Roading Law as it Applies to Unformed Roads – The Sequel

Introduction

In February 2007 I completed a paper *Roading law as it applies to unformed roads (Roading law)*. It was written at the request of the Ministry of Agriculture and Forestry (MAF) to provide a commentary in support of work being done by the Walking Access Consultation Panel on walking access to the outdoors, and was published in association with the Panel's report to the Minister for Rural Affairs. It has been subject to a critique by Mr Bruce Mason, who has taken issue with some of the conclusions reached in my paper in an article entitled *Critique of 'Roading Law As It Applies To Unformed Roads'* published on the website of "Recreation Access New Zealand"[1], and I understand distributed to a range of persons interested in walking access.

Given the theme and critical nature of Mr Mason's article I consider that it is necessary to address its credibility and place on record the method adopted by me in researching and writing *Roading law*.

The purpose of *Roading law* is to describe the origin and status of unformed roads. This necessarily had to be original work. *Roading law* conservatively states in summary form, essential elements on the origin and status of unformed roads, striking a careful balance between statute law and authoritative decisions of the superior courts. Irrelevant, non-binding, and superseded authorities are omitted. Mr Mason repeatedly misrepresents the author of *Roading law* even to the extent of attributing to the author the opposite of what he has said. In his commentary on "occupiers" he shows that he has a limited understanding of the basic principles of land law and legal language; and appears not to understand the methods of legal scholarship. In this latter respect the author of *Roading law* has taken care to avoid the pitfalls in legal writing identified by Bryan Garner in "A Dictionary of Modern Legal Usage" Oxford University Press, 1987 at p392. An author should avoid: (1) undiscriminating citation

[1] http://www.recreationaccess.org.nz/

of authority; (2) unfamiliarity with controlling precedents; (3) mechanical treatment of judicial questions; (4) misconception of the doctrine of precedents; and (5) over consideration of points of law. At p453 he points out that legal writing is not a proper vehicle for the exploitation of pedantic learning or extraneous disquisitions.

Mr Mason is, of course, entitled to his opinions, but his statements about the law are not credible if not backed up by an accurate analysis of relevant statutes and case law. For example, notwithstanding Mr Mason's opinion to the contrary, documentary dedications of unformed road cannot be made in New Zealand. There is no inherent power to register an instrument of dedication under the Land Transfer Act[2]. All written instruments of dedication to be registered under the Land Transfer Act must be authorised by statute. A statutory dedication by memorandum of transfer must be made strictly in accordance with the statute which specifically authorised the dedication[3]. There is no statute now in force which authorises the dedication of an unformed road. A full analysis of my research is included in this memorandum.

In preparing *Roading law* as a commentary suitable for the general reader, I assured MAF that every statement made in my commentary could be supported by a detailed analysis to the standard of a formal legal opinion. Throughout the deliberations of the Walking Access Consultation Panel the author was in discussion with the Panel and MAF staff providing specialised advice as required. The analysis which follows of my statement in *Roading law* on the "Exchange of Road for Other Forms of Public Access" provides an example of my method. All of the commentary in *Roading law* is supported by the same standard of research. The nature of the subject is that much of the commentary in *Roading law* is law-based whether based on the statutes or on relevant decisions of the courts. Any part of the commentary may be expanded into a full opinion.

In the interests of simplicity and certainty, cases are cited only when a precise point of law is unequivocally decided. If a point of law may be demonstrated by reference to a

[2] *Martin v Cameron* (1893) 12 NZLR 769.
[3] [4] "Exchange for other forms of public access" is the main topic selected to illustrate the detail of the research undertaken to provide support for all propositions made in *Roading law*.

statute rather than a decision of the court, the statute is preferred as an authority – a statute is the highest statement of legal principle.

As there is no satisfactory index of either statute law or case law on unformed roads – a subject with an obscure past – the New Zealand Law Reports from 1840 to the present day were examined in detail to identify relevant decisions of the superior courts. The early statutes relating to roads were identified and a manual search made of these and succeeding statutes to the present time. Current statutes were separately identified and a search undertaken of these and the statutes leading back to the statute which first enacted the equivalent or near equivalent provision. Human frailty may have produced some omissions but, I hope, not too many. The research for the commentary was designed to ensure that it was based on impeccable sources.

The scope of the commentary is defined in accordance with good practice for legal writing by the express exclusion of irrelevant material. The objection of Mr Mason to the express exclusion of formed roads of various categories from a commentary on unformed roads is irrelevant and unhelpful.

In addition to commentary on the origin and status of unformed roads, *Roading law* also deals with:

- elements of unformed roading law raised by the Panel and generally by the public;
- the potential to actively promote alternative routes using existing legislation i.e. what may be achieved without changing the law; and
- simple suggestions to improve local administration, drawing on precedents statutorily established in the United Kingdom.

The part dealing with maintenance reflects a request from the Panel, and requests made of the author, who has been extensively consulted on the point by both land owners and staff of local authorities. The detailed section on road stopping was inserted because of serious misconceptions in public circulation at the time of writing.

There are errors and misconceptions in Mr Mason's work, some of which I will note. However, my main purpose is to provide an illustration of my method and the depth of my research[4], to underpin the values expressed in *Roading law*, rather than point out where he is wrong.

Key Issues

To place key issues relating to unformed roads in perspective I will:

- confirm my analysis concerning whether or not an occupier of an unformed road may acquire any rights over unformed road;
- provide an illustration, supported by leading academic authority on local government law, of the discriminating use of case-law on roads;
- analyse the law relating to dedication, including relevant statute law and case law;
- show why a taking under the public works acts is not a dedication; and
- show that precedents established in the United Kingdom may provide a basis for better management of unformed road.

Rights and Roads

Most unformed roads are physically occupied by adjoining owners. *Roading law* discusses whether or not occupiers may acquire rights over roads. The conclusion reached is explicit. To place what is said in *Roading law* beyond doubt I will set out in full my commentary under the heading **"Does Occupation confer ownership?"** at p19.

Does occupation confer ownership?

> Many unformed roads have now been occupied by, and incorporated into the holding of, the owner of the surrounding land for very long periods – in some cases more than a hundred years. Questions have often been raised about ownership, and opinions expressed about supposed rights to the land so occupied.

THE LAW, HOWEVER, IS VERY CLEAR. THERE IS NO POSSIBILITY OF THE OCCUPIER ACQUIRING ANY RIGHTS OF OWNERSHIP OR POSSESSION THROUGH OCCUPANCY, USE, OR CARE OF ANY UNFORMED ROAD. (EMPHASIS ADDED)

Section 172(2) of the Land Act 1948 provides that:

> Notwithstanding any statutes of limitation, no title to any land that is a road or street, or is held for any public work, or that has in any manner been reserved for any purpose, or that is deemed to be reserved from sale or other disposition in accordance with section 58 of this Act, or the corresponding provisions of any former Land Act, and no right, privilege, or easement in, upon, or over any such land shall be acquired, or be deemed at anytime heretofore to have been acquired by possession or user adversely to or in derogation of the title or Her Majesty or of any local authority, public body, State enterprise referred to in the Second Schedule to the State-Owned Enterprises Act 1986 or person in whom the land has been at any time vested in trust for the purposes for which it has been reserved as aforesaid.

Firstly, this section is not restricted to roads, whether formed or unformed, laid out after the Land Act 1948 came into force. It applies to roads (and other public land) established before or after the coming into force of the Land Act 1948.

Secondly, the section protects from adverse possession roads or streets, land held for public works, public reserves, and land reserved from sale along water margins under the Land Acts dating back to 1892. It makes no difference whether the land is in the name of a State-owned enterprise, Her Majesty the Queen, a person or persons, or a council.

The statute law further protects the legality of roads which may have been included in a certificate of title through error, misunderstanding, or otherwise without authority when the title document was issued by the Registrar-General of Land. Section 77 of the Land Transfer Act 1952 provides:

> 77. **No right to public road or reserve where unauthorised registration** – No right to any public or reserve shall be acquired, or be deemed to have been

> acquired, by the unauthorised inclusion thereof in any certificate of title or by the registration of any instrument purporting to deal therewith otherwise than as authorised by law.

Blanchard J when delivering the decision of the Court of Appeal in *Man O'War Station Ltd v Auckland City Council* (2000) 2 NZLR 267, at p286 said:

> The clear intent of the section is to render ineffective the registration of any instrument in so far as it purports to deal with a road in a manner not authorised by law.

In other words the existence of a legal road will prevail over a certificate of title even if the road is not shown on or referred to in the title document.

Blanchard J also observed in his judgment on behalf of the Court at p286:

> The integrity of the roading infrastructure is of such importance to the economic and social welfare of any society that it is to be anticipated that the public right to the use of roads will be given a measure of priority when it comes in conflict with private claims.

The relevant law is clearly set out. I was surprised therefore to note an email circulated on 6 April 2007 by Bruce Mason which states:

> "PUBLIC ROADS AND 'OCCUPIERS'
> The [Walking access Consultation] panel provides the first 'official' acknowledgement of the full value and public status of unformed legal roads (a subject which I have pursued for years). They are public highways in every sense – "Landholders do not have the right to refuse access over legal roads that intersect private land", however the panel introduce the fallacious concepts of adjoining landowners also being "occupiers' of roads. This is based on advice from Brian Hayes, former Registrar-General of Land.
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> "The term 'occupier' has extensive application in our statutes and relates to possession of land to the exclusion of others, with trespass rights. Nothing could be further from the truth in regard to public roads.
>
> "Hayes' advice to the panel arises from omission of well-established current law, case law in particular".

