arrangement between owner, designer, constructor and environmentalist. They are formed into a high performance team singularly focused on whole of life value project outcomes.

5. **Public Private Partnerships (PPP)**

   The feature of PPP procurement is the private investment initiative for value driven funding of both capital development and long term operation for public infrastructure. Whole of life performance of the infrastructure element is commercially driven to meet prescribed outputs and benefits set by the public agency. This type of procurement fosters extensive, whole of life, value outcomes whilst covering all risks and commercial challenges presented.

In our view, the only project delivery options that NZTA can employ with confidence to successfully negotiate the rigours of the current "call-in" process are options 1 and 3. "Project Alliance", "Design and Construct" and "Public Private Partnership" mechanisms are very difficult under "call-in" unless detailed design is finalised. The 'one stop shop' nature of the "call in" process severely constrains the level of innovation that such procurement methods are supposed to deliver. In our view this is a serious restriction on the timely delivery of RONS in particular.

With respect to the "concept designation" for near term projects we recommend that the RMA be amended to make it clear that an assessment of effects should be appropriate to the stage of preliminary design and that flexibility for detailed design can be reserved to the outline plan and minor resource consent stage subject to the following prerequisites:

(a) That the lapse period for the concept designation cannot exceed ten years

(b) That the comprehensive performance standards for mitigation of any adverse effects will not change if the project delivery mechanism and/or form of project formation/construction is subsequently altered post approval, and

(c) That any subsequent resource consents required to give effect to the designation, irrespective of operative and regional plan provisions are deemed to be "controlled activities" and the outline plan could be handled by the EPA where the NOR was handled by the EPA without redress to a de novo Board of Inquiry process, or by the relevant consent authority .[2]

Our reasoning for item (c) is that if the adverse effects of the project have been identified and addressed at the boundary of the designation and comprehensive performance standards applied by way of condition on designation then detailed design and required outline plans and resource consents should be minor and not create the opportunity for relitigation of the proposed infrastructure. The exception would be where the comprehensive performance standards for the mitigation of adverse effects are to be contravened.

In our view "comprehensive performance standards" cover matters such as noise limits, discharge standards, construction traffic management, design standards, landscaping and so on.

The approach we outline above is effectively another tool for infrastructure projects and specifically allows a "concept designation" to address all high levels matters, enables innovative means of design and build and subsequent consents and plans to be subject to non-notified two party consent procedures. . It is not a replacement for existing consenting paths, rather it adds an additional consent path opportunity for some projects that can also take advantage of the "fast track" provisions of 'call in.' In our opinion, the rigorous nature of performance standards effectively safeguard environmental imperatives, while the concept designation will materially improve the cost and time efficiency of project delivery.

In terms of improving the efficiency and functions of existing consent paths section 149ZB of the RMA should also be amended to allow the EPA to decide minor alterations or additions to designations and resource consents rather than referring such alterations to a territorial authority, Environment Court or Board of Inquiry. The section as currently worded is too restrictive and inflexible and we support giving the EPA decision-making abilities in the interests of efficiency and flexibility.

Finally, we concur with the Officials non-legislative suggestion on page 27 of the report that they "develop statutory or non-statutory guidance to inform what is in an outline plan, when they are required and how the provisions in the RMA should be applied."

[2] It is noted that the ITAG was not unanimous on the status of subsequent resource consents as "controlled activities".

RECOMMENDATIONS

12. That the lapse period for a "concept designation" cannot exceed 10 years.
13. That a "concept designation" shall be accompanied by a level of preliminary design sufficient to allow detailed design details to be reserved to the outline plan stage where any consents required to give effect to it are relatively minor.
14. That any subsequent resource consents required to give effect to a "concept designation" are deemed to have controlled activity status irrespective of objectives, policies and rules otherwise contained in a regional or district plan.
15. That clause 149ZB of the RMA be amended to allow the EPA to make decisions on minor alterations and additions to designations and resource consents required thereto.
16. That MfE develop non-statutory guidance to inform what is expected to be in an outline plan, when they are required and how these provisions in the RMA should be applied.

3.3.3 Comparison with Overseas Practice

We note that a number of overseas jurisdictions use the concept based consenting method for major projects. The Ministry for the Environment has reviewed a number of alternative approaches to consenting and decision making on major infrastructure projects in Ireland, Australia and the United Kingdom. The key points to note from this analysis, included in Appendix 3 of our report, are summarised below:

1. "Like New Zealand, Ireland, the United Kingdom, and the Australian states have experienced issues associated with the time and cost of approval processes for major infrastructure projects

2. All jurisdictions have a dedicated path for infrastructure projects but Ireland England and the Australian States have more integrated processes for considering critical infrastructure projects

3. Procedures in other jurisdictions almost always include independent assessment and hearings for significant projects

4. Criteria are set to determine whether or not projects are of regional or national significance and whether or not they should be considered centrally or locally

5. The purpose of declaring a project as having regional or national significance is to ensure that its potential value and impacts on the local and regional context are recognised and managed accordingly

6. In Ireland the "An Board Pleanala" the independent planning appeals board makes all planning approval decisions on strategic infrastructure projects, however it does not fully integrate approvals under other relevant legislation that may apply to a project. There is no appeal unless there are grounds for judicial review by the High Court

7. In England an independent authority – the recently established Infrastructure Planning Commission (IPC) – makes decision on strategic infrastructure projects where there are national policies and standards in place, otherwise the Minister decides an application on advice from the IPC. The IPC development consent order process avoids the need for many of the range of separate consents which previously had to be obtained under separate legislation and from different government agencies, departments and local authorities.

8. Unlike New Zealand and Ireland where either local authorities, a Planning Tribunal, or the Environment Court make the final decision, in most Australian states and in England (when there are no national policy standards in place) the relevant Minister decides, but usually on advice from an independent panel of experts. There are usually no appeal rights on decisions made by the Minister, apart from judicial review of legal process.

9. Extensive pre-application consultation with affected communities, local government and relevant authorities is either required or encouraged for major projects

10. A detailed Environmental Impact Statement (EIS) or the New Zealand equivalent Assessment of Environmental Effects (AEE) is required in advance of an application being made and these are open to public comment

11. It is a common feature of such legislative processes to allow a form of concept plan approval. This involves public participation and identification of issues at an early stage and for detailed plans to be approved by the relevant authority at a later date. The ability to defer such matters is intended to eliminate unnecessary duplication in the assessment process and provides the ability to delegate decisions on matters of detail, thereby speeding up the process.

12. Early consultation and subsequent concept approval processes provide for the environmental, social and cultural outcomes that will be required of any project to be specified early in the design development phase, thereby incentivising innovation in the design and delivery of the project to meet or exceed the standards that have been set." (pages 15 & 16 Appendix 3).

In contrast to New Zealand, key features of overseas practice are that major projects almost always go through a dedicated independent approval or recommendation process and are not considered by local authorities. The regional and national economic, social and environmental benefits are considered in substance, as well as the environmental effects. Public participation is focussed at the front end of the process on the overall merits of the project, rather than being involved in the detail of environmental regulation. Concept approval processes are the norm, rather than the exception and innovation in project design and delivery is incentivised.

ITAG considers that for the reasons set out in the preceding discussion there is considerable merit in adopting a similar approach to overseas jurisdictions in New Zealand for major projects. Necessarily, precedent drawn from comparative jurisdictions would need to be adapted to the unique circumstances within New Zealand, including the provision for tangata whenua values and interests. A further

alternative approach described as a 'project consent' for critical infrastructure projects is described in section 4.3.

3.4 Long term Designations and Lapse Periods

The matter of long term protection of routes or sites for infrastructure has been examined by the ITAG. There are a small number of circumstances where it would be appropriate to identify and protect a route or a site for a major infrastructure project many years – 20 years or more - in advance of the actual work being completed. Examples of this could include a new or extension to a major port or airport, a new or extended national highway or railway, and national transmission routes for electricity, gas or oil. These and similar types of infrastructure represent major investments for New Zealand and provide essential support to economic development of the country. As national infrastructure planning improves at Government and Crown agency and infrastructure provider levels we anticipate more of these long term projects emerging. NOR for such projects allows for protection of routes and sites, and enables wider land use planning in an integrated manner. There are other mechanisms potentially available to indicate the location and routes of such projects such as the strategic long term plans of providers, a statutory National Infrastructure Plan (does not currently exist), spatial plans (as required under the Local Government Act for Auckland) and Regional Policy Statement or District Plans under the RMA. The NOR process under the RMA provides a high level of statutory protection and certainty for the planned work, and higher levels of certainty for other related planning for other infrastructure, urban land development or other economic development of land.

We believe that the Official's discussion of the "concept approach" is a little misdirected. As discussed above scope already exists in the legislation for a long term route or site protection designation approach. The Tauranga Northern and Eastern Arterials and the additional Waitemata Harbour Crossing projects have been approached on this basis.

There is a view that the utility of designations as a long term planning tool for network infrastructure can be undermined by the short duration of the current lapse period (five years) and the reluctance to extend this timeframe beyond 10 to 15 years to cater for longer term projects (e.g. those with a 20 – 30 year time horizon). A current example is the Northern Busway Extension project.

However none of the statutory options put forward by the Officials are considered to be particularly satisfactory. Our review of recent NOR applications indicates that the legislative lapse period is the exception rather than the rule. That is, recent 'requiring authority' applications pay particular attention to the nominated lapse period and generally the 5 year statutory period is not the norm. While the Courts response to a minimum lapse period is variable, we note that the majority of Court decisions accept 10 years as the minimum even though longer periods, typically 15 years, have been sought in a number of instances.

On balance no change to the current lapsing period is recommended because the Courts have, to date, endorsed longer lapse periods in appropriate circumstances.

Notwithstanding this comment we note that the Courts have not yet had to rule on the lapse period for a genuine long term future-proofing infrastructure project.

If there is any doubt that long term lapse periods can be approved, then we would recommend amendments to the RMA.

Currently the only project we are aware of that is likely to meet the long term future proofing criteria is the Northern Busway Extension (NBE) project. The NBE is not yet ready to lodge but will likely be staged in response to growing congestion and public transport demand over a period of up to 30 years. We believe the Courts will sanction such a long lapse time because NZTA and its project partners will undertake early purchase of directly affected landowners properties thereby avoiding the traditional "urban blight" allegations levelled at long term designations that prompted the rationale for the introduction of the five year lapse period in the 1991 version of the RMA.

We commend the early purchase practice currently being employed. Continuation of this practice, in our view, removes the need for any further legislative change. We do however recommend Option 6 in the Officials Report to "develop non-statutory criteria to confirm/inform circumstances where extensions to the statutory lapse period may be considered."

RECOMMENDATION

17. That MfE develop non-statutory criteria to confirm / inform circumstances where extensions to the statutory lapse period may be considered.

3.5 Multiple Designations

To a certain extent, traditionally, designations as stand-alone entities, have focused on a particular essential work and do not facilitate an integrated and co-ordinated approach to infrastructure planning and development, as they effectively veto rights over proposals of other infrastructure providers. While section 177 of the RMA sets out the procedure to be followed where there is more than one designation on a given site often competing interests have not always achieved the best outcomes. The historical tension between rail and road priorities is one example, e.g. the Mercer to Long Swamp Expressway Extension of SH1 where optimal road realignments were constrained by the refusal of rail to allow realignment of its twin tracks.

In our view there should be scope to develop and authorise the joint or multiple use of a single designation(s). Currently the partnership between Kiwirail and NZTA for both the AWHC and SH20 Waterview / Avondale and Southdown Rail Link projects are good examples that would be enhanced by the Officials Option 2 – Enable NORs to be sought for a co-location of infrastructure by requiring authorities (page 31 of Appendix 2).

We also endorse the non-legislative options set out under Options 3 and 4, that is:

"(3) use processes available under the Local Government Act to signal areas where improved infrastructure co-ordination could be achieved; and

(4) develop strategic guidance / direction for central government agencies."

With respect to Option 3 we consider that UTAG should report further on the mechanisms to achieve this option. With respect to Option 4 "patch protection" has tended to be the norm in the recent past and in this regard the Government should give consideration as to how it needs to bring a disparate range of crown agencies under its overall control into line in the interests of the long term sustainable development of New Zealand infrastructure. In this respect the process to develop a long term National Infrastructure Plan is, in our view, a step in a co-ordinated direction.

RECOMMENDATIONS

18, That sections 168 and 171 of the RMA be amended to provide for the co-location of infrastructure by requiring authorities without the need to determine which requiring authority has first priority.

19. That MfE and LGNZ develop non-statutory procedures under the Local Government Act to indicate and illustrate areas where improved infrastructure co-ordination could be achieved.

20. That MfE develop strategic guidance and direction for central government agencies for infrastructure.

4. OTHER ISSUES RELATING TO INFRASTRUCTURE

4.1 RMA Purposes and Principles

There is a justifiable perception that the RMA is frustrating infrastructure development due to the lack of explicit recognition or status that infrastructure has within Part II of the Act. We agree that there is a lack of empirical evidence to suggest that the lack of express recognition is frustrating infrastructure development. However it is fact that major infrastructure development, whether at regional or national level, is vital to the long-term sustainable development of New Zealand.

The 2010 National Infrastructure Plan clearly, in our view, establishes the importance of major infrastructure development and its associated co-ordination across a range of sectors to the long-term future of New Zealand.

The 2009 TAG report had the following to say about sections 6 and 7 of the RMA:

> "Sections 6 and 7 are at present rather a hotch-potch collection of sentiments, all directed at "environmental" issues (as that term is commonly understood), rather than the economic, cultural and social questions which are also central to the sustainability issues which lie at the heart of the Act.
>
> From time to time, calls emerge for an amendment to sections 6 and 7 to correct this "imbalance" and insert in those sections references, for example, to "affordable housing" or "the development of infrastructure."
>
> The TAG has considered these suggestions, and a related proposal to amend the definition of "environment", and recommends that no changes be made as part of Phase I of the reform process.
>
> The TAG is concerned that any changes to these sections be thoroughly considered and widely consulted upon, both as to their societal acceptance and their legal effect. It would be unfortunate if an amendment designed to simplify and streamline the Act, were to result in further doubts arising as to the interpretation of, and the weight to be given to, its most important provisions."

We agree with the observations made above and go further to recommend that the importance of infrastructure should be appropriately recognised in section 6 of the RMA as part of an overall review of the focus of both sections 6 and 7.

Section 5 in our view requires no modification.

Early in our Phase II review process we identified the foregoing as a matter to be addressed with some urgency. As a result of our recommendation in February 2010 the Minister has instructed us to give further consideration as to how major infrastructure should be included in either section 6 or 7 of the RMA. Notwithstanding the current 'mish-mash' of sentiments in sections 6 and 7, in our view major infrastructure should be included as a section 6 matter and we recommend that section 6 be amended to insert the following:

"(xx) The development and operation of regionally and nationally significant infrastructure."

It is not the ITAG's role to rationalise the matters contained in sections 6 and 7 given our terms of reference.

RECOMMENDATION

21. That section 6 of the RMA be amended to add an additional clause which states: "The development and operation of regionally and nationally significant infrastructure."

4.2 Reconsenting

Reconsenting only relates to takes, uses, discharges and resource allocation which can be consented up to a maximum of 35 years - land use consents have no time limit. As noted in the Official's Report (page 41) "there is a lack of clarity in the RMA as to the scope of information required during the re-consenting for the use of public resources associated with infrastructure (ie. what information is required and for what purpose?)." We agree with that view notwithstanding the 2005 RMA amendments intended to favour the consent holder over other possible applicants.

While the 2005 RMA amendments have contributed to this lack of clarity we accept that concern persists from some infrastructure sectors about the life of consents and the time and costs involved in re-consenting activities.

The Official's Report (pages 43-46) lists seven options. We have considered the merits of each option. The reality is that the need for re-consenting generally arises from water allocation or other resource allocation and discharge issues and not the actual land use per se. In a number of respects this is a strange juxtaposition given that the physical infrastructure (dam, power station, tail race and transmission facilities) is often a significant "sunk cost" not easily removed or remediated.

We are not saying that 'just because it is built it should remain', rather, existing significant scale infrastructure needs to be recognised because in many respects it represents the "permitted baseline". The physical existence of built infrastructure is not the primary reason for protecting or preserving its long-term existence, but it is a factor that must be taken into account in any re-consenting process. We understand that was the intended purpose of section 104 (2)(A).

In these circumstances we recommend the Official's option 2A – "A New Process for Consent Renewal" be adopted for the reasons set out on page 44 of the Official's Report, as follows:

- "conferring rights to apply by the existing consent holder (not right of renewal).
- Expressly allowing applications well within the consent term (the 'Evergreen' approach) while enabling the existing consent to be exercised until the expiry in the event the new application is unsuccessful.
- Providing the ability to continue the consented scale of activity while the re-consenting application is being processed up until existing consent expiry (if consent declined).

- Constraining the scope of the new consent to the existing consented activity or activities within a 'same effects envelope,' where practical.
- Constraining the information requirements for re-consenting (for example, limited to / focusing on effects of operation as opposed to occupation by the activity/existing structure etc, 'emerging / new effects', 'emerging values or expectations', any implications of new plan provisions, monitoring data, 'holder performance' or 'efficiency of use'). This could be achieved through an amendment to schedule 4 of the Act (Assessment of Effects on the Environment).
- Requiring councils to limit their consideration to the above matters while also taking into account matters such as scale/degree of investment and financial implications. This could be expressed by incorporating or perhaps an expansion of section 104(A) type considerations.
- Constraining notification and consultation requirements with affected parties and appeal rights." [3]

Treaty Settlements, both completed and pending, will also need to be a particular consideration in any re-consenting that occurs over the next 20 years. Many of the existing infrastructure consents were granted prior to Treaty Settlements and the emergence of a body of jurisprudence pertaining to tangata whenua values. Treaty Settlements contain a number of instruments, such as statutory acknowledgements, that directly and indirectly intersect with the RMA to provide elevated status to, and an evidential basis for, tangata whenua values. The applicable jurisprudence has had a similar and reinforcing effect. Therefore, it will be important in any re-consenting to carefully provide for these changes in the circumstances, which would amount to specific new information requirements, cultural impact assessments and openness to mitigating impacts on cultural values.

We agree with the Official's Report pros (benefits) set out on page 44. With respect to the dis-benefits (cons) listed we consider that the "New Process" clauses to be inserted in the RMA could be worded in a manner that reasonably reduces the risks of locking in "inefficient use of resources" and "changing community preferences." We reach this view on the basis that the rate of technological innovation and New Zealand's political governance structure will provide sufficient safeguards to ensure that the "embedding of obsolete mechanisms" will not occur.

Examples of obsolete infrastructure reaching its 'use by date' without legislative provisions are numerous throughout New Zealand's evolution and development over the past 200 years. Some infrastructure examples include the Meremere Power Station, the Victoria Park Market incinerator, wharves and jetties, Marsden B and railway lines.

Finally we would also recommend that Schedule 4 of the RMA should be amended to include particular information requirements for re-consenting existing infrastructure to clarify the existing consented project or work baseline and the scope of the information required to support such applications.

RECOMMENDATIONS

22. That a new process for consent renewals be introduced where its key

[3] ITAG have amended these reasons in part.

features would be:

- Conferring rights to apply by an existing consent holder;
- Expressly allowing renewal applications well within the existing consent term;
- Providing for the consented scale of activity to continue while the reconsenting application is being processed;
- Constraining the scope of the new consent to the existing scale of activity within the same "effects envelope" where practical;
- Constraining the information requirements to the effects of the existing operation as opposed to the actual occupation, emerging/new effects or emerging values or expectations;
- Requiring consent agencies to confine their concerns to the matters listed above;
- Constraining notification and consultation requirements to directly affected parties rather than the public at large;
- To take account of Treaty settlement issues where they are relevant; and
- To require the reconsenting process to take reasonable and realistic account of an "efficient use of resources".

23. That Schedule 4 of the RMA be amended to include the particular information requirements for reconsenting existing infrastructure including what the existing infrastructure baseline is and the scope of information required to support a renewal application.[4]

4.3 Alternative Methods – Project Consent Process for Major Infrastructure

Major infrastructure, of regional and national significance, is important to our social and economic development as a nation. As identified in this report, we consider that the current statutory consenting path may inhibit efficient and innovative infrastructure development that has been subjected to optimal public participation on the key decisions pertaining to such development. Having carefully considered the relevant factors, we recommend that a new consenting path for major infrastructure projects should be provided that streamlines the various statutory approvals for major projects into an integrated process. We have termed this alternative a 'Project Consent' and recommend that it is a new category of consent that is obtained through a new consenting path that exists as an additional alternative to, rather than substitute for, the extant pathways.

The 'Project Consent' has the following key characteristics;

- *Scope*—the 'Project Consent' would be available for all regionally and nationally significant infrastructure that satisfy the section 6AA of the RMA national significance test;
- *Nature of consent*—the 'Project Consent' would be an all encompassing consent that prescribes the 'envelope of effects' for the proposed development. In place of the multiple consents and approvals that are currently required under a

[4] The above recommendations were endorsed by the majority of ITAG members.

number of statutes, the 'Project Consent' would be a single and comprehensive authorisation to conduct the development. The 'envelope of effects' approach would carefully prescribe the permissible footprint of the development, allowing for greater innovation and flexibility of project delivery method within parameters that meet the statutory environmental, social and cultural imperatives;

- *Consent process*—the 'Project Consent' would be administered by one, centralised agency, which we consider is best housed in the EPA, and involve two key stages; (1) concept design approval through a Board of Inquiry process that determines the permissible envelope of effects; and (2) design approval through the EPA or other agency as directed by the Board of Inquiry to rigorously evaluate whether the detailed design falls within the envelope of effects. Both stages would allow for participation and strict evaluation according to the statutory imperatives and criteria. This streamlined process would replace the multiple decision makers under the current model with one decision maker.

As the 'Project Consent' is a new, although not necessarily novel, consent category and process we set out our reasoning at some length in the following parts;

- Assessment of Existing Processes;
- International Comparators;
- Overview of Project Consent;
- Evaluation of Project Consent on Public Participation;
- Companion Initiatives; and
- Recommendations and acknowledgements.

