Walking Access in the New Zealand Outdoors

A report by the Land Access Ministerial Reference Group

ISBN 0-478-07761-0

Disclaimer

While every effort has been made to ensure that the information in this publication is accurate, the Ministry of Agriculture and Forestry does not accept any responsibility or liability for error of fact, omission, interpretation or opinion which may be present, nor for the consequences of any decision based on this information.

Comments on the contents of this paper, including errors of fact, omission and interpretation, would be appreciated and should be directed to:

MAF Policy
Ministry of Agriculture and Forestry
PO Box 2526
Wellington

Telephone: (04) 474 4100
Facsimile: (04) 498 9898

Requests for further copies should be directed to:
Publication Adviser
MAF Information Bureau
P O Box 2526
Wellington

Telephone: (04) 474 4100
Facsimile: (04) 474 4111

Preface

When the Hon Jim Sutton asked me to chair the Land Access Ministerial Reference Group (the Group), I knew it would be a challenge, but I did not envisage the breadth and depth of discussions that would take place, not only around the table, but throughout the whole country and in both of our cultural strands. It is a tribute to my Group that it has been able to initiate discussions that have been so wide-reaching.

This report shows that access arrangements and associated conventions in New Zealand are under threat. Few New Zealanders recognise this, and there is a reluctance to debate the implications. The Group was given many examples that demonstrate the problems and opportunities for access. Undoubtedly, there is no "one solution fits all" response, yet action is essential in the current environment that seems to focus on "rights" over society at large.

Our Group proposes a broad strategy to promote, encourage and where necessary, direct better public access by foot to rivers, lakes, the coastline, and our forest, mountains and countryside. At the heart of this strategy is the belief that solutions need to focus on provision of access per se rather than ownership for access.

Past attempts to secure formal access to waterways and resources for both Maori and Pakeha first came together, although not intentionally, in the Land Act 1892 when the then Minister of Lands, Jock McKenzie, gave legal status to the Queen's Chain. Specific proposals are suggested to advance and affirm McKenzie's vision for free public access to waterways. This focus builds on Maori and Pakeha needs for practical and secure access without affecting ownership.

I would like to thank the Group for its constructive participation in and consideration of the issues. This Group has an immense range of expertise, and experiences, and the fact that this is an agreed report on a complex, emotive and controversial topic reflects highly on all members. I would like to particularly thank Mr Brian Hayes for his detailed historical research on the legal foundations of the Queen's Chain. He has written a companion document to this report.

I would also thank the many individuals, groups and organisations that responded to the Group with helpful and detailed ideas, examples and views about access. This report endeavours to encompass the range of views expressed through the broad approach it has taken.

Many thanks are also due to Mark Neeson, Grant King and Sharon Thurlow (Ministry of Agriculture and Forestry), who provided advice and secretariat support to the Group.

Finally, thanks to the Hon Jim Sutton for establishing the Group, which has delved in depth into the access situation and taken time to listen to wide-ranging points of view. I have enjoyed the challenge and, on behalf of the Group, now offer our findings to the Minister with the knowledge that this report provides a way forward.

John Acland
Mount Peel
Peel Forest
August 2003

Abbreviations

CPLA	Crown Pastoral Land Act 1998
DOC	Department of Conservation
PCE	Parliamentary Commissioner for the Environment
HSEA	Health and Safety in Employment Act 1992
LINZ	Land Information New Zealand
MAF	Ministry of Agriculture and Forestry
NPS	National Policy Statement
NZCA	New Zealand Conservation Authority
NZCPS	New Zealand Coastal Policy Statement
NZWA	New Zealand Walkways Act 1990
OIC	Overseas Investment Commission
PWA	Public Works Act 1981
RMA	Resource Management Act 1991

Executive Summary

Much of New Zealand's culture and recreation is based on access to the outdoors, whether it be in the mountains, countryside, on rivers and lakes or the coastline. The current concern is that the social conventions that have governed how this access has traditionally been sought and obtained are becoming less stable. Contributing factors include increased responsibilities on landowners, and change in communities, land uses and recreation patterns.

There is a divergence between the expectations and understanding of those providing and those demanding access, which causes tension between tangata whenua, landowners, users and agencies.

This report outlines the discussions and conclusions of the Ministerial Reference Group established in January 2003 to consider whether the arrangements for public access to water margins, access to public land and private rural land are sufficient, while providing for private land use, both now and in the future.

The report proposes a **New Zealand access strategy**, which has five objectives that underpin the shape and content of the strategy:

- to **strengthen leadership** and to provide direction for, and coordination of, access arrangements nationwide;
- to provide greater **clarity and certainty of access** by locating and publising what is acceptable and where it may occur;
- to affirm the validity and **embrace the ethos of the Queen's Chain** by providing mechanisms for its promotion and enhancement;
- to **encourage negotiated solutions**; and
- to find ways to **improve current legislation** provisions for access.

The current legislative mechanisms for access and institutional arrangements are proving to be inflexible and insufficient to meet the expectations for access, today and in the future. The report concludes that a more assured approach to access is needed. This report is intended to promote discussion and debate on the topic, as its implications are very complex. The property rights ethos predominates in New Zealand. It cannot realistically be expected that this will change quickly to accommodate access pressures.

New Zealanders need to be willing to debate the complexities and implications for access to protect and enhance the opportunities for all to have walking access to the outdoors.

Contents

1 Introduction

"Kia horo te marino,
kia whakapapa pounamu te moana,
kia tere te rohirohi i mua to huarahi."

"May peace be widespread, may the sea glisten like greenstone,
and may the shimmer of light guide you on your way."

Background

The principles, values and concepts established by our Maori and Pakeha forebears continue to shape a uniquely New Zealand identity. Maori concepts involving land, water and resources have a particular set of values and concepts that are bound in whakapapa (genealogy) and customs relating to place, resources and tradition. This gives rise to the term "tangata whenua" or those who hold the customary rights to a given place and its natural resources. It is not a general right that is shared with those of a non-descent line without the express permission of the tangata whenua of the "place".

For Pakeha, enjoying New Zealand's unique environment has been a special privilege from the day the first explorer stepped ashore.

Maori and Pakeha share some commonalities, albeit from different cultural contexts, regarding respect for, and a sense of belonging to, land and waters. Access to food and other resources required to sustain a range of customary practices was a fundamental requirement for whanau, hapu and iwi in pre-contact period. The cultural framework for managing access, use and management of land and resources underpins the status of tangata whenua now as it did in the past. Access, use and management of a range of sites, places and resources is an important element of retaining customary practices, resource use and transmitting knowledge from generation to generation.

Access to these resources is essential for gathering kai moana and for foot-based recreation (walking, tramping, fishing). It is also important for reinforcing our spiritual, intellectual, economic and social attachments with them. Understanding the forces and linkages that have shaped this nation's identity is central to the debate about access.

Active participation in outdoor recreation brings personal, community, economic and environmental benefits. Many New Zealanders believe that their opportunity to freely visit these areas is synonymous with being a New Zealander. New Zealanders view themselves as a free, rugged, independent outdoors people. The annual migration in the summer to the beaches, lakes,

rivers, bush and mountains reflects this culture. The outdoors provide opportunities to explore new places, and experience solitude, challenge, adventure and new perspectives on space and time. It is this image that is celebrated and promoted around the world, helping to create a thriving tourist industry.

This investigation into the demand for walking access to water margins and the outdoors for Maori customary use, recreation and leisure originated in a paper written in 1996 by the Hon Jim Sutton, Minister for Rural Affairs. The Minister expressed serious concerns that significant future problems might arise if action was not taken to clarify and enhance access rights. At its core, he believed that New Zealand rules on access "are built on foundations of sand".

In the intervening period, other developments brought wider public attention and focus on access, for example public concern about reported restrictions on access to land in the South Island high country arising from the sale of land to overseas investors (The Listener, 2 March 2002).

The Government considered a report from the Hon Jim Sutton in March 2002. A more detailed paper was considered in September 2002, in which a conceptual framework was advanced for taking into account the issues relating to access and which proposed that a reference group be established. This framework is discussed in more detail in Chapter 2.

A Land Access Ministerial Reference Group (the Group) was formed in January 2003 to test the validity of the following problem:

> *"Whether there is sufficient certainty, information, mechanisms and awareness of expected conduct to ensure responsible public access to waterways and private rural land while providing for private land use, both now and in the future?"*

The Group was also invited to report on any associated matters as they arose out of the terms of reference. The full terms of reference are set out in Appendix 1.