Notwithstanding an explanation which I provided him on 24 April 2007[5] addressing the appropriate use of the word "occupier" in the context of *Roading law* he continues with the same line of reasoning in his "critique" dated 16 July 2007. I turn again to *Roading law* at p9 where I say:

> When a road has once been made or has become a public road, the right of the public to use it as a public road continues forever unless it has been legally stopped by process of law, for "once a highway, always a highway". (See *Mackay v Lynch*, 3, NZLR, SC, 425; and also *Cherry v Snook*, 12, NZLR, 54; *Martin v Cameron*, 12, NZLR, 769; *Hughes v Boakes and another*, 17, NZLR, 113; *Borough of Onslow v Rhodes and another*, 23, NZLR, 653; 6, Gaz. L.R., 336; and *Borough of Lower Hutt V Yerex*, 24, NZLR, 697).
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> An unformed road is a highway and as good as any other road. Any doubt that unformed roads were in some way inferior to formed roads has long been dispelled by the decisions of the Supreme Court (then the High Court) and the Court of Appeal, both of which were confirmed by the Privy Council in *Snushall v Kaikoura County* (1840-1932) New Zealand Privy Council Cases 670.

I do not think I could have been more explicit. I would have thought it impossible for any reader to say that I have said that by occupying an unformed legal road anyone could acquire any legal rights over the road or defeat the right of the public to use it.

The critique consistently has a difficulty with the word "occupier". The origin of the problem is quite clear from the statement set out above that the word "has extensive application in our statutes and relates to possession of land to the exclusion of others, with trespass rights". The assumption is made by Mr Mason that whenever an author uses a variant of the verb "to occupy" a statutory meaning is intended. This is a fundamental misapplication of legal principles.

One of the first principles of statutory interpretation is that a word in the context in which it is used may carry a statutory meaning or a natural or dictionary meaning. An understanding of this principle is essential to any form of legal analysis. This is a basic legal skill. Statutory definitions of the same word vary from one Act to another

[5] Unpublished commentary dated 24 April 2007.

adding a further complication. A mechanical treatment of words will inevitably lead to error, triviality, and irrelevance.

In land law there are two types of occupier. There may be an adverse possessor (who excludes every other person including the true owner) and an adverse occupier (who may not necessarily have exclusive occupation) each of which occupy the land in a different way[6]. Every "occupier" in a natural or dictionary meaning occupies some part of the surface of the earth or something upon the earth. However, not everyone who occupies something is an occupier as defined in s2 of the Trespass Act 1980. Recognising the difference is a fundamental legal skill.

The meaning of the word "occupier" intended by the author of *Roading law* is obvious from the context in which it is used. It is not possible to validly construe the author of *Roading law* as saying that someone may acquire legal rights over an unformed road by occupancy, use, care, obstruction, or building upon it, for he said the exact opposite.

In speaking of an occupier of a road we are not dealing with the subject of legal possession but with a term that implies something different. In *Rhodes v Beckett* (1909) 29 NZLR361 the then Supreme Court had to deal with an unformed road which was occupied by an adjoining owner. The headnote to the case records that the road was "occupied by the vendor" who "grazed his stock on it" but who was not "by virtue of his user of the road an 'occupier' within the meaning of sections 11 and 31 of 'The Fencing Act 1908'". He was, however acknowledged to be a physical occupier.

The distinction between legal possession and physical occupation may be made plain by a consideration of the differences between "adverse possession" and "adverse occupation".

[6] Noted on the next page.

Adverse Possession

In English law all title to land is founded on possession[7]. Therefore a person who is in possession, although wrongfully (say, as a trespasser), has a title which is good against everyone except those persons who can show a better title to the same land; that is to say those persons who can prove that they or their predecessors had earlier possession of which they were wrongfully deprived. In New Zealand the English law applied to land either held or formerly held under the "Deeds" systems. In practice, Deeds title originated from sales by the Crown prior to 1870.

Under the Deeds system, if a person who is rightfully entitled to land takes no steps to regain possession within a period prescribed by the Limitation Act 1950 (i.e. 12 years), their remedies at law will be barred and their title extinguished. The person who went into possession wrongfully, is in adverse possession of the land, for by possession for the prescribed period, full title may be obtained. The trespasser is an adverse possessor. On the other hand, an adverse occupier, as is described below, may occupy land with no colour of right and may never be able to acquire rights over it.

Adverse Occupation

The doctrine of possession as evidence of title was largely eliminated in New Zealand by the Land Transfer Act 1870 which applied to all alienations by the Crown after 1870, and by the Compulsory Registration of Titles Act 1924 which directed that all deeds land should be brought under the Land Transfer Act. The Land Transfer Act 1870 introduced New Zealand's system of registered title to land. This is not based on possession as evidence of ownership but on a certificate of title issued by the State. Under the Land Transfer Act no title may be acquired by possession or use adverse to that of the registered proprietor. Under the Act, the registered proprietor of an ordinary certificate of title, effectively has equivalent protection from trespassers, as has a road under current law.

[7] The land title law of New Zealand in the period 1840 – 1870 was based on English law.

Many titles were issued under the Land Transfer Acts in the period 1870 – 1914 at the time when there were considerable numbers of itinerant persons in New Zealand, such as gold miners some of whom purchased land, and some of whom (say, railway construction workers) were given free grants by the Crown. However, after the gold discoveries were exhausted and, railway construction was substantially completed, these persons abandoned their properties seeking work elsewhere[8]. Generally, but not exclusively, neighbours occupied the abandoned land. These trespassers were not adverse possessors for they occupied the land without colour of right, and under the law then applying, could never get a title. They were however physically in possession as adverse occupiers for the reality of their occupation was there for all to see. Occupiers of unformed roads rank in a similar way.

Land lawyers and surveyors had to deal with the reality of the situation and from the early years of the Land Titles System, say, 130 years ago, the concept of "adverse occupation" as distinct from "adverse possession" has been acknowledged in expert opinion. In practice, the Land Transfer Surveyor who on behalf of the Crown examined survey plans for accuracy prior to deposit under the Land Transfer Act for the issue of title, in a report to the District Land Registrar, would provide advice on any adverse occupation of the land surveyed, or any adverse occupation of the roads or public land adjoining that land. Adverse occupation in the ordinary and natural meaning of the term "occupy" has been with us from the beginning of the Land Titles System and associated Survey System.

As time went on the law was found to be too rigid and in 1963 the Land Transfer Amendment Act permitted adverse occupiers to apply for title to land in the certificate of title occupied. However, the Land Transfer Act continued to protect the original registered proprietors from trespassers. Should the registered proprietor named in the Register or a descendant object to the issue of title to the adverse occupier, the Registrar-General of Land may not proceed to grant a new title to the adverse occupier. The documentary owner or those persons claiming through that owner retain the registered proprietorship. The adverse occupier cannot destroy the title of

[8] Gold miners and railway construction workers commonly abandoned their land. In addition, titles have been abandoned across a broad spectrum of land owners.

the owner by occupancy if the true owner objects. Indefeasibility of title is preserved. The rigid protection given roads and public land (set out in p4-6 above) has of course remained in force. However, persons may continue to "occupy" roads when, say, fences are misplaced, and, more particularly, when roads are unformed[9].

The distinction between adverse possession and adverse occupation, although of very early origin in New Zealand land titles law, continues to be recognized in modern authorities. "Brookers Land Law" as updated on 31.3.04 says at LT 79.08:

> Adverse occupation is not ordinary adverse possession, but occupation adverse to the certificate of title (now computer register). See *Zachariah v Morrow and Wilson* (1915) 34 NZLR 885 and *Franklin v Ind* (1883) 17 SALR 133.

There is, however, a commonality applying to both adverse possession and adverse occupation i.e. enclosure is the best evidence of either.

Two statutes may be demonstrated to expressly acknowledge that roads may be enclosed, and, by necessary implication, occupied, though not exclusively, in the ordinary and natural meaning of the words "enclosed" and "occupied".

Authorised Enclosure of Roads

Adjoining owners have been permitted for the past 117 years, on statutory terms, to use gates to enclose roads[10]. The first provision to authorise swing gates was s12 of the Public Works Amendment Act 1889 and since then a variety of legislation has permitted roads to be gated and enclosed. Section 344 of the Local Government Act 1974 (now in force) authorises gates and cattle stops across roads on fairly prescriptive conditions. Section 8 of the Trespass Act 1980 fortifies s344 to ensure the safe farming of domestic animals.

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[9] *Hutt County v Whiteman Bros* (1923) NZLR 751. The Headnote reads: the plaintiff, the Hutt County Council brought an action for possession of a road in the occupation of the defendants, who were alleged to have encroached upon the road.

[10] "Enclose" in this context means to enclose land intersected or bordered by an unformed legal road for stock control purposes where the legal road is not fenced off longitudinally from the adjoining private land.

8. Gates – Every person commits an offence against this Act who-

(a) …

(b) With intent to cause loss, annoyance, or inconvenience to any other person,-

(i) Opens and leaves open a shut gate; or

(ii) Unfastens and leaves unfastened a fastened gate; or

(iii) Shuts and leaves shut an open gate-

on or leading to any land used for the farming of domestic animals or of any other animals held under lawful authority.

Section 8 is a clear statutory recognition of occupancy of a road in the normal and natural meaning of the word. This provision is designed to ensure that farming operations are not hindered by inappropriate behaviour concerning a gate on any road, whether formed or unformed, leading to farmland.

There is no more compelling authority than statute law, to recognize that a road may be "occupied" in the natural meaning of that word; that recognition is consistent with the correct use of language, legal principles, and commonsense. This cannot, however, be exclusive occupation as the common law right to pass and re-pass on the road remains unaffected.

In addition to current law there are early precedents acknowledging that roads may exist in an enclosed situation. In *Loughnan* and the *Cambridge Road Board v Morgan* (1912) 31 NZLR 697 the Court of Appeal ruled that section 129 of the Public Works Act, 1908, is general in its terms, and applies to all "gates, fences[11], or obstructions" whatever placed upon or across public roads. Section 132 of the Road Boards Act 1908 states that "The Board may by writing authorise any person to erect swing gates across any district road" as does s54 of the Rabbit Nuisance Act 1908 and so on.

[11] The road in issue, although a public road, was in a state of nature. The practice of fencing off these roads must have at that time been common enough for the legislature to expressly provide for fencing in the statute.