4.3.1 Assessment of Existing Processes

The current statutory processes result in a series of resource consents and approvals being sought from multiple decision makers. In practical terms, this can result in major infrastructure development requiring literally hundreds of discrete consents and other approvals. A typical infrastructure project can require the following consents and approvals:

Nature of Activity	Approval Required	Decision Maker
Land Use	Land use resource consent	Consent authority—depends on pathway adopted (potentially territorial authority, regional council, Environment Court, Board of Inquiry)
	Notice of requirement for designation	Requiring authority, with recommendations from local authority and subsequent outline plan process

Earthworks in beds of streams	Land use resource consent	Consent authority—as above
Take water for construction purposes	Water permits-- note often multiple permits required for different parts of the project	Consent authority—as above
Take water for project purposes (e.g. cooling, irrigation, industrial processes)	Water permits-- note often multiple permits required for different parts of the project	Consent authority—as above
Divert water—culverts, drains and the like	Water permits-- note often multiple permits required for different parts of the project	Consent authority—as above
Discharge to water—stormwater and the like	Water permits-- note often multiple permits required for different parts of the project	Consent authority—as above
Occupy an area of the coastal marine	Coastal permit	Regional council
Affect (modify or destroy) wildlife habitat	Wildlife permit	
Affect (modify/destroy) archeological sites	Authorisation	Historical Places Trust with right of appeal to the Environment Court
Affect conservation estate	Concession	Minister of Conservation

We also note that in practice there are further complicating factors, such as;

- Dual/Multiple approvals—most major infrastructure projects require approval by both regional and territorial authorities, which we consider to be cumbersome and result in overlap in consideration of effects by each authority; and
- Omissions from Streamlined Processes—the processes intended to streamline consenting, such as the 'call in' process, are not all encompassing. For example, approvals under the Historic Places Act 1993 and the Reserves Act cannot be considered under the 'call-in' process, which detracts from the desirability of following the current streamlined processes.

In our experience, the current statutory processes inhibit efficient, innovative infrastructure development that has been well scrutinized by the public in the following ways;

- *Efficiency*— the current processes inhibit efficiency in two key ways; (1) duplication through multiple decision makers scrutinising discrete aspects of the project in a fragmented fashion; and (2) time lost through consents being 'missed'; due to the significant number of consents required, it is possible for discrete consents to be unforeseen at the time of the initial application and

therefore costly delays are incurred when further consents are applied for part way through the project;

- *Innovation*— innovation in project design and delivery is inhibited by the highly prescriptive nature of the discrete approvals at an early stage in the development process. As discussed above, infrastructure procurement through PPPs, Project Alliance and Design and Construct, is particularly difficult where detailed design is required early in the project. Additionally, these methods of procurement are intended to deliver enhanced design innovation which is materially stifled by the early prescriptive nature of the current consenting and approvals processes;
- *Complexity*— the early focus on highly specific impacts and conditions confines public engagement and project evaluation to the technical aspects of the proposed development. As a result, there is limited opportunity for the public to engage on the prior and important matters of whether the development should proceed and if so, how;
- *Inconsistency*—across the various decision makers, we have experienced notable inconsistency in the way that different decision makers apply the applicable statutory criteria and we do not consider that the inconsistent outcomes are in the national interest.

We consider that these factors materially impede sustainable infrastructure development in New Zealand, and that it is in the national interest to consider the 'Project Consent' as an alternative that can deliver environmentally sound outcomes.

4.3.2 International Comparators

As referred to in section 3.3.3, a number of comparable jurisdictions have sought to address the inhibitors to infrastructure development that we have identified above as applying to New Zealand. While we do not consider that New Zealand should adopt international precedents wholesale, we consider there are constructive improvements that can be gleaned from international best practice.

In our analysis, the following appear to be common in international practice;

- *Significance Threshold*—that infrastructure development is able to proceed through a dedicated process if it meets specified criteria for regional or national significance. This threshold test also appears to ensure that the potential value as well as impacts of the development are recognized in the relevant processes;
- *Integrated Process*—the various approvals required are consolidated into one process to remove fragmentation and so decrease time and cost inefficiencies;
- *Single Independent Decision Maker*—a dedicated decision maker is empowered in all jurisdictions reviewed, and while there is diversity in the actual decision maker (variously a Minister, dedicated Commission, Board or the like) the common feature is that the decision maker is independent and has developed expertise in infrastructure development;
- *Staged Process*—international precedents share a two stage process that allows for an initial concept approval that specifies the permissible footprint for the development, followed by a later approval of detailed plans. This staged approach is intended to eliminate duplication in the assessment process and

speed up the process of decision making on matters of detail. It is our understanding that concept approval processes are the norm internationally and are recognized to incentivize project design and delivery;

- *Pre-Application Consultation*—early and comprehensive public engagement is required in a many jurisdictions to ensure that the environmental, social and cultural outcomes required by the project are identified in advance and the project design can be developed to incentivize innovation to meet or exceed the expectations of the community.

We consider that international precedents provide sound guidance for developing a dedicated New Zealand consent and pathway for infrastructure development.

4.3.3 Overview of the 'Project Consent'

The 'Project Consent' recommendation is intended to enable efficient, innovative and environmentally sound infrastructure development in New Zealand.

The objectives that we have sought to achieve in the design of the 'Project Consent' include;

- *Efficiency*—that major infrastructure should be developed as efficiently as possible in terms of both time and cost;
- *Innovation*—that we should encourage innovation in the design of infrastructure, including in delivery on social, environmental and cultural outcomes sought from the development;
- *Project Delivery*—that there should be sufficient flexibility to allow for the optimal procurement method for infrastructure development;
- *Public Participation*—that communities, statutory agencies and tangata whenua should have fulsome opportunities to engage on the strategic merits of the proposed development and identify the social, environmental and cultural outcomes that should be incorporated into the design of the development so that it can best meet community needs and expectations.
- *Environmental Sustainability*—we have endeavoured to develop a process which focuses on the project's proposed changes to the environment as a result of the project and management of its effects; rather than highly technical focus on a myriad of resource consents and other approvals, and the legal processes around those consents

In summary, the 'Project Consent' would provide for a single project consent to be obtained from a single consenting/approval authority. In summary;

- *Scope*—the 'Project Consent' would be available for all regionally and nationally significant infrastructure that satisfy the section 6AA of the RMA national significance test;
- *Nature of consent*—the 'Project Consent' would be an all encompassing consent that prescribes the 'envelope of effects' for the proposed development. In place of the multiple consents and approvals that are currently required under a number of statutes, the 'Project Consent' would be a single and comprehensive authorization to conduct the development. The 'envelope of effects' approach would carefully prescribe the permissible footprint of the development, allowing

for greater innovation and flexibility of project delivery method within parameters that meet the statutory environmental, social and cultural imperatives;

- *Consent process*—the 'Project Consent' would be administered by one, centralised agency, which we consider is best housed in the EPA, and involve two key stages; (1) concept design approval through a Board of Inquiry process that determines the permissible envelope of effects; and (2) design approval through the EPA or other agency as directed by the Board of Inquiry to rigorously evaluate whether the detailed design falls within the envelope of effects. Both stages would allow for participation and strict evaluation according to the statutory imperatives and criteria. This streamlined process would replace the multiple decision makers under the current model with one decision maker.

We consider the project consent should have discretionary activity status under the RMA.

The process for obtaining the consent is set out on the next page in a diagram that incorporates both statutory and non-statutory components of the process;

PRE-STATUTORY PROCESS:

- Applicant prepares scheme options, identifies affected parties and all statutory approvals that will be required
- Applicant consults on scheme options with public, Iwi authorities and relevant statutory authorities (EPA, HPT, DOC, Fish and Game, Local Govt etc)
- Applicant refines the preferred concept design

STATUTORY PROCESS—PROJECT CONSENT APPROVAL:

Project Consent Path Approved;

EPA conducts significance test and makes recommendation to Minister;

Minister approves or declines project consent pathway.

Consultation on AEE;

Scope of AEE discussed with EPA;

Detailed AEE completed at expense of applicant;

Public, Iwi authorities and relevant statutory authorities engaged in AEE

Application Lodged and Notified

EPA conducts pre-application assessment to ensure application is complete;

Public notification by EPA

Transmitted to Board of Inquiry for Hearing and Decision

Submissions and Hearing

BOI receives reports from statutory, local government and Iwi authorities on consultation, AEE, and recommendations whether to approve/decline;

Hearing conducted on application

Decision and Project Specification

BOI approves/declines project consent

If approved, consent specifies project envelope standards including; dimensions, air/water/noise standards, visual/amenity services etc

NON-STATUTORY DESIGN PROCESS:

- Applicant chooses procurement method;
- Design and construction method is focussed on optimal delivery of consent specifications;
- Provider determined through competitive or collaborative bid process;
- Detailed design finalised

STATUTORY PROCESS—DESIGN APPROVAL:

Design Lodged & Notified

Detailed Design lodged with EPA;

Public notification by EPA

Detailed Design Assessed

EPA reviews design for compliance with project consent Statutory and Iwi authorities present submissions/reports on compliance

Decision

EPA or other decision maker approves/declines application on basis compliance with project consent

We consider that this process would result in the following improvements to the consenting of major infrastructure at each stage in the process;

- *Pre-Statutory Process* – this stage is intended to ensure that the public, statutory and Iwi authorities are engaged at the beginning of the project life cycle where the public is most qualified to provide input and where expression of desired community outcomes is most valuable. The debate of the merits of the project and the outcomes and envelope of effects that it must deliver would be resolved at the beginning and incorporated into the project scoping and design. The benefits to infrastructure providers are that this early engagement process occurs before expensive detailed design is entered into. We also note that acceptance of applications under the statutory process, as below, will be conditional upon a detailed AEE and consultation process having been undertaken and that the project meets criteria to assess national or regional significance.

- *Statutory Project Consent Approval Process*— the statutory process provides for an an integrated Board of Inquiry process that integrates consents under the RMA along with other statutory compliance that may be required for a project to proceed. The project consent process would avoid the need for many of the range of separate approvals which currently have to be obtained under separate legislation and from different government agencies, departments and local authorities. The envelope of effects would be described (and where possible standards defined) by the Board of Inquiry process in the form of an approval including conditions on performance standards to be achieved. Detailed approvals to outline plans or management plans could be given either by the Environment Protection Agency or the relevant statutory, regional or territorial authority, as decided by the board of inquiry. These might include, for example, approvals under the Historic Places Act, Foreshore & Seabed Act, Reserves Act, Public Works Act, the Local Government Act, and other relevant statutes.

We also note the importance of appropriately populating Boards of Inquiry and encourage the Ministry and Minister to develop a cadre of experts with knowledge of infrastructure who would be suitable as members of boards of inquiry who are able to hear and determine a wide range of infrastructure and other major projects in an efficient and knowledgeable manner. As an example, in the UK Commissioners of the Infrastructure Planning Commission are chosen for their knowledge of public engagement and inclusion as well as their technical and professional skills. They are accountable to the Courts, have a strict code of ethics and are free of political interference.

We also recommend that the EPA serve as a centralised administrative body for reasons of efficiency and cultivating the necessary expertise.

- *Non-Statutory Design Process*—after concept approval has been gained in the project consent, the infrastructure provider will engage in procurement and design processes. Having identified the project outcomes that must be met, including necessary environmental, social and legislative imperatives, the design and project delivery focus would be centred on meeting or exceeding the output specification at the least cost. We consider that this will inevitably drive innovation around value for money outcomes through either competitive or collaborative procurement methods;

- *Statutory Design Approval Process*—once the detailed design has been completed, the EPA or other decision maker as determined by the BOI in the

concept approval stage, will scrutinize the design to ensure that it complies with the conditions and standards specified in the project consent. This stage will allow for further participatory processes to ensure that the development is rigorously evaluated.

We have also considered the importance of due process, and recommend that the following appeal processes be provided for:

- *Statutory Project Consent Approval Process*—we consider that any appeal from this stage of the process should be on points of law only; and
- *Statutory Design Approval Process*—we consider that there should be no appeal from this stage of the process as the provisions of s 176A Outline Plan Approval would apply.

We consider that there needs to be a careful balance between fully providing for due process and not encouraging re-litigation of matters that have been addressed.

4.3.4 Evaluation of Project Consent on Public Participation

We have considered the impacts of the 'Project Consent' on participatory processes because we recognise that such participation is fundamental to the design of the RMA scheme and we consider that this is an important component of balanced, accountable and transparent natural resource management. We have particularly considered the impact on participation by;

- Statutory and Local Authorities;
- Public;
- Tangata Whenua.

Statutory and Local Authorities

In the new regime, all statutory and local authorities with an interest would be consulted and, by law, local impacts would be balanced against national benefits. Local authorities would have a role in the system at all stages, including:

- At the overarching level by input into the development of National Policy Statements
- At the project level by the requirement for applicants to consult local authorities, as well as other bodies and the local community, before they submit an application to the EPA
- The EPA would be required to take account of the views of the local authority and others on the adequacy of the applicant's publicity and consultation in deciding whether an application can be accepted as valid.

- The local authority may submit a Local Impact Report (LIR) to the Board of Inquiry. The LIR would describe the likely effects of the proposed development on the local authority's area. The Board would have regard to the LIR in deciding an application, and would reject the application, if the adverse impacts outweigh the benefits.

With respect to the Local Impact Report requirement under section 149G(3) of the RMA we consider the criteria to be addressed are too broad and open to interpretation. We therefore recommend that this section be amended by deleting the words "the key issues in relation to the matter that includes:"

Public

The project consent regime is intended to provide better opportunities for the public and local communities to get involved in decisions that affect them. There are three opportunities to get involved:

- in the debate about what national, regional local policy means for planning decisions
- in the development of specific projects during the consultation process and
- the examination of applications for development consent – both by making written representations and appearing at the Board of Inquiry hearings

Applicants would be required to carry out extensive public consultation before making application to the EPA. Engagement with the local community and a range of other bodies at the pre-application stage would be a very important aspect of the new system. Further consultation would take place following the submission of the scheme to the EPA.

The system is designed to ensure that applications are prepared to a high standard – they would have to demonstrate that they have taken into account responses from consultation. The EPA and/or the Board of Inquiry would be empowered to refuse to accept or consider any applications that are inadequate in significant areas including public consultation and environmental impact assessment.

Once an application has been accepted as valid by the EPA, the EPA would be required to publicise this, and the public will have a further opportunity to express their views by making written representations to the Board. The Board would be required to make all representations public and allow interested parties the opportunity to comment on them.

By this process, we consider project approvals can be both streamlined and benefit from consideration in an integrated manner whilst enabling extensive community participation.

Tangata Whenua

Tangata whenua would share the opportunities for participation open to statutory and local authorities and the public more generally (as immediately above). We consider that Iwi authorities should be recognised as having a status equivalent to

Statutory Authorities, and be able to participate in the evaluation and participation process in exactly the same ways as these authorities.

Applicants would be expected to comprehensively engage with tangata whenua before making an application, including conducting cultural impact assessments early in the design process. It would be expected that the EPA and/or Board of Inquiry would refuse to accept applications unless they have sufficiently accounted for tangata whenua values in their applications and completed thorough cultural impact assessments.

The underlying objective would be to ensure that tangata whenua values and interests were elicited through best practice engagement and integrated into the design elements of the development.

4.3.5 Companion Initiatives

We consider that there are three important companion initiatives that ought to be progressed to construct a conducive national context for the 'Project Consent' to operate in an optimal fashion;

- *Recognition of National Importance*—we consider that recognising major infrastructure as being of national importance within Part 2 of the RMA is an important requirement. This change is needed to give recognition to the importance of infrastructure such as transport, energy, telecommunications, water, waste infrastructure and other essential community infrastructure services. Such an amendment would be fully consistent with the purpose of the Act set out in Section 5 which is to "enable people and communities to provide for their social, economic, and cultural well-being and for their health. Further consideration of this companion initiative is set out above at section 4.1;
- *National Instruments*—we consider that it is important for government policy to provide clear direction for infrastructure development and approval, particularly in respect of nationally important infrastructure as well as specifying the standards and conditions for infrastructure development. We recommend that the following instruments be developed/maintained; National Infrastructure Plan, National Policy Statement and National Environment Standards on infrastructure. These documents would provide the strategic planning and statutory context for the development and consideration of specific infrastructure projects. This recommendation is discussed further below at section 4.4;
- *Regional Instruments*—as an important part of implementing central government policy, we consider that local authorities should also develop plans and policies to guide regionally important infrastructure development, including reflecting infrastructure in; regional policy statements, spatial plans and LTCCPs. These documents would similarly, provide the strategic planning and statutory context for the development and consideration of specific infrastructure projects.

4.3.6 Recommendations and Acknowledgements

We recommend the following:

RECOMMENDATIONS

24. That a new project consent process be included in the RMA to be called the Project Consent Process incorporating the procedural steps set out in the Project Consent Process diagram contained on page 33 of our report.
25. The MfE investigate the means and manner in which a cadre of experts with particular knowledge of infrastructure requirements can be established to support and serve on Boards of Inquiry.
26. That Section 149G(3) be amended by deleting the words "the key issues in relation to the matter that includes."

We also wish to acknowledge the contributions to the above analysis and recommendations from a paper called "Improving Effectiveness and Efficiency of Approval Processes for Critical Infrastructure" prepared by Stephen Selwood, May 2010 and the Officials report. We acknowledge Stephen's contribution and in general support the thrust of his paper. On pages 48 and 49 of the Officials report a number of options are outlined and discussed. However, none of them capture, in our view, the scope of the Project Consent approach we consider to be appropriate as a completely new consent category and consenting path.

4.4 National Instruments

There is currently a lack of certainty and planning around the future development of National Policy Statements (NPS) and National Environmental Standards (NES). We agree with the Officials that the "lack of an agreed programme" means that "the current approach to considering new interventions is ad hoc and lacks a structured, transparent approach to forward planning on current Government priorities and emerging issues ..."

The Officials provide a detailed description of what NPS and NES are intended to be and what their function is on pages 50 – 52 and we agree with the concerns they raise particularly with respect to the 2010 National Infrastructure Plan where "it is unclear what effect it will have on RMA policy statements and plans as there is no strong legislative requirements for it to be taken into account or for regard to be had to it."

Our recommendation with respect to major infrastructure being a RMA section 6 matter (see section 4.1 of our report) will however make a difference to a degree. As a result of this recommendation it is likely that a definition of "major infrastructure" will have to be included in Section 2 of the RMA. Such a definition could be framed along the lines of "Major Infrastructure" means any type of infrastructure described in the National Infrastructure Plan, regional policy statements and regional spatial plans.

With respect to the Officials discussions on the Options to address the problems with NPS and NES we endorse their preferred option of "developing an agreed programme of national instruments" because such a strategy would align "the work of teams involved in developing regulatory and non-regulatory interventions with the key priorities outlined in MfE's Statement of Intent and by Cabinet."

Such a strategy should also reduce the potential for conflict between national instruments and allow for prioritisation of these instruments.

RECOMMENDATIONS

27. That a definition of "major infrastructure" be added to section 2 of the RMA. Such a definition to mean "any type infrastructure described in the National Infrastructure Plan, regional policy statements and regional spatial plans."[5]
28. That MfE develop an agreed inter-departmental programme of national instruments which reflects the wishes of Cabinet.

4.5 Strategic Integration of Infrastructure with Land Use

Section 30 (1)(gb) of the RMA sets out that it is a function of regional councils under the Act to achieve the strategic integration of infrastructure with land use through appropriate objectives, policies and methods. Regional policy statement changes have been adopted or are in process in the Auckland, Bay of Plenty, Waikato and Canterbury regions to give effect to this function. The hierarchy of plans means that when the relevant parts of the RPS are operative, district plans must give effect to these new provisions. ITAG comments that RPS and district plans are a coarsely grained and partial way to achieve integration of infrastructure with land use – a matter addressed in more detail in the UTAG report.

In our view any legislative change at this stage is premature and we endorse the Official's option l provision of guidance on Section 30 (l) (gb). We would also suggest that MfE review second generation plans for compliance with the requirements of Section 30 (l)(gb).

RECOMMENDATIONS

29. That MfE prepare a guidance note on how the requirements of section 30(1)(gb) are anticipated to be implemented.
30. That MfE set up an ongoing review process to consider how second generation plans are meeting the requirements of section 30(1)(gb) and to then report to Government on whether further action is required.

4.6 Government Submissions

It is reported to us that the current process and application of Government submissions is ineffective and there is a lack of clarity as to their purpose. While we sympathise with the problems set out on pages 60-62 of the Officials the reality is that these are non-statutory intercommunication problems as between government departments, agencies and to a lesser extent state owned enterprises. Unnecessary patch protection could be part of the problem and some appropriate interdepartmental head banging would most likely not go amiss.

[5] One member of ITAG did not endorse this recommendation.

We agree that a review of Cabinet Office Circular (CO (06) 7) is a sensible idea. We note that if the term "major infrastructure" is defined in the RMA as we recommend (see section 4.4 above) then submissions from major government agencies eg NZTA are likely to be more frequent. Such submissions should not be pitched with a big brother tone.

RECOMMENDATION

31. That a review of Cabinet Office Circular (CO(06)7) be undertaken by MfE with inputs from other appropriate government departments for a report back to Government as to whether further action is required.

4.7 Reverse Sensitivity

As the Officials note and from our own experiences, reverse sensitivity is causing difficulties for a wide range of activities, in particular major infrastructure providers and the agricultural sector. This is particularly the case with noise on major roads. As Chief Environment Court Judge, Thompson observed in a relatively recent case "*If there is anything to complain about, sooner or later somebody almost certainly will do so*".

The RMA does not have any guidance on whether, or how, to address reverse sensitivity. To assist us we have reviewed the thrust of the NZS Noise Standard 'New and Altered Roads NZS 6806:2010, being an amalgamation of NZS 6803 and the Transit Noise Guidelines. The 2010 standard is very much a step in the right direction. However we have some reservations over the requirement to install acoustic treatments on roads that are being altered either by the road controlling authority or as a result of subdivision or land use development. It is not clear to us whether the acoustic costs of retrofitting altered roads to comply with the new standard have been fully taken into account.

Notwithstanding this situation we support the Officials Option 1 – Identifying reverse sensitivity in any future National Policy Statement on infrastructure provisions, and Option 2 – legislative amendments which would include describing reverse sensitivity as an effect in section 3, defining the term in section 2 and amending section 31 to make it clear that addressing reverse sensitivity is a territorial authority function.

RECOMMENDATIONS

32. That future National Policy Statements on infrastructure issues be required to identify where reverse sensitivity issues are or could be an issue.
33. That Section 3 of the RMA be amended to record that reverse sensitivity is an effect that is required to be taken into account.
34. That a definition of "reverse sensitivity" be included in Section 2 of the RMA.
35. That Section 31 of the RMA be amended to make it clear that addressing reverse sensitivity issues is a territorial authority function with respect to district plan issues and resource consents being sought.