The Group was also given the task of advising the Minister on:

- access to the foreshore of the lakes and the sea and along rivers;
- access to public land across private land; and
- access onto private rural land to better facilitate public access to and enjoyment of New Zealand's natural environment.

In considering the three issues listed above, the Group was asked to assess:

- the level of certainty about what land is accessible and under what conditions;
- the generation, collection and dissemination of accurate and clear information relating to access;
- whether the present level of understanding of what constitutes "responsible access" (conduct) is adequate and whether this approach could be applied in New Zealand; and
- appropriate mechanisms/processes for managing conflicts and concerns.

The Group was asked to confine its investigation to foot access only. This was taken to mean the exclusion of all motor vehicles, mountain bikes, helicopters and horses (but the inclusion of ski touring). The foundations for foot-only access are firstly, that it must be exercised responsibly and subject to reasonable constraints for cultural and social (wahi tapu, funerals) and land management purposes (e.g., lambing), privacy and safety purposes; and secondly, that dogs, firearms and camping are not permitted as of right.

The Minister appointed 11 people to the Group: Mr John Acland (chair), Mr Bob Cottrell, Mr Edward Ellison, Mr Gottlieb Braun-Elwert, Mr Brian Hayes, Mr Simon Kennett, Ms Sally Millar, Ms Penny Mudford, Ms Claire Mulcock, Mr Kevin Prime and Mr Eric Roy (Mr Prime later resigned from the Group to take up a position as an Environment Court Commissioner).

Each member brought a wide range of knowledge and experience to the Group, both in terms of the subject matter and from their own specialist fields. While there was no requirement for members to represent particular sectors of the community, the involvement of various members with conservation, recreation, farming, land law, tangata whenua, and local and central government added value to the discussion.

This report is the product of a seven-month investigation by the Group that commenced in January 2003. The Ministry of Agriculture and Forestry (MAF) serviced the Group.

Consultation

To assist its work, and bearing in mind the Minister's request for a broad conceptual approach to the topic, the Group undertook an informal consultation and information-gathering exercise to help it understand the various perspectives in the community on access. Organisations with a real and long-standing interest in and knowledge of the topic were invited to

provide written comment and meet with the Group. These organisations are listed in Appendix 2. Some of these organisations activated networks to encourage their members to make their views known to the Group. The Group also received around 231 letters on the topic. A summary of "submissions"[1] is available separately from MAF and on MAF's website (www.maf.govt.nz).

The Group asked for views on:

- the perceived extent and nature of issues relating to access (to waterways, the coastline and the countryside) and the causes;
- potential solutions to address any issues;
- the likely social, cultural, economic and environmental impacts resulting from those solutions; and
- with respect to access, the desired vision for the future.

A two-day meeting in Wellington on 14 and 15 April 2003 provided an opportunity for organisations and individuals to make presentations to the Group and to enter into wide-ranging discussion. The Group also heard from the Department of Conservation (DOC) and the Department for Courts, Te Puni Kokiri, the Surveyor-General and Registrar-General of Lands, and Sport and Recreation New Zealand. The Group also heard from the Department of Labour (on occupational health and safety legislation).

Members of the Group also attended meetings of rural community groups in the Wairarapa (Castlepoint) and Banks Peninsula (Duvauchelle) and of Maori in Rotorua. The full Group visited the Turangi-Taupo area to help it better understand views held by Maori and freshwater anglers relating to access. Members also participated in a multiplicity of local events, meetings and other events to discuss and seek views about the project.

Both the written material offered and the dialogue with various organisations have proven invaluable to the Group's enquiry. The submissions affording "on the ground" examples of nationwide access problems and solutions have been of particular use. The fact that access arises frequently as both a national and a local issue reflects community concerns and interest about current arrangements. The Group was impressed by the depth of analysis, innovative thinking and the openness of discussions and is grateful for the time, effort and thought given to this topic of substantial conceptual and practical difficulty.

[1] Because the Group did not undertake a formal consultation process, the written responses are not classified as formal submissions. Nevertheless, the summary usefully describes the correspondence the Group received from interested parties and is used here in a general sense.

2 The Characteristics of Access

Background

Social conventions are customs and practices that mould and are moulded by societal values. These conventions guide communities on what is acceptable and beneficial to the people within them. In the context of public access to land or water, the convention has been that people who want reasonable access must be granted it after obtaining the consent of the landowner (whether government or private). This convention is more important for informal arrangements for access rather the legal rights conferred on the public by legislation.

Customary rights to land are generally derived from take tupuna – a right which can be established because an ancestor has asserted himself over land or resources using, for example, any of the tikanga (lore or custom) listed below:

- umu tangata – rights through conquest;
- take whenua – also an inherited right;
- mahi tangata – an ancestral right proven because of the discovery and subsequent naming of the land and resource;
- tuturu te noho – rights of settlement which are only valid if there is an established inter generational permanence or ahi kaa;
- kai taonga – exchange of land or resource for taonga (gifts and or other treasures); and
- tuku whenua – the gifting of land or resource.

The above determines how customary right were achieved for particular areas but does not define the nature and extent of those customary rights as they apply today.

There are quite differing views within New Zealand society on whether there is currently a crisis with regard to public access to the foreshore, lakes, rivers, the bush and mountains. Based on all that the Group has seen, heard and read, it believes that the face of public access in New Zealand is undergoing change and being increasingly restricted, to the detriment of many New Zealanders seeking access and those who support the concept of open access. The social conventions that have provided the platform for obtaining public access from landowners are under increasing stress. There are many reasons for this and they are explored in this chapter, along with the broad influences and themes relating to access.

Where a stable community exists, there is opportunity for these obligations to be learnt and understood by its members. A stable community within a defined setting will be familiar with the information relevant to land access in that locality, such as rules that may apply during lambing.

Community changes are often minor and intermittent, yet the cumulative effect can be significant. Tangata whenua, landowner and community expectations regarding access and the conduct expected of each party may lead to social norms changing more quickly than some parties can adjust to them. Changes may be driven by population dynamics, new landowners, different land uses and increased mobility. For example, new owners may not understand or even be aware of informal arrangements that may exist between tangata whenua and previous owner(s) for access to kai moana or wahi tapu sites.

A further aspect is the current lack of a shared understanding about where access is available and under what circumstances. Such an understanding is necessary to provide certainty about the location of specific land tenure and the rights attached thereto. As the community structure changes or differing expectations arise regarding access or the community is no longer aware of this information, these informal arrangements become subject to increased tension possibly leading to conflict.

Thus, the approach taken by the Group is to assess whether the mechanisms for developing access arrangements that balance landowner rights and community needs and wants are sufficiently dynamic or adequate to meet new contexts. If these mechanisms are not appropriate then a case may exist for government intervention.

From the terms of reference set before the Group, four elements appear to determine the future of the social conventions relating to public access in New Zealand and on which the Group has focused its investigation:

- *Certainty about what land is accessible and under what conditions:*

  There is a lack of certainty and clarity regarding the definition of, and rights of access to and along, water margins and to other public lands such as the conservation estate. "Urban myths" exist about the meaning, location and use of, and rights of access to, the Queen's Chain. There is no legal device called the Queen's Chain.

- *The generation, collection and dissemination of accurate and clear information relating to access:*

  Information about the existence, and knowledge of the location, of land for public access (including unformed roads) is seldom publicised. For instance, there is a public right of access along "paper"

roads but this right cannot be exercised properly if information on the whereabouts of these roads is not known.

- *Establishing a socially agreed "norm" regarding the desired conduct of visitors, and expectations relating to "responsible access"*:

  There are no widely used processes to manage interaction or conflict (aside from excluding access) arising from changes in land use, communities and patterns of recreational use.

  Visitors to an area may feel that there is a "right" to cross land if they cause no damage and are considerate, and access is for a specific purpose, e.g., to walk along, fish or swim in a river or other low-impact recreational activity. Visitors may not seek permission because the owner cannot be readily identified or found, or the time needed to obtain permission may not be seen as worthwhile.

- *Appropriate mechanisms/processes for managing conflicts and concerns*:

  Which, if any, mechanisms are required to help minimise conflict and increase recreational opportunities? The Trespass Act 1980 protects the landowner's property right to exclude and provides mechanisms to enforce it. It does not offer mechanisms to minimise or manage conflicting expectations (aside from excluding access).