Further Rights

One other main plank of Mr Mason's contrary argument, concerns the treatment of a series of cases which relate to frontager's rights. He considers these cases to be of wide general authority. Professor K A Palmer, the leading academic authority on the law of local government, interpreting the law in his outstanding text "Local Government Law in New Zealand" 2nd Ed 1993, takes a contrary position at p464, confining the councils' powers clarified in *Fuller v MacLeod* (1981) 1 NZLR 390, the leading appeal court case, and other cases, to "an existing urban area".

The author of *Roading law* independently reached the same conclusion as Professor Palmer, noting that in the frontagers' rights appeal court cases that:

(1) The Judges in *Fuller* refer to many English cases, some Australian, and several earlier New Zealand cases as authorities. From a reading of the recent New Zealand cases which discuss earlier authorities, the authoritative cases all concern streets in urban areas. Likewise the "frontager" cases, the subject of the New Zealand Court of Appeal decisions, concern urban streets; and
(2) In referring to statute law, the Appeal Court Judges confine their discussion to the various Municipal Corporations Acts, statutes which exclusively apply to urban streets.

The principles set out by Garner referred to on page 1 of this memorandum summarise criteria for the discriminating use of case-law precedents. These principles preclude for example, unequivocally applying appeal court cases which were decided in relation to access to streets in the circumstances of a city, to unformed roads in the countryside. The opinions of the judges in these cases, whilst deserving of great respect, have mainly been shaped by common law applying to urban streets, and may not necessarily apply authoritatively to rural land in the context of unformed roads. In any event, much of what the judges say in these cases is dicta, given as asides, not intended to be a conclusive statement of the law in all circumstances, and certainly not having that result. Rather than refer to cases which do not have an unequivocal application to unformed roads (the appeal court has not heard argument or made a

specific decision on unformed roads in the context of frontagers' rights) *Roading law* is confined to decisions which actually state the law in New Zealand and apply to unformed roads.

As an aside, having walked the length of the Strand in London, I can see that points of the common law of England applying to frontagers on the Strand, may apply to Queen Street in Auckland. Having walked alongside many of the braided rivers of Canterbury, I cannot make the same connection with the Strand and, say, a road adjoining any one of these rivers.

Whilst at a high level of principle, formed roads and unformed roads carry the same legal attributes, the physical differences which are so obvious, prudently lead to a discriminating use of authority. The correct application of the doctrine of precedent is clearly illustrated by Professor Palmer at p464 of "Local Government law in New Zealand". He says:

> Concerning the construction of access ways upon public road reserves to facilitate entry on to private land, a council may arrange to construct the access at public cost where for the public benefit, or allow it to be constructed at the cost of the private occupier where essentially for private benefit. Except with consent of occupiers affected, the council may not construct or authorise such work in an existing urban area, where the access would unreasonably interfere with the frontage of an adjoining occupier and limit access to that property. But where the limitation is not significant the council may be entitled to authorise the access work. This work could extend permitting a garage to be sited on the roadside reserve.[62]
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> 62. *Fuller v MacLeod* [1981] 1 NZLR 390 (CA) (alternative access way restrained). Cf *Frecklington v Wellington City Council* [1988] 1 NZLR 72 (garage on road reserve 12 feet from neighbour's frontage allowed).

He ties the decisions of *Fuller* and *Frecklington* to urban land, the type of land with which the cases were concerned.

Fuller, dealing with vehicular access along the frontage to a residential property, decided that a frontager's common law rights of access to the highway were applicable in New Zealand subject to any statutory limitations. This means that the

owner of land adjoining a road generally has a right of access to the road from any part of the property and a right along with the public of free passage along the road.

In the context of the typical unformed road running possibly for several kilometres through a farm property, incorporated in and visibly part of the pasture, or, say, an unformed road alongside a river, the common law frontage rights of the adjoining owner as explained in *Fuller* may obviously have a strained and artificial application. Having physically included an unformed road in the greater parcel of farmland, the enclosing land owner will pass over the road latitudinally and longitudinally, in the ordinary course of farming operations. The land owner is not concerned with any physical "frontage" as such, and the recreational user is concerned with the right of free passage. In the precise language adopted by land lawyers since 1870 when the first Land Transfer Act was enacted, the adjoining owner will adversely occupy the road[12]. The discussion in *Roading law*, on the origin and status of unformed roads, may properly be completed without reference to the urban "frontage" cases.

Nuisance

Roading law is designed to present straightforward explanations of essential elements of relevant law. A brief comment on the law of nuisance illustrates that in appropriate circumstances the provisions of a statute may be preferred to a complex discussion on a decision of the Court essentially dealing with the same point of law.

It is convenient as a starting point to turn again to an extract from Dr Palmer who at p458 says:

> All public roads (not being State highways or government roads) and the soil thereof and materials vest in fee simple in the corporation of the territorial council, and are under the control of the council. The council is bound to recognise the common law rights of passage, and may not block off a street or create a public nuisance without lawful authority.[29]
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> [29] LGA, ss316. See *Lower Hutt City Council v Attorney-General* (ex rel *Moulder*) [1977] 1 NZLR 184 at 188. As to control: see *Transport Department v Glausiuss*

[12] Physically occupy it without colour of right.

> [1966] NZLR 873. *Moore v MacMillan* [1977] 2 NZLR 81 (stockyard encroachment not lawful)[13]. *Paprzik v Tauranga District Council* [1992] 3 NZLR 177; 1 NZRMA 73 (council may licence road trading activities under bylaws). See above, 12.3.6.

In the leading case *Lower Hutt City Council v Attorney-General* (ex rel) *Moulder*, at p191 the President of the Court of Appeal in delivering the principal judgment expresses some concern that neither counsel for the appellants nor for the respondent refer to s168 of the Municipal Corporations Act 1954:

> There may well be other difficulties, particularly the provisions of s168 of the Municipal Corporations Act which provides:
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> > "Nothing in this Act shall entitle the Council to create a nuisance, or shall deprive any person of any right or remedy he would otherwise have against the Corporation or any other person in respect of any such nuisance".
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> The effect of this section was discussed in Irvine and Co Ltd v Dunedin City Corporation [1939] NZLR 741. It was held that the section applies to both private and public nuisances. It was also held that specific powers given to a local body by statute will not override the provisions of the then equivalent of the present s168 except in so far as the execution of the specific powers must necessarily or inevitably lead to the creation of a nuisance. However, no argument was addressed to us on the effect of s168 and we say no more about that particular matter.

The Court decided the case on the basis of the submissions made by Counsel. Section 168 is, however, dominant in the matter, and the decision of the Court is consistent with it.

Section 168 in a slightly different format is now enacted as s191 of the Local Government Act 2002 and is reproduced on page 38 of *Roading law* as the authoritative word on the matter. A statutory statement provides the most authoritative statement on the law. For the sake of simplicity, given the legal complexities which govern the decision in *Moulder,* s191 is cited in *Roading law* in

[13] Dr Palmer states the ratio for *Moore v MacMillan* (i.e. the point actually decided for which the case stands as an authority). The generality of the law may, however be more widely stated in the judgment than the point to be decided actually requires and for the avoidance of doubt the author has preferred to refer to it only on the point of law actually decided.

preference to a discussion based on the decision of the Court. That is all that the general reader needs to know.

> **191 Local authority not authorised to create nuisance**
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> This subpart does not entitle a local authority-
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> (a) to create a nuisance; or
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> (b) to deprive the Crown or any person of any right or remedy the Crown or the person would otherwise have against the local authority or any other person in respect of any nuisance.

Exchange for other forms of public access

Unformed roads when laid out as paper roads or physically laid out on the ground may not always meet requirements for public access. The vast bulk of these roads are legal roads by virtue of being "Crown land over which a road is laid out and marked on the record maps" (see Roading law at p9). This part addresses some of the problems which attend exchanging unformed road for alternative access. Historically, the law relating to the creation of new roads after settlement is concerned with roads either formed or to be formed. The legislature has however provided some new solutions.

Probably the most serious allegation of Mr Mason is his refutation of my comments under the above heading.[14] I set out this part of my commentary in full:

> There are formidable if not insurmountable difficulties in exchanging unformed roads for new unformed road in the same vicinity. The whole network of unformed roads is predicated on laying out of unformed roads on Crown land whether pegged on the ground or laid out as paper roads. It is not possible to lay out unformed roads in a state of nature over private land; since the enactment of the Public Works Amendment Act 1900 it has been unlawful for the owner to do so when land is subdivided. The Public Works Amendment Act required all new roads to either be formed (in rural areas) or formed and metalled (in boroughs or in proximity to boroughs). Over the last 100 years standards of formation have been progressively increased. A private owner cannot dedicate road without the acceptance of the council. Councils do not accept the dedication of roads which are unformed.

[14] Summarised as finding 5 in Mason's *Critique of 'Roading Law As It Applies To Unformed Roads'* : *There are no significant statutory obstacles in the way of dedicating new unformed roads from private or Crown land.*

The then Supreme Court (now the High Court) in 1907, following on from a decision made a few months earlier by the Court of Appeal, ruled that a transfer which attempted to dedicate unformed roads was illegal and unregistrable and the Council had no power to accept the dedication. *Roading law* sets out in an adequately detailed summary form, all that the general reader needs to know on whether or not a new unformed road may be readily or legally created over private land. My commentary, in addition to legal analysis, is based on observed practice over 10 years as a land titles officer (Assistant Land Registrar and legally qualified Examiner of Titles), 14 years as a District Land Registrar[15] and 16 years as Registrar-General of Land. The last 11 years have been spent as a consultant barrister initially providing advice to other lawyers in land law and latterly providing policy advice.

Before a consideration of the relevant case law is made a brief review of the statute law applying from 1900 to the present time will show how the law draughtsman has been meticulous in providing authority for statutory dedication in a range of circumstances which has steadily been shrinking since 1961. On the authority of case law, registered documentary dedication is not lawfully available if the dedication is not statutorily provided for. The law draughtsman has clearly been acutely aware of the law, and the legislators have enshrined appropriate principles in the statutes.