5. PWA Compensation Issues Addressed by ITAG

5.1 Introduction

The Government is focused upon "identifying options for improving …. compensation provisions under the RMA and Public Works Act": National Infrastructure Plan ("NIP") p.63.

The purpose of the continued improvement is to remove "unnecessary barriers and identifying new mechanisms, so that infrastructure development can be progressed in as timely a fashion as possible." NIP p.63.

Our investigations and research have highlighted a number of such barriers and other deficiencies in the compensation regime, aspects of which do not meet a number of the regulatory review programme's general principles for good regulation, including in particular minimising "adverse effects on …. property rights." NIP p.62

In particular we refer to:

1. Disputes over the quantum of compensation payable causing delays in the acquisition of land.
2. A frequent perception that the levels of compensation inadequately compensate owners facing dispossession.
3. The obligation to offer back land to the party from whom it was acquired if all or part of the land is no longer required for a public work.
4. The sequential nature of the designation and taking procedures adding to the time which elapses between identification of the required land and its eventual acquisition.

5.2 Disputes over Compensation Amount

Officials identified this to us as being an issue which contributed to development not being progressed in as timely a fashion as possible.

Our understanding is that Government agencies very rarely pay anything until agreement is reached (or a Land Valuation Tribunal Order made) as to the total amount payable. We further understand that this is a practice rather than a legal requirement.

We can readily appreciate how this practice can delay acquisition of required land. An owner frequently has a markedly different view of the property's value to that held by the requiring authority, and indeed given that the valuation of land, including various interests in land, and businesses is perhaps as much of an art as a science, this should come as no surprise.

We can readily appreciate too that an agency's refusal to make an advance payment can often seriously inconvenience an owner seeking to relocate. The owner will often not have sufficient resources to enter into an agreement to purchase a new property. This inconvenience will undoubtedly on occasion sour

and the relationship between the owner and the requiring authority, thus further contributing to delays in the property's acquisition.

We can see no reason why requiring authorities should adopt their present practice. We note with interest that in Queensland an owner is entitled to require the authority to pay 60% of its offer as an advance, and a similar provision in the UK allows an owner to seek a 90% advance payment. The position of the requiring authority is easily protected by the registering of a Compensation Certificate against the title of the property. We would regard such a practice as being consistent with minimising adverse impacts on property rights.

In the case of owners unwilling to enter into such an agreement, we recommend that the Act be amended to allow early acquisition upon payment of the authority's valuation figure, with the balance and interest to be paid after determination by the LVT. We understand that such a procedure is in place in the State of New York.

RECOMMENDATION

36. That the PWA be amended to allow a requiring authority to pay the authority's valuation figure to secure early acquisition and access for the works to commence and where the balance and interest (if any) to be paid shall take place after determination by the Land Valuation Tribunal.

5.3 Levels of Compensation

There is a common perception that the levels of compensation, such as market value and solatium, paid or offered by the requiring authority do not adequately compensate owners facing dispossession.

5.3.1 Solatium

We deal first with one area in respect of which this perception is clearly well founded; namely the payment of *"solatium".* ("Solatium" is a legal expression meaning compensation for hurt feelings or grief over and above actual loss).

In general, this is a payment made to owners of owner occupied residential properties in recognition (to adopt a line from the Australian film "The Castle") of the loss of their home as distinct from their house.

This amount was set in 1981 at $2000.00 and remains unchanged after 29 years. It is no wonder that in this respect at least the perceptions of state agencies as being mean rather than reasonable (let alone generous) is so prevalent. At a bare minimum this amount should be increased by reference to the rate of inflation over that period, and in order to prevent it falling further behind again over time, we recommend that it be suitably indexed into the future.

We gave some consideration to whether the solatium should be expressed as a percentage of the property's value. (The 2001 Official's Report indicated that 5% was a common figure in Canada). However, given that the basis of the payment is for hurt feelings or grief over and above actual loss, it is our view that there is no

justification for compensating more wealthy owners more generously than those of modest means.

We do however favour a payment in respect of properties where the owner has resided for a long time: a home that has been the centre of a family's existence for decades does, in our view, warrant a higher level of compensation than a house they purchased last year. Thus we recommend that the solatium payment be increased by $5,000 if the property has been in the same ownership for the last 5 years, $10,000 if in the same ownership for the last 10 years, $15,000 after 15 years and $20,000 after 20 years or more.

We do not consider that solatium payments should be extended to business owners given the existing loss of profit provisions and the like already contained in the PWA.

RECOMMENDATION

37. That the PWA be amended to increase the solatium payment from $2000 set in 1981 to the appropriate indexed amount as of today and be further amended by annual indexing. In addition it be increased by $5000 if the property has been in the same ownership for the last five years, $10,000 if in the same ownership for 10 years, $15,000 after 15 years and $20,000 for 20 years or more.

5.3.2 Market Value

We are advised that the Public Works Act does not permit the payment of compensation at a higher amount than *"market value".* That is to say officials' advice to us is that state agencies are not permitted to ever pay even a modest premium over and above market, in an endeavour to achieve an early acquisition.

In their 2001 report to Cabinet, officials noted that:

> *"Where both parties agree to an acquisition, an open market transaction is often not possible because of the 1981 Act's strict compensation requirements. These do not allow either the Crown or a local authority to pay more for the land than the value determined by a registered valuer. Consequently payment over time and above a prescribed amount is unable to be traded off against time and administrative costs even if the overall cost to the crown or local authority is less than with the cost of a compulsory acquisition".*

Ironically, agencies regularly pay very large sums in recompense of owner's legal and valuation expenses; yet they are not permitted to pay even a modest premium on the purchase price. We have no doubt that such a prohibition is counter-productive to the objective of progressing works *"in as timely a fashion as possible",* let alone the added nett cost to the State in terms of the fees and expenses it incurs in disputing valuations

In the private sector of course an anxious purchaser will frequently pay a premium to reflect the added value that it places upon the desired property. We see no reason why state agencies should be disadvantaged in this respect.

Furthermore, it should not in our view, be overlooked that the land is being acquired because of the benefit which will consequently flow to the public. If the public is to benefit, we are of the view the person facing dispossession should not be expected to carry the brunt of the burden. We regard the State as having an obligation to err on the side of generosity; and of course the same is all the more so when the acquiring authority is actually a private entity. Accordingly we recommend that a 5% premium be payable as a matter of course over and above fair market value. Such a policy would, we believe, engender a more positive public perception of land acquisition, earlier and easier acceptance by those being imposed upon, reduced cost of litigation and associated time savings. In comparison to overseas jurisdictions where a 15% premium is common, 5% is a modest premium.

We are also advised that subject to adherence to a "fair market value" policy approach (further explained below) that the net fiscal impact on current government PWA acquisition programmes is likely to be between $7 - $10 million per annum on a $150 - $300 million spend rate. In our view the likely goodwill associated with this policy changes far outweighs any fiscal disbenefits.

In terms of the foregoing our use of the term "fair market value" is critical to ensure that advocacy type valuations (inflated value for negotiation purposes) are avoided in the first instance. It is reported to us by Officials that advocacy valuations are not uncommon and agencies can face situations where a negotiated settlement price (splitting the difference) results in a premium being paid in any event. In such situations payment of a 5% premium is not recommended. Further research into valuation practices and a rewrite of LINZ compulsory acquisition guidelines is warranted in our view. Such a review should be subject to a specified timeframe (six months) to impose some rigour into the review process.

We also considered whether the reported prohibition on payment of a premium should be repealed in favour of a provision that the requiring authority be permitted to pay a premium of 15% above the market value, conditional upon agreement to the acquisition within twenty working days. The maximum premium would then be reduced to 10% if agreement was reached between the second and fourth months after the giving of notice, and be removed altogether if agreement is not reached within four months.[6] (thus a regime in which there would be an automatic 5% premium, with the requiring authority being permitted to offer an additional 10% for prompt agreement, and an additional 5% for a slower agreement would apply). We also considered whether those who continue to object to the taking after four months should no longer have their legal and valuation fees (ie. those incurred after the fourth month shut off) paid by the requiring authority. We stress that this applies to fees in respect of the taking, not the dispute as to valuation. On balance we consider that an additional premium

[6] We envisage that the premium be paid not on the Crown's valuation, but as a percentage of market price. That will remove any incentive for an acquiring authority to undervalue the property, and allow the market price to be agreed or resolved through the present procedures.

payment regime is warranted provided the early delivery benefits of such a regime are tangible. We thus recommend accordingly, with certain provisos.

We consider that an early settlement *"premium"* would go a considerable distance towards addressing the costs incurred by the inability to acquire the property in *"as timely fashion as possible".* Indeed in so far as it will often result in lower transaction costs, any added cost to the Crown may not be substantial.

We can readily envisage an urban motorway project facing the prospect of having to compulsorily acquire at least 200 residential properties. A major simultaneous acquisition, with all the inherent paperwork, costs and delays inherent in a disputed acquisition will almost inevitably have a negative impact on timely project delivery. A more liberal compensation regime as we suggest will likely positively benefit the RONS.

We stress that the recommended premium is not to be regarded as a compulsory payment on the part of the acquiring authority. It is a payment which will recognise first the savings to the authority arising from a prompt settlement and secondly, the desirability of enabling an early commencement to the project.

In those cases where an agency is designating to protect, for example, the route of a long term project not intended to be undertaken for some years, we would anticipate that a premium may be paid but rarely, because simply, there is little benefit to the acquiring authority in a prompt acquisition.

We appreciate that in the case of Maori land which is of course often in extremely complex multi-ownership, some extension of these timeframes is warranted.

We anticipate that these reforms would considerably assist in the timely acquisition of property, ensure appropriate recognition of property rights and dampen public concerns about the use of compulsory acquisition.

In our view, all those whose land is compulsorily acquired for a project of benefit to the public are entitled to something additional by way of recognition of their loss. Mere market value does nothing to reflect the sense of dispossession that often is experienced by those whose land is being taken against their will.

As we note elsewhere, it is our view that as an acquiring authority is presumably acting in the public interest for the benefit of the community as a whole, it is unfair that the burden of enabling the public benefit to be realised should fall entirely on those who are being dispossessed of their property. We regard the State as having a responsibility to err on the side of generosity, and of course that point carries even more force when the acquiring body is a private company.

We therefore recommend that all those whose land is being acquired be entitled to payment of market value together with a premium of 5% to reflect the fact of their being dispossessed.

RECOMMENDATIONS

38. That LINZ / MfE and NZTA undertake further research into the veracity,

objectivity and reliability of current valuation practices within New Zealand used to determine 'fair market value', that is, the average 'willing purchaser willing seller' price settlement outcomes as a pre-requisite to the implementation of recommendations 40 and41. The research period to be no more than six months.

39. That LINZ in response to recommendation 38 redraft its compulsory acquisition guidelines.
40. That upon determination of 'fair market value' (as set out in recommendations 38 and 39) in the requiring authority acquisition process under the PWA that a 5% premium be payable as a matter of course.
41. That requiring authorities be authorised to pay a premium of up to 10% in addition to the 5% payable under recommendation 40 where there is demonstrable benefit to the requiring authority in securing early settlement. The percentage premium paid and the required time limits for early settlement would be at the discretion of the requiring authority taking account of the urgency and immediacy of the infrastructure project.
42. That any ongoing objections to the taking of land after four months, in terms of recommendations 40 and 41, will mean that legal and valuation fees otherwise payable by the requiring authority are not payable by the requiring authority. The first 4 months would still be paid.
43. That any fees or costs associated with disputes as to the valuation of land should follow the event, as in normal litigation.

5.4 Collectively Owned Maori Land and Treaty Settlement Assets

Collectively owned Maori land and land returned under Treaty Settlements should arguably be treated as a distinct category of land under the Public Works Act due to the nature of ownership structures and ancestral significance of the land.

Collectively owned Māori land is, with very few exceptions, land that has been held continuously since before 1840 and in many instances for over 40 generations of the same families. The land tends to have heightened significance as a geographically small representation of unbroken genealogical connection to the landscape, in contrast to the larger parcels of land that have been lost or taken over time. In a more practical sense, the administration of collectively owned land is cumbersome due to the fragmentation of ownership and rigorous statutory quorum requirements for decision making.

Treaty Settlement assets, particularly where land is returned for reasons of tribal or cultural significance, similarly tend to have high significance attached to them.

The implications for compulsory acquisition processes could extend to;

a. Time bound processes – accommodating the cumbersome nature of governance arrangements by providing for a longer period to complete certain steps and/or starting the clock running once a particular milestone has been reached;
b. Solatium payments –increasing the solatium to respond to the multiple numbers of owners, which potentially extends into the hundreds and in respect of some parcels, thousands;

c. Market value – responding to the difficulties of valuing collectively owned land and the predominant state of under-development of Māori land by more generous approaches to valuation and/or premium payments.

RECOMMENDATION

44. That requiring authorities give consideration to alternative acquisition mechanisms for collectively owned Maori land including non-alienable perpetual leases, replacement with like for like and partnership opportunities associated with long term / permanent occupation.

5.5 The Obligation to Offer Back

If a state agency acquires land for a public work and then determines not to proceed with the project or use only part of the land originally acquired, it is required by s.40 of the Public Works Act to offer the land back to the party from whom it was acquired (or the successors of that party). Similar obligations prevail if the agency determines after many years that the public work is no longer needed and decides to close or relocate the facility.

We understand that this obligation has over the years caused the state agencies significant problems, largely because of their own failure to promptly comply with the obligation to offer back and the apparent predatory tactics of some property developers purchasing beneficial rights and then seeking to enforce the s.40 provisions. Specifically, s40 says that when land is no longer required for a public work the requiring authority will *"sell the land by private contract to the person from whom it was acquired or to the successor of that person."* The process can be difficult as it involves ascertaining who the previous owner or successors in title are and offering the land back at market value.

We are advised that identifying and locating multiple former owners or beneficial successors is problematic in a proportion of the properties that are declared surplus and can take 6 – 12 months or longer depending on how long the Crown has held the property and the number of former owners that need to be traced.

Where the disposal involves Maori land it is often impossible to trace former owners and in these circumstances accredited suppliers must apply to the Maori Land Court (MLC) for direction. The MLC often orders the Crown to vest the land back in the former owners to right past wrongs. We understand that in one case the land could not be vested back in the former owners because the entity no longer existed and the MLC instructed the supplier to offer the land back to the former owner. The MLC was advised that the reason the requiring authority made the application in the first instance was because the owners (over 40 in total) could not be identified or located and the requiring authority wanted some direction on whom they should deal with. Three years later and many attempts to resolve the situation and the requiring authority is still waiting for direction from the Court.

We understand that identifying and locating former owners begins as soon as a property is declared surplus and is required before the stage 2 s40 report is

submitted to LINZ. Among other things, we are advised the investigation involves searching a wide range of records and contacting the successor in title or tenant at the last known address, previous employers, known relatives, associates and the family solicitor.

It frequently involves a genealogist to search birth, death and marriage records and identify and locate missing living people an identifying and finding out about New Zealand ancestors and other relatives.

In some instances it may also be necessary to advertise in both New Zealand and Australia or further abroad in an attempt to locate the former owner, and if the former owner or one of the former owners has died, it is necessary to obtain a copy of the death certificate. If they have died overseas it may be necessary to get a relative to uplift the certificate as some local laws do not allow anyone else to uplift the certificate. In one instance in Northland, we are advised it took nearly 18 months to complete the process before the land could be offered back to the beneficial successor who then declined the offer. This does not seem to be good use of public time and money.

In our view the s40 processes on offer back is time consuming and expensive and we think it could be rationalised. Possible options for this are:

1. Placing a time limit (say 6 months) after which LINZ would exempt the property from s40 offer back provisions of the PWA, provided the Crown's accredited supplier can demonstrate a robust investigation and certain key steps being taken with no successor identified. This should apply equally to Maori land.
2. Not offering the land back to successors in title but only to individuals from whom the land was originally taken. If they are deceased the obligation to offer back does not apply. We realise this option is likely to be politically and socially unacceptable, however, when the original purpose of s40 is considered (i.e. to right a wrong), and those people cannot be found, it appears pragmatic.
3. More efficiency in the OTS[7] administered Maori Protection Mechanism review/decision process which can take much longer than the advertised five to six month period.

Given that the obligation is imposed by statute, and it is only reasonable that it be imposed, we recommend that on acquisition the requiring authority be authorised to pay an additional premium of 5% to relieve itself of this future obligation. Such a recommendation would largely address options 1 and 2 above.

Not only would this benefit the Crown in terms of saving future expense and costly litigation, it would also enable the payment of a further sum to *"sweeten the cake"* so far as the owner is concerned.

It is noted that Māori land and Treaty Settlement land is less likely to be amenable to the waiver of the buy-back obligation, due to the significance of ancestral connection. While Iwi and Māori land owners may be comparably disadvantaged by not having the same likelihood of accessing this 'sweetening of the cake', no specific accommodation is recommended except that exploring methods to

[7] Office of Treaty Settlements

improve efficiency in the Maori Protection Mechanism would appear to be worthwhile.

RECOMMENDATION

45. That the PWA be amended to allow a requiring authority, at its discretion, to offer an additional 5% above market value in return for land owner relinquishment of the section 40 offer back obligations.
46. That Officials explore the extent to which more efficiency in the OTS administered Maori Protection Mechanism review / decision process can be achieved.

5.6 Sequential Nature of Designation & Land Taking Process

Acquiring authorities customarily seek first to designate land they intend to acquire (either at some future distant time or at an early date), and then in due course proceed through the Public Works Act to acquire property.

It has been suggested to us that this two-step process both delays and renders the acquisition more expensive. As we understand the position, it is not a legislative pre-requisite to the compulsory acquisition of land that its proposed designation must have first been upheld by the Environment Court or otherwise become final. We are aware however that over the last 10 years at least, it has become the practice for acquiring authorities to act in this manner largely because of a policy directive of the former Government.

We can see how the two step process adds to the cost and delay and recommend that the Act be amended to make it explicit that compulsory acquisition can proceed regardless of whether or not the proposed designation has been finalised.

There is a degree of commonality between the matters to which the Court has regard when considering objections to appeals against a proposed designation and appeals against compulsory acquisition. We recommend that the Resource Management Act and Public Works Act be amended to enable the requiring authority to be able to apply to the Court (or a Board of Inquiry) for an Order that both matters be heard together. This approach is conditional upon the acquiring authority actively pursuing a proactive land purchase policy pre lodgement of an NOR.

The point has also been made to us that the valuation dispute could perhaps be resolved by the Environment Court at the same time as the designation and taking procedures.

Given that the valuation exercise is a discreet one and shares no issues in common with the others, we doubt that any significant savings could be made by such a reform; in any event we would be loathe to lose the expertise of the Land Valuation Tribunal in such matters.

We also understand that section 66(1)(a)(ii) of the PWA requires a requiring authority to pay all the owner's "reasonable valuation and legal fees or costs

incurred in respect of the land taken or acquired." This obligation relates to disputes as to both the taking itself and the level of compensation.

In our view that provides quite perverse incentives. There is every incentive for an owner to be grossly unreasonable given that all the costs are met by the authority; and little incentive to be anything other than obstructive.

We instead recommend that owner's legal and valuation expenses in the four months following the issue of the Notice of Intention be met in full. After that, we recommend the normal litigation practice be followed whereby costs follow the event. This recommendation is quite consistent with and complements well our recommendation in section 5.3.2.

RECOMMENDATIONS

47. That both the RMA and the PWA be appropriately amended to allow a requiring authority to apply to the Court (or Board of Inquiry) for an order that appeals against a proposed designation and compulsory acquisition be heard together. Such an order to be conditional upon the requiring authority pursuing a pro-active land purchase policy pre-lodgement of the NOR.
48. That during the compulsory acquisition process an affected landowners legal and valuation expenses in the first four months of the issue of the Notice of Intention will be paid by the requiring authority, thereafter costs are to follow the event.

5.7 Injurious Affection

There is a perception that the eligibility for injurious affection under the PWA is overly limited and not clearly defined. There also appears to be some confusion about the mechanisms for addressing injurious affection that is, between effects mitigation under the RMA and monetary compensation under the PWA. Having considered the range of options set out on page 77 of the Officials Report and advice from LINZ we are of the view that the present provisions are working satisfactorily and that no legislative change is necessary. Further we were advised that injurious affection is paid quite often and that it is a land valuation matter.

5.8 Information to Landowners

There is a perception in some quarters that the criteria and information available regarding acquisition under the PWA is unclear. We note that the Crown's Landowner's Rights booklet includes information as to how the compensation provisions work is provided to the landowner at the first meeting to discuss acquisition. We understand that local authorities adopt a similar approach.

In our view the options put forward by the Officials on page 79 of their report

"2 Extended information to landowners,

3 Create first point of contact for landowners for initial advice on acquisitions"

represent good practice and should take place as a matter of course. We do not believe legislative change is necessary. However it would be worthwhile undertaking some research into landowner's views on the adequacy of the information provided by the Crown and local authorities on the acquisition process and compensation.

RECOMMENDATION

49. That MfE undertake some research on the adequacy of the information provided by requiring authorities during the acquisition and compensation process.

5.9 Land Access

There are alleged to be some access delays, particularly to network utility operators (NUO's), from landowners refusing access to private land for survey and investigation, prior to the formal PWA acquisition process. We are advised that access problems at the pre-acquisition stage are rare for Crown and local government authorities. While NUO's may occasionally have some problems a reluctance to resort to Powers of Entry under section 111A of the PWA is not a legislative defect.

Accordingly we recommend no changes.

5.10 Private Access to PWA Compulsory Acquisition Provisions

There is apparently a perceived lack of clarity on how private sector Requiring Authorities (eg private companies and State Owned Enterprises) are able to access PWA powers to compulsorily acquire land and by association dilution of the "public works" concept.

As we understand the situation NUO's that have been granted requiring authority status cannot compulsorily acquire land in their own right. The Minister of Lands must agree to acquire land under section 186 of the RMA as if it were a Government work. We were advised that due to the limited number of applications considered by the Minister of lands under section 186 there is no evidence that there is any significant problem that needs to be addressed from either an operational or legislative perspective. Accordingly no action is required.

5.11 Long-Term Certainty

Within Government and Crown Agencies there is a concern that the existing PWA provisions may not provide for new, flexible and cooperative uses of land, and facilitate improved long term infrastructure development certainty by Government and private entities, particularly around urban development. In our view the recommendations we have made on compensation levels and associated changes to the PWA in sections 5.2 to 5.5 of our report will go a considerable way towards providing greater flexibility.

We have also noted (see below) in section 6 of our report that the work of UTAG could influence the final form of our own recommendations on legislative changes to facilitate major infrastructure projects.