Urban and Rural Private Land

Wherever there are people, there is a need to provide for recreation and safe movement from one area to another. In cities, public access is provided through public roads, footpaths, walkways and reserves (open spaces). Where natural features such as waterfalls, the coastline, rivers and beaches exist in or adjacent to urban areas and become attractions, public access to them has traditionally been provided through the purchase of land by central or local government.

In contrast, public access on private rural land may be facilitated through walkways, public roads, rights of way, easements, other negotiated agreements between the landowner and user, or implicit arrangements (with benevolent landowners). These mechanisms are often less visible and much more subject to change. Public access in this context differs from urban areas. Access is predominately to enable the exercising of customary uses and for recreational purposes by individuals or groups.

The built environment affects expectations for access. Within cities there is a sharp delineation, by way of physical signs, between private property and the areas available to the public. Manicured gardens, security alarms and letterboxes are interpreted as social indicators that an area is residential private property. These tangible signs reinforce the perception that homes

and their curtilages are not available for access by the general public. Likewise, places of work in a city may be fenced or contained within a building, thus indicating how far the public is welcome. There is not the same potential for recreation without the invasion of privacy.

Rural land, however, is characterised by low population density and open space, lacking the pointers that help to define private property. Current legal mechanisms for access, such as unformed legal roads by their nature being public, provide a right of entry and use in an area that is otherwise private. These factors contribute to a presumption by some that private rural land generally should be available for recreation. This attitude tends to ignore the fact that the countryside is a place of work and where people live. While these lands are private and, in that sense, no different to urban areas, their size and "openness" generate quite different expectations to those that exist in urban areas.

The discussion in this chapter thus far indicates that people hold different perceptions and expectations about public access in urban and rural environments. The variation between what is and is not acceptable for public access is in part derived from the culture, values and desires of people. There is no differentiation in terms of ownership in law between urban and rural land. Both rural and urban landowners are subject to the Resource Management Act 1991 (RMA), the Biosecurity Act 1993 and other provisions which impose limits and define "appropriate" property use. It is only city and district plans developed under the RMA that provide some differentiation for land as urban and rural by zoning for activities. These plans recognise that similar activities have different effects when they occur on rural land compared with urban land.

Changes in Land Use

Private rural land has experienced significant changes with regard to community composition, land ownership and land use over the past 15 years. These changes mean that expectations for public access may not be met, or have undergone transformation.

The nature of land ownership in rural New Zealand, especially land close to cities and towns, is also changing, with increasing numbers of "lifestyle blocks" and the associated aspirations of those owners. This is common on the peri-urban fringe and commuter areas where rural land is subdivided for lifestyle blocks. Open spaces, particularly those adjacent to bodies of water, are being replaced by small properties whose owners have sought the serenity and privacy of the countryside. The demarcation of these properties as "private" is visibly more obvious than the former open space which dominated these areas. The values of these residents are more akin to those

of urban residents, including their expectations for public access. Indeed, public access through these small rural blocks could often impinge on the curtilages of private dwellings. As a consequence, public access to these areas becomes increasingly restricted. This problem is accentuated by district plans that permit closer settlement and subdivision without providing for public access needs.

The main source of income for the majority of rural property owners in New Zealand continues to be farming. Where appropriate, however, landowners have also sought to diversify away from traditional land uses or have sought off-farm income. Profitability and technology have stimulated conversion to intensive land uses such as horticulture, deer farming, cropping and dairy farming on lowland areas. This constrains the extent of land that is physically suitable and available for recreation. Deer fencing, for instance, means that it is physically difficult to have public access. Controls on access may be needed in areas of intensive farming to minimise impacts on production, safety and the requirements of different land uses for space (e.g., deer farms, forestry and viticulture).

Other grounds that landowners might have for controlling public access are discussed in Chapter 6.

A significant and continually developing rural tourism industry now operates as an integral part of traditional farming systems and rural communities. The Group was informed about an increasing trend for landowners to capitalise on controlled access over private land by investing in activities such as private walkways, garden and farm tours, and home-stays.

Other businesses cater for the high-income-bracket tourist who is prepared to pay for exclusivity. This is common in the hunting safari and fly-fishing industries. Demand from overseas anglers for high-quality fishing experiences has increased commercialisation of freshwater fishing in New Zealand. More landowners are looking to take advantage of this opportunity, either by developing ventures themselves or by leasing exclusive rights to fish the waters to other businesses. A consequence is that independent anglers who may have enjoyed relatively unrestricted access to water margins for fishing in the past are now being excluded from high-quality fishing opportunities. Examples of restrictions are the Hawkes Bay region where it is estimated that 24 percent of the 3715 kilometres suitable for fishing have no legal public access, and the Nelson region where access exclusions or restrictions vary from 41.5 percent to 95 percent (Maruia River).

Tension arises where anglers seek access to the following areas:

- publicly owned riverbeds and banks surrounded by public land. This presents no major "as of right" access issues except where practical access cannot be obtained (because it is a "wilderness zone" or natural obstructions mean that crossing private land is necessary);
- publicly owned rivers surrounded by private land where public use of the Queen's Chain is determined by the adjoining landowner who controls practical access; and
- privately owned riverbeds and banks surrounded by private land where there is presently no "as of right" access to the land, wildlife, fish or water.

Changes in Land Ownership

Many farming properties have passed traditionally through the family line which, in effect, brought permanence to the make-up of rural communities. Changes in economic drivers and land uses have led to a less cohesive community and more variability in composition. New owners, including overseas investors and owners, expatriates and New Zealand investors, bring with them different concepts of property ownership and expectations of what should and should not occur on their properties.

This has implications for access arrangements that are based on mutual understanding and trust within a stable community. If the community structure changes, differing expectations arise regarding access or, if the community is no longer aware of these informal arrangements, they become subject to increased tension possibly leading to conflict. Submissions received by the Group outlined concerns about the number of farms and coastal areas being bought by overseas interests or absentee owners and the subsequent closure of access. The submitters felt that some of this new generation of landowners tend to disregard the New Zealand culture and identity, which places a high value on free access to natural resources and a lifestyle based on outdoor recreation.

The Group appreciates that there are costs to landowners in providing access (a public good) and that this cost should not be undervalued. Landowners face increasing demands on their time and resources in dealing with access requests. While there is a legacy of goodwill among landowners for providing access, this can be eroded as landowners incur the cost when this privilege is abused or irresponsible behaviour occurs on their properties.

On the other hand, most users act reasonably and seek access for responsible activities. Users expect to be able to secure permission to have access over land to water margins and public land. This expectation is under challenge as foreign ownership, new owners with no family attachment to

the locality, absentee owners, lifestyle blocks and other economic and land tenure changes create barriers to gaining permitted access.

Changes in Demand for Access

The reasons for access remain relatively constant despite social and economic changes. Tangata whenua require access to obtain mahinga kai (traditional food or resource areas) or native plants for the continuation of customary practices (as guaranteed by the Treaty of Waitangi). Maori and Pakeha seek access to retain connectedness with a physical setting for spiritual understanding, family history, customary behaviour, traditions or simply the enjoyment arising from the activities pursued in a place. This may be reinforced by visiting the physical setting on a regular basis or merely being satisfied with the knowledge that it exists and it is possible to gain access.

New Zealanders favour private transport because of the independence and convenience it offers. The small population, the isolation of communities and the ruggedness of the terrain also mean that the public transport infrastructure is not comprehensive outside metropolitan areas. Compared to 50 years ago, better roads and cars, wider choice and inexpensive travel, more leisure time, increased disposable income and a wider range of recreational pursuits mean more people are better able to travel more quickly to remote areas for recreation. Distance is no longer a barrier to recreation for even weekend adventures.

This ease of access brings with it problems for rural communities and landowners: crime (theft, drug plantations); health (disposal of toilet waste); dogs; disruption to farms and businesses (time answering queries, damage to property, mixing of stock, damage to fences and tracks); and personal safety.

Other factors influencing the future demand for access include:

- the New Zealand population is likely to be older, more Polynesian and more Asian, with an increased preference for the coastal environment and short-duration activities; and
- the North Island population is likely to increase rapidly and there will be an increased demand for recreational facilities.