Statute Law

The late Mr E C Adams in his leading series of articles written in 1950 on the doctrine of dedication (1950) NZLJ 315 (1951) NZLJ 12 and 27 states:

> It was not until the passing of the Public Works Acts Amendment Act, 1900, that it was necessary for a private person subdividing land to provide each allotment with frontage to a public highway, and it was not until that Act that a written registered instrument of dedication of land as a highway was necessary.

[15] In my experience, engineering, surveying, and planning staff of the territorial local authorities invariably approach any issue concerning unformed roads in a very conservative way to ensure that the council should not accept any financial or other accountability.

He could have added after the word necessary the words or "authorised and then only in specific circumstances". Previously the common law doctrine of dedication was wholly applicable. The new statute law on dedication was of radical effect, for in a complete departure from common law, dedications could be registered under the Land Transfer Acts **before use by the public was established**. Except where the new statute law applied, the common law continued to state the law. Use by the public generally, and almost always over a period of years, is an essential element of a dedication at common law, provided that a clear intention to dedicate the land as public road may be attributed to the owner[16]. There was a period when the new law went through a process of adjustment to get the wording right.

The first provision dealing with the question of frontage to roads is section 20 of The Public Works Acts Amendment Act, 1900, and it says, "In every case where the owner of land *hereafter subdivides* the same into allotments for the purpose, of disposing of the same by way either of sale or lease,… it shall be his duty to provide that such allotment has when so disposed of, a frontage to a road or street". Then came the Act of 1903, which provides that when the owner of any land sells any part thereof he shall, unless such part has a frontage to an existing road or street or private street, provide and dedicate as a public road or street a strip of land of not less than 66ft. in width... Then there was the Act of 1904, which said that the provisions of sections 2 and 3 of the Public Works Act shall not be deemed to prevent the registration of any transfer if the road is not less than 40ft. in width shown on any plan deposited in any Land Registry office before the passing of The Public Works Acts Amendment Act, 1900. Then came section 2 of The Public Works Act Amendment Act, 1905, which said that nothing in the section of the Act of 1904 should be deemed to authorise the registration of a transfer or conveyance unless the Registrar was satisfied that subsection 2 of section 2 of The Public Works Act, 1903, has been complied with.

[16] The common law doctrine of implied dedication continues to apply in New Zealand subject to the automatic divesting of title to the Council under s316 of the Local Government Act 1974; *Man O'War Station v Auckland City Council* (judgment No2) (2002) 3NZLR 584 at 601 (Privy Council).

Then in 1905 the Public Works Act Compilation Act was enacted. Sections 116 and 117 of the Compilation Act 1905 stated the essential law on dedication. These provisions were carried forward in later versions of the Public Works Acts.

> 116. (1.) Where the owner of any land sells any part thereof he shall (unless such part has a frontage to an existing road, street, or private street) provide and dedicate as a public road or street a strip of land of not less than sixty-six feet in width giving access to such part from some existing road, street, or private street:
> …
> (2.) The owner shall form the road or street so dedicated to the satisfaction of the local authority, and shall, where the road or street is in a borough or town district, or is within the County of Selwyn, if so required by the local authority, metal the road or street, or any required portion thereof, to the satisfaction of the local authority, and shall also construct in connection therewith such drains and footpaths as may be agreed upon between the owner and local authority.
> (3.) The dedication shall be by instrument in writing under the hand of the owner, and registered by him in the office of the District Land Registrar or, as the case may require, of the Registrar of Deeds.
> (4.) The Registrar shall refuse to register any instrument affecting the land unless and until he is satisfied that the owner has complied.
>
> 117. (1.) Where land having a frontage to an existing road or street of a less width than sixty-six feet is subdivided into allotments for the purpose of sale, the owner shall set back the frontage of the land to a distance of at least thirty-three feet from the centre-line of the road or street, and shall dedicate as a public road or street the strip of land between the frontage-line so set back and the frontage-line as previously existing, and the land so dedicated shall form part of such existing road or street:
> provided that this section shall not apply in any case where the local authority having control of the road or street, by resolution, declares that the provisions hereof shall not apply to any specified road or street, …

The Public Works Act 1908 replacing the Act of 1905 retained each of these sections again as sections 116 and 117 respectively. Next came the Public Works Act 1928 where s116 became s125 and s117 became s128. Each section was at various times amended in some respects, but not in any respect material to the requirement to dedicate.

A boost in status for sections 125 and 128 came in the form s9 of the Land Subdivision in Counties Act 1946 where the statutory requirements incorporating s125 and s128 were retained and considerably expanded. Subsections 7 and 8 of s9 read:

> (7.) Every proposed road and every piece of land shown on the scheme plan as road which is not an existing public road shall be dedicated by instrument in writing which shall be registered by the owner in the office of the District Land Registrar or, as the case may require, of the Registrar of Deeds.
> (8.) The Registrar shall refuse to register any instrument of dedication unless he is satisfied that the requirements of this section have been complied with.

When the Counties Amendment Act 1961 replaced the Land Subdivision in Counties Act 1946 automatic statutory vesting of allotments shown as road and for other public purposes (s35) replaced dedication by transfer under the Public Works Act. Section 24(3) of the Counties Amendment Act 1961 says:

> (3) The provisions of section 125, 126, and 128 of the Public Works Act 1928 shall not apply with respect to the sale or subdivision of any land in accordance with a scheme plan approved by the Council under the provisions of the Part of this Act:

This section did not work particularly well in some respects and s19 of the Counties Amendment Act 1964 dealing with the subdivision of land fronting an existing narrow road reinstated the dedication requirement as would have previously applied by virtue of s128 of the Public Works Act.

To do this the new s24A(3) as inserted by s19 reads:

> (3) In every such case, the owner shall dedicate as a public road the strip of land between the frontage line as so set back and the frontage line as previously existing, and thereupon the land so dedicated shall form part of the existing road.

There is one other relevant provision in the Counties Amendment Act 1961. Section 27 dealing with water supply, sewage disposal, and road formation, includes as subsection 5(b) a provision which would:

> (b) Require that the owner dedicate, or obtain the dedication of, a strip of land widening the road. The Council, or, in the case of a Government road or proposed government road, the Minister of Works, or, in the case of a State highway or proposed State highway, the National Roads Board, shall accept dedication of every such strip of land.

The draughtsman of the Counties Amendment Acts clearly understood that in order to dedicate a road by statute, the enabling provisions must make express provision for dedication, so that there is authority to register the instrument. In boroughs and cities the provisions of sections 125 and 128 of the Public Works Acts continued to apply up until the enactment of the Municipal Corporations Amendment Act 1964. Section 23(3) says:

> (3) The provisions of sections 125 and 126 of the Public Works Act 1928 shall not apply with respect to the sale or subdivision of any land in accordance with a plan of subdivision approved by the Council under the provisions of this Part of this Act:
> Provided that the provisions for subsections (5), (5A), (5B) and (5C) of the said section 125 shall apply with respect to the proposed streets and private streets shown on the plan of subdivision.

Some residual dedication by memorandum of transfer was retained. Section 24 of the Amending Act dealing with the subdivision of land fronting an existing narrow street says in subsection 3:

> (3) In every such case, the owner shall dedicate as a street the strip of land between the frontage line as so set back and the frontage line as previously existing, and there-upon the land so dedicated shall form part of the existing street.

The automatic vesting of land shown on plans of subdivision as new street is provided for by section 30(3) of the Municipal Corporations Amendment, and almost all new streets were to be created in this way:

> (3) Notwithstanding anything in section 168 of the Land Transfer act 1952, on the deposit as aforesaid of any approved plan, all land shown thereon as streets, or as forming part of existing streets, or as access ways or service lanes shall vest as such in the Corporation free of encumbrances.

The Local Government Amendment Act 1978 repealed both The Counties Amendment Act 1961 and the Municipal Corporations Act 1954 and, in providing new codes for subdivisions and roads inserted new parts XX and XXI in the Local Government Act 1974. The Local Government Act 1974 introduced the same subdivisional and roading law for both Municipalities and Counties.

Attention turned to section 125 of the Public Works Act 1928 which was repealed by s4(1) of the Local Government Amendment Act 1978. However, that created a subdivisional loophole and when in 1979 the Local Government Act was next amended s9(8) of the 1979 Amendment said:

> (8) Notwithstanding the repeal by section 4 (1) of the Local Government Amendment Act 1978 of sections 125 to 127 of the Public Works Act 1928, the said sections 125 to 127 shall apply and be deemed to have continued to apply, as if they had not been repealed, to the land to which they applied immediately before the commencement of the Local Government Amendment Act 1978:
> Provided that the said sections 125 to 127 shall not apply and shall be deemed not to have continued to apply in the case of a subdivision to which Parts XX and XXI of the principal Act apply or have applied.

In theory, a dedication by memorandum of transfer could be registered under this provision, but that is now so unlikely, that it is not necessary to discuss the operation of the section.

Section 306 of the Local Government Act 1974 (as inserted by s2 of the Local Government Amendment Act 1978) provided for the automatic vesting of roads and streets in counties, cities and boroughs.

> 306 (3) Subject to section 316 of this Act, and notwithstanding anything in section 168 of the Land Transfer Act 1952, on the deposit as aforesaid of any approved survey plan all land shown thereon as roads or road reserves shall vest as such, free from encumbrances (without the necessity of any instrument of release or discharge or otherwise)-
> (a) In the case of a regional road or a reserve for a regional road, in the regional or united council or in the territorial authority, as the case may require:
> (b) In the case of a Government road, in the Crown:
> (c) In the case of a State highway, in the Crown or in the council, as the case may require:

(d) In the case of a road or road reserve in the County of Fiord or on land that does not form part of any district, in the Crown:

(e) In the case of any other road or road reserve, in the council.