Further we are united in our view that the current PWA should maintain the stance that it is for "public works" of RAs and NUOs and not for private land developer compulsory purchase of privately owned land.

5.12 Objections Process

As noted in section 5.5 there are currently two opportunities for landowners to object through the Environment Court. This can lead to some duplication of procedures (eg parties litigating on similar issues twice), increased costs and time delays (eg two years plus). We note that traditionally the operational policy of Crown agencies and Governments of the day is to delay starting PWA compulsory acquisition proceedings until a designation is confirmed.

LINZ have confirmed to us that there is no legislative impediment to commencing a PWA acquisition process well before a designation is confirmed so that the two separate appeal or objection processes can be run together. To date to our knowledge no RA or NUO has made such an attempt.

Probably the main reason why not has been politically motivated given the negative publicity of the "big brother" spectre of compulsory land take. In our view such fallout can and should be managed by the RA's emphasising the following key points:

(a) The compulsory acquisition steps will not proceed to conclusion if the designation is not confirmed by the Environment Court, and
(b) While the RMA emphasis is on environmental effects, the reality is that there is a key emphasis upon "the necessity for the project". This need/necessity informs the Court as to whether the landowners right to object under the PWA has merit.

In our view the relevant provisions are inextricably linked in any event. Having considered the options set out on pages 86 and 87 of the Officials Report, while Option 4 (remove over lapping grounds under each process) has merit, our preference is Option 6 (Hold joint Environment Court hearings for appeals under the RMA (consents and/or designations)) and PWA (compulsory acquisition) on the basis that it could consist of a range of options to resolve appeals, depending on the characteristics of the case. This would be similar to the 2009 RMA amendments offering 3 options to progress resource consents and designations.

Recommendation 47 addresses this issue.

6. RELATED WORK STREAMS BY UTAG

6.1 Introduction

As previously noted, UTAG will be considering a range of issues that will / could impact on infrastructure delivery, e.g. the long term role of urban design principles as these may affect infrastructure. The UTAG report is not due for completion until July 2010 and it is in the early stages of its advisory process.

In this respect its recommendations could influence, and to some extent alter, some of our recommendations. Because the outcomes of both the ITAG and UTAG reports are likely to be linked to a degree a preliminary view of the issues that UTAG could have an influence on for our final report are set out below under a series of headings.

6.2 Preliminary Views of UTAG on Infrastructure Issues & ITAG Responses

(a) Upgrade of the "Call-in: Criteria

One of the questions upon which the Minister has specifically sought the advice of UTAG is how central government may achieve a "greater voice" in decision making under the RMA, particularly on infrastructure-related issues.

We have already recommended that s.6 be amended so as to make specific reference to "*the development and operation of regionally and nationally significant infrastructure."*

We understand that UTAG may well propose an amendment to ss.149P(1) and 146U(1) of the Act. These require that a board of inquiry and the Environment Court are obliged when considering a matter which has been "called-in" to *"have regard to the Minister's reasons for making a direction in the matter."*

"Have regard to" is a very low level test in law, and we share UTAG's initial view that amending this requirement so that "particular regard", or some similar wording, is to be had to the Minister's reasons would be more appropriate.

(b) Spatial Plans

Another matter which is being considered by UTAG is the role of spatial plans and in particular the linkages between such plans and other plans under the RMA, the Local Government Act and the Land Transport Management Act.

We understand that UTAG has reached the view that for a spatial plan to be properly effective it would need a significant degree of central government input, central government commitment to its goals and a final sign-off from central government.

Unless that is the case, UTAG is of the view that a spatial plan would be a *"lame planning instrument, of limited benefit and it is questionable whether the cost and effort would be justified."*

We agree, and endorse UTAG's views on this issue. The preparation of well informed spatial plans to which all are committed would be helpful to the timing and provision of infrastructure. On the other hand, a spatial plan that lacks central government input, content and approval could well turn out to be worse than the status quo.

(c) Urban Design & Infrastructure

We have considered the nature of the interface between urban design principles (such as those contained in the NZ Urban Design Protocol) and major infrastructure requirements and whether there are grounds to rein-in overzealous use of urban design principles as they may affect major infrastructure projects. We have concluded that there is no need for any legislative changes, rather an appropriate balance needs to be struck between the need for effects mitigation measures and enhancement aspirations that go beyond the major project works.

Some local authorities have tended to see major project works in their area as an opportunity to have the works proponent fund their particular "nice to have" local area projects under the name of urban design mitigation / enhancement.

While no action is recommended at this stage we do consider that MfE and EPA should monitor the situation particularly with respect to the RONS.

7. NEXT STEPS

7.1 The Merits of Consultation on this Report

We have proposed a number of changes to the provisions of both the RMA and the PWA. In the circumstances we consider that the wider community, interest groups and the like, should be given an opportunity to comment on these proposals. As we have previously stated the designation tool under the RMA is a powerful mechanism and any proposals to further empower this mechanism should be subjected to rigorous and informed debate before major changes are legislated. Accordingly we recommend that a period of consultation be provided for.

7.2 Interface with UTAG

Further to our comments in section 7.1 above and as noted in section 6 of our report, the UTAG deliberations on a wide range of urban development matters could and should have a major impact on the scope of our final recommendations.

In this respect given the later reporting date for the UTAG report, consultation on our preliminary findings and recommendations can only be of considerable benefit.

7.3 Subsequent Actions

It is envisaged that these would be determined once consultation on the ITAG report has been completed and the UTAG report process is complete.

APPENDICES

1. Composition / Biographies of ITAG.

2. Report to Infrastructure Technical Advisory Group, Ministry for the Environment, January 2010.

3. Improving Effectiveness and Efficiency of Approval Processes for Critical Infrastructure, Stephen Selwood, May 2010. This report includes as an attachment 'International Approaches to Major Infrastructure / Project Assessment, MfE, March 2010.

Appendix 1

ITAG Biographies

Mike Foster (Chair) is an independent planning consultant and director of Zomac Planning Solutions Ltd. From 1985 to 2001, he was Director of Planning at Beca Carter Hollings & Ferner Ltd, consulting engineers and planners. Mike Foster has over 30 years experience in planning and resource management issues and has extensive experience in major projects gaining consent under the RMA.

Mike Foster is past president of the New Zealand Planning Institute (NZPI) and the recipient of the distinguished service award from the NZPI. Mike was a member of the 2008 Technical Advisory Group appointed to provide advice on the Phase 1 Resource Management reforms and will bring invaluable infrastructure project experience to this infrastructure TAG.

Adrienne Young Cooper is an independent director and planning consultant and is a founding director of Hill Young Cooper Ltd, a specialist resource management and environmental consultancy. Adrienne Young Cooper worked in local government in a senior management role at Rodney District Council from 1983 to the 1990's.

She is an expert resource management consultant for government and private clients, and has extensive public board service. As a resource management consultant, Ms Young Cooper has carried out a wide range of projects for central government, regional councils, district and city councils and private clients. She has served on many major public boards including the Auckland Regional Transport Authority, the Auckland City Property Enterprise Board, Maritime New Zealand and Manukau Building Consultants.

Alan Dormer is an Auckland barrister specialising in resource management and planning law with a Masters in Public Policy He is an experienced hearing commissioner and has sat, in that capacity, for eight local authorities.

Alan Dormer has been appointed to a number of government-led law reform advisory groups and was Chair of the Technical Advisory Group appointed in 2008 to provide advice on the Phase I Resource Management reforms. Alan is also a past president of the Resource Management Law Association and in 2009 was awarded the Association's "Outstanding Person" award; making him the only dual recipient of both this and the Planning Institutes prestigious "A O Glasse Award for Outstanding Services to Planning". Alan teaches the Making Good Decisions Programme delivered by the University of Auckland's Centre for Continuing Education and has served on the Environmental Legal Assistance Advisory Panel since 2005.

Kelvin Reid is a solicitor and Director of Goodman Tavendale Reid. Kelvin is a skilled litigator, specialising in commercial, resource management and employment matters. Kelvin Reid is based in Christchurch and has considerable experience of South Island issues and the handling of complex matters, including resource management disputes arising in relation to water allocation and quality issues in the Waitaki River and on the Canterbury plains. His depth of understanding of South Island infrastructure and irrigation issues will bring a particular expertise to the Group.

Lindsay Crossen is a civil engineer with Fulton Hogan and was Fulton Hogan NZ Group's Chief Executive from 1998 to 2008. Lindsay Crossen has served as member of several boards and has been Chair of Roading NZ and Northern Gateway Alliance which was responsible for the largest road construction built in New Zealand.

Lindsay Crossen is currently a member of the National Infrastructure Advisory Board appointed by the Government in May 2009. Together with eight years spent as Executive Engineering Manager for the Southland District Council he brings to this group over 41 years practical experience in NZ infrastructure building.

Sacha McMeeking is of Ngāi Tahu descent and in 2009 was appointed General Manager Strategy and Influence with Te Rūnanga o Ngāi Tahu.

Sacha McMeeking was a law lecturer at University of Canterbury from 2005 to 2007 and her career to date has included legal academia, social work, kaupapa Māori programme design and strategic and political advice. Sacha McMeeking will bring a strong Māori perspective to the group.

Stephen Selwood has been Chief Executive of the NZ Council for Infrastructure Development since 2005. He is member of many boards including: Deputy Chair of Cleft NZ from 2009; Auckland Regional Council's Economic Development Agency since March 2009; Business NZ Energy Forum since 2006 and the Employers and Manufacturing Association Infrastructure Policy Committee since 2005.

Stephen Selwood has a wealth of knowledge and experience of strategic and public policy issues across transport, energy, water, telecommunications and social infrastructure development. His understanding of New Zealand infrastructure and planning processes will provide a strong support to any resource management infrastructure policy recommendations.

Appendix 3

Improving Effectiveness and Efficiency of Approval Processes for Critical Infrastructure, Stephen Selwood, May 2010.

Improving Effectiveness and Efficiency of Approval Processes for Significant Infrastructure Projects

Balancing national and regional infrastructure needs against social, environmental, community and individual interests is almost always a vexed issue.

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, in some cases, infrastructure projects of national significance can take up to a decade or more before they are eventually approved. Not only does this inhibit New Zealand's productive capacity, such delays also constrain the social and environmental benefits of improved infrastructure. The key questions are whether existing processes are adequate to enable timely decisions to meet the nation's infrastructure needs and how can they be improved to provide for integrated and balanced consideration of community needs against wider, social, environmental and economic imperatives?

This three part paper is focussed on addressing these key questions. Part One looks at challenges that the RMA and other legislation pose for sustainable infrastructure development in New Zealand. Part two canvasses the approach taken in overseas jurisdictions who, like New Zealand, have introduced reforms to streamline decision making for infrastructure projects. Finally, Part Three set outs an option for reform of the RMA and other statutory processes. The recommended "Project Consent" provides an alternative and optional consenting path that would integrate most, if not all, statutory approvals and facilitate timely and more participatory consultation and approval processes for projects of national significance.[8]

Part One

Perceived Problems 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 significant 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 wider economic, social and environmental benefits 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

[8] This paper is prepared by Stephen Selwood in May 2010 and represents the policy position of the New Zealand Council for Infrastructure Development on desirable reforms to the Resource Management Act.

Act requires Regional Councils to take greater responsibility for the integration of essential infrastructure with land use. This was 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;

- The lack of national guidance or standards on issues such as noise, physical separation, storm water, run off, erosion and sediment control, construction-dust controls or vibration.

- 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.

- 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;

- The role of often-vociferous public interest groups and "nimbys" using environmental concerns as a proxy for self interest;

- Focus on the environmental effects of a project rather than on the societal benefits of a project

- 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);

Use of Call In as a means to streamline consent processes in New Zealand

The changes to the RMA in 2009 have made it easier to call in projects of national significance enabling direct referral to the Environment Court or to a Board of Inquiry. However, it remains to be seen whether applicants will want to pursue this option as there are a number of risks posed by the call in process.

Most significantly, the one stop nature of the process means there is little room for error. At least with a two step process involving Council hearings, the applicant can be much better prepared having been exposed to matters raised and the approach taken by objectors. In some respects, Council hearings provide a significant and robust form of community engagement that can provide an early test of the applicants case.

Moreover, the adversarial nature of Environmental Court hearings or Planning Board hearings is not a conducive environment for achieving positive resolution of differences. Nor is it a particularly satisfactory environment for those objecting to a proposal and who are unfamiliar with the legal process.

The RMA legal process tends to be focussed on technical issues relating to environmental effects which may or may not go to the core issue of whether or not an infrastructure proposal has merit, or not. Often objectors are wanting to debate the fundamental issues around whether or not a project is justified but are unable to address these issues directly.

Finally, although call in may streamline approval processes under the RMA, this may still mean further litigation under other legislation that may be relevant to a project including the various Acts described earlier in this paper. Consideration of a single consenting process, incorporating one dominant set of provisions governing essential infrastructure, would potentially streamline the consent process and remove duplicity.

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

There are a number of other Acts that significantly impact the statutory approval of infrastructure projects. On occasions these have been used iteratively to hold up or prevent projects from proceeding in a timely manner. In some instances this has resulted in projects not proceeding or major increases in project costs which have in turn caused difficulties in gaining the requisite funding approvals to enable projects to proceed.[9]

Examples of relevant legislation can include:

- **The Historic Places Act 1993 (HPA).** Archaeological Authorities are required under the HPA for a number of projects. The Wellington Inner City Bypass for example required two Environment Court processes, one under the RMA and one under the HPA.

- **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. 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 which took ten years to be fully consented and funded, it was found

[9] Examples of such projects have included Wellington Inner City Bypass, SH20 Mt Roskill Extension, SH1 Northern Gateway, SH1 Victoria Park Tunnel

that this Act, was relevant to construction. Further cost and eighteen months delay was added to the project in order to resolve this anomaly;

• **The Land Transport Management Act 2003**. In the case of major projects constructed in the last six years, further assessment had to be carried out after other approvals were in place, to ensure that projects contributed 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.

Evidence of Protracted Approval and Consent Processes

There are a number of examples where the time taken and the cost of progressing a proposal through RMA or other approval process have been considerable.

One that illustrates both the time and complexity of a consenting programme is the Wellington Inner City Bypass.

Case Study: Wellington Inner City Bypass

The approval process for the Wellington Inner City Bypass started in 1994 when Transit made a decision to abandon the previously planned larger city link project between the Terrace and Mount Victoria tunnels. A revised, reduced-scale proposal was developed and submitted for consideration to Wellington City Council for designation; and subsequently to Wellington Regional Council (WRC) for regional resource consents early in 1996. After receiving 1500 submissions, commissioners conducted a two-week hearing later that year with a positive recommendation towards the end of 1996. Transit confirmed the recommendation in 1997 and WRC granted the consents. A number of appeals were received. Some of these were withdrawn, and the remaining parties unsuccessfully attempted to resolve their issues through a voluntary mediation process that ceased later in 1997. The Environment Court sat for three weeks in late 1998 and approved the designation in 1999. A minor High Court matter was resolved later.

Impact of Historic Places Act

In 2001, after detailed design had been completed, Transit submitted applications for archaeological authorisation to the NZ Historic Places Trust (NZHPT); which determined that the whole project was of such significance that public notification was required under the Historic Places Act. After considerable deliberation, the Historic Places Trust duly confirmed the authorisations, which were then appealed by primarily the same party as had appealed under the RMA. The Environment Court's decision upheld the archaeological authority granted by the NZHPT.[10]

As the NZHPT noted in their submission to the Treasury Towards and National Infrastructure Plan Facts and Issues report [11] this case set an important precedent in respect of who has standing under the HPA:

[10] *Te Aro Heritage Trust, Campaign for a Better City Incorp v NZHPT* (Environment Court, W52/2003, 30 July 2003)

[11] Available at www.**infrastructure**.govt.nz/**plan**/**submission**s/pdfs/s-ifi-nzhpt-oct09.pdf

In making its decision, the Court examined the limited appeal rights of third parties in relation to section 20(1) of the Historic Places Act. This section states that only any person who is 'directly affected' by an archaeological authority decision may make an appeal to the Environment Court. The Court found that CBC and THT were not 'directly affected' and that the scope of 'directly affected' under the Historic Places Act was limited to mean:

- Any person with a proprietorial interest in the land.
- The applicant for the authority the subject of the appeal.
- Tangata whenua who are linked to the site through their ancestry.

Other persons without a proprietorial interest in the land such as children and grandchildren being directly affected by a proposal to dig up a grandparent's grave, whether any such person was 'directly affected' would be determined on the evidence. [12]

This decision created a helpful precedent in terms of determining, and limiting, which parties are directly affected under the Act. That said, there remains a strong possibility that national projects could involve directly affected parties, as now defined, who might stop or delay progress through iterative use of HPA in concert with RMA approvals and other legislation that can apply to major projects, including exercising appeal rights in each case here possible.

Impact of Land Transport Management Act 2003

Prior to any approvals for funding, the LTMA was enacted. As this was a new piece of legislation that altered the focus of transport provision and administration, Transit carried out an independent review of the project to ensure that it met the principles of the LTMA. Funding was eventually approved in 2004 and the project commenced later that year, a full decade after the project was conceived. Given the project had a benefit cost ratio calculated at the time to be 3.8:1, the opportunity costs of delay would have been substantial.

It is important to recognise that this project was a highly complex urban roading improvement in a central city environment. There was also significant opposition, and real social and environmental issues to be considered. The whole process, while lengthy in time from inception to implementation, required a number of issues to be addressed, worked on, improved and alternatives assessed.

Other Examples of Project Delay and Complexity of Process

While the Inner City Bypass is an example of the length it took one controversial project, there are numerous examples of lengthy approval processes. Some examples include:

- The Kapiti Western Link Road that had two Environment Court and two High Court hearings before RMA approvals were gained. Various other consents and authorities have been, or are required. The project has subsequently been superseded.

[12] ibid, p 50

- The Orewa to Puhoi Northern Gateway (ALPURT B2) project, that had a lengthy environment court history and required tolling consultation and ministerial approval under the LTMA.

- The SH20 Mount Roskill Extension also required High Court approvals and consideration under the provision Reserves and Other Land Disposal and Public Bodies Empowering Act 1915.

- It took six years from original application to a successful appeal to the Environment Court for Contact Energy to re-consent the company's operation of its Hawea, Roxburgh and Clyde Hydro dams

- It took six years after its initial application and an appeal to the Environment Court for Contact Energy to re-consent its existing geothermal plants at Wairakei and Poihipi near Taupo

- Meridian Energy discontinued and failed to gain consents for two major electricity generation projects in the South Island – Project Aqua (which was discontinued after four years in development) and Project Hayes wind farm which is under appeal four years after initial lodgement

- The Hunter Downs Irrigation proposal lodged in October 2006 received local Council approval in April 2010

- Cost, duplication, complexity of process when considering proposals falling under both the Conservation Act 1987 and Resource Management Act 1991: Both Acts consider the nature of natural and physical resources affected by a proposal, their significance, and options to avoid, remedy, or mitigate adverse effects. While the legal tests under the two Acts are different, each and every value that falls to be considered for the purposes of these tests in the Conservation Act, also has to be considered under the Resource Management Act. However, projects are normally processed in two stages which lead to delay and increase in cost. For example, Meridian's Gumfields wind farm proposed in Northland is located on both privately owned land and conservation estate. The concession was lodged in February 2006 (after Meridian successfully won the tender in October 2005) and is awaiting a formal determination prior to lodging the resource consent applications. Similarly, Meridian's Mokihinui hydro project (adjourned in April 2009 and having just received a positive Council decision) is also subject to the Conservation Act;

- Ongoing compliance once projects are built: Greater regulation in relation to national environmental standards that prescribe technical standards would be of assistance. For example, Standards New Zealand have revised NZ6808 Acoustic - Wind farm noise which stipulates the level of sound that is reasonable. However, the issue as to what is 'reasonable' seems to be a matter of ongoing debate and this is despite compliance of resource consent conditions, agreement between independent experts, satisfaction of NZ standards together with applying the best practicable options.

- Reverse sensitivity: Due to the lengthy timeframe for consenting wind farm projects, Council is likely to receive applications for other activities on adjacent land before a decision on the wind farm application has been made. The proposed subsequent activity may have the potential to unfairly compromise the wind farm project due to the potential for such an applicant to subsequently raise concerns about reverse sensitivity effects. For example, Meridian considers itself to be an affected party because of the potential for reverse sensitivity issues to arise between proposed dwellings and the proposed wind farms in respect of consent applications for subdivision and residential developments on land adjacent to, or nearby, proposed farms.

It must be stressed that there are often other issues unrelated to the various legislative requirements that contribute to the length of time form inception to completion. These can often include property, engineering and funding issues. Moreover, it is not simply that approving authorities and processes are at fault. Often problems relate to poor planning and consultation by project proponents as well. Nevertheless, the examples are illustrative of the interplay between investment decisions, the confidence to invest, and complexities of the legislative and regulatory processes. It is perhaps unsurprising that anecdotal feedback often suggests that New Zealand is seen as a difficult place to invest in from an infrastructure perspective and why New Zealand's infrastructure rankings are consistently so low on the World Economic Forum Global Competitiveness surveys.

Fear of Litigation as a Driver of Projects Costs

The Ministerial Report on Roading Costs undertaken in 2006 clearly identified that the costs of a number of major roading projects undertaken in recent years have escalated significantly (sometimes by more than double). By and large this was the result of attempts by Transit New Zealand to avoid litigious delays to resolve political and community concerns in regard to environmental and community impacts of the projects.

The advisory group found that scope change resulting from community and environmental impact mitigation measures were a key driver of cost increases for the a number of roading projects that they studied:

Project	**Time to Approve**	**Cost Change in $millions as identified in 2006**
Northern Gateway (Alpurt B2 Toll Road)	9 years, 1997 to 2006	82 to 340
Victoria Park Tunnel	5 years, 2001 to 2006	165 to 320
Waterview Connection	14 years, 1996 to current (The project is to be called in under the RMA in 2010)	72 to 1,380
Manukau Extension	6 years, 2000 to 2006	125 to 225

The group reported on two key projects in detail. In respect of the Northern Gateway project the Group found that:

"It appears that the environmental enhancements incorporated in ALPURT B2 at a cost of $65 million were in response to the risk that the Manu Waiata Restoration Protection Society (the Society) would challenge the project's compliance with the requirements of the LTMA. In response to a February 2004 letter from the Society, the Board looked for environmental enhancements to the project, which ultimately led to the inclusion of the Nukumea viaduct and Johnsons Hill tunnels. The inclusion of these features appeared to the Advisory Group to be in order to expedite the project, and ultimately resulted in a significant cost increase."[13]

In respect of the Victoria Park Tunnel (Option D) which is now under construction the group found that:

An objective assessment of environmental effects prepared in September 2002 for Transit NZ showed that 'Option D [northbound tunnel option] retains the status quo within Victoria Park, and therefore has no significant reduction in effects compared to Option A [viaduct option]'. On this basis, there appears to be no objective reason to provide additional funds to construct Option D instead of Option A. In fact, analysis indicates that significant environmental improvement will only occur if all traffic is moved underground. However, there is currently no plan to replace the existing viaduct.