At the same time, there is a concern that urban people are becoming less familiar with the rural environment, its needs and community expectations. Preceding generations of urban dwellers were more likely to have rural links through friends or family, affording them the opportunity to experience

farm life. As a result, appropriate behaviour was acquired (such as closing gates, controlling dogs and farm systems). Today's urban society has fewer rural knowledge of links, and this rural knowledge and understanding is fading.

Despite popular perceptions, 85 percent of New Zealanders live in urban areas of 1000 people or more. Traditionally there has been a close connection between urban and rural New Zealand. Today, urban families have fewer, if any, opportunities to visit their "rural cousins". The rural connectedness that is presumed to link New Zealanders together is myth rather than reality. In 1890 there were 18 people per farm, in 1950 there were 21 people per farm and in 2002 there were 57 people per farm.

It is difficult to gauge the current and potential level of recreational demand from urban dwellers. Major cities usually have regional, or similar, parks that provide recreational opportunities close to them. As the population increases and the urban area expands, pressure on these public areas may require augmentation through private or commercial ventures or through other means. The high use of existing walkways suggests that an increasing urban population will result in more pressure for better access on the margins of urban and rural areas. Submissions and other literature show that peri-urban areas are coming under pressure for more public access and higher use. For example, forests owned by Carter Holt Harvey near Auckland and Levin and those owned by Wenita Forest Products Ltd and City Forests Ltd near Dunedin are heavily used by mountain bikers and each company has a comprehensive recreational access policy. In the Auckland and Wellington regions the respective regional, city or district councils have had an active policy of increasing recreational opportunities over the past 15-20 years.

It is apparent that future requirements for public access along, and use of, water margins and the foreshore will increase. Submissions suggested that in the future, property adjacent to beaches (which are popular for picnicking or camping) in the Auckland region will come under pressure. This pressure arises from people achieving access by vehicle and accessing the coastline by boats.

Proposals to improve access need to be balanced against other "public good" interests, such as environmental protection (including biodiversity protection, biosecurity controls, protection of coasts and waterways, and riparian management) and protection of cultural values (including mahinga kai and wahi tapu). Many such interests have been defined and protected by the Government under existing policies, strategies and legislation. Many are also being protected voluntarily by landowners and community groups.

Conclusion

Future arrangements for public access to the outdoors should reflect the values of New Zealand society. As one submission put it: "The land and waters of New Zealand are a treasure to all those who feel they are New Zealanders and access to these, in part, historically defines the values of our society." Tangata whenua have traditionally not been part of a national "access debate".

For Maori, access issues have always been localised as the affected parties would have been concerned only with their own resource and access issues. Custom dictated that it was not seen it as their right to speak for other whanau, hapu and iwi even if the issues were replicated around the country. The overlay of land tenure changes removed many customary access, use and management roles that previously existed. The affected whanau, hapu and iwi were not a part of the new "governance" structures that sprang up and were, in many cases, not attuned to the new structures that seemed remote from customary practice and the face-to-face, site by site relationships that governed custom.

Nevertheless, there are situations where where Maori may have had informal and traditional access arrangements for obtaining mahinga kai but the land has undergone ownership changes, placing those arrangements at risk. In addition, Maori are sometimes facing new pressures over access arrangements. For example, Mt Tarawera is on Maori land and is one of the few resources that the local iwi has to develop an income. Hence, it has restricted access to organised guided walks under a concession arrangement.

The social conventions on which public access has traditionally been sought and obtained are in a state of significant flux. There appears to be a divergence between the expectations and understanding of those providing and those demanding access. This divergence has been displayed in a variety of ways, including:

- where access has become an assumed right rather than a privilege, thus abusing the goodwill extended by landowners; and
- where landowner values for use of land do not align with traditional expectations, whether cultural or lifestyle oriented.

Any changes to the existing balance of interests, rights and responsibilities relating to access may have significant social, economic and environmental implications. It will be important to identify and assess these implications as part of any ongoing review of public access provisions.

3 Arrangements for Access in New Zealand

Background

New Zealand's arrangements for public access have three dimensions. Maori hold land tribally. Individuals or groups from other tribes were given access rights and even invited or allowed to reside with particular tribes. In a way not too dissimilar to the European approaches to land "rights", hapu and whanau groups were allocated the right to use predetermined areas of land according to the specific and general needs of the individual and the group. While Maori customary title allowed individuals and groups "customary" rights in the use and occupation of land, a veto existed on all alienation or absolute giving away of land outside the tribe (Asher and Naulls, 1987). That arrangement was, however, governed by a mix of mechanisms such as manawhenua, turangawaewae, rangatiratanga, whaka-papa and ahi kaa (continued occupation). These controls regulated the acquisition and maintenance of resource rights (Tau Te M. et al. 1990).

The second dimension is that of the European, where statute determines the provision of, and access rights to, lands. Legislation provides for rights of access onto land for a variety of reasons other than recreational access (mining exploration, emergencies, utilities).

Legal public access for walking and other passive recreation is composed of eight basic types of reservation including roads, esplanade reserves, marginal strips and access strips. There are eight basic reservations that make up the Queen's Chain:

- roads (1840-1892);
- marginal strips (1892 to the present time);
- ambulatory marginal strips (1990 to the present time);
- public reserves along water (1840 to the present time). [These are the marginal strips which were retained by the Crown when land was alienated];
- esplanade reserves, of various types (1912 to the present time);
- recreation reserves (1977-1979);
- esplanade strips (1991 to the present time); and
- Maori reservations (2002 to the present time).

The status of publicly owned margins along water boundaries is set out in Appendix 3 "The Queen's Chain at a Glance".

Aside from acquisitions and compensation under the Public Works Act 1981 (PWA), the ability of DOC and local authorities to require public access is currently triggered only when there is a change in the status of the land adjoining the foreshore, or where public access requirements over private land are a condition of a resource consent.

Other needs for access tend to be met through informal arrangements where negotiated agreements occur between the landowner and specific individuals or groups. This usually includes access by tangata whenua for customary use, although section 6(e) of the RMA requires that local authorities recognise and provide for the relationship of Maori, their culture and traditions with their ancestral lands, water, sites, wahi tapu and other taonga.

Legislation also has an impact on how access can (or should) occur. In addition to the statutory regime, there is a small but developing regime based on codes of conduct. These are generally developed by an organisation for use by its members (e.g., the New Zealand Mountain Bike Code) or by the public.

Guidance Given to Government Agencies

Resource Management Act

The RMA is the primary statute guiding local government in its decisions about the sustainable management of New Zealand's environment. Part II of the RMA makes specific mention of public access as being a matter that local authorities must recognise and provide for when developing and implementing their respective policy statements and plans. Section 6(d), "Matters of national importance" states:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers.

Section 6(d) does not guarantee a right of access to all areas of the coast, but acknowledges the importance of coastal access to New Zealanders. The maintenance and enhancement of public access to the coast must be balanced against its effect on other important natural, social and cultural resources listed in Part II of the RMA (including Maori cultural values).

The New Zealand Coastal Policy Statement (NZCPS), which sits under the RMA, provides more specific guidance to local government about the management of the coast. The NZCPS includes four policies that directly relate to the maintenance and enhancement of public access. These issues are to be addressed by regional policy statements, regional plans, coastal plans and district plans. The four policies relate to:

- *restriction of access*: to protect the environment, Maori cultural values or public health and safety, or to ensure a level of security consistent with resource consent;
- *awareness of access*: that agencies strive to locate all areas that the public may access and as a consequence, ensure that provisions are made for people with disabilities to access the coast;
- *possible mechanisms for providing access*: namely, the creation of esplanade reserves, esplanade strips and access strips; and
- *identifying important cultural sites*: for Maori who wish to access them, if it is practicable to locate these in plans.

Within the coastal management regime established by the RMA and the NZCPS, territorial authorities are empowered through section 31 of the RMA to make provision for public access to the coastal environment from the landward side. The current legislative tools available to city and district councils are esplanade reserves and strips or access strips.

New Zealand Walkways Act

The New Zealand Walkways Act 1975 established a New Zealand Walkways Commission and district walkways committees to promote, supervise and control the administration of walkways established under that Act. Walkways offer an alternative to other reservations and provide recreational access over both public and private land. This statute was replaced by the New Zealand Walkways Act 1990 (NZWA), which radically altered the way in which walkways are administered[2], although the purpose remains unchanged.