There are two other relevant provisions in part XXI of the Land Government Act 1974. Section 320 states that certain powers as to roads to be exercised by special order and mentions that a special order is not necessary if a dedication is registered. Whether this section is intended to be read disjunctively or conjunctively with the other section which provides for dedication of a strip to widen a road is not clear. This is section 322, which deals with land for road formation or widening, and clearly applies to formed roads. Section 320 was repealed, on 7 July 2004, by section 6 of the Local Government Act 1974 Amendment Act 2004 (2004 No 64) and Section 322 was repealed, on 1 October 1991, by section 362 of the Resource Management Act 1991 (1991 No 69). The matter therefore need not be pursued. Section 320 is noted because if it was read disjunctively from s322 an argument could have been constructed to make it apply to all roads including unformed roads. In the scheme of things which has applied since 1900 it is an oddity which of course is now redundant.

Whilst Part XXI of the Local Government Act 1974 applying to road is substantially retained as current law it has yielded in some respects to the Resource Management Act 1991. For example, the provisions of the Local Government Act dealing with:

- road access (s321);
- roading contributions as conditions of approval of a scheme plan (s321 A); and
- land for formation or widening (s322),

were repealed by the Resource Management Act 1991 or amendments to that act.
Mr Mason states that apart from provisions for gradient there are no other provisions in the Resource Management Act dealing with the formation of roads. That, however, is not correct. Section 106 of the Resource Management Act 1991 provides:

106[17] Consent Authority may refuse subdivision consent in certain circumstances

[17] Section 106: substituted, on 1 August 2003, by section 44 of the Resource Management Amendment act 2003 (2003 No 23) when paragraph (c) dealing with roads – legal and physical access – was inserted.

(1) Despite section 77B, a consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that-

(a) …

(b) …

(c) sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision.

(2) conditions under subsection (1) must be-

(a) for the purposes of avoiding, remedying, or mitigating the effects referred to in subsection (1); and

(b) of a type that could be imposed under section 108.

This is one of those awkward provisions (intelligible to lawyers) where "may" in subsection (1) certainly should be read as "must". In this respect, it is worth turning for a moment to subparagraphs (a) and (b) of subsection (1):

(a) the land in respect of which a consent is sought, or any structure on the land, is or is likely to be subject to material damage by erosion, falling debris, subsidence, slippage, or inundation from any source; or

(b) any subsequent use that is likely to be made of the land is likely to accelerate, worsen, or result in material damage to the land, other land, or structure by erosion, falling debris, subsidence, slippage, or inundation from any source…

The considerations in (a), (b), and (c) of section 106 (1) are disjunctive. That is, each is to be separately assessed by the Council. There would be some interesting questions of liability for the Council if, in circumstances where any of the paragraphs had an application, the Council did not exercise its discretion to refuse consent.

The council must therefore satisfy itself that in a subdivision each allotment has not only legal access but adequate physical access. The discretion of the Council is widely-based in relation to physical access. In a subdivision however, an appropriate standard of formation would have to be provided for, as the onus is on the subdividing owner to provide adequate physical access. In a sub-divisional situation if the Council does not ensure that suitable physical access is provided by the sub-divider,

in keeping with its (the Council's) statutory duty, it may well find itself liable to provide it[18].

Perhaps it is appropriate to note here that for many years councils have had power to take a bond from a sub-divider to ensure that roads legalised without formation or complete formation are subsequently formed to the standards required by the Council. These are not "unformed" roads in the present context[19].

Under s223 of the Resource Management Act a survey plan of subdivision must either be approved or declined by the territorial authority. If approved under subsection (3)

> (3) The chief executive or an authorised officer of the territorial authority must certify that a survey plan has been approved under this section.
>
> (5) A certificate under subsection (3) is conclusive evidence that all roads, private roads, reserves, land vested in the authority in lieu of reserves, and private ways shown on the survey plan have been authorised and accepted by the territorial authority under this Act and under the Local Government Act 1974.

Such certificates have application only when land is subdivided.

The vesting of land as road under the Resource Management Act is automatic on deposit of the plan of survey and is provided for by s238:

> **238 Vesting of roads**
>
> (1) When a District Land Registrar or Registrar of Deeds deposits a survey plan, or a Chief Surveyor approves a survey plan to which sections 228 applies, the land shown on the survey plan as road to be vested in a local authority or the Crown vests, free from all interests in land including any encumbrances (without the necessity of any instrument of release or discharge or otherwise), -
>
> (a) in the case of a regional road, in the territorial authority or regional council, as the case may be:

[18] This point was noted by counsel, Chapman KC in Bank of New Zealand v District Land Registrar, Auckland (1907) 27 NZLR 126.

> "If the appellant's contention is correct and these (unformed) roads have been dedicated, the local authority will have to maintain twenty-five miles of badly made or unmade roads running through a private estate, and that would throw a very heavy burden upon the ratepayers". *(words in brackets added by the author)* Note also the decision of the Court of Appeal in *District Land Registrar at Wellington v Brightwell and Findlay* (1912) 31 NZLR 707.

[19] Refer to ss108 and 108A Resource Management Act 1991.

(b) in the case of a government road declared as such under any Act, in the Crown:

(c) in the case of a state highway, in the Crown or the territorial authority, as the case may be:

(d) in the case of any other road, in the territorial authority.

(2) This section has effect notwithstanding section 168 of the Land Transfer Act 1952 (which relates to the dedication of roads for the public purposes).

Section 238: words inserted, on 7 July 1993, by section 125 of the Resource Management Amendment Act 1993 (1993 No 65).

There is no power expressed in the Resource Management Act to dedicate road by memorandum of transfer and none in the Local Government Act 1974. Nor, as has been demonstrated by the statutory processes which eventually eliminated statutory dedication, do any of the former statutes which authorised dedication by memorandum of transfer have any application today[20]. The early statutes requiring formation were innovative and not surprisingly, quickly received the attention of the Courts.

Case Law

The leading cases on dedication in New Zealand date from the years soon after the enactment of the Public Works Amendment Act 1900. Before passing to a consideration of the judicial rulings which excluded dedication of unformed roads it is helpful to briefly review two authorities referred to by the late Mr E C Adams (above) in (1950) NZLJ 315. He noted at p316:

> In *Commissioner for Railways v Dangar*, (1943) 15 LGR 101, in which Herron J in describing a dedication at common law said:
>
> > At common law "dedicate" must be taken to mean the act on the part of the owner of opening land to the public for the use by it as a road with the intention of granting an irrevocable licence to use it and the acceptance of the dedication by the public by making use of the way.
>
> Mr T F Martin (the author of *Conveyancing in New Zealand*) once said:

[20] Except possibly s125 of the Public Works Act 1928 which is preserved in a very narrow context by s9(8) of the Local Government Amendment Act 1979.

> In order to constitute dedication there must be acceptance by the public as well as an intention on the part of the landowner to dedicate. The acceptance by the public is generally evidenced by their having used the road for a number of years or by the local authority having expended moneys on the road.

The principles which underpin the doctrine of dedication would militate against the creation of an unformed road by implied dedication at common law. I know of no current authority which would provide even faint support for such a proposition[21].

In respect of statutory dedication by memorandum of transfer, the third and last case in a series of three related cases[22], *Howell and others v District Land Registrar* (1908) 27 NZLR 1074 arose out of the refusal of the District Land Registrar, Wellington to register a transfer purporting to dedicate an unformed road. Cooper J gave an unequivocal opinion, supporting the Registrar, at the conclusion of a judgment that is a truly comprehensive assessment of the law. At page 1082 he said:

> Two classes of instruments creating a public road are authorised to be registered under the Land Transfer Act – Proclamations taking a road under the Public Works Act, and instruments of dedication under sections 116 and 117 of that Act; and this instrument is within neither of these classes. I do not think the opinion of Mr Justice Richmond in *Martin v Cameron* (12 NZLR 769) upon this point has been affected by any subsequent decision or legislation. He refers expressly to section 79 of "The Public Works Act 1882", a section which vested public roads outside boroughs and cities in the King, and to the possibility of a dedication being effected by a grant from the landowner to the Crown; but he expressed a distinct opinion that an instrument of dedication cannot be registered under the Land Transfer Act. He said, "A highway is a kind of passage for the public in general, not an easement nor an kind of incorporeal hereditament. … The interest created by dedication is *sui generic*, and, in my opinion, is not a registrable estate or interest under the Act. It is argued that the soil in every public road vests in the Crown under section 79 of "The Public Works Act 1882", and that the interest thus created is registrable. But the Land Transfer Act contains no provision applicable to such an interest in the Crown". I am unable to find any provision in the Land Transfer Act

[21] Refer generally to *Man O'War Station Ltd v Auckland City Council* (2002) 3NZLR 584 (PC) and (2000) 2NZLR 267 (CA)

[22] These are:

(i) *The Assets Realisation Board v District Land Registrar* (1907) 26 NZLR 473
(ii) *Bank of New Zealand v District Land Registrar Auckland* (1907) 27 NZLR 126 (CA)
(iii) *Howell and others v District Land Registrar* (1908) 27 NZLR 1074

> which authorises registration of such an instrument as this is, and the only provisions in the Public Works Act authorising the registration of instruments creating roads are inapplicable.

Earlier in his judgment Cooper J made a reference to s79 of the Public Works Act 1882 by referring extensively to the judgment of Mr Justice Edwards in *Assets Realisation Board v Auckland District Land Registrar* (1907) 26 NZLR 473 which if it had correctly stated the law would have permitted dedication of unformed roads. Cooper J said of the opinion of Edwards J.