And that…

Transit NZ appears to be making decisions to speed up projects that have high cost implications. There does not seem to have been a systematic process to establish the scope of this project based on the assessment of environmental effects.[14]

The full history of project scope changes for two of the case studies analysed by the group are included in the appendices.

While not explicitly stated in the report, it seems reasonable to conclude that the behaviour of Transit New Zealand in selecting project design options was and arguably still is (as evidenced by the design of the Waterview tunnels) being significantly influenced by risks and time costs associated with protracted legal processes, involving both RMA and other legislative requirements. In other words, while it might be possible to gain necessary approvals for projects by taking an adversarial approach through the courts, the costs of delay and the political risks associated with the contentiousness of the process make it easier and faster (if not necessarily cheaper) to make the necessary changes to the project scope.

The key question to be addressed is whether this approach is achieving an optimal balance between economic, social and environmental imperatives, and whether a more streamlined integrated approach to project approvals might yield a better outcome.

This has been the approach adopted by a number of other jurisdictions including England, Ireland, and the State governments of Australia which are summarised in the following section.

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[13] Ministerial Roading Advisory Group on Roading Costs Final Report August 2006 p13

[14] [14] Ministerial Roading Advisory Group on Roading Costs Final Report August 2006 p15

Part Two

Key Features of International Approaches to Major Infrastructure/Project Assessment

The Ministry for the Environment has reviewed a number of alternative approaches to Assessment and decision making on major infrastructure projects in Ireland, Australia and the United Kingdom. The detailed review is included in the appendices to this report and is recommended reading by way of background and identification of possible solutions to the challenges that we face in New Zealand. The key points to note from this analysis are summarised below:

13. Like New Zealand, Ireland, the United Kingdom, and the Australian states have experienced issues associated with the time and cost of approval processes for major infrastructure projects

14. All jurisdictions have a dedicated path for infrastructure projects but Ireland England and the Australian States have more integrated processes for considering critical infrastructure projects

15. Procedures in other jurisdictions almost always include independent assessment and hearings for significant projects

16. Criteria are set to determine whether or not major projects are of regional or national significance and whether or not they should be considered centrally or locally

17. The purpose of declaring a project as having regional or national significance is to ensure that its potential value and impacts on the local and regional context are recognised and managed accordingly

18. In Ireland the "An Board Pleanala" the independent planning appeals board makes all planning approval decisions on strategic infrastructure projects, however it does not fully integrate approvals under other relevant legislation that may apply to a project. There is no appeal unless there are grounds for judicial review by the High Court

19. In England an independent authority set up under the Labour government – the Infrastructure Planning Commission (IPC) – makes decision on strategic infrastructure projects. The IPC has jurisdiction where there are national policies and standards in place, otherwise the Minister decides an application on advice from the IPC. The IPC development consent order process avoids the need for many of the range of separate consents which previously had to be obtained under separate legislation and from different government agencies, departments and local authorities.

    The newly elected Conservative Liberal Democrat coalition government aims to bring forward legislation next year to replace the Infrastructure Planning Commission with a Major Infrastructure Unit as part of a revised Communities and Local Government structure that includes the Planning Inspectorate. Recommendations on nationally significant infrastructure projects will be made to Secretaries of State for final decisions.

20. Unlike New Zealand and Ireland where either local authorities, a Planning Tribunal, or the Environment Court or make the final decision, in most Australian states and in England (when there are no national policy standards in place) the relevant Minister decides, but usually on advice from an independent panel of experts. There are usually no appeal rights on decisions made by the Minister, apart from judicial review of legal process.

21. Extensive pre-application consultation with affected communities, local government and relevant authorities is either required or encouraged for major projects

22. A detailed Environmental Impact Statement (EIS) or the New Zealand equivalent Assessment of Environmental Effects (AEE) is required in advance of an application being made and these are open to public comment

23. It is a common feature of such legislative processes to allow a form of concept plan approval. This involves public participation and identification of issues at an early stage and for detailed plans to be approved by the relevant authority at a later date. The ability to defer such a matters is intended to eliminate unnecessary duplication in the assessment process and provides the ability to delegate decisions on matters of detail, thereby speeding up the process.

24. Early consultation and subsequent concept approval processes provide for the environmental, social and cultural outcomes that will be required of any project to be specified early in the design development phase, thereby incentivising innovation in the design and delivery of the project to meet or exceed the standards that have been set

In contrast to New Zealand, key features of overseas practice are that major projects almost always go through a dedicated and often independent approval or recommendation process and are not considered by local authorities. The regional and national economic, social and environmental benefits are considered in substance, as well as the environmental effects. Public participation is focussed at the front end of the process on the overall merits of the project, rather than being involved in the detail of environmental regulation. Concept approval processes are the norm, rather than the exception and innovation in project design and delivery is incentivised.

The most significant recent development has been the establishment and proposed disestablishment of the independent Infrastructure Planning Commission in England which currently provides a “one stop shop” review process for nationally significant projects. The role of IPC and the reforms proposed by the new Conservative Liberal Democrat coalition government is discussed in the following section.

Infrastructure Planning and Consents in England and Wales

The Infrastructure Planning Commission (IPC) was set up by the former Labour Government under the Planning Act 2008. It is an independent public body with the dedicated task of examining and deciding applications for nationally significant infrastructure projects. The IPC currently acts in accordance with new National Policy Statements being prepared for each type of infrastructure in the five general fields of energy, transport, water, waste water and waste.

The system applies across England and to some cross border oil and gas pipelines into Scotland. In Wales the IPC only deals with applications for ports and energy projects.

Applications to the IPC include nuclear and fossil fuel power stations, onshore and offshore wind farms, major improvements to the national grid, railways and roads, reservoirs, harbours, airports and sewage treatment works. Projects are dealt with by the IPC if they are of a certain size and importance which are set out in detail within the Act. The Secretary of State may also direct a proposal within the five general fields to the IPC, even if it does not meet the statutory criteria, if it is considered to be of national significance. The IPC does not consider applications in other areas, such as retail or housing development.

One Stop Consents Shop

The IPC process provides for a "development consent order". This is a new single consent intended to simplify and speed up the planning process for national infrastructure and means all stakeholders, including local authorities and the public, have one, single process in which to engage.

A development consent order avoids the need for many of the range of separate consents which previously had to be obtained under separate legislation and from different government agencies, departments and local authorities. Examples include planning permission, authorisation for compulsory acquisition of land, approvals under a range of Acts including Green Belt (London and Home Counties) Act 1938; the Pipelines Act 1962; the Gas Act 1965; the Energy Act 1976; the Ancient Monuments and Archaeological Areas Act 1979;the Electricity Act 1989; the Listed Buildings Act; the Harbours Act 1964: the Transport and Works Act 1992; the Highways Act 1980; the New Roads and Street Works Act 1991.

Conservative Liberal Democrat Coalition Government plans to replace IPC

The establishment of the IPC has been highly controversial. Opponents have complained that the process overrides rights of participation by local communities. Prior to the election, the Conservative Party campaigned on its intention to abolish the IPC. Accordingly , following the election, the Queen's Speech on 25th May 2010 included the Decentralisation and Localism Bill, one of the objectives of which is to "abolish the IPC and replace it with an "efficient and democratically accountable system that provides a fast-track process for major infrastructure projects" [15].

In practice, according to a recent comment by Sir Michael Pitt, chairman of the IPC, "the expertise, processes and special character of the IPC will be retained by creating a Major Infrastructure Unit as part of a revised Communities and Local Government (CLG) structure that includes the Planning Inspectorate"[16].

The likely changes are:

- NPSs will have to be debated and approved by both houses of Parliament.

[15] Quote from UK government coalition agreement: "The Coalition: our programme for government" p11 available at www.cabinetoffice.gov.uk/media/409088/pfg_**coalition**.pdf

[16] Sir Michael Pitt, Message from the Chair, May 2010, available at http://infrastructure.independent.gov.uk/?page_id=8

- All decisions will have to be ratified by the Secretary of State, rather than just those where there is no relevant NPS.

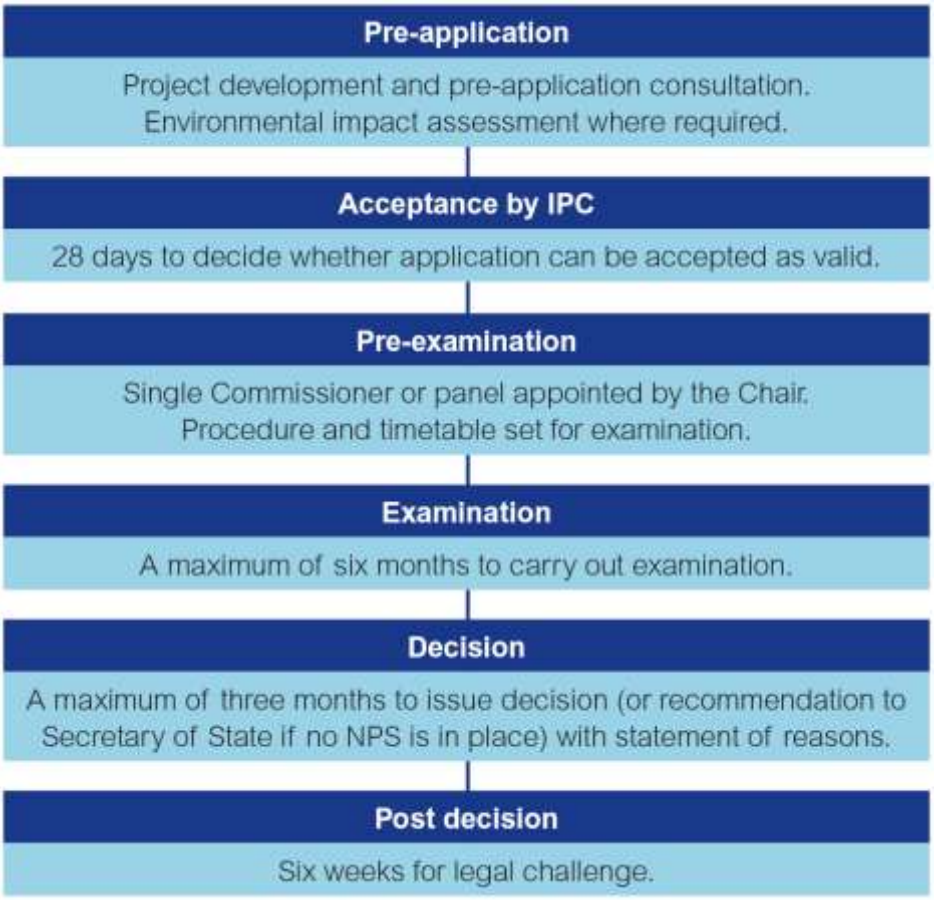
- Private or hybrid Bills are likely to be used for very major linear projects

The changes are designed to redress the "democratic deficit" which the coalition partners perceive as being a major problem with the IPC, as currently constituted. It is understood that the Decentralisation and Localism Bill could be published as early as autumn 2010, in which case it is likely to become law by summer 2011 and the IPC could be formally abolished and the new specialist unit operating from autumn 2011. Large scale energy, transport, waste or water projects are likely to continue to be dealt with by the IPC at least until autumn 2011.

Participation processes under the existing IPC process

Notwithstanding the political heat surrounding the IPC, a review of the process implemented by the IPC since its inception does actually provide for extensive opportunities for public engagement. Heavy front-loading means that applicants are required to carry out extensive consultation with local communities ahead of submitting an application. The IPC can provide advice and guidance to potential applicants on questions of process (not on the merits of the proposal itself) before they apply. All this advice is published.

The application process for a nationally significant infrastructure project, as summarised below, involves a series of stages, including extensive pre-application consultation, publicity and community engagement that must be undertaken by the applicant:



After the conclusion of the examination process the Infrastructure Planning Commission may refuse the proposal, or it may grant a development consent order which may contain a list of requirements with which the development must comply.

Local Authority Participation

In the regime administered by the IPC, all local authorities with an interest are consulted and, by law, local impacts must be balanced against national benefits. Local authorities have a role in the system at all stages, including:

- The development of National Policy Statements

- The requirement for promoters to consult local authorities, as well as other bodies and the local community, before they submit an application to the IPC

- Commissioners must take account of the views of the local authority and others on the adequacy of the promoter's publicity and consultation in deciding whether an application can be accepted as valid.

- The local authority may submit a Local Impact Report (LIR) to the IPC. The LIR describes the likely effects of the proposed development on the local authority's area. Commissioners must have regard to the LIR in deciding an application, and may reject the application, even if it is in accordance with a relevant National Policy Statement, if the adverse impacts outweigh the benefits.

Public Participation

The regime is intended to provide better opportunities for the public and local communities to get involved in decisions that affect them. There are three opportunities to get involved:

- in the debate about what national policy means for planning decisions
- in the development of specific projects and
- the examination of applications for development consent – both by making written representations and appearing at the IPC's hearings

Promoters must carry out extensive public consultation before they make their application to the IPC. Engagement with the local community and a range of other bodies at the pre-application stage is a very important aspect of the new system. Further consultation takes place following the submission of the scheme to the IPC.

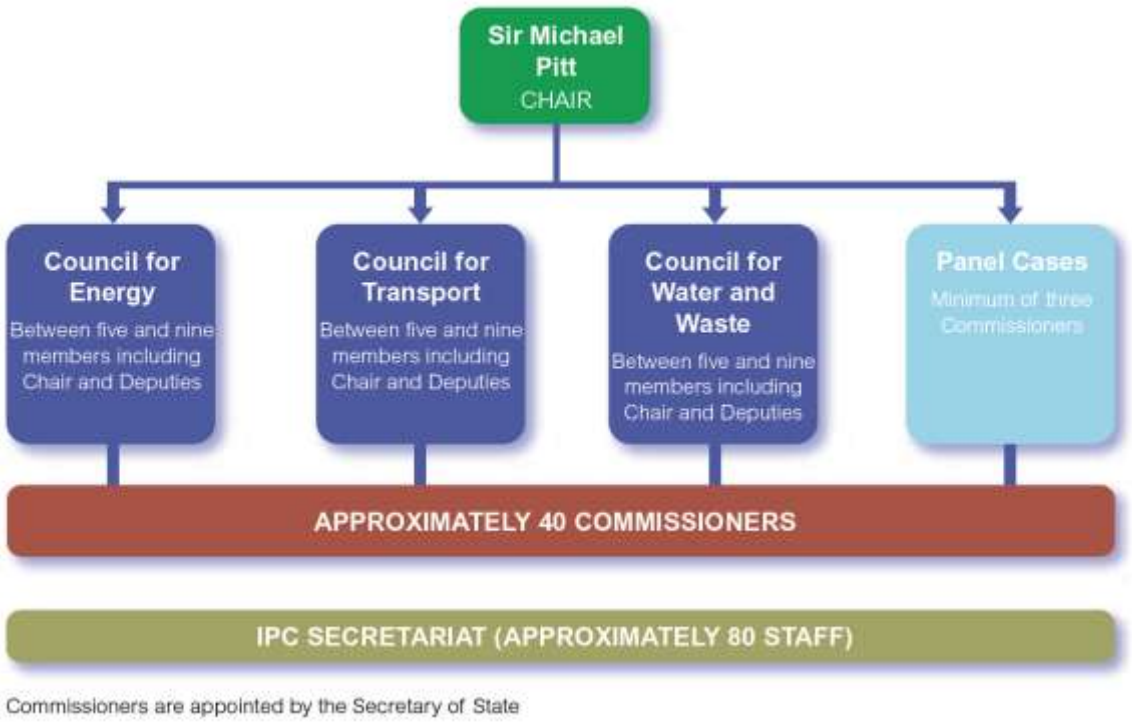
The system is designed to ensure that applications are prepared to a high standard – they must demonstrate that they have taken into account responses from consultation. Commissioners are empowered to refuse to accept any applications that are inadequate in significant areas including public consultation and environmental impact assessment.

Once an application has been accepted as valid by the IPC, the applicant must publicise this, and the public will have a further opportunity to express their views by making written representations to the IPC. The IPC must make all representations public and allow interested parties the opportunity to comment on them.

Public Hearing

Public hearings are held at which the evidence will be examined by the Commissioner who chairs the meeting. The principal approach to testing the evidence is inquisitorial – the Commissioner puts questions to the applicant and others. The Commissioner must ensure that the evidence is properly considered, allowing cross-examination when appropriate, and make sure that everyone has fair opportunities to make their views known and influence the outcome.

Commissioners of the Infrastructure Planning Commission, tasked with conducting fair and open examinations, are chosen for their knowledge of public engagement and inclusion as well as their technical and professional skills. They must consider the evidence and government policy, and act independently when making their decisions on individual applications. Commissioners are accountable to the courts; they work to a strict code of ethics and are free of political interference. Applications are examined either by a panel of Commissioners or by a single Commissioner, depending on the size and nature of the project. Applications examined by a single Commissioner are decided by one of three IPC Councils. The following chart gives a summary:



Although the new government in England has seen fit to provide for greater political involvement in decision about major projects, the IPC process is illustrative of potential improvements to statutory processes in New Zealand. In particular the emphasis on extensive early public consultation and engagement, rigorous pre-application assessment, and integration of statutory processes warrants further consideration in the New Zealand context. The development of integrated hearing processes has also been a feature of reforms in Australia and Ireland.

Australian States and Ireland also consolidate approvals under various Acts for infrastructure projects

In 2005 the New South Wales State government amended their Environmental Planning and Assessment Act to streamline consents for critical infrastructure projects. The changes were aimed at streamlining approvals, without compromising on environmental outcomes. The Act consolidates 15 approvals under nine Acts into a single assessment process and approval given under the Environmental Planning and Assessment Act. The assessment and approvals are co-ordinated by the Department of Infrastructure, Planning and Natural Resources. The provisions relating to the assessment and management of impacts on critical habitats, and threatened species, populations and ecological communities and their habitats under the Fisheries Management Act, the Threatened Species Conservation Act and the National Parks and Wildlife Act are integrated into the assessment under the Act.

In addition, the environmental protection provisions under eight different Acts are integrated into one approval. Those provisions relate to impacts on waterways, riparian zones and coastal processes, including from the use of water, water management works, dredging and aquifer interference under the Rivers and Foreshores Improvement Act 1948, the Water Management Act 2000 and the Coastal Protection Act 1979; impacts on aquatic ecology, including from dredging, obstructions in waterways or disturbance of mangroves under the Fisheries

Management Act 1994; impacts on terrestrial ecology under the Native Vegetation Act 2003 and the National Parks and Wildlife Act 1974; bushfire risks under the Rural Fires Act 1997; impacts on Aboriginal items or places under the National Parks and Wildlife Act 1974; and impacts on heritage values, including in relation to excavation under the Heritage Act 1979.

Projects may still require a licence for ongoing operations under the Protection of the Environment Operations Act, an approval under the Roads Act, an aquaculture permit, mining or petroleum production lease or approval under the Mine Subsidence Compensation Act as is relevant. In these circumstances, there is a joint assessment with the agencies contributing to the one assessment. Once the Minister has determined the project, any subsequent approval must be substantially consistent with the Minister's approval. This requirement applies in relation to any appeal over those authorisations.

The process ensures a focused integrated assessment and consultation regime is undertaken prior to a decision to proceed being made. In most circumstances, a concept approval will be obtained to establish the environmental performance requirements for a project which must then be delivered in accordance with that approval. The decision is not appealable except if the appeal is initiated or approved by the State government. The reforms were designed to ensure timely and efficient delivery of critical infrastructure projects; provide certainty in the delivery of key infrastructure projects; ensure appropriate environmental benefits; focus on outcomes rather than process and encourage innovation in design to achieve the outcomes sought.

The Irish Government introduced the Planning and Development Strategic Infrastructure Act 2006. This established a new Strategic Infrastructure Division of the National Planning Board which provides a streamlined consent process (with provision for consultation with the decision makers) for energy, transport, waste and water infrastructure projects. Projects go straight to the Board, rather than first having to get local authority approval, thus reducing the length of time it takes to get development consent planning permission. Although not as all encompassing as the English and Australian approval processes, the Act also empowers the Board to replace the Minister for Transport as the consenting authority for Railway Orders. The effect of this is that proposals for rail infrastructure are submitted directly to the Board.