The NZWA establishes walkways through consultation and agreement with the landowner by creating an easement. The aim of the Act is to provide:

> "the people of New Zealand … safe, unimpeded foot access to the countryside for the benefit of physical recreation as well as for the enjoyment of the outdoor environment … they pass through" while protecting the rights of landowners.

[2] The Commission and district committees were subsumed into the New Zealand Conservation Authority and conservation boards respectively.

After consultation, the local conservation board makes a recommendation to DOC to negotiate a right of way easement or lease of the land. The purchase price or other consideration for any easement or lease is paid out of money appropriated by Parliament for the purpose. Walkways entitle public foot access over the walkway without charge. A walkway proposal is approved by the Minister of Conservation and formally declared a walkway by a notice published in the New Zealand Gazette.

There are over 150 walkways in New Zealand. They offer a variety of opportunities for outdoor recreation. Many are close to urban centres and are popular for family outings (DOC, 1995). A large number of walkways have been approved but many are not formally surveyed or gazetted. For example, Canterbury Conservancy has 25 approved walkways but only one has been formalised under the. The St James Walkway (North Canterbury) has become a major tourist attraction.

Most official walkways cross public land because there are fewer legal difficulties and management issues to overcome and the process of establishing walkways is time consuming and costly (survey costs). The formal status of these walkways provides landowners with legally enforceable rights and enables compensation to be paid if losses occur that are directly attributed to the use of the walkway. However, until the walkways are gazetted, these rights are not conferred on the landowner and there is no ongoing certainty of access for the user.

DOC advised the Group that it places greater priority on negotiating informal written agreements with adjoining landowners to establish, maintain and enhance practical and legal access to the DOC estate than on the creation of new walkways over private land. These agreements are not binding on subsequent landowners and can be revoked at any time.

Guidance Given to Landowners

Landowners have, unless legislation specifically states otherwise, absolute control over access to their property. The following statutes describe the core responsibilities (and liabilities) that the landowner must consider when granting access. These apply to all land, whether Maori or general title.

Health and Safety in Employment Act

The Health and Safety in Employment Act 1992 (HSEA) deals with all safety and health issues in all workplaces and during all work activity. The rights and responsibilities of property owners (Crown, lessees and

managers) in relation to people entering the workplace (including farmland) are detailed in the 1998 amendment to the HSEA.

The Health and Safety in Employment Amendment Act 1998 sought to clarify the responsibilities of farmers who host recreational visitors. The amendment makes it clear that farmers do not have a duty to persons using their land for recreational or leisure purposes unless they have given express consent to those persons to be on their land.

This amendment was made following the case of *Labour v Berryman* (1996)[3], where a farmer was held liable for the death of a beekeeper who was killed when a bridge on the Berrymans' farm collapsed while the beekeeper was driving on it.

The amended Act gives owners two choices when considering access requests from those seeking to enter a workplace either to:

(a) say no: This releases the landowner from any responsibility for the person's safety. If the person continues onto the property, trespass laws might then apply; or

(b) say yes: The landowner then has a responsibility to inform persons of any "abnormal" situations/hazards that exist on the property.

Landowners cannot be held liable for damage, injury or death if they warn authorised visitors (i.e., those who have sought permission) of all "out of the ordinary" or "abnormal" dangers. "Abnormal" means particular activities or events that may be occurring (e.g., blasting, felling trees and earth moving). It does not include natural hazards, or typical features of the land (e.g., wasp nests and bluffs).

The Group notes that, while the legislation has been clarified, many grey areas remain under the HSEA. Identifying who is responsible for carrying out requirements under the HSEA is complicated by situations of common use of land or common ownership (e.g., Maori land in multiple ownership and top-dressing airstrips that may have been constructed and funded by a group of farmers). As these situations have not been tested in case law, landowners are reluctant to give permission as long as this uncertainty remains.

[3] (1996)5 NZELC 98,394 (Digest)

Occupiers' Liability Act

The Occupiers' Liability Act 1962 codifies common law by imposing a "common duty of care" on occupiers of land and premises (including the Crown) towards all visitors who are permitted to enter. This is a duty to take such care, given the circumstance of the case, is reasonable to see that the visitor will be reasonably safe using the premises for the purpose for which he or she is invited or permitted by the occupier to be there.

Crimes Act

Landowners are liable under sections 145 and 156 of the Crimes Act 1961 if they erect, make, operate or maintain anything which may endanger human life. This places the onus on landowners to take reasonable precautions with bridges or roads on their property that may be used by the public.

Forest and Rural Fires Act

The Forest and Rural Fires Act 1977 establishes responsibility for the control of fires and the liabilities and penalties for outbreaks. While it does not have specific provisions regarding access, it does allow a fire authority (previously DOC, but now territorial authorities) to exclude some or all persons from entering a forest where fire hazard conditions exist. This overrides any other access arrangements.

The Act makes provision for the recovery of any loss of property damaged or destroyed by fire, or for the recovery of costs incurred for prevention. The cost of an average rural fire (for helicopters, crew, food, etc) may amount to $200,000. It is, however, often difficult to trace the person(s) responsible for the fire. The New Zealand Fire Service Commission or the affected landowner overseeing the firefighting is often left with the cost of the fire and/or facing legal action.

It is the responsibility of the landowner to take civil action to recover costs from a fire started on his or her property; however, this is expensive. For this reason it is necessary, despite the cost, to insure against the risk from public negligence. The potential cost to the landowner provides a significant disincentive for allowing access onto a property.

Guidance Given to the Public

Trespass Act

New Zealand has very rigorous trespass laws. Under the Trespass Act, a criminal offence of trespass is committed by a person who, after being

warned to leave by the occupier of a place, neglects or refuses to do so. The Act is designed to apply in a wide variety of situations ranging from domestic premises to nightclubs, commercial workplaces and farms.

The Trespass Act is the primary statute governing access to private land, including Maori land, and protects the right of the landowner to determine access to property, subject to exceptions contained in other legislation. These laws reinforce the view that the "right to exclude" is part of the "bundle" of rights attached to property. The Trespass Act reflects the current legal position that a private landowner's rights are paramount.

The Trespass Act in effect defines and addresses "irresponsible" access, such as leaving gates open, disturbance of stock by taking dogs onto a property and not asking permission. Apart from non-statutory guidance, this is the only "code" which builds a social awareness of the needs of, and responsibilities towards, rural landholders.

Customary Processes

Custom (tikanga) and practices over the administration of land and resources were developed by kaitiaki (guardians) to safeguard and protect their taonga. Kaitiaki develop rules and protocols to define how these resources would be managed with respect to decisions of access and use of those resources. Concepts of rahui (a form of prohibition) and tapu (sacred) were used to regulate access and use of all resources. Tribal groups were also expected to observe the protocols applying to the lands of neighbouring tribes (Asher and Naulls, 1987, p. 4).

Non-statutory Guidance

Some outdoor recreation organisations have developed non-statutory codes of conduct/practice specific to their particular interest or activity. These codes indicate appropriate and responsible behaviours towards others, the need to apply common sense when exercising a right of access and care for the environment. The best known and most widely accepted is the New Zealand Environmental Care Code, promoted by DOC, which describes acceptable conduct on DOC land. Other codes are specific to game bird hunting, fishing or mountain biking. Federated Farmers have developed land access codes that provide guidelines for promoting good relationships between the landowner/occupier and mineral exploration companies.

In the case of commercial rafting, a code of practice for safety was developed by the New Zealand Rafting Association under Part 80 of the Maritime Safety Act 1998. The Association is responsible for administering the only recognised qualification for white water rafting in New Zealand. The Maritime Safety Authority Rules adopt this code of conduct. This is the only known code for a recreational activity that is defined under legislation. The following chapter discusses recent developments in codes of conduct that define "responsible access" overseas.

Access Arrangements on Maori Land

In general terms, legal access (such as the laying out of roadways) cannot be granted over Maori land except by agreement with the landowners or by order of the Maori Land Court. This is reflected in section 11 of the RMA, which exempts Maori land from the restrictions on the subdivision of land.[4] An amendment to Te Ture Whenua Maori Act 1993, however, provides that a Maori reserve (that is not a wahi tapu) may be held for "the common use and benefit of the people of New Zealand". This is consistent with the non-alienation provisions in the RMA, although local authorities may be represented as a trustee for the reserve.