> His Honour, however, discussed sections 78 and 79 of "The Public Works Act 1882". These sections correspond with sections 101 and 102 of the Compilation Act 1905. He (Edwards J) said, "User by the public is not necessary to give effect to the dedication. It appears to me to be equally clear that user or any other act of acceptance by the public is not necessary to complete the right of highway under a grant or dedication by the private owner. The statute speaks of 'grant' or 'dedication' in such manner as to show that it was conceived that there might be a difference between grant and dedication in this connection, and that both alike refer to the acts of the owners of the land alone. The word 'grant' may be inappropriate. There could be no grant to the public, though there might be a grant to a person or corporation for public purposes. There may, however, be a dedication by deed poll duly registered, and indeed that was the proper mode of effecting a dedication under 'The Public Works Act 1900', and it is under the 'The Public Works Act 1900' and it is under the Compilation Act if the law has not been altered, into which I have not thought it necessary to inquire: *Ex parte Wilson*. Such a dedication would not take effect in England unless it were followed by user by the public, or by some other act which showed an acceptance by the public of the dedication, but I think that it would be impossible to say that it was not an effectual dedication under section 78 of 'The Public Works Act 1882'. In my opinion, therefore, it is not necessary, to perfect a dedication under the Act of 1882, to show user or any other unequivocal act of acceptance by the public, nor is there any reason why, under the legislation of those years, it should be so. The creation of a highway entailed no liability upon the public, who might use it or not as they pleased, and who were under no obligation to construct or repair it. In those days, before the acts of every individual were regulated in detail, as they are under recent legislation, the dedication of land as a highway, whether formed or unformed, was looked upon as a public advantage".

Cooper J at p1080 said of this passage that these observations were dicta only (i.e. not the ratio, the actual basis, for the decision) although entitled to very great respect. He (Cooper J) went on to comment further on the opinion of Edwards J:

> His references to the state of the law in 1882, as indicating that under that Act acceptance by the public was unnecessary to constitute a complete dedication, do not, I think, apply with the same force to the Act of 1905, which compiled Acts in which the restrictive regulations referred to by His Honour were contained. In *The Bank of New Zealand v The District Land Registrar, Auckland*, His Honour the Chief Justice expressed an opinion that under the Act of 1882 acceptance by the public, evidenced by acts of user by the public, was essential to complete any dedication. His opinion was that there could be no complete dedication without such acceptance. Mr Justice Williams considered that the roads in question in that case were not, under the circumstances, dedicated to the public, there being no such act of acceptance. Mr Justice Chapman considered that there was no complete dedication. "A passage in his judgment has some bearing upon the question whether there may not be a dedication by deed poll. He said, a public highway becomes such by dedication when complete, creating an interest of a special kind in favour of the public in the land, and when once that kind of interest is created it is finally and irrevocably created. I do not think that section 107 of the statute" [the Land Transfer Act] "advances the matter very far, as up to this point what has been done is at most to create a right in the transferee with which the public are not yet concerned. If that be so, that relation may be set aside by contract. I do not, therefore, think that an intention on the part of the proprietor to dedicate, or the mere contract to dedicate, or his belief that he has dedicated, effects a dedication, though if it is shown that, either at the demand of the transferee or otherwise, the proprietor has fulfilled his obligation, the indestructible public right has arisen. The difference is fundamental: 'way' is a species of property which is in some owner; "highway" is a public right involving the renunciation of property. Fulfilment of the obligation by the proprietor involves acts resulting in the completion of the dedication in a manner recognised by law". He does not intimate in what way the renunciation by the proprietor of his property in the road is to be carried out, or whether such a renunciation is effective before it is accepted by the public user of the road. My judgment in that case proceeded upon the ground that the deposit of the plan was merely some evidence of dedication, but that it did not become conclusive evidence unless there had been acceptance by the public user of the roads.

The view of Edwards J would have supported registration of a dedication of an unformed road. Although Cooper J said that the opinion of Edwards J was deserving of "great respect", he clearly disagreed with it, and had in support a unanimous decision of the Court of Appeal in *Bank of New Zealand v District Land Registrar, Auckland* (above). Stout CJ provided the leading judgment. At p134 he said:

> Before the piece of land can become a highway there must be something more than an intention to dedicate by the owner. It was said by Mr. Justice Blackburn in Fisher v Prowse 2B&R770, 780 that both dedication by the owner and user by the public must concur to create

> a road otherwise than by statute, and in the same case it is said, "It is, of course, not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them ..." If the public never accepts it, and if no one claims or can claim that it be used as a public road, it seems to me that the dedication was not complete. Of course it is not necessary, as was said in the *Attorney-General v Biphosphated Guano Company* 11 Ch.D. 340 in order to constitute a dedication binding on the owner of land to prove that the parish in which the road alleged to be dedication is situated has taken the road so as to be liable to repair it. In the same case, however, it is said that there is need of proving that the road has been in fact thrown open to the public and used by them, for without such proof the existence at one time of the *animus dedicandi*, however clearly established, can lead to no inference of dedication.

In 1907 the Judges of the Supreme Court and Court of Appeal were Chief Justice, Sir Robert Stout and Judges Joshua Strange Williams, John Edward Denniston, Worley Bassett Edwards, Theophilus Cooper and Frederick Revans Chapman.

All of the judges were acknowledged authorities in land law (for example, Denniston J heard *Bank of New Zealand v District Land Registrar, Auckland* in the then Supreme Court and his judgment was confirmed in the Court of Appeal). Of the six judges only Edwards J took the view, at least by implication, that the dedication of an unformed road could be undertaken under what is now paragraph (b) of the definition of Road in s43 of Transit New Zealand Act 1989[23].

Cooper J in *Howell* (above) has in effect summarised the opinions of the entire judiciary (with the exception of Edwards J) on the law of dedication, holding as a result that:

(1) a statute must authorise the dedication by a memorandum of transfer of any land as road;

(2) the terms of that statute must be strictly complied with; and

[23] The definition in s43 states: "Land over which right of way has in any manner been granted or dedicated to the public by any person entitled to make such grant or dedication". The definition of "road" in s43 and its predecessors has always been considered as being retrospective*: Snushall v Kaikoura County*, [1920] NZLR 783, and *Wellington City Corporation v McRea*, [1936] NZLR 286; rev. on app… [1936] NZLR 921. These cases in effect confirm the opinion of Cooper J in *Howell* and the majority then of the judiciary. For Edwards J to be correct, the definition would have had to have a prospective i.e. future application which clearly it does not.

Note. The definition in s43 is identical to s78(2) of the Public Works Act 1882 referred to in the above cases listed in footnote 19.

(3) the council must be empowered by the statute to accept the dedication and must actually do so.

These principles continue to state the law.

As the legislation then in force required the formation of any road to be dedicated, a memorandum of transfer of an unformed road could neither be accepted by the council nor registered under the Land Transfer Act.

The legislature clearly required a very precise observance by councils of its statutory requirements in relation to roads and streets. Section 191D of the Counties Act 1956 and s187 of the Municipal corporations Act 1954 are drawn in similar terms. Section 191D states:

> **"191D. Chairman and Councillors personally liable for laying out road of less than legal width, etc.** – (1) Every Chairman or Councillor commits an offence against this Act who consents to the laying out of any road of a less width than that required by law, or to any other unlawful act in relation to any road".

The acceptance by the Council of a dedication which was not statutorily authorised would be an unlawful action in relation to a road. Both provisions were repealed by s9 of the Local Government Amendment Act 1979 and not replaced. It was therefore unnecessary to refer to either section in *Roading law*. However, these provisions do assist in providing an understanding of the historical environment in which councils were required to work in relation to roads.

Currently, there is nothing in the Local Government Act 1974 or the Resource Management Act 1991 to authorise the dedication by memorandum of transfer of an unformed road or, for that matter, any road. Nor as is indicated above may a dedication by memorandum of transfer be made by virtue of paragraph (b) of the definition of "Road" in s43 of Transit New Zealand Act 1989.

Action under the Public Works Acts

At common law in order to dedicate a road the owner of the land had to provide indisputable evidence of an intention to dedicate or the actions of the owner had to provide that evidence. Then there has to be an act of dedication. Then over a period of years the public had to use the land as road showing an acceptance by public of the actions of the owner in providing that land as road. The Public Works Amendment Act 1900 modified the common law so that use and acceptance by the public, a common law essential of dedication, may be dispensed with. There must however be a written acceptance by the Council.

EC Adams in the series of articles previously mentioned points at p315 (1950) NZLJ to the mistake made in 1842 when New Zealand's first Conveyancing Ordinance was drawn up. The ordinance did not provide for the written dedication of roads and streets over private land. This almost certainly was the greatest blunder in the history of our land law, for in the period 1842 to 1900 many roads were laid out over private land without dedication, formation or legalisation, subsequently providing difficulties for landowners, councils, and land-title administrators, for the best part of the next century. Problems continue to occur even to this day. At the time of writing, I have been asked to comment on the legality or otherwise of a "road" predating 1900. Several hundred thousand dollars are in dispute.

Mr Adams noted early practices at p316:

> Now, what happened when there was a private subdivision of land before the coming into operation of the Public Works Acts Amendment Act, 1900, was something like this. The subdividing owner laid down the "roads" or "streets" on his plan of subdivision for the sole purpose of the sale of his lots, and really did not care in the least whether they became public highways or not. The mere deposit of the plans in the Land and Deeds Registry Office did not make these "roads" or "streets" public highways; at most, the mere deposit was evidence of the *animus dedicandi: Bank of New Zealand* v *Auckland District Land Registrar*, (1907) 27 N.Z.L.R. 126.

Section 20 of the Public Works Act 1900 sought to curb this lawless situation by prohibiting the laying off of undedicated roads and unformed roads over private land, and successive governments have maintained that policy to the present day. Prior to 1900 under the general powers in the Public Works Act 1894 (and in subsequent

Public Works Acts) a road of doubtful status, if a public work, could be proclaimed road as a "public work" as defined in the Act.

The Land Act 1892 introduced the power which substantively is now expressed as s114 of the Public Works Act 1981. From 1892 there has existed a power by notice in the Gazette to proclaim Crown and private land as street or road. Private land may be declared to be road under s114 only with the consent of the owner and the territorial authority.

However, from 1900 onwards, successive governments have:

> (a) from time to time enacted legislation which authorised written dedication over privately owned land by memorandum of transfer, in specified circumstances; and
>
> (b) never authorised the written dedication of unformed road over privately owned land.

The question therefore arises as to whether the discretion of the minister under s114 of the Public Works Act 1981 is circumscribed by longstanding policy not to permit new unformed roads over privately owned land. The procedural factors which apply in respect of a taking under s114 so differentiate from the law on dedication that a separate approach is required.