Part Three

Conclusion: Towards a consolidated consent process for New Zealand

In recommending an improved infrastructure planning and approval process for New Zealand the Technical Advisory Group has the opportunity to capitalise on both domestic and international best practice. NZCID recommends that this would see the development of a system which provides:

1. Recognition of the importance of the provision of infrastructure services as being of national significance and intrinsic to meeting the sustainable development purpose of the Act and to enabling people and communities to provide for their social, economic, and cultural well-being and for their health and safety as set out in Part 5 of the Act

2. An independent and balanced assessment of economic, social, cultural, and environmental imperatives required by the RMA and other relevant legislation

3. Integrated assessment of legislative requirements and corresponding removal of duplicity of process for national and regionally significant infrastructure

4. Clear policy guidance and standards established by central government through National Policy Statements and National Environmental Standards

5. Extensive pre-application consultation with affected communities, local government and relevant authorities to enable communities and stakeholders to flag key issues that will need to be addressed and to influence the conceptual design approach

6. Appraisal of community impact and environmental effects, both positive and negative, via a detailed Assessment of Environmental Effects (AEE) undertaken in advance of an application being made and which is open to public comment

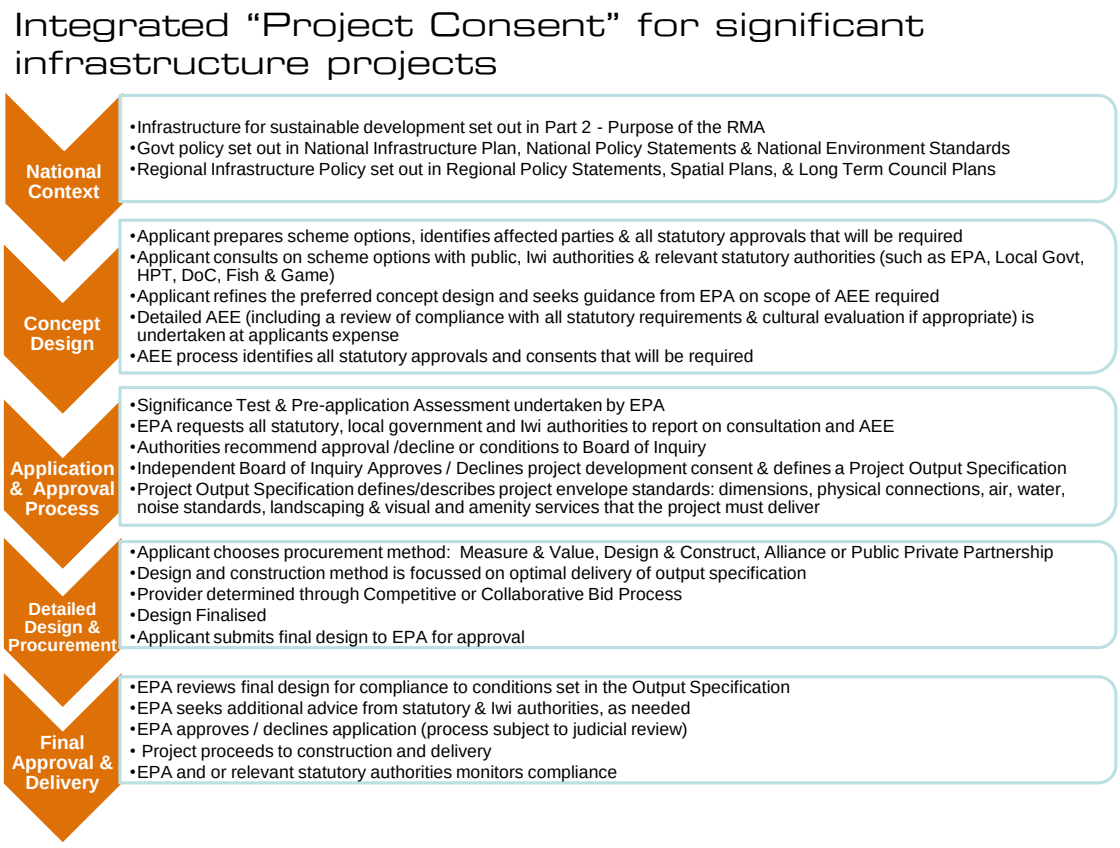
7. Acceptance of applications for assessment to be conditional upon a detailed AEE and consultation process having been undertaken and that the project is of national or regional significance

8. Concept approvals involving public participation and identification of issues and for detailed plans to be approved by the relevant authority(ies) at a later date.

9. Focus on specification of outputs that will deliver environmental social cultural expectations of the communities that the infrastructure will serve and to encourage innovation in design and delivery to meet or exceed those agreed community outcomes

Project Consent – an optional consent path for significant infrastructure projects

Adopting these policy principles NZCID recommends that the RMA be amended to provide project sponsors with the option to proceed to an integrated planning consent process to be known as a "Project Consent" as illustrated and discussed below.



A Project Consent would be a new single consent which is intended to simplify and speed up the planning process for significant infrastructure. It would mean that all stakeholders, including local authorities and the public, have one, single process in which to engage. Like call in, the Project Consent path would be optional. Project sponsors could elect to go down the Project Consent path, or they could choose to use the alternative consenting processes currently provided under the Act.

It is envisaged, although not essential, that the proposed change would be supported by changes to Section 6 of the Act to recognise the importance of significant infrastructure such as transport, energy, telecommunications, water, waste infrastructure and essential community services in meeting the purpose of the Act to "enable people and communities to provide for their social, economic, and cultural well-being and for their health" as asset out in Section 5 of the Act.

It is also envisaged that Government policy for the provision of significant infrastructure would be set out in National Infrastructure Plan, and in the development of National Policy Statements & National Environment Standards. Similarly, regional infrastructure policy would be set out in Regional Policy Statements, Spatial Plans, & Long Term Council Plans. These documents would provide the statutory context for the development and consideration of specific infrastructure projects.

A key feature of the Project Consent process, as envisaged, is that public engagement is focussed at the beginning of the project life cycle where the public is most qualified to provide input. The debate of the merits of the project and the outcomes and envelope of effects that it must deliver are resolved at the beginning, by means of an integrated Board of Inquiry process, before expensive detailed design is entered into.

Having identified the project outcomes that must be met, including necessary environmental, social and legislative imperatives, the design and project delivery focus is centred on meeting or exceeding the output specification at the least cost. This is intended to drive innovation around value for money outcomes through either competitive or collaborative procurement methods.

The Project Consent would avoid the need for many of the range of separate consents which currently have to be obtained under separate legislation and from different government agencies, departments and local authorities. The envelope of effects will be described (and where possible standards defined) by the Board of Inquiry process in the form of a Project Consent output specification. Final approvals will be given by the Environment Protection Agency, on advice from the relevant statutory authorities in respect of any other legislative approvals applied for. These might include, for example, approvals under the Historic Places Act, Foreshore & Seabed Act, Reserves Act, Public Works Act, the Local Government Act, and others.

A designation and Project Consent approval could go hand in hand, or where a designation is already held, the Project Consent would be approved within the conditions set by the designation. The Boards of Inquiry would be supported by the EPA, and all other processes regarding their appointment and authority would remain the same as currently provided under the RMA section 6AA.

Local Authority Participation

In the new regime, all local authorities with an interest would be consulted and, by law, local impacts would be balanced against national benefits. Local authorities would have a role in the system at all stages, including:

- The development of National Policy Statements

- The requirement for applicants to consult local authorities, as well as other bodies and the local community, before they submit an application to the EPA

- The EPA would be required to take account of the views of the local authority and others on the adequacy of the applicants publicity and consultation in deciding whether an application can be accepted as valid.

- The local authority may submit a Local Impact Report (LIR) to the Board of Inquiry. The LIR would describe the likely effects of the proposed development on the local authority's area. The Board would have regard to the LIR in deciding an application, and may reject the application, if the adverse impacts outweigh the benefits.

Public Participation

The regime is intended to provide better opportunities for the public, Iwi and local communities to get involved in decisions that affect them. There are three opportunities to get involved:

- in the debate about what national and regional policy means for planning decisions
- in the development of specific projects and

- the examination of applications for Project Consent – both by making written representations and appearing at the Board of Inquiry hearings

Applicants would be required to carry out extensive public consultation before making application to the EPA. Engagement with the local community, Iwi and a range of other bodies at the pre-application stage would be a very important aspect of the new system. Further consultation would take place following the submission of the scheme to the EPA.

The system is designed to ensure that applications are prepared to a high standard – they would have to demonstrate that they have taken into account responses from consultation. The EPA and or the Board of Inquiry would be empowered to refuse to accept or consider any applications that are inadequate in significant areas including public consultation and environmental impact assessment.

Once an application has been accepted as valid by the EPA, the applicant would be required to publicise this, and the public will have a further opportunity to express their views by making written representations to the Board. The Board would be required to make all representations public and allow interested parties the opportunity to comment on them.

In summary this process is designed to achieve the necessary balance between streamlining decision making for projects of national significance whilst providing full and open opportunity for public participation in the decision making process. It provides for integration of decisions across all relevant statutes utilising the skills and expertise of the relevant statutory authorities and recommending authorities. It ensures substantive and extensive opportunities for public engagement and consultation during the critical project development phase, through the public hearing process and through consideration of local impact reports prepared by affected local authorities. The focus on outcomes, as opposed to inputs, is designed to ensure that opportunities to drive innovation can be maximised. The approval process is centred on delivering infrastructure services that meet or exceed New Zealander's expectations for sustainable social environmental and economic development of the nation.

Appendix 1[17]

History of scope change and cost estimates for ALPURT B2

The cost estimates over time for ALPURT B2 were as follows:

Year	1997	1999	2001	2004	2005
Cost $ million	82	98	138	218	359*

** This does not include an additional $78 million of capitalised interest required to service the debt component of the funding for this project.*

- **1999:** The scope for ALPURT B2 was established—two lanes, 80 km/hour, state highway. This scope was maintained until June 2004.
- **1999–2003:** A rigorous consent process was completed, including public hearings, appeals, Environment Court hearings and High Court proceedings. All necessary consents were obtained by early 2003.
- **Late 2003:** ALPURT B2 moved from being 26th in national priority to having funding approved. There appears to have been a strong desire to have the project built quickly.
- **January 2004:** Transit NZ's consultants, Andel Consultants, assessed ALPURT B2 for compliance with the recently enacted LTMA. The consultants recommended no changes in scope.
- **February 2004:** A paper provided to the Transit NZ Board, indicated that appellants to the ALPURT B2 resource consents argued to have the Nukumea Stream bridged and a tunnel constructed through Johnsons Hill. For both suggestions, the paper concluded that 'this argument has been considered by the Transit Board [in October 2002] and rejected'. No decisions relating to the project's scope appear in the Board minutes.
- **March 2004:** It was reported to the Transit NZ Board that 'An existing significant risk has been brought to our attention in the last month. The Manu Waiata Restoration Protection Society (the Society) have written to the Board summarising its concerns with ALPURT B2, which are of an environmental nature. The Society have a long association with ALPURT B2 and have campaigned for much higher standards of mitigation to environmental impacts on the ALPURT B2 design than those included in the December 2003 specimen design (of B2). While the Society presents a number of arguments around legal aspects of the project and approval process, its underlying motive is to achieve higher levels of mitigation of environmental impacts.'
- **April 2004:** The Transit NZ Board noted that 'as per the Board's wishes, one of the first tasks for the Alliance [the contracting alliance building ALPURT B2] is to prepare an environmental risk register. This register will be used to assess opportunities for environmental enhancement over the current specimen design which will include, amongst other issues, an assessment of tunnelling through Johnsons Hill and bridging the Nukumea Stream.'
- **June 2004:** The Transit NZ Board was presented with 'opportunities to achieve enhanced environmental outcomes' developed by the Alliance, focusing on the Nukumea viaduct and Johnsons Hill tunnels (and related relocation of the northern termination). The Board resolved to include the Nukumea viaduct in the project scope, and to continue the investigations of the Johnsons Hill tunnels and relocated northern termination.
- Transit NZ's decisions to include the Nukumea viaduct and Johnsons Hill tunnels in the project appear to be on the basis of compliance with the LTMA. However, the January 2004 Transit Major Projects Review of ALPURT B2 for compliance with the LTMA did not identify the need for the scope change.

[17] Extract from Ministerial Roading Advisory Group on Roading Costs Final Report August 2006 p 14

Appendix 2

History of scope change and cost estimates for Victoria Park Tunnel

Year	2001	2002	2003	2004	2005	2006
Cost $ million	90–110	105	155	160	369.6	320

- **November 2001:** The Transit NZ Board released three options for public consultation from five short-listed options. It was noted by the Transit NZ Board that Option B (new depressed roadway) and Option C (full or partial tunnel) offered no roading benefits additional to Option A (widened or new viaduct), and that it was likely that only Option A would be fully fundable.
- **June 2002:** It was reported to the Transit NZ Board that preliminary feedback from key stakeholders indicated general preference for Option A. It was also reported that feedback from Auckland City Council officers indicated a tunnel was the preferred option but that it was unlikely to be funded.
- **September 2002:** The Transit NZ Board was presented with a social and environmental evaluation of four options. In summary, Option B (partially covered trench) and Option C (full tunnel) offered some amenity benefits, at a cost of $165 million to $180 million more than Option A (widened or new viaduct). Option D (northbound tunnel) only offered modest amenity benefits, at an additional cost of $100 million.
- **November 2002:** The Transit NZ Board resolved that '...Transit cannot justify the additional costs of either a full tunnel or a northbound tunnel without local funding to meet the additional costs'.

- **December 2002:** The Auckland City Council Transport Committee resolved that:
  – Option A was unacceptable
  – the Council expected the improvements to fully mitigate the impacts of this project by trenching and tunnelling
  – funding through a combination of tolls and debt funding should be investigated.
  There was also pressure on Transit NZ at the time to deliver this project as soon as possible in order to realise the benefits of other major motorway projects due to be opened.
- **December 2004:** The Transit NZ Board was presented with a single option—Option D (northbound tunnel). 'While it may seem somewhat deterministic to advocate a specific approach to this transport issue, we would make it clear that we see this as a political decision'. A northbound tunnel became the preferred option, and is the basis of the project at this time.
- **April 2005:** Land Transport NZ reviewed the project and approved design funding to further evaluate the northbound tunnel option. The incremental costs and benefits of each option were not clearly presented.

Appendix 3

RMII – I

International Approaches to Major Infrastructure/Project Assessment

Report Prepared by Ministry for the Environment March 2009

This paper reviews a number of alternative approaches to assessment and decision-making on major infrastructure projects in Ireland, Australia and the United Kingdom[18]. The information focuses on the questions: who decides, what rights are involved, and how are applications for major infrastructure development decided.

Summary of International Approaches

Country /State	Rights involved	Who decides?	How is decision made?
Ireland:			
Strategic infrastructure development	Direct application to Strategic Infrastructure Division of the Board for development which meets criteria;, public notification of application, EIS & decision; public submissions process; no appeal unless grounds for judicial review by High Court	Three members of An Bord Pleanála (the independent Planning Appeals Board)	Area plans, regional / national interests and guidelines, and environmental effects of proposed development; decision due within 18 weeks unless time extended
New South Wales			
Major Development State Environmental Policy (SEPP)	Proponent can lodge full project application plan for full approval, or concept plan for staged approval; comprehensive environmental assessment, public consultation and submissions processes; appeal possible in certain circumstances	Planning Assessment Commission (PAC) or Minister of Planning	Minister of Planning can declare a project as major development; Department of Planning must provide environmental assessment report to guide determination by either PAC or Minister
Infrastructure SEPP	Environmental assessment, public	Infrastructure providers for smaller	Infrastructure providers must

[18] Information on examples from Ireland, Australia and United Kingdom is drawn from publications produced by relevant government agencies

	consultation and submissions processes	projects, local council or Minister of Planning for larger projects	perform environmental assessment of proposed facilities and conform to applicable codes & standards
Critical infrastructure	No appeal possible	Minister of Planning	Minister can declare major development to also be critical infrastructure
Victoria			
Priority Development Projects	Projects which meet criteria are referred to Priority Development Panel (PDP) for assessment, or can be called-in by Minister PDP report may be released at Minister's discretion No appeal possible	Minister for Planning	Priority Development Panel provides independent advice to Minister for Planning Minister will consider the PDP's report in making statutory decisions or issuing advice about a project
Queensland			
Projects of State Significance	Environmental Impact Statement may be required before application lodged	Assessment agency, Co-ordinator General or Minister of Planning	Minister can declare project to be of State Significance. Environmental Impact Statement must be done & considered by decision maker
South Australia			
Specified projects under Development Act	Projects which meet criteria are referred to DAC, which is subject to same appeal rights as council Development Assessment Panels	Minister for Planning	DAC provides independent advice to Minister for Planning Minister will consider their report in making final decisions
Declared Major Development Proposals	Projects which meet criteria may be referred by Minister to DAC; public has ability to comment on EIS; no appeal possible	Governor on advice of State Cabinet, having regard to Assessment Report	Environmental Impact Statement (EIS) must be prepared by proponent & assessed with proposal by Minister, who

			prepares an Assessment Report
United Kingdom			
Nationally significant infrastructure projects	Projects which meet criteria are referred to IPC for assessment against relevant NPSs; public consultation at 3 stages; appeal possible through courts if IPC act unreasonably	Infrastructure Planning Commission (IPC)	IPC assesses benefits & adverse impacts of proposal

Ireland

Ireland's planning system was introduced in 1964, when the Local Government (Planning and Development) Act 1963 came into effect. The large body of planning legislation and regulations in the years since then, including the Planning and Development Act of 2000, reflects the expansion of the statutory development control system to meet the demands arising from economic growth, rising public concern in the area of environmental control, also, a desire on the part of the public for a statutory and independent planning appeals system. The physical planning system in Ireland is the responsibility of local planning authorities (County Councils, Town Councils, etc).

Ireland has an independent third party planning appeals system which is operated by An Bord Pleanála[19] (the Planning Appeals Board). All planning decisions made by planning authorities may be subject to independent review by An Bord Pleanála.

In addition the regional authorities have responsibility for drawing up and implementing Regional Planning Guidelines to support strategies for regional development. The Minister for the Environment, Heritage and Local Government is responsible for planning legislation while the Department of Environment is also responsible for the national planning framework (see below) and for the issuing as required guidance documents in respect of national issues such as Rural Housing, Wind Energy, Retailing, etc.

The Environmental Protection Agency[20] (EPA), a statutory body funded by the Department of the Environment, is responsible for protecting the environment. Its role is to protect and improve the environment taking into account the environmental, social and economic principles of sustainable development. It is responsible for licencing and controlling large scale waste and industrial activities, overseeing local authority environmental protection responsibilities, compliance, and assessing the impact of proposed major developments on the environment.

[19] www.pleanala.ie
[20] www.epa.ie

In November 2002 a National Spatial Strategy was published by the Department of Environment, Heritage and Local Government to provide an overall framework for planning in Ireland. Plans at regional and local level must have regard to the National Spatial Strategy.

To speed up the process for obtaining planning approval and consents for strategic infrastructure, the Planning and Development (Strategic Infrastructure) Act 2006 made significant changes to the way strategic infrastructure developments are determined within the planning system. Strategic infrastructure development is defined as development which meets one or more of the following criteria:

- is of strategic economic or social importance to the State or a region;
- would contribute significantly to the fulfilment of any of the objectives of the National Spatial Strategy or any regional planning guidelines in force in an area
- would have a significant effects on the area of more than one planning authority.

Planning applications for certain large scale private development, generally of a class which requires environmental impact assessment (EIA) and which the Board certifies as meeting the criteria referred to above, will be made directly to the Strategic Infrastructure Division of An Bord Pleanála (the Board). These are listed in the 7th Schedule of the 2000 Planning Act which was inserted by the 2006 Act[21] (referred to as 7th Schedule development). The Schedule lists certain classes of projects related to major energy, transport and environmental infrastructure. Previously such planning applications were made to the local planning authority (e.g. county council) with a right of appeal to the Board. Applications for approval of gas infrastructure and railways will also be made to the Board generally by the relevant utility providers.

In addition to 7th Schedule development, strategic infrastructure development includes: proposed development by local authorities in their own functional area which requires EIA; certain EIA developments by the State which previously did not require planning permission; major gas pipelines and their associated terminals, buildings and installations; high voltage electricity transmission lines and interconnectors; motorways and other major roads; development by or on behalf of a local authority on the foreshore; railway works including light rail and metro systems and certain associated commercial development on adjacent land; and compulsory acquisition of land associated with certain of the above developments.

While the procedures for all cases may vary, in general there will be a three-step process:

(i) Consultations: where a prospective applicant for permission / approval / other consent requests pre-application consultations with the Board,

(ii) Scoping: where a prospective applicant requests the Board to ‘scope’ the EIS for the project (see Q9), and

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21 http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/acts/2006/a2706.pdf

(iii) Application: where the applicant submits an application for planning permission, approval or other consent to the Board.

*(**Note:** a flowchart of Ireland's Strategic Infrastructure Development process is provided in Appendix 1 below.)*

The Planning and Development (Strategic Infrastructure) Act makes provision for wide-ranging public participation in relation to strategic infrastructure development:

- before applying to the Board, the prospective applicant must publish notice of the proposed application in one or more newspapers and by site notices. These notices will indicate the nature and location of the proposed development, that an EIS has been prepared (where required), the times and places where the application (and EIS) can be inspected, that an application is to be made to the Board for planning permission / approval, the types of decision which the Board may make and that submissions may be made to the Board by the public and others e.g. prescribed bodies

- the Board will also include notice of receipt of the application in its weekly list of new cases and post it on its website

- the applicant must make the application and the EIS available for inspection and for purchase, for a period of at least six weeks, at the Board's offices and those of the planning authority in whose jurisdiction the proposed development would be located

- any person or body may make submissions to the Board (for a fee of €50) within the period allowed for the application to be inspected (minimum of six weeks) in relation to the implications of the proposed development on the proper planning and sustainable development and the likely effects on the environment of the proposed development

- the applicant and any person who makes submissions to the Board in relation to the application can request the holding of an oral hearing. The Board has an absolute discretion whether to hold an oral hearing of any application

- where meetings have been held between the Board and prospective applicants (and in certain cases other bodies/persons who, in the opinion of the Board, may have relevant information), the record of any such meetings will be made available for inspection

- where the Board requests further significant information in relation to the application, this information will be made available for public inspection

- All those involved in the application including those who made submissions or were heard at the oral hearing will be notified of the decision by mail and the decision will be posted on the Board's website.

The Board will make a decision on an application on the same basis as normal planning appeals, i.e. the proper planning and sustainable development of the area and the effects, if any, the proposed development would have on the environment. The Board will have regard to such matters as the policies and objectives of the local development plan(s), Ministerial planning guidelines, regional planning guidelines, the National Spatial Strategy, the policies and objectives of the Government and the national interest. In addition, the Board must consider the

application which is before it, including the EIS (if any), any submissions made to the Board in relation to the application, the report of the local planning authority(s), including any recommendations submitted by the elected members of the authority, and the report and recommendation of the Board's inspector on the application/oral hearing.

The Board has a statutory objective to determine strategic infrastructure cases within eighteen weeks commencing on the last day for receipt of submissions from the public. Where it is not possible or appropriate to determine the case within that time frame, the Board will notify all concerned and give a revised date by which it intends to determine the matter.

There is no appeal against the decision of the Board on an application to carry out strategic infrastructure development. Its validity may only be challenged by way of judicial review in the High Court within 8 weeks of the decision. The Court will not re-open the planning merits of the case and may only give leave to pursue the review process where it is satisfied that there are substantial grounds for contending that the Board's decision is invalid or ought to be quashed and that the person seeking the judicial review has a substantial interest in the matter.

The Board has no powers of enforcement (except for railway orders). Enforcement of planning decisions and interpretation of conditions imposed in decisions are primarily the responsibility of the local planning authority, which must follow up on complaints made regarding unauthorised development including non-compliance with planning decisions. Any person may apply to the High or Circuit Court for an injunction in relation to unauthorised development in certain circumstances.

Australia

New South Wales

The legislative framework for planning in NSW was established under the *Environmental Planning and Assessment Act 1979* (EP&A Act) and amended by the *Environmental Planning and Assessment Amendment Act 2008* and its *Regulations* in 2009.