Even within Maori land there are anomalies, such as the access strip along the shore of Lake Taupo. This access strip was created through the Maori Land Amendment and Maori Land Claims Act 1926 as part of an agreement between Ngati Tuwharetoa, the tangata whenua of the Lake Taupo region, and the Crown. This agreement provided that the bed of Lake Taupo and the Waikato River, down to and including Huka Falls, would be the property of the Crown, but did not give title to the Crown. In 1992, ownership of the beds was revested in Ngati Tuwharetoa.

The deed allows continued freedom of entry to, and access on, the lake waters for recreation and enjoyment, subject to conditions and restrictions by the Taupo-Nui-A-Tïa Management Board to protect and control the public use. To reflect the access privileges given to the public, the Crown makes an annual payment to Ngati Tuwharetoa equivalent to half of the annual income from fishing licences for the Taupo fishing area which is administered by DOC.

[4] There are variations on this provision. For instance, where there is a partition of land into parcels to be held by owners who are not members of the same hapu, the Maori Land Court must have regard to the requirements of the territorial authority in respect of esplanade reserves and make an order for a Maori reservation instead of an esplanade reserve.

Treaty of Waitangi

Maori assert that under the Treaty of Waitangi the Crown, as a Treaty partner, has an obligation to actively protect the property interests of Maori land, as well as customary interests. Article Two of the Treaty granted to Maori "full exclusive and undisturbed possession of their lands and estates forests fisheries and other properties". The Waitangi Tribunal has expressed its preference for defining the rights under Article Two as "rangatiratanga", rather than the "exclusive possession" used in the English text of the Treaty. According to Crengle (1993), who has published a commentary on implementing the RMA in the context of the Treaty principles, the use of the term "rangatiratanga" denotes:

> "an institutional authority to control the exercise of a range of user rights in resources, including conditions of access use and conservation management. Rangatiratanga incorporates the right to make, alter and enforce decisions pertaining to how a resource is to be used and managed, and by whom." (p.11)

Conclusion

Current arrangements for public access exist within a legal framework that establishes clear rights for the landowner to determine access to property. Other statutes such as the Forest and Rural Fires Act and the HSEA provide little incentive for the landowner to allow access outside the existing legal framework. The NZWA is intended to overcome some of these difficulties however, the procedures required are costly and, under the current legislative regime, opportunities are frequently not progressed.

Guidance on the rights and responsibilities for obtaining and granting public access are skewed, often by perverse incentives, in favour of excluding the recreational user. Absolute rights to obtain access are conferred only on public land, such as roads. Even then, this is not unfettered access. The existence of these roads is not generally publicised by territorial authorities and often their correct position is unknown, a situation tolerated by landowners who are concerned about security, stock disturbances and rustling. Territorial authorities are reluctant to enter into disputes because of the cost – to ratepayers – of surveying the roads and the fact that benefits often accrue to visitors rather than ratepayers.

Notwithstanding this, government agencies, private organisations and interested members of the public continue to make incremental and case-by-case efforts to protect and, where possible, enhance access to the New Zealand backcountry, rivers, lakes and foreshore. This may be through subdivision and other land sales or through community and landowner initiatives. In general, the focus is to protect or facilitate access to public land, especially

where private landowners have, consciously or otherwise, prevented access to the Queen's Chain. These initiatives may continue but a strategic approach is needed rather than ad hoc incremental attempts to fix gaps in the law that will lead inevitably to frustration and continued conflict.

4 Public Access Arrangements in Other Countries

Background

In contrast to the largely statute-based access arrangements in New Zealand, a markedly different approach to public access is found overseas. An influential factor in considering access arrangements in other countries is that the rights and traditions embodied in either formal rules or social conventions reflect the society in which they exist.

In Europe (including Scandinavia, Scotland and England), the arrangements have formed in a society that has well-established expectations for access across private land and has experienced only gradual change in farming systems. While the principles of respect and responsible access are an integral part of society, the systems are not without pressures, such as increasing urbanisation with little public land available for outdoor recreation. To this end, some countries have chosen to codify in statute the common law that governs public access.

The Group stresses that access arrangements should be viewed in the context of their cultural and societal traditions. New Zealand is unique in that national parks and other public reserves account for approximately 30 percent of land, one of the highest proportions in the world. Customary access in Europe tends, in some cases, to align itself with legislation, whereas in New Zealand customary access of tangata whenua (and perhaps Pakeha) is not well reflected in statute.

Access Arrangements in Other Countries

There is little comprehensive and useful information and research on access arrangements in other jurisdictions. Comparisons between countries are also difficult because of different legal systems, different physical characteristics of the countryside and different cultures. This report does not consider legislation in Australia, the United States and Canada. These countries like New Zealand have a common law and statutory foundation. In addition, the federal/state/provincial government system means that access laws are likely to vary widely.

The following is a survey of predominately European arrangements, summarised from a research paper completed for England's House of Commons (2000).

France

Traditional rights of access are largely restricted to rights of way in the form of servitude de passage (right of passage) and droit de marche-pied (right to walk, along canals and canalised rivers). There are about 120,000 kilometres of footpaths in France (about 50,000 kilometres less than in the United Kingdom, although France is a larger country). Rights of public access, other than rights of way, are only available within national parks and nature reserves.

Germany

Betretungsrecht, the traditional right of public access, confers a public right of access to forests, open land and foreshores, and along footpaths and roads. The right does not give access to enclosed farmland, except on farm roads and tracks. This right has been given a modern statutory basis. It enables free access across another's land and the right to pick berries, flowers and mushrooms anywhere, provided that there is no damage done to the owner's property. Under federal legislation, the right extends to walking, running, sitting, camping, playing, cycling, horse riding and using wheelchairs in forests and, in some states, includes skiing and skating. This right applies to about one third of the former West Germany. Comparable information is not available for the former East Germany.

Switzerland

Switzerland also has a Betretungsrecht, mainly over uncultivated land, and there are also ancient rights of access to forests and woodlands. Access is restricted for periods when land is being cultivated.

Austria

There is a traditional right to roam and the Forstgesetz provides a legal right of access to forests, subject to conditions and restrictions. By contrast, in the Netherlands the main access rights are the public rights of way.

Scandinavia

Access arrangements in Scandinavia confer varying rights on the public for access. In Denmark, legislation provides for access to public forests and to all beaches. The Conservation of Nature Act (Denmark) 1968 provides access for walking and short visits to uncultivated and unfenced areas and roads in private forests.

Access to private land by the public for non-destructive recreation exists in Sweden through the concept of Allemansrätt ("Everyman's Right" or "The

Right of Common Access"). This concept grew out of customary practices in the Middle Ages and is an unwritten law. It is a package of "ill-defined" rights, responsibilities and obligations. It allows free access across another's land, the right to stay overnight and the right to pick berries, flowers and mushrooms anywhere, provided that there is no damage done to the owner's property. It excludes access to private grounds, parks, croplands and gardens (the "Home Peace Zone"). The concept retains the support of landowners, although it faces challenges such as costs to landowners from increasing public use, a tendency for commercial businesses to capture the benefits but not the obligations of Allemansrätt, and disturbance from recreational activities such as snowmobiles and camping.

Allemannsretten, or the public right of access, is also part of Norway's cultural heritage. Norwegians have traditionally allowed the public to travel over, enjoy short stays on, or collect natural products for personal consumption on land and waters owned by others. The Outdoor Recreation Act 1957 sought to adapt traditional rights to modern circumstances due to the pressure these rights were coming under and to codify them in detail.

England and Wales

Access across certain rural land in England is based in custom (it is part of the "King's Highway") and in legislation since 1884. It is not an unfettered right.

In its 1997 manifesto, the British Labour Party promised increased access to the countryside. The first step was a consultation paper in 1998 on access to the countryside. Following consultation, a Bill was introduced in March 1999 "to give people greater access to the countryside" and was passed as the Countryside and Rights of Way Act (England) 2000.

The legislation confers a right of access (foot access only) to defined "access land" but not the "right to roam" over all land. "Access land" throughout England and Wales will be opened for access once a comprehensive mapping of these areas has been completed.

There is no compensation for any landowner resulting from the creation of a statutory right of public access over his or her land where it is defined as "access land". The Act does, however, remove landowners from owing any duty to any persons from risks resulting from the existence of natural features or from walls, fences or gates (except proper use of gates or stiles). Landowners may restrict access for any reason for up to 28 days per year without permission, with the opportunity to seek further restriction or exclusions on land access for management reasons.