There appears to be no doubt that when first enacted as s13 of the Land Act 1892, the section was intended to apply to formed roads or roads to be formed. The section is included in the Land Act and the designated minister, under that Act is the Minister of Lands. The section commenced: *The Governor, by notice in the Gazette, may from time to time proclaim as a street or road*: However, despite being in the Land Act, according to Short[24], the actual administration of the section was effected through the Minister of Works, the Department of Roads, and the District Road Engineer:

> In forwarding an application for the issue of a proclamation under this enactment, the local body should send it to the Minister for Public Works, through the District Road Engineer for

[24] W S Short, *A Treatise Upon the Law of Roads, Bridges, and Streets in New Zealand*. Timaru Post Newspapers Co Limited, 1907, at 250.

> the district concerned, with a request that he will recommend it and forward the documents to the Minister. The District Road Engineer will then report upon the application…

There could not be any stronger imputation that the section is designed to apply to formed road, or road to be formed, for the officials named were concerned with formed roads rather than unformed roads. Unformed roads had been created in the early days of the colony under the auspices of the general government, then under the provincial governments, and, later, under the Departments of Lands. Unformed roads intended to remain in a state of nature were never engineering concerns which would have required the attention of The Department of Roads and district roading engineers.

Section 13 of the Land Act 1892 stated that the legal process for taking a road was proclamation by the Governor, as did the succeeding s11 of the Land Act 1908 and the next section, s12 of the Land Act 1924. When s29 of the Public Works Amendment Act 1948 replaced s12 the terminology of a "proclamation" was retained and this remained as law until amended by s7 of the Public Works Amendment Act 1965 when the Minister of Works substituted for the Governor – General to take land "by notice published in the Gazette". When s114 of the Public Works Act 1981 (now in force) was enacted subsection (1) was to read:

> (1) Subject to subsection (2) of this section, the Minister may, by notice in the Gazette, declare any land, whether owned by the Crown or not, to be road.

Turning again to s13 of the Land Act 1892, the section said that "when proclaimed the lands "… shall be and be deemed to be thenceforward dedicated to the public". Deeming makes an action not of a certain class to have the effect of that class. Section 11 (3) of the Land Act 1908 maintained the same stance. The deemed dedication provision was omitted from s12 of the Land Act 1924 and has been omitted from s29 of the Public Works Amendment Act 1948 and s114 of the Public Works Act 1981.

A road taking under s114 of the Public Works Act 1981 is not a dedication of land as road.

It is a taking under the Public Works Act permitted at the discretion of the Minister of Lands.

From the inception of the section in 1892 it has been subject to policy direction. The Department of Roads set out[25] a procedure required to be observed by local bodies in obtaining the issue of a Proclamation taking lands for roads or for opening the closing roads under Section 13 of 'The Land Act, 1892'.

Paragraph 28 of the instructions reads:

> 28. A road or part of a road cannot be closed under Section 13 of "The Land Act, 1892", unless another road, or part of a road, be taken thereunder in lieu of the road or part of the road to be closed.

Section 13(3) provides for an exchange of road for new road not as a mandatory aspect of the operation of the section but as an option. Nevertheless, as a matter of policy, the operation of the section was greatly restricted. The District Road Engineer is directed in Paragraph 29 of the instructions to make a recommendation to the Minister of Works based on the public interest, confirming that formed roads or roads to be formed were the target of the section.

When the history of the section is coupled with the long standing policy of all governments from 1900, to permit statutory dedication of roads either formed or intended to be formed on private land in the range of authorised situations as are set out in the statutes above, but not otherwise, there may be problems in giving s114 of the Public Works Act 1981 a broad interpretation which would authorise substantive new unformed roads over privately owned land.

On its face, in the terms in which it is now drawn, s114 is wide enough to permit the taking of land for any road whether formed or unformed. However, the policy of successive governments since 1900 has been not to permit unformed roads to be laid out over private land. If a road not intended to be formed is taken under s114 the

[25] As noted in 1907.

exercise of the discretion vested in the Minister must necessarily breach this convention. Given the sensitive reaction of the land owning community to the access proposals first formulated in 2003/4/5, and later abandoned, there may be some difficulty in annunciating a policy for taking unformed road under the Public Works Act (despite that taking may not take place without the consent of the owner).

Any such takings under s114 would be dependent on the current policy of the Government, and affected by:

- The varying attitudes of the territorial local authorities towards unformed roads.
- The aversion many of the territorial local authorities have shown in respect of unformed roads.
- The historical antipathy of landowners to unformed roads.

To effect a taking and an exchange, the Minister of Lands, the territorial local authority, and the owner must be in agreement. Given the diversity of factors which may have a bearing on the exchange of an unformed road for another road there is an obvious problem in co-ordinating a policy and no agency to co-ordinate such a policy.

However, there is a corollary between s114 of the Public Works Act 1981, and s116[26] of that Act which deals with road stopping. Section 116 of the Public Works Act is now very conservatively applied having been overtaken by the provisions in a statute of more recent origin. The modern stopping procedures established by s342 and the tenth schedule to the Local Government Act 1974 are now preferred. Similarly, s114 in the light of its history, perhaps should not be applied outside of the scope of the roading applications originally intended. That history may appear to exclude from s114 an application to unformed roads except perhaps where the section may be employed in a technical sense to fill, say, an eroded gap or a flaw in an existing road. The legislature has now provided, in the Resource Management Act 1991, a modern alternative to an unformed road when new substantive access is required over land or along water, in the form of access strips[27] over land, or esplanade strips[28] along water.

[26] S116 of the Public Works Act 1981 is extensively discussed at p41 of "Roading Law".
[27] Resource Management Act 1991, s237B.
[28] Resource Management Act 1991, s232.

Section 116 dealing with road stopping now for practical purposes defers to the modern procedures in the Local Government Act. Clearly, the original purpose of s114 was to provide an inexpensive way of legalising formed roads or roads to be formed. Where **access,** rather than a road is required, it too may defer to modern practice established under the Resource Management Act 1991.

The Bushey Park Road stopping and substitution of an Esplanade Strip along the Shag River under the auspices of the Waitaki District Council, approved by the Environment Court on 18 July 2005, provides an example of modern practice in action. The observations on the statutes set out immediately above appear to be precisely applied.

An extensive esplanade strip as provided for in s232 of the Resource Management Act 1991 along the true left bank, upstream of the mouth of the Shag River, was established as part of a scheme of access re-arrangement. An unformed road was stopped under the Local Government Act 1974 for inclusion in the property of the adjoining owner who granted the esplanade strip. Some gaps in a coastal road were gazetted as road under s114 of the Public Works Act 1981 to re-establish continuous coastal access some of which apparently had been lost through erosion.

In his Decision, Environment Judge J A Jackson noted that the Council had explained that:

> That the Council has no power to require that existing private access ways be dedicated to the public and that practical access in this area has historically been reliant on the goodwill of the landowner; para 20(4)

Judge Jackson then observed:

> With the proposed alternative access, the public will no longer need the roads. Access to the coast and along the Shag River will continue and will be secured in accordance with the covenants that will be entered into creating the esplanade strips and the vesting of specified coastal land in the Council as road; para 28(2)

The Council was soundly advised, for at the outset, it correctly observed that it had no power to take a dedication of access along the river.

The solution adopted is in accord with current law and modern practice. It is an illustration of new law supplanting the old; a recognition in respect of access that the old law (i.e. that applying after 1900 and up until the enactment of the Resource Management Act 1991) authorising the laying off of new roads was never tailored for the creation of new unformed roads over privately owned land; nor does the solution in any way compromise the Crown.

Conclusion

The reader will have observed that a discussion at the level of detail set out in this memorandum would have been inappropriate in *Roading law*. The reader may also observe that the summary in *Roading law* set out under the heading "Exchange for other forms of public access" on page 15 of this memorandum states the key difficulties in effecting exchanges of unformed road for unformed road. The inability of private owners to dedicate unformed road, in context, a major inhibition on effecting exchanges, has been settled for over 100 years. Private owners may not lay off new unformed roads because there is no statutory power to dedicate by memorandum of transfer. Historically, Councils have not accepted the dedication by memorandum of transfer of roads which are unformed, because the Courts have ruled these instruments are unregistrable. In any event, under existing statute law, there is no power for a council to accept such a dedication. Whether the Public Works Act may be used for a substantive taking of new unformed road may be contentious, given the range of factors which may impinge on a taking, some of which have been identified. From an historical perspective, the various sections in the public works legislation dating from 1892, which enabled the exchange of old road for new road, were directed as a matter of policy at either formed new road or new road to be formed. Ostensibly, there may be a power to take a new unformed road under s114 of the Public Works Act 1981, but to do so the Minister must breach a convention which has existed for over 100 years. There are formidable problems in establishing a workable process.

As an aside, attention is drawn to p50 of *Roading law* where the author suggests an alternative process to that of road stopping and substitution adopted in Bushey Park. The alternative suggested would be simpler and cheaper.

Misrepresentations

It is not my purpose to address all of the errors of fact and law and extravagant supposition made by Mr Mason but I will refer to two examples of misrepresentation.

As the Bushey Park road stopping is discussed above it is convenient first to refer to it. The scheme of re-arrangement was not substantially a "road swap" as indicated by Mr Mason at p26 of his critique:

> A successful 'road swap' serving public-walking purposes has been negotiated recently in north-east Otago. This was an agreement between objectors to road stopping, the adjoining landowner and the Waitaki District Council. Sections of the unformed Bushey Park Road were stopped and a newly dedicated unformed road added to an existing unformed coastal road, providing a practical alternative walking route to the mouth of the Shag River.

The major part of the so-called swap is the creation of an esplanade strip along the river, and in that respect Mr Mason misrepresents the position. The new fill-in pieces of road to provide access to and along the coast formed a relatively minor rather than substantive, part of the new scheme of access.

There is no newly dedicated unformed road as Mr Mason would have it. The gaps which have become road are declared to be road under s114 of the Public Works Act 1981 (NZ Gazette 13/10/2005 No175 p4415). In a legal sense the land is taken under the Public Works Act under ministerial discretion[29].