The revised planning system operates through a series of planning instruments, which include State Environmental Planning Policies (SEPPs) and Local Environmental Plans (LEPs). These documents form a hierarchy of legal instruments which regulate land use and development.

Proposals are considered under different parts of the Act, including:

- Part 3A, for major projects of regional or State significance which require an approval from the Minister for Planning
- Part 4, for other proposals which require consent, usually by the local council but by the Minister in limited circumstances. Under Part 4, minor or routine development may also be complying development approved by accredited certifiers

- Part 5 for proposals which do not fall under Part 4 or Part 3A. These are often infrastructure proposals approved by local councils or State agencies which are undertaking them.

In addition, minor proposals can be exempt from development approval, while other proposals are prohibited under various planning instruments.

The State Government has simplified the planning system by removing over 2000 concurrences and referrals to government agencies, thus reducing timeframes. It has made a range of housing, infrastructure, commercial, industrial and other projects "complying development" so that they can obtain an approval in 10 days if they comply with prescribed criteria.

The new NSW Housing Code outlines how new detached single and two-storey houses and home alterations and additions on specific lot sizes and zones can be approved within 10 days. It also outlines how 40 different types of minor improvements, such as garden sheds or rainwater tanks, can proceed without planning or construction approval.

The recent changes to the development application process aim to provide greater certainty of the timeframes for the assessment of different types of development applications. The focus is on ensuring that the applicant provides the appropriate information to the consent authority so that the application can be assessed and determined in a timely manner.
A further package of amendments to the development assessment process in Part 4 of the EP&A Act and its Regulations is out for consultation (August 2009). The package introduces changes to the procedures for making and assessing development applications. The key changes are[22]:-

- The removal of the "stop of the clock" provisions;
- Setting assessment periods of 50 days, 70 days and 90 days for different types of development applications before they are deemed to be refused and able to be appealed to the Land and Environment Court for the application to be determined - tailoring assessment timeframes to reasonably reflect the complexity of the application or the processes by which it is assessed;
- Setting clear milestones for different stages of the assessment process, including responses from Government Agencies;
- Providing guidance on the information required for the preparation and assessment of development applications before they are submitted; and
- Enabling applications triggering regional issues, or applications where Council is the proponent for works or has a conflict of interest, to be determined by a Joint Regional Planning Panel (JRPP).

Draft Development Assessment Guidelines under this legislation have been prepared for applicants and Councils, and outline the revised development

[22] NSW Development Assessment Guidelines Part A Consultation Draft - http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=IPWikV92xZQ%3D&tabid=339

assessment processes and the matters which must be included in a Statement of Environmental Effects to accompany all development applications.

Development assessment process

The development assessment processes are tailored to reasonably reflect the complexity of the application. The development application (DA) processes only apply when a development application is required for a proposed development. A development application is required when:

- an environmental planning instrument i.e. a Local Environmental Plan (LEP) or State Environmental Planning Policy (SEPP) applying to the land, identifies the proposed development as permissible with consent, or
- the development on the land enjoys existing uses rights (i.e. it is an existing development which previously was permitted on the site and is now prohibited by the zoning) and the development is proposed to be altered or extended.

These Development Assessment Guidelines do not apply to an application for development that is 'complying development', 'exempt development' or matters assessed under Part 5 of the EP&A Act, or is prohibited under a LEP or SEPP and does not have existing use rights.

'Complying development' was introduced in the EP&A Act as a fast and simple approval process for routine development. The purpose of complying development is to create an 'as-of-right' development application process subject to pre-set standards. A person undertaking a 'complying development' can choose either the council or an accredited certifier to certify that the proposal complies with the standards. Examples of 'complying development' include single dwelling houses on average sized lots, bed and breakfast accommodation and commercial fit-outs.

'Exempt development' was introduced for minor forms of development where, subject to pre-set standards, there is no need for development consent to be obtained. Current examples of 'exempt development' include non-structural internal alterations to a house, rural sheds set back from the boundary, flag poles less than six metres in height and some fences.

Responsibility for determining DAs

All development applications (DAs), or applications to modify an existing development consent, will be determined by *Council* unless determined by:-

- *Joint Regional Planning Panels* (JRPP) - which determine DAs for 'regionally significant development' based on the criteria in the Major Development SEPP; or Crown DAs referred to it for determination, or
- *Minister for Planning* – who determines DAs of a class of development nominated in the Major Development SEPP or other instruments or legislation; or Crown DAs which may be referred to the Minister for determination.

Types of development applications

Regionally significant development

Regionally significant developments are assessed by Councils and determined by the JRPP. They include developments which are not 'major projects' and meet the following criteria:

- All developments worth over $10 million, which are not classed as 'major projects' to be determined by the Minister
- Subdivisions of land over 250 lots
- Certain coastal developments, particularly in sensitive areas. These developments can include buildings over 13 metres in height, some subdivisions of land and some recreational and tourism facilities
- 'Designated developments' that need particular scrutiny because of their nature or potential environmental impacts. These developments require an environmental impact statement
- Development worth more than $5 million including public and private infrastructure; such as community facilities, child care centres and places of public worship; developments where the council is involved or has a conflict of interest; Crown development; and ecotourism.

Designated development

Designated development is listed in Schedule 3 of the EP&A Regulations or in environmental planning instruments. If a proposal is 'designated development', the development application will need to be accompanied by an Environmental Impact Statement (EIS) addressing matters prescribed by the Department of Planning. The JRPPs will determine all 'designated developments'.

Timeframe for assessing DAs

The EP&A Act gives a consent authority a minimum time period to undertake an assessment before an applicant can appeal to the Land and Environment Court for the application to be determined. This is termed the "deemed refusal period". It does not mean that the application has been refused, but the applicant has a right to appeal to the court to take over the consent role.

The 50, 70 and 90 day assessment periods recognise that different classes of development will generate different issues, or have a level of public interest or follow different processes for assessment and hence should have different minimum timeframes.

The time period is counted in calendar days and commences once the development application has been "accepted" by the consent authority (i.e. up to 7 days after lodgement).

Planning Assessment Commission

The NSW Planning Assessment Commission (the Commission) began operations in November 2008, as part of the NSW Government's planning reforms.

The Environmental Planning and Assessment Act 1979 (EP&A Act) details the functions of the Commission which includes the review of project applications, when those matters are delegated to it by the Minister for Planning. Another function of the Commission is to provide advice to the Minister on a range of planning and development matters, as defined in the EP&A Act. It is a statutory body representing the Crown.

The Commission's responsibilities are:

- To determine, or review and advise the Minister of Planning on applications for approval of Part 3A projects and concept plans as delegated by the Minister for Planning with the exception of *critical infrastructure projects*
- To review any aspect of a major project under Part 3A
- To review the environmental aspects of a proposed development the subject of a development application
- To review a proposal to constitute, alter or abolish a development area
- To act as a Joint Regional Planning Panel (JRPP), an independent hearing and assessment panel, or a planning assessment panel
- To advise the Minister on planning or development matters, environmental planning instrument, or the administration of implementation of the provisions of the EP&A Act.

The Planning Assessment Commission is to consist of a Chair and between 3 and 8 members appointed by the Minister for Planning. Each member must have expertise in at least one of these disciplines: planning, architecture, heritage, the environment, urban design, land economics, traffic and transport, law, engineering, tourism, or government and public administration.

NSW Major Development Assessment System[23]

A particular development or development type may be declared a major development to be assessed under Part 3A of the *Environmental Planning and Assessment Act 1979* (EP&A Act). The approval of the Minister for Planning is required for these projects to be declared a major development, and they are normally assessed by the Department of Planning. Major developments are identified either in:

- State Environmental Planning Policy (Major Development) 2005 (Major Development SEPP), or
- an order by the Minister for Planning published in the NSW Government Gazette.

The Minister may also decide whether to authorise or require a concept plan to be lodged for a project, which provides a broad overview of the proposal. If a concept

[23] A community guide - NSW major projects assessment system, March 2006: http://www.planning.nsw.gov.au/assessingdev/pdf/part3a_communityguide.pdf

plan is approved, further approvals will be required before the project can proceed further.

Any development that is declared to be a major development to which Part 3A applies, may also be declared to be a *critical infrastructure project* if it is of a category that, in the opinion of the Minister, is essential for the State for economic, environmental or social reasons

Development types

Schedule 1 of the Major Development SEPP describes the types (also known as classes) of development that may be declared a Part 3A project, including:

- agriculture, timber, food and related industries
- mining, petroleum production, quarries and associated processing industries
- chemical, manufacturing and related industries
- general manufacturing, distribution and storage facilities
- residential, commercial or retail projects
- tourism and recreational facilities
- health and public service facilities
- transport communications, energy and water infrastructure
- resource and waste related industries.

Schedule 1 commonly sets thresholds (such as a total capital investment value or the number of operational employees) before a proposal may be considered a major project. In relation to proposed residential, commercial or retail projects, the threshold is that such projects must have a capital investment value of more than $100 million. For other types of development (e.g. a proposed timber mill) the relevant threshold is that it employs more than 100 people full time or has a capital investment value of more than $30 million.

If the Minister forms the opinion that a proposal meets the threshold, then it is declared a major project under Part 3A of the EP&A Act.

For specified types of development (such as development related to railway corridors and infrastructure, marina facilities in selected areas or for performing arts facilities), the Minister forms an opinion as to the planning significance of the proposal, as well as whether it meets the relevant threshold, before declaring the proposal to be a major project under Part 3A of the EP&A Act.

Specified sites

Schedules 2 and 3 of the Major Development SEPP list the types of developments that are considered projects under Part 3A of the EP&A Act because of where they are located, including:

- major subdivisions of land within the NSW Government's mapped coastal zone, which allows a consistent approach to be developed in the assessment of these proposals and the objectives of the NSW Coastal Policy to be more easily implemented
- certain development within mapped areas or State significant sites.

If the Minister forms the opinion that a proposal meets the location and other requirements set out in the Major Development SEPP, then it is declared a major project under Part 3A of the EP&A Act.

Major Development Assessment Process

A comprehensive environmental assessment, public consultation and submissions process is set down in the EP&A Act. The Director-general of Planning must provide an environmental assessment report to the Minister of Planning to guide the Minister's consideration of the project application.

Determination

The Minister of Planning may request the Planning Assessment Commission (PAC) to determine, review or advise on any aspect of a major project or concept plan. The PAC or the Minister may approve or disapprove the carrying out of the project and determines the conditions that apply to the implementation of the project. The Minister determines *critical infrastructure projects.*

Note: the declaration of a project as a *critical infrastructure project* excludes:

- proponent or objector appeals in respect of the determination of an application for approval of the project
- with respect to the project all environmental planning instruments (other than SEPPs that specifically relate to the project) and certain council orders
- third-party appeals against the project under this Act or other environment protection legislation.

In addition, the NSW Government has passed more recently the State Environmental Planning Policy (Infrastructure) 2007 (known as the Infrastructure SEPP) (see later in this paper). Therefore, NSW now distinguishes between *major developments, infrastructure projects* and *more routine projects*.

Environmental Assessment Process

The new laws ensure a focused, robust and consistent assessment of a major project's potential environmental impact. Under the new regime, the Department of Planning prepares and makes publicly available the key issues that a proponent must address in an environmental assessment of the proposal.

In preparing the environmental assessment, the proponent is also encouraged to consult with the community, relevant councils and agencies. The environmental assessment is generally required to include a written statement of commitments outlining how the project's likely environmental impacts will be minimised or managed. If the project is approved, the proponent will be required to honour these commitments as part of the conditions of approval. Once the proponent has prepared the environmental assessment, it is exhibited for public comment for a minimum of 30 days.

The proponent can be required to respond to issues raised in submissions and provide a preferred project report, which outlines any proposed changes to the project to minimise its environmental impact. If it is determined that the proposed changes significantly alter the nature of the project, the proponent may be required

to make the preferred project report available to the public. All key project documents, including project declarations, applications and environmental assessments must be made publicly available.

Critical infrastructure

Any development that is declared a major project under Part 3A of the EP&A Act may also be declared a *critical infrastructure project* if, in the opinion of the Minister, the project is essential for the State for economic, environmental or social reasons. The same assessment process applies as for other major projects.

Concept plans

There are a number of ways to propose to carry out a major project. One is to lodge a project application that contains detailed information about the project. Another option is to submit a concept plan, which provides a broader overview of what is proposed. Approval of the concept plan would establish the framework for more detailed development of the proposal, and may include the need for further approvals. Project applications and concept plan applications, including those for critical infrastructure, are subject to the Part 3A environmental assessment process.

Independent hearing and assessment panels

As part of the planning reforms, provisions have been made in the EP&A Act for the use of independent hearings and assessment panels (IHAPs) to strengthen the assessment process. This could be a panel of experts or a panel of officers representing the Department of Planning and other relevant public authorities. The Minister can decide to convene an IHAP and appoint panel members at any stage in the assessment process to provide important advice on issues of concern. Public hearings may also be undertaken to provide input into the panel's assessment and recommendations. The IHAP then produces a report outlining the issues and making recommendations which are determined by the Minister.

Appeals

Both proponents and objectors can appeal decisions made under the Part 3A assessment system, under certain circumstances. A proponent of a major project who is dissatisfied with the determination of the Minister can, within three months of receiving notification of the determination, appeal to the Land and Environment Court.

Objectors may also have appeal rights in respect of a major project determination. Any appeal 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 for the project.

Both proponent and objector appeals cannot be pursued where projects have been the subject of either a Commission of Inquiry or a report prepared by a panel of experts, or when the project has been declared critical infrastructure. This is similar to the situation which existed before the creation of the Part 3A system.

NSW State Environmental Planning Policy (Infrastructure) 2007[24]

The State Environmental Planning Policy (Infrastructure) 2007 (known as the Infrastructure SEPP) assists in providing new infrastructure by introducing updated planning provisions to improve efficiency and service delivery. The Infrastructure SEPP assists local government, the NSW Government and the communities they support, by simplifying the process for providing essential infrastructure in areas such as education, hospitals, roads and railways, emergency services, water supply and electricity delivery.

The Infrastructure SEPP has specific planning provisions and development controls for the following types of infrastructure works or facilities:

- affordable housing developments
- air transport facilities
- correctional centres
- educational establishments
- electricity generating works
- electricity transmission and distribution
- emergency services facilities and bushfire hazard reduction
- flood mitigation works
- forestry activities
- gas transmission and distribution
- health services facilities
- housing and group homes
- metro rail corridors
- parks and other public reserves
- port, wharf and boating facilities
- public administration buildings and buildings of the Crown
- rail infrastructure facilities
- research stations
- road and traffic facilities
- schools facilities
- sewerage systems
- soil conservation works
- stormwater management systems
- telecommunications networks
- travelling stock reserves
- waste or resource management facilities
- water supply systems
- waterway or foreshore management activities

The Infrastructure SEPP outlines the planning rules for these works and facilities, including:

- Where such development can be undertaken;

[24] NSW Planning for Infrastructure - A Community Guide to SEPP (Infrastructure) 2007, January 2008: http://www.planning.nsw.gov.au/planningsystem/pdf/dop08_005_infra_sepp_communityguide.pdf

- What type of infrastructure development can be approved by a public authority under Part 5 of the Environmental Planning and Assessment Act (EP&A Act) following an environmental assessment (known as 'development without consent');
- What type of development can be approved by the relevant local council, Minister for Planning or Department of Planning under Part 4 of the EP&A Act (known as 'development with consent');
- What type of development is exempt or complying development;
- The relationship of other statutory planning instruments to the Infrastructure SEPP.

The planning system supports an efficient and robust assessment of new infrastructure proposals. Before the introduction of the Infrastructure SEPP, many proposals were being delayed by the former planning regime for infrastructure proposals, which often caused unjustifiable delays.

The Infrastructure SEPP identifies projects that can be determined by infrastructure providers and those that still require assessment through the traditional development application process. Infrastructure providers will now be able to determine an increased number of smaller-scale building works, freeing up council planning resources to concentrate on larger projects and strategic planning. However, where infrastructure providers can approve their own works, the responsible agency and other determining authorities will still be required to undertake a proper environmental assessment of proposed new facilities. There are also increased consultation requirements imposed on such providers.

The Infrastructure SEPP overrides most other environmental planning instruments under the EP&A Act including local environmental plans, regional environmental plans, and other State environmental planning policies. However, the Infrastructure SEPP does not alter the major developments assessment system (Part 3A of the EP&A Act and the Major Developments SEPP).

Victoria

Significant projects in Victoria are referred to the Priority Development Panel (PDP)[25]. The PDP is an advisory committee established by the Minister for Planning under section 151 of the Planning and Environment Act. It is a multi-disciplinary panel of experts with skills and experience in planning and planning-related fields, such as urban design and architecture, land economics, social research, transport planning and engineering.

The PDP is an advisory body, not a decision maker, and provides independent advice to the Minister for Planning, who ultimately makes decisions on major projects. The PDP has been established to:

[25] Priority Development Panels, Department of Planning and Community Development, State of Victoria: http://www.dse.vic.gov.au/DSE/nrenpl.nsf/LinkView/772B4917A2450378CA256FA9007AD632706E7682A0D0E6C9CA2572FF000BF58E

- identify ways to provide faster approvals processes for developments of State or regional significance
- work closely with project proponents and local government to speed up decision-making
- provide expert advice to assist in resolving issues and facilitating strategic planning outcomes.

In many instances the projects being considered by the PDP are projects proposed by the State Government. There is a real sense of the state 'owning' major projects at senior ministerial level.

Projects considered by the PDP must meet a majority of the following criteria:

- Be of genuine State or regional significance, for example it:
  - may have substantial effects on the achievement or development of State and regional planning objectives
  - could have significant effects beyond its immediate locality or in more than one municipality
  - raises a major issue of State or regional policy or public interest, such as the implementation of Melbourne 2030 objectives.

- Relate to the planning or development of:
  - a Transit City, Principal and Major Activity Centre
  - a key strategic redevelopment site as defined in Melbourne 2030, and
  - give effect to environmental, social and economic objectives for sustainable development for those locations.

- Include one or a combination of the following:
  - development and implementation of a Structure Plan or Urban Design Framework
  - a proposal for a substantial mixed use development
  - a proposal for use of the Priority Development Zone.

- Be of a scale or level of complexity that requires special management arrangements, for example:
  - requiring coordination across Government agencies to facilitate outcomes
  - requiring an integrated assessment of issues
  - where standard approval processes may cause substantial delay or cost to the project.

The Minister may seek the advice of the Priority Development Panel at any stage during the planning process. However, requests made early in the process enable issues to be identified and resolved and opportunities for facilitation explored.

A referral may be prompted by a range of planning processes, including requests to the Minister to:

- provide advice to the responsible authority or planning authority about a planning permit, planning scheme amendment or the appropriate planning scheme provisions to be applied
- authorise or make a Ministerial decision in relation to a planning scheme amendment
- prepare a Ministerial amendment under the provisions of the Planning and Environment Act 1987
- 'call-in' an application.

Each project referred to the Priority Development Panel will result in a written report that may be released at the Minister's discretion. The Priority Development Panel must report to the Minister within a time agreed with the Minister. The Minister will consider the Priority Development Panel's report in making statutory decisions or issuing advice about a project.

The process of gaining approvals for major projects remains complex, however the PDP process does provide extra focus and attention to how to ensure a fair process, but also achieve regulatory approval in a reasonable timeframe.

Queensland – Department of Infrastructure & Planning

The *Integrated Planning Act 1997* (IPA) is the key piece of legislation that governs planning and development throughout Queensland.

The IPA requires that specific land use controls are set out by the local governments and form part of their Planning Schemes which are required to be prepared and revised regularly (i.e. every eight years). IPA specifies that these Planning Schemes are to have regard to such core matters as land use and development, infrastructure and valuable features.

The State Government is also involved in Queensland's development landscape providing input into the preparation of Planning Schemes as well as being a 'Referral Agency' for a certain variety of development proposals to ensure that the development will not compromise State interests and planning initiatives.

Development Approvals, including 'Preliminary Approval'

Development consent under IPA takes the form of a 'Development Approvals'. There are two types of Development Approvals:

- *Development Permit* - where development is able to proceed subject to conditions but not until any subsequent required approvals (e.g. Building Works Approval, Operational Works Approval etc.) are in place. This is similar to the approach taken under the RMA.

- *Preliminary Approval* - where 'in principle' approval is given; however, development cannot proceed until a subsequent Development Permit has been granted.

Example - A preliminary approval may seek a conceptual approval for a "residential precinct" or an "industrial precinct", but may not state the nature or density of the development. The approval only goes so far as to approve the

concept of a residential or industrial use for the premises, but does not authorise the nature, scale or density. These aspects of the development would be the subject of further preliminary approvals or development permits.

The benefit of Preliminary Approvals is that they can be used to override the Planning Scheme, essentially varying the effect of the Scheme and its application to the subject site/development, i.e. to set out different development guidelines/outcomes to that specified in the Planning Scheme. It can also be used to reduce the level of assessment that would be applied to certain future development as a result of the Preliminary Approval. The closest comparison in the NZ context is where a preliminary approval would be given to a non-complying activity 'in principle' – thus then allowing the applicant to proceed investigating the detailed effects of an activity with this certainty. This scenario could equally be compared to a site specific private plan change.

It is noted that in addition to the two types of approval noted above, a refusal may be issued in which the proposed development is not approved.

The IPA has recently been replaced by the Queensland Sustainable Planning Act 2009 which retains the concept of 'preliminary approvals'. The new Act was scheduled to commence in Queensland late 2009. The new system attempts to fine-tune planning and development assessment in Queensland and introduced changes including standard planning scheme provisions, the introduction of new assessment processes and approvals, and increased court powers to process development applications.

The new Act also introduced stronger Ministerial powers to direct an assessment manager or a concurrence agency to decide an application or take an action with a specified period if the development involves a State interest, and the ability to assess a called-in application against state interests only or to require the assessment manager to assess the application on behalf of the Minister[26].

Declaration of 'State Significance'

Many large infrastructure proposals can also be declared as 'Significant Projects' under S.26 of the *State Development and Public Works Organisation Act 1971*. This is a recognition that these are likely to be complex or contentious projects; with a different approach to planning such that an EIS must usually be prepared before any planning applications are lodged, so as to 'front end' likely requirements for mitigation in a coordinated manner.

Under the Act, major projects (including large-scale infrastructure and others) can be declared to have 'State Significance' based on one or more of the following criteria:

- complex approval requirements, including multi-level Government involvement

[26] Further work is needed to assess the nature and extent of the changes under the new legislation.