In addition, the Act provides for a "country code" to cover the arrangements for land access. It establishes a National Countryside Access forum composed of representatives from landowners, local government and recreational groups to advise on the development of policy and procedures on access to the access land and rights of way.

Scotland

Rural Scotland is dominated by a small number of large estates (particularly in the Highlands) farmed by tenants. The Scottish Executive (Government) has been concerned about the adverse effects of absentee landowners, land owned by trusts and companies, and large estates being used exclusively as hunting and fishing estates. Exclusive ownership or land monopoly was inflating land values, frustrating the ability of local communities to purchase the land.

In response to these concerns, in 1997 the Scottish Executive began a wide-ranging and comprehensive review of its land legislation. The outcome was the Land Reform (Scotland) Bill introduced into the Scottish Parliament in November 2001 and assented on 23 January 2003.

One objective of the Land Reform (Scotland) Act 2003 is to promote "responsible access" to land, whereas, previously, rights and responsibilities regarding access involved a complex mix of legislation and common law. The Scottish "model" for access comprised three elements: changes to legislation, an outdoor access code and new responsibilities for local authorities.

The legislation provides for:

- a statutory right of "responsible access" to all land (including enclosed agricultural land, as well as open and hill ground) regardless of ownership;
- responsible access for informal recreation and passage purposes. It does not allow any motorised form of recreation. Camping is allowed where travel necessitates it (additional responsibilities apply) but the public cannot stay on land indefinitely;
- restrictions on access to buildings and their curtilages in the interests of privacy and safety, and to places on the grounds of health, safety or the national or public interest; and
- specific consideration to be given to farming practices.

A key component is a Scottish Countryside Access Code which provides guidance on responsible behaviour, interprets the public right of access to the outdoors and advises people where to find information and how to obtain help if a problem occurs.

Local authorities have existing powers to provide and ensure access, including the ability to acquire land, remove obstructions, close paths and provide ranger services and facilities. The legislation assigns responsibility to local authorities to facilitate access and provide practical assistance where significant problems arise. The practical application of this is through the provision of information, local access forums, and access strategies and plans.

In general, the Scottish reforms address the fact that previously, access to land was neither secure nor encouraged, which limited people's confidence to utilise rights of access. In summary, the Scottish access reforms involve:

- a combination of legislation, a code of conduct and local government to achieve desired outcomes;
- a code providing a societal reference point or norm for "responsible access";
- a set of principles, definitions and conditions pertaining to the right of access; and
- an agency responsible for the provision of information and for dealing with conflicts when problems arise over access.

Conclusion

Traditional rights of access are a common component of the European experience. These rights are never unfettered, but may provide for access by area (forests, foreshore or defined paths) or exempt access (such as cultivated land). Where traditional rights of access have come under pressure from societal change, there have been varying attempts to codify these rights into statute to ensure that the privileges of enjoying the countryside are available to future generations. Tourism and commercial opportunities have increased the pressures on traditional "rights" through encouraging their use by people unaccustomed to local values and traditions.

New Zealand faces some of the same pressures on private rural land as its overseas counterparts, such as tourism and changes in land use and ownership. By understanding the social conventions that have moulded how our society thinks about access, New Zealand can respond appropriately to protect these conventions and prevent erosion of the ability of the public to enjoy the countryside, forests and coastal environment. Aside from the values outlined in Chapter 2, an important consideration in the access debate is property rights, discussed in the following chapter.

5 Discussion on Property Rights

Background

The Group has considered property rights in relation to access only. There has been much wider and more detailed discussion of property rights in recent reports on the management of natural resources, such as the work undertaken by the Ministerial Advisory Committee on Biodiversity on Private Land. The Group, however, considers that the concept of property rights is an important consideration in any proposal to address issues relating to public access. For that reason, this chapter discusses the concept with a focus on access.

Tangata whenua considered that access created governance issues for Maori landowners and that the Crown as Treaty partner had an active interest in protecting the property interests of Maori land. Landowners and landowner organisations considered that greater provision of access on private property would result in the loss of property rights. On the other hand, some user organisations and submitters considered that public access did not adversely impact on property rights and no loss would occur.

What is Property?

At a basic level, the law of property is concerned with the entire network of legal relationships that exists between individuals in respect of things. "Property" is the name given to the "bundles" of mutual rights and obligations which prevail between "subjects" (the owners of rights) in respect of certain "objects" (the things privately owned through the ownership of rights).

If property is a relationship, the content of the relationship is liable to change. The "subjects" of property may differ from one social era to another. The "objects" of property are likewise liable to fluctuate with the passage of time and the emergence of new economic or social conditions. Above all, the ideology of property is profoundly influenced by changing factors of social, political and economic philosophy.

In traditional Maori society, property was managed as common property by a group, such as iwi, hapu or whanau. Under this regime of common property the group had a right to exclude non-members of the group, and those non-members had to abide by any exclusion. The members of the

management group had a duty to set rates of use and management levels to ensure maintenance of the resource.

This "bundle", or "cluster", of rights can be seen as the total sum of possible rights in a property. This totality may be visualised as a bundle of kindling or a box of matches. Each twig or match represents a particular right. Each right can be dealt with separately, a different person may own each right and each right has a value.

What are Property Rights?

The concept of property rights has evolved over time, and the "bundle" of rights attached to land ownership is different now than it was 10, 100, 150 or 500 years ago due to changes in the social and economic development of the country.

The highest form of ownership, or property right, under the Crown is freehold or fee simple. In our society the freehold owner has less than the totality of rights, because the State has reserved and progressively taken or acquired for itself a significant number of rights which make up that totality.

The "totality" comprises two groups of rights: those which belong to a community in a variety of forms and over which the owner has little or no control, and the balance which vest in the owner and are usually marketable and transferable.

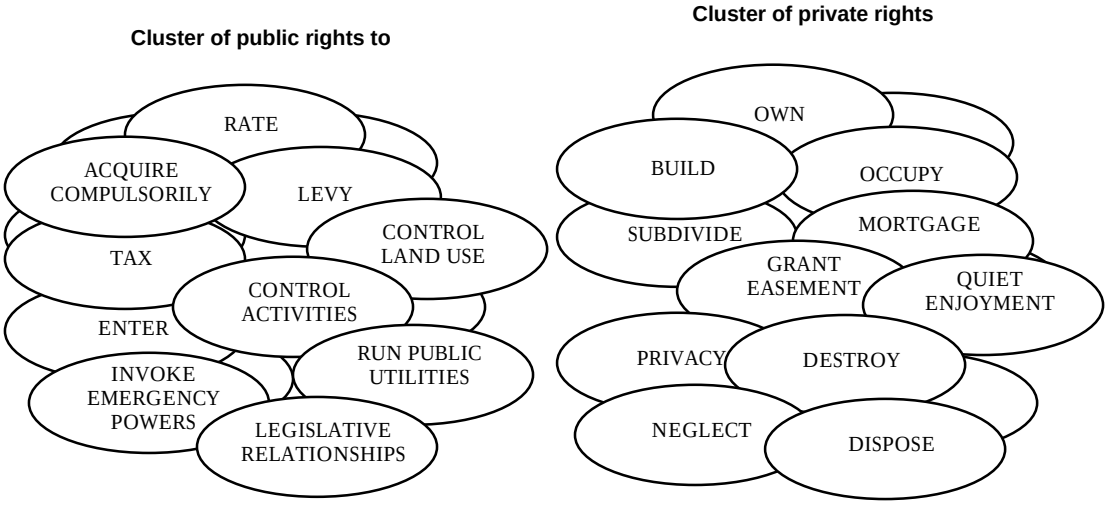

Figure 1: Cluster of Public Rights and Private Rights

The "bundles" represent a European view of property rights. Tangata whenua concepts, on the other hand, include customary rights and uses

which have never been defined, but have been included in legislation in a general way.

Property rights of Maori have already been eroded through the confiscation of land and through legislation, in particular under the PWA. Maori have also gifted land for national parks. To further take away these property rights is considered by organisations and individuals with which the Group had contact with to be a flagrant disregard of the principles of the Treaty of Waitangi, in particular the principle "to act in utmost good faith".