[29] This solution may not however be available if a road along the coast has been stopped by the operation of s15 of the Foreshore and Seabed Act 2004.

This tendency to misrepresent both fact and law exemplified throughout his "Critique" is well illustrated in the section he heads "Realignment of unformed Roads". For example on page 25 he says in a footnote:

> (+) subdivision of land is governed by Part 10 of the RMA 1991 not Part 20 of the LGA 1974 as Hayes states (Hayes, 2007a:50). Part 20 was repealed by the RMA (Eighth Schedule). There is nothing in Part 10 of the RMA specifying any requirement for road formation.

The author of *Roading law* did not make the statement attributed to him in this footnote. What he did state was "since 1 April 1979 the Crown has been bound by the sub-divisional law etc" and added in a footnote by way of parenthesis that part XX and XXI of the Local Government Act 1974 are the authority for the commencement of the new legal requirements.

The Better Management of Unformed Roads

The physical characteristics of unformed roads differ greatly from highways which are formed and maintained from public funds. It is simply a matter of fact that most unformed roads are physically occupied by the owner of the adjoining land. These occupiers in a technical sense may be trespassers; so of course is every other occupier of another person's land.

All rights the public may have either at common law, or by virtue of statute law, are unaffected by the occupancy of any road by the owner of the adjoining land, whether by licence from the Council, or merely as an occupier. These occupiers are not legal custodians, yet it is largely through work undertaken on the land by the occupier, say, pasture maintenance, or suppression of noxious weeds, that the public may enjoy their rights of passage. If the surface of the road is allowed to degenerate then a road will often become impassable. In the writer's experience, a change of farming practice from sheep farming to beef cattle, produced a change of vegetation on an unformed road leading to and along a very good trout stream, making the road completely impassable, denying access to the river. Many and varied are the practices which confer physical passage over unformed roads; the right of free passage (in practical terms useless if it is not physically available) is never, or hardly ever, provided at

public expense. The occupiers "interest" in the road may not be a legal interest, but it is absurd to say that the occupier has no interest, for if there is any expenditure on such a road, it is likely to be the money of the occupier which is applied to provide a surface which is usable by the occupier and the recreational user.

Statutory management of unformed roads intended to remain in a state of nature has hitherto had a low priority. The statute law relating to bylaws on roads primarily exists for the benefit of formed roads. That is axiomatic. There appears to be no case law to test the validity of bylaws made under general authority to regulate the use of roads which remain in a state of nature; neither an extensive computer search nor a manual search have identified any authority.

No matter how attractively an argument in favour of the application of bylaws made under general legislation to unformed roads is packaged, until the matter comes before the superior courts to test the validity of any special bylaw, the law must remain uncertain. In addition, general legislation may not necessarily authorise bylaws which may serve the special attributes of unformed roads.

In recent years in the United Kingdom, both in England and in Scotland attention has been given to the use of bylaws to provide standards to apply to the right of passage in the field. The Countryside and Rights of Way Act 2000 (England) and the Land Reform (Scotland) Act 2003, scrupulously preserve rights of passage over various forms of public access, and provide for bylaws to give a balance of rights and duties. The maturity expressed in the English Act in particular is based on the application for more than 50 years of legislation providing public access in the countryside[30]. At a glance, the English legislation is greatly superior to the existing New Zealand law on bylaws in the context of unformed roads.

The bylaws suggested in *Roading law* are a simplified version of each of the above statutes and are set out below.

[30] The forerunner is "The National Parks and Access to the Countryside Act 1949". Colin Sara in "Boundaries and Easements", Sweet & Maxwell 1991, shows how the law developed in England through various stages. The Countryside Act 1968 replaced the Act of 1949 and was in turn replaced by the Wildlife and Country side Act 1981. The Countryside and Rights of Way Act 2000 is the law now in force.

It should be the duty of the territorial local authority to enact and enforce bylaws in relation to unformed roads in order to:

- preserve order and rights of passage;
- prevent damage to the surface land comprising the road or anything on it; and
- ensure that persons exercising the right of passage over any unformed road so behave themselves as to avoid undue interference with the enjoyment of the land comprising the road by other persons and occupiers.

Bylaws may relate to all unformed roads in the district or any particular such roads.

Bylaws should not interfere with:

- the exercise of any public right of way; and
- any authority having under any enactment functions relating to the unformed road to which the bylaws apply.

The essence of a public road is preserved; the bylaws authorised in terms of this proposal are no more intrusive than bylaws currently authorised under current legislation applying to formed roads. Such proposed bylaws like the existing bylaws authorised in England and Scotland recognise the reality of good balanced practice on the land. Current law in New Zealand does not.

Section 17 of the Countryside and Rights of Way Act 2000 (England) and section 12 of the Land Reform (Scotland) Act 2003 are set out below to provide excellent examples of law which may be readily adapted to New Zealand conditions.

Countryside and Rights of Way Act 2000 England

Miscellaneous Provisions Relating to Right of Access

S17 Byelaws

(1) An access authority may, as respects access land in their area, make byelaws-

(a) for the preservation of order,

(b) for the prevention of damage to the land or anything on or in it, and

(c) for securing that persons exercising the right conferred by section 2(1) so behave themselves as to avoid undue interference with the enjoyment of the land by other persons.

(2) Byelaws under this section may relate to all the access land in the area of the access authority or only to particular land.

(3) Before making byelaws under this section, the access authority shall consult-
(a) the appropriate countryside body, and
(b) any local access forum established for an area to which the byelaws relate.

(4) Byelaws under this section shall not interfere-
(a) with the exercise of any public right of way,
(b) with any authority having under any enactment functions relating to the land to which the byelaws apply, or
[(c) with the provision of an electronic communications code network or the exercise of any right conferred by or in accordance with the electronic communications code on the operator of any such network.
][FN1]

(5) Sections 236 to 238 of the Local Government Act 1972 (which relate to the procedure for making byelaws, authorise byelaws to impose fines not exceeding level 2 on the standard scale, and provide for the proof of byelaws in legal proceedings) apply to all byelaws under this section whether or not the authority making them is a local authority within the meaning of that Act.

(6) The confirming authority in relation to byelaws made under this section is-
(a) as respects England, the Secretary of State, and
(b) as respects Wales, the National Assembly for Wales.

(7) Byelaws under this section relating to any land-
(a) may not be made unless the land is access land or the access authority are satisfied that it is likely to become access land, and
(b) may not be confirmed unless the land is access land.

(8) Any access authority having power under this section to make byelaws also have power to enforce byelaws made by them; and any county council or district or parish council may enforce byelaws made under this section by another authority as respects land in the area of the council.

[FIN1] substituted by Communications Act (2003 c.21) Sch 17 Para 165(2)

Land Reform (Scotland) Act 2003

S12 Byelaws in relation to land over which access rights are exercisable-

(1) The local authority may, in relation to land in respect of which access rights are excercisable, make byelaws-

(a) making provision further or supplementary to that made-

(i) by sections 2 and 9 and under section 4 above as to the responsible exercise of access rights; and

(ii) by section 3(2) and under section 4 above as to the responsible use, management and conduct of the ownership of the land;

(b) specifying land for the purposes of section 6(j) above;

(c) providing for-

(i) the preservation of public order and safety;

(ii) the prevention of damage;

(iii) the prevention of nuisance or danger;

(iv) the conservation or enhancement of natural or cultural heritage.

(2) Byelaws made under section (1)(c) above may, in particular-

(a) prohibit, restrict or regulate the exercise of access rights;

(b) facilitate their exercise;

(c) so as to protect and further the interests of people who are exercising or who might exercise access rights, prohibit or regulate-

(i) the use of vehicles or vessels;

(ii) the taking place of sporting and recreational activities;

(iii) the conduct of any trade or business;

(iv) the depositing or leaving of rubbish or litter; and

(v) the lighting of fires and the doing of anything likely to cause a fire, on the land.

(3) Byelaws made under this section shall not interfere with the exercise of-

(a) any public right of way or navigation; or

(b) the functions of a statutory undertaker.

(4) Sections 202 to 204 (byelaws) of the Local Government (Scotland) Act 1973 (c.65) apply to byelaws made under this section as they apply to byelaws made under that Act, but with the following modifications and further provisions.

(5) The references to one month in subsections (4), (5) and (7) of section 202 shall be read as references to such period of not less than 12 weeks as the local authority determine.

(6) The local authority shall, at the same time as they first make the proposed byelaws open to public inspection, consult the persons and bodies mentioned in subsection (7) below on the proposed byelaws.

(7) Those persons and bodies are-

(a) every community council whose area includes an area to which the proposed byelaws would apply;
(b) the owners of land to which the proposed byelaws would apply;
(c) such persons as appear to them to be representative of the interests of those who live, work, carry on business or engage in recreational activities on any land affected by the proposed byelaws;
(d) the local access forum established by them;
(e) every statutory undertaker which carries on its undertaking on land to which the proposed byelaws would apply;
(f) Scottish natural heritage; and
(g) such other persons as they think fit.

(8) The local authority are, for the purposes of subsection (6) above, to be taken as having consulted a person of whom or a body of which they have no knowledge or whom or which they cannot find if they have taken reasonable measures to ascertain whether the person or body exists or, as the case may be, the person's or body's whereabouts.

A Final Observation

Firstly, this paper is designed to demonstrate the care taken to ensure there is no failure of information in *Roading law* and secondly, to show by the examples of analysis provided, that legal principles underpin *Roading law*. Every statement in *Roading law* is supported by similar research.

Garner (above at p1) observes at p392 of "A Dictionary of Modern Legal Usage" that generally not all of the uncertainties relating to a given subject can be plumbed by any author writing an opinion on a legal matter. *Roading law* does not purport to be a definitive work. It was written to serve two ancillary purposes: first that it may stimulate interest (and better, some action) in an area of law which previously has received scant attention, and secondly, to provide some certainty for general readers in a part of our land law which, up to this time, has been subject to so many misconceptions.

Brian Hayes
16 October 2007