- a high level of investment in the State
- potential effects on infrastructure and/or the environment
- provision of substantial employment opportunities
- strategic significance to a locality, region or the state.

Once a project is declared as being of State significance, generally an EIS is required to ensure that the project's environmental, social and economic impacts are appropriately considered and mitigated.

There are two types of declaration for a 'significant project' under the Act:

1. Requiring an environmental impact statement under s26(1)(a) of the Act – Projects that are declared as significant are generally considered to be the most important or complex. Declaration of a project as significant does not mean Queensland Government backing. Rather, it signals that the project warrants an environmental impact statement.
2. Not requiring an environmental impact statement under s26(1)(b) of the Act - A project can be declared significant but not requiring an environmental impact statement. This recognises the significant nature of the project to either the region or the State. Applications under other statutes, such as the Water Act 2000 and the Vegetation Management Act 1999 require a project to be of a significant nature before detailed consideration can be made.

The purpose of declaring a project as having State significance is to ensure that its potential value and impacts on the local and regional context are recognised and managed accordingly. It is also a mechanism to provide flexibility within the local and State planning framework to be able to respond to important development projects that require a high degree of attention on a range of matters from a variety of stakeholders and specialists.

The Act was amended in late 2006 to strengthen the powers of the Coordinator-General of Planning. This gave the Coordinator-General the power to step in where decision makers (state departments or councils) fail to make a decision on a key project.

South Australia – Department of Planning and Local Government

The processes for making development applications and assessing those applications are laid out in the Development Act 1993 and Development Regulations 2008. The vast majority (around 90 percent) of development applications are determined by Local Councils in their role as assessment authorities.

Some specified kinds of development application are determined by an independent Development Assessment Commission (see below), while a small number of declared Major Developments are determined by the Governor, on the advice of State Cabinet, after going through the Major Developments proposal process, which involves a detailed environmental assessment.

Development Assessment Panels[27]

Since July 2001, all local Councils have been required to establish Development Assessment Panels (DAPs) in order to increase the impartiality and certainty of development assessment decisions. Under the changes to the Development Act in February 2007 a council **must** delegate its powers and functions as a relevant authority with respect to determining whether or not to grant provisional development plan consent under the Act to:

- its council development assessment panel (see below for information on changes to the composition of such panels); or
- a council officer (but not an elected member); or
- a regional development assessment panel (if one exists).

Panels are required to have a membership of seven (there are some exceptions) with majority independent membership.

Provisional development consent with deferral of specific matters

A relevant authority, when assessing a development proposal in the form of an application for either a development approval or a provisional development plan (PDP) consent, can defer its decision on a specific matter of the proposal. The assessment of the deferred matter can be completed during the assessment for the provisional building rules (PBR) consent, or one of the other consents that may be relevant under the Act.

For example, the development of a major tourist accommodation complex in a rural area requires development approval. Some of the factors that need to be addressed by the relevant authority include the treatment and disposal of effluent and the layout of landscaping. Preliminary information on such matters is all that would be required as part of the assessment for the PDP consent, to assure the relevant authority of the proposed development's consistency with the provisions of the relevant Development Plan. The applicant could then provide the full details on such matters during the assessment for the PBR consent. At that stage, the applicant has a greater degree of certainty in respect of the proposed development and would be more inclined to commit resources towards providing the required detailed information to the relevant authority, but without wasting resources prematurely.

The ability to defer such matters can help to eliminate unnecessary duplication in the assessment process and provides the opportunity to delegate decisions on matters of detail, thereby speeding up the decision making process. However, deferral should only relate to relatively non–controversial details, and matters of a fundamental nature should not be deferred. In all cases, deferred matters must be resolved prior to issue of final development approval.

Development Assessment Commission[28]

[27] Department of Planning and Local Government, State of South Australia: http://www.planning.sa.gov.au/go/panelsbill2006

The Development Assessment Commission (DAC) is an independent statutory authority, consisting of a group of people with a variety of expertise, which assesses and determines specified kinds of development applications in South Australia. These are prescribed in the Development Act and Development Regulations and include:

- waste management or disposal applications
- certain developments of significant regional impact
- certain types of development in key areas of the State, including the Hills Face Zone, the River Murray Flood Zone, the Adelaide Park Lands, various Conservation Zones and the Adelaide Hills water catchments
- most Housing SA and Land Management Corporation applications
- certain types of development by councils themselves or involving council land, and
- applications where the council requests – and the Minister for Urban Development and Planning agrees – that the DAC be the assessing authority.

In its decision-making role, the Commission:

- operates under the same law, and must apply the same Development Plan policy as would a council development assessment panel
- is subject to the same appeal provisions, and has the same enforcement powers as a council development assessment panel
- normally handles planning issues itself, but delegates building assessment to the relevant council, and
- can establish delegated committees for certain matters or development within particular areas.

The DAC assesses all applications for Crown development and public infrastructure development, providing a report to the Minister for Urban Development and Planning, who makes the final decision.

The Commission has a role in dealing, together with councils, with applications specifically contrary to Development Plans. Where a council considers that a proposal warrants approval despite it being 'non-complying' with the Development Plan, the council may grant approval provided the DAC agrees.

The DAC also has a role at the start of the Major Development proposal assessment process, setting the level of assessment for appropriately declared proposals and providing detailed Guidelines for assessment. The Commission can also act as the Governor's delegate for assessing variations for approved Major Developments.

Major Development Proposals[29]

[28] Department of Planning and Local Government, State of South Australia: http://www.planning.sa.gov.au/index.cfm?objectid=E9F1EB7C-96B8-CC2B-6F950E32775384C8

[29] Department of Planning and Local Government, State of South Australia: http://www.planning.sa.gov.au/index.cfm?objectid=B0D6F25D-96B8-CC2B-63BE28584A11F809

The Minister for Urban Development and Planning can ‘declare’ a proposed development a 'Major Development' if he or she believes: (1) such a declaration is appropriate or necessary for proper assessment of the proposed development; and (2) where the proposal is considered to be of major economic, social or environmental importance. This triggers a thorough, state-run assessment process with opportunity for public comment before any decision is made on whether the proposal warrants an approval.

In most instances, the proponent of a proposal writes to the Minister to request a proposal be assessed using the Major Development provisions. However, the Minister may also be asked by members of the community to consider making a declaration, or simply become aware of what appear to be important social, environmental, or economic issues associated with a development or project.

A declaration of 'Major Development' means the Minister (assisted by Planning South Australia) will comprehensively assess the proposal and its impact using the following process:

Stage 1 - Referral to the Development Assessment Commission (DAC) for setting of assessment level and guidelines

Once a proposal has been declared a Major Development proposal by the Minister, it is referred to the DAC, which will consider the application and identify the key social, environmental and economic issues relevant to the assessment of the proposed development. It will then determine which level of further detailed assessment is required and will publicly issue a Guidelines document to the proponent stating what level of assessment is required and what issues that assessment should address. This concludes the DAC's role.

The three possible levels of detailed assessment which can be required by the DAC are:

- An *Environmental Impact Statement* (EIS). This is the level of assessment required for the most complex proposals, where there is a wide range of issues to be investigated in depth.
- A *Public Environmental Report* (PER). This level of assessment, sometimes referred to as a 'targeted EIS', applies where the issues surrounding the proposal require investigation in depth but are narrower in scope and relatively well known, or there is existing information available.
- A *Development Report* (DR). This is the least complex level of assessment, which relies principally on existing information.

Stage 2 - Proponent prepares and releases an Assessment document

The proponent will prepare an EIS, a PER or a DR, as directed by the Development Assessment Commission. The length of time it takes a proponent to prepare the assessment document depends upon the level of assessment, the complexity of the proposal and the sensitivity of the site. Once it is complete, the EIS, PER or DR is released for public and agency comment.

Stage 3 - Responding to public comment on an EIS, PER or DR

After the appropriate public comment period on an EIS or PER, the proponent will then be required to respond to any public or agency comments (this is optional for a DR). The proponent's Response Document will be released for public information.

Stage 4 - Assessing the proposal

The Minister (with the assistance of Planning SA) will then assess the whole proposal, and detail that assessment in an Assessment Report. It is common that a proposal will be refined in response to the Assessment Report.

Stage 5 - Decision

The Governor will make a decision on the final proposal (on the advice of the Minister and Cabinet) having regard to the Assessment Report and other documentation. The decision may take a variety of forms, including approving or rejecting the proposal, or approving with conditions attached. Some matters of detail may also be reserved for a later decision. There are no appeal rights against the decision of the Governor.

UK – Outline Planning Permission

The type of preliminary approval known as the 'Outline Planning Permission' (OPP) was established by the Town & Country Planning Act (1990). An outline application is appropriate where a person or company wants to have permission 'in principle' for the erection of a building, before going to the expense of having detailed plans prepared. Outline planning permission may only be granted for building operations, not for engineering, mining or other operations, nor for changes of use.

In May 2006, the UK Government introduced changes to the planning applications process and modified the outline planning permission regime in relation to the information to be provided at the outline application stage and the matters that may be reserved for future approval.

Applications for OPP should include information on:

- *Use* - the use or uses proposed for the development and any distinct development zones within the site identified.
- *Amount of development* - the amount of development proposed for each use.
- *Indicative layout* - an indicative layout with separate development zones proposed within the site boundary where appropriate.
- *Scale parameters* - an indication of the upper and lower limits for height, width and length of each building within the site boundary.
- *Indicative access points* - an area or areas in which the access point or points to the site will be situated.

The new definition of 'reserved matters' is as follows:

- *Layout* - the way in which buildings, routes and open spaces are provided within the development and their relationship to buildings and spaces outside the development.
- *Scale* - the height, width and length of each building proposed in relation to its surroundings.
- *Appearance* - the aspects of a building or place which determine the visual impression it makes, excluding the external built form of the development.
- *Access* - this covers accessibility to and within the site for vehicles, cycles and pedestrians in terms of the positioning and treatment of access and circulation routes and how these fit into the surrounding access network.
- *Landscaping* - this is the treatment of private and public space to enhance or protect the site's amenity through hard and soft measures, for example, through planting of trees or hedges or screening by fences or walls.

An OPP is not a permission to start work on site. The permission notice states which matters have been reserved for later approval. Once an OPP has been granted, the buyer of the building site has three years during which they must submit the 'reserved matters' application otherwise the entire process begins again. Work may begin on site when all of the reserved matters have been approved. The permission lasts for two years from the date of approval of the last of the reserved matters.

UK – Infrastructure Planning Commission

The Planning Act (2008) introduced a new, simpler planning system for applications to build nationally significant infrastructure facilities in England and Wales. The new system covers applications for major energy generation, railways, ports, major roads, airports and water and waste infrastructure. Smaller infrastructure projects which fall below the thresholds set out in the Act, and other developments such as housing or retail, continue to be dealt with under the existing planning systems.

There are three key elements to the new procedures for national infrastructure projects:

1. Ministers will issue National Policy Statements (NPSs) about the infrastructure that the country needs for the next 10-25 years. These will be finalised by the Government after appraisal of their sustainability, followed by public consultation and Parliamentary scrutiny. This will make sure that people have early input into the formulation of the policy, rather than repeating the same arguments in different local enquiries.
2. Numerous and sometimes overlapping "consent regimes" for major infrastructure projects are replaced with a single system. This will provide a clear and accessible application process.
3. A new, independent, Infrastructure Planning Commission (IPC) will be created. This will bring together experts from key sectors - including

planners, lawyers, environmentalists and communities. The Commission will examine and decide applications for new infrastructure development, using the criteria on national need, benefits and impacts set out in the NPSs, and consideration of evidence put forward on potential local effects. Where the Commission approves an application it will be able to specify measures to mitigate the impact on a local area. It will be accountable to ministers and Parliament for its performance. The aim is to bring greater objectivity, transparency and accountability to the decision-making process. Under the new process the time taken from application to decision is expected to be under a year in the majority of cases.

NPSs will establish the national need and set out policy for infrastructure; explain how they take account of the Government's relevant social, economic and environmental policies; and show how they contribute to tackling climate change. There will be NPSs for the following types of infrastructure:

- *Energy* - power stations; renewables – electricity generation (e.g. wind farms); electricity networks (i.e. power lines etc.); fossil fuel – electricity generation (e.g. gas and coal power stations); oil and gas infrastructure (e.g. pipelines and storage)
- *Transport* - ports
- *National networks* (i.e. strategic roads and railways, including strategic rail freight interchanges); airports; water and waste; waste water (e.g. sewage treatment infrastructure); hazardous waste (e.g. high temperature incineration); water supply (e.g. reservoirs).

The first NPSs on nuclear power, renewable energy, electricity networks, fossil fuel generation, oil and gas infrastructure, and ports and national networks are expected this autumn[30].

The IPC will be established from October 2009 and accepting applications from the energy and transport sectors from 1 March 2010. Where a relevant NPS is in place, the IPC will use it to make the decision, with the focus on the issues related to that particular planning application rather than the wider issues of need. If the relevant NPS has yet to be designated, the IPC will instead report with a recommendation to ministers.

The IPC will operate a one-stop development consent process for nationally significant infrastructure projects. It will decide whether to grant consent on the basis of the policies set out in the NPSs, taking into account domestic and European law, reports from affected local authorities, and evidence put forward by local communities and other interested parties during examination. In making its decision the IPC will weigh up the benefits and adverse impacts of the application. The IPC will have to give detailed reasons for its decisions and can be challenged in the courts if people think it has acted unreasonably.

[30] Planning, the Journal of the Royal Town Planning Institute, 16 October 2009

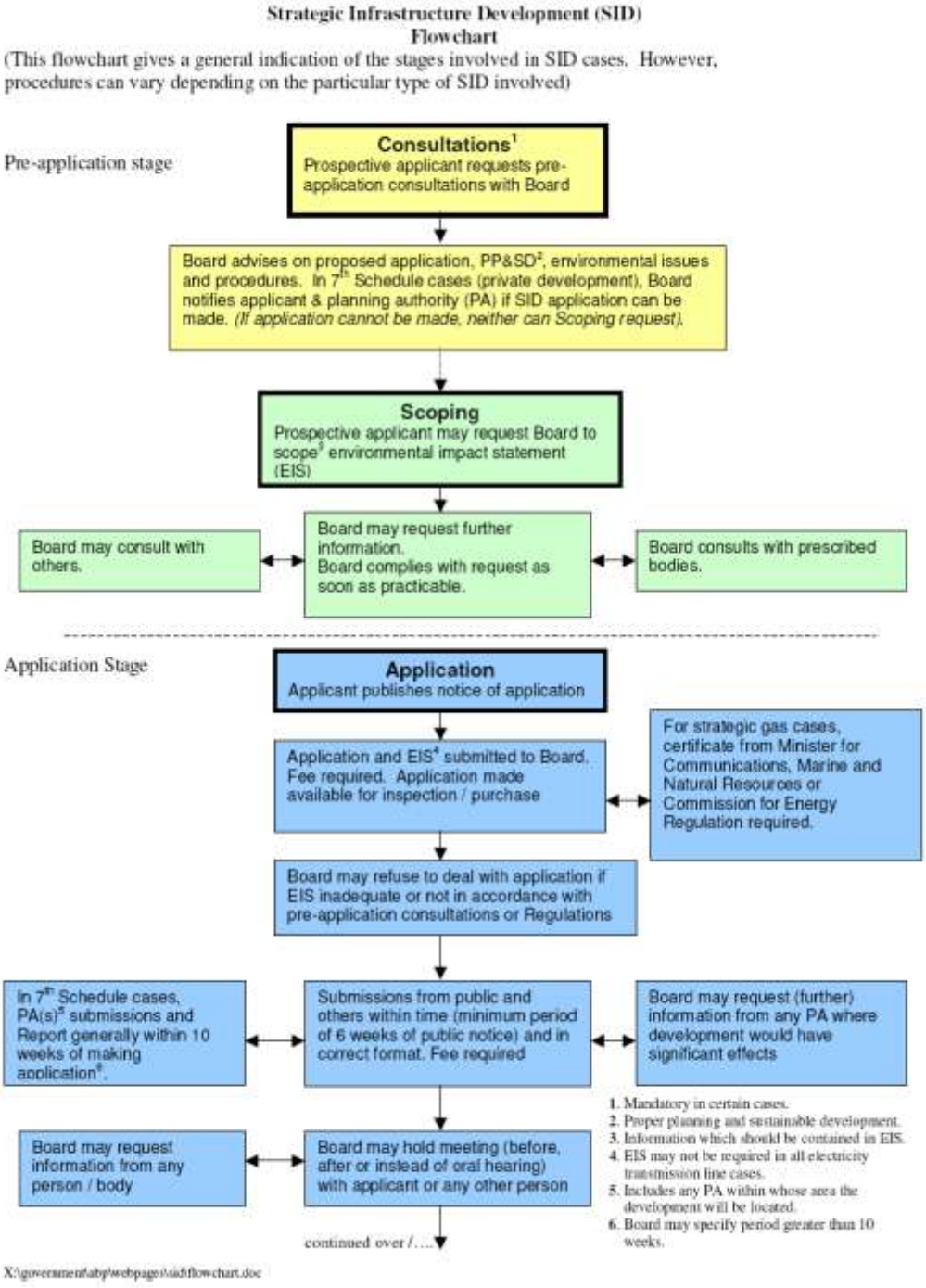
The new process will provide clearer and better opportunities for the public and local communities to get involved from an early stage in decisions that will affect them. There will now be three opportunities for individuals and groups to have their say. They are:

- *during the public consultations on the draft NPSs* - this will provide an opportunity for debate on the national need for the various types of infrastructure, rather than repeating this when each large infrastructure application is considered by the IPC;

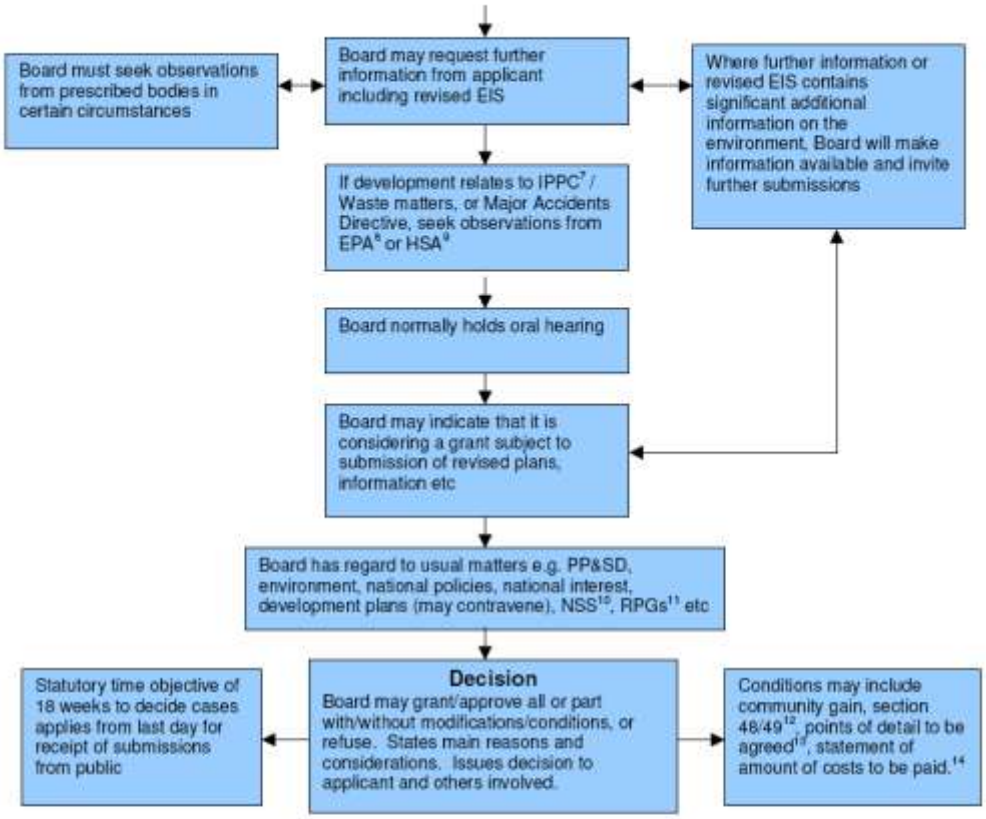
- *when applications are being prepared for submission to the IPC* – at this stage developers are required to consult with local communities about what they plan to do; and

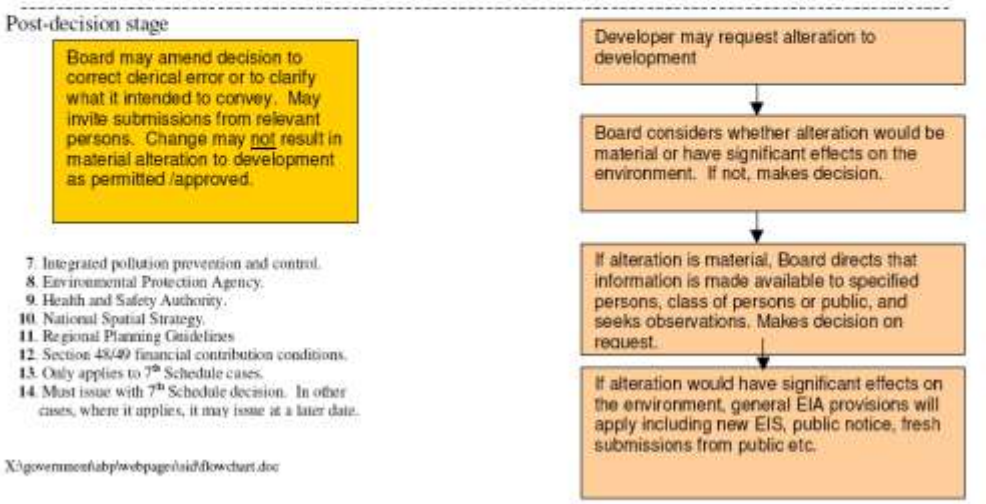
- *during the IPC's examination of applications* – when individuals and groups can submit evidence in writing as well as in person at hearings held by the IPC.

Appendix 1 – Ireland's Strategic Infrastructure Development Process[31]



[31] http://www.pleanala.ie/sid/flowchart.htm





7. Integrated pollution prevention and control.
8. Environmental Protection Agency.
9. Health and Safety Authority.
10. National Spatial Strategy.
11. Regional Planning Guidelines
12. Section 48/49 financial contribution conditions.
13. Only applies to 7th Schedule cases.
14. Must issue with 7th Schedule decision. In other cases, where it applies, it may issue at a later date.

X:\government\abp\webpage\sid\flowchart.doc

Last updated 6 March 2007