These organisations and individuals also contended that the Crown must recognise the rights guaranteed under the Article Two, which granted "full, exclusive and undisturbed possession of their lands and estates forests fisheries and other properties". They also asserted that all agents of the Crown should undertake active protection of the property rights under Article Two. As the majority of land trustees for Maori land are not resident on the land to which access may be sought, there is also a problem with governance and control of access.

The rights from the above "bundle" that are likely to be impacted by increased access to private land which were highlighted to the Group are rights to privacy, quiet enjoyment of property and ability to use and maximise the productivity from the property.

In New Zealand, the natural water, freshwater sportsfish and wildlife do not attach to the property title. The RMA controls the taking, using, damming or diverting of water. Additionally, fishing for freshwater sportsfish, such as trout and salmon, requires the purchase of a licence under the Conservation Act 1987.

Spectrum of Views on Property Rights

As property rights are a construct – comprising social, economic and legal elements tensions arise from the wide variation in views held about property rights and the exact nature of the "bundle" of rights associated with land ownership. This "bundle" attaches to land title but is not absolute, as it is subject to legislative obligations, which constantly change. The "bundle" is not defined and is subject to constant renegotiation.

Property rights can be viewed from two quite different perspectives:

- Property rights are not fixed: they fluctuate depending on prevailing economic and social conditions.

This may, for instance, require that a person gives up private value for public benefit and that socially moral action should not be "rewarded".

- There is an unfettered ability to use land, and the certainty that this provides is a cornerstone of a market economy.

This view also includes the concept that property rights are guaranteed, subject to any constraints that may be imposed by law. Any change to property rights requires a high level of justification and clarity in order for certainty to be maintained. The "surrender" of property is considered worthy of compensation.

Most of the organisations and individuals with which the Group had contact had views on property rights that fell between the two perspectives. There was a high degree of interest in property rights, but a low level of agreement about the exact "bundle" of property rights. The Group did not form a view about where its position fell on this continuum of views on property rights.

In relation to access, the transfer of property rights can move in either direction between the "bundles". Some improvement or enhancement of access will involve the transfer of private rights to public rights. In other situations, where the public is not using unformed roads and public property rights are therefore not being upheld, the issue is one of assuring the public that their existing rights to use these public lands are not diminished.

Another concept to take into account when considering property rights is natural justice. When central or local government is making any decisions that affect the property rights of any person or organisation, prior notification of the intent of those decisions should be made to that person or organisation, including the reasons for making those decisions and an opportunity to comment or make representation on those decisions.

In addition to this is engagement of Maori on the issue of access – which has not occurred in the past. This goes beyond commenting on proposals, to the duty of the Crown under the Treaty to actively protect the interests of Maori.

Property Rights in Relation to Access

The core question is where does society draw the line between the right to exclude someone from land and the State's interest in ensuring public access, in a manner consistent with societal expectations?

Most actions in relation to access will not involve the absolute taking or any expropriation of property rights, but are more likely to involve a restriction on the exercise of property rights, falling short of the taking of those rights (Guerin, 2002).

The Group notes that, in any transfer of rights of any sort (from one "bundle" to the other) there is also a reciprocal transfer of the associated responsibilities, duties and accountabilities. For example, if rules are introduced placing restrictions on the use or management of indigenous forests (i.e., some rights of the landowner to make decisions on that land are circumscribed), is it still appropriate to expect the landowner to be responsible for maintaining and looking after forests in a manner similar to when he or she still had the full "bundle" of rights? In this example, the right to make unfettered decisions about land use has been transferred but the responsibility/accountability has not been equally transferred.

The majority of trusts and incorporations restrict access to their owners/shareholders, mainly for farming and occupational health and safety reasons. Shareholders must seek permission, and when granted it are given the appropriate cautions. Some require that the shareholders contact the lessees when they require access to properties. In essence, the shareholders are treated the same as members of the public.

There are a large number of unmanaged Maori land-owning interests (in the order of 16,000 titles), without any legal management structure. Lacking a legal entity, they cannot act collectively (because they require authority) and cannot control or monitor access.

Consequently, consideration needs to be given in the access debate to the nature of any right that may be "transferred"; for example, what liabilities would remain with the landowner. If any right is removed, the responsibilities, duties and accountabilities should be transferred with that right.

Conclusion

Because property rights are a societal construct – comprising social, economic and legal elements – they constantly change. The "bundle" of property rights attaches to land title but is not absolute, as it is subject to many legislative obligations. This "bundle" is not defined and is subject to constant renegotiation. The Treaty includes an active requirement for the Crown to protect property rights for Maori. Customary title has not been defined, but is included in legislation in a general way.

6 Concerns in Access

Nature of Problems of Access to the Countryside

The occurrence of an activity in a specific area, in this case access on private rural land (the countryside), has both positive and negative outcomes. Access for walking, tramping, fishing and similar recreation results in health benefits; allows enjoyment of the surrounding countryside; provides an environmental awareness; and enables people to continue traditions and customary use on or beyond the land. The Group heard from rural landowners who are positive about allowing access and who enjoy the interaction with recreational groups and the public. Nevertheless, managing the negative outcomes of access has been, and continues to be, the main concern of property owners, who have to balance the day-to-day responsibilities of their own businesses with providing for those who wish to have access through and over their properties.

There are risks in overly generalising the nature and extent of these outcomes. Each access situation is made unique by its geographical location, the number and types of individuals driving the demand, land use and many other factors. The Group believes that it is necessary to document the core concerns that were raised by, and in discussion with, organisations and individuals.

Public access over private rural land may be restricted for a wide variety of reasons, some of the more significant of which are discussed below. The Group notes that cultural reasons are also pertinent in this discussion. Specific reasons for restriction of access may be:

- for protection through rahui, a form of prohibition on access to protect the resource (e.g., mahingi kai); and
- for protection of taonga or wahi tapu which are not necessarily clearly identified to the public (nor is there any desire that such wahi tapu should be clearly marked).

Some interest groups have identified private ownership of land as synonymous with restricted access for recreation and amenity (Hunter, unpublished). The Group heard evidence in support of, as well as against, this assertion. There are areas used for rural industrial purposes, including power generation facilities, sand, gravel and rock extraction, and factories (e.g., dairy processing), where exclusion of the public altogether from operational sites is necessary. Similar arguments apply to the operation of essential infrastructure such as water supply, ports and airports.

Recreational activities and events continue to occur on private rural land with the consent of the landowner, although, even during the course of the Group's deliberations, it was informed of examples where host landowners have disallowed events that have historically taken place on their property. The Group was also informed, however, of a recent community event held mainly on private land that had to be cancelled because of the cost implications of requirements imposed by DOC for a short section of the event that would have crossed conservation land.

The Group notes that conflict may more often occur when a legitimate request is denied for no apparent "good reason" or the reason given does not stand up to scrutiny. For instance, occupational safety and health requirements are sometimes given as a "catch-all" reason for declining access.

Rural Landowner Concerns

Impact on Forest/Farming Practices

There are many practical land (farm, forestry, viticulture, horticulture) management reasons for declining or limiting access that vary according to season and land use type. For example, access may disrupt livestock production, particularly where users are not acquainted with farm practices may not know how to behave around stock (e.g., closing gates, minimising disturbance, lambing times). This is exacerbated when members of the public want to walk dogs on private rural land.

In forestry blocks, silviculture and logging operations are incompatible with recreational pursuits, and activities must be managed accordingly. Some rural land uses – such as deer farms – which require high fences and minimal disturbance of animals are, by their nature, simply incompatible with access.

Merely being available to facilitate access, inform users of risks or simply respond to queries involves time and effort, and may disrupt farm routines. In remote areas, farming families are often the only source of help when people strike difficulties.

Biosecurity

The movement of people (and vehicles) across properties has potential repercussions for the spread of disease, pests or weeds. There is a lack of understanding of the real risks that people pose by, for instance, not dealing appropriately with toilet waste. Human faeces represent a biosecurity risk for the transfer of disease to animals, and less directly through the

contamination of water. Unvaccinated dogs that are onto properties may be capable of spreading sheep measles. The Group notes that, in the case of marginal strips where ownership may be separated from management responsibilities, these risks are commonly disregarded, and seldom understood and their potential impacts generally not appreciated.

An interesting observation by one submitter was that vehicles (especially 4WD vehicles) pose greater risks of spreading weeds than do humans. With the increasing use of 4WD vehicles, this is a legitimate concern.

Potential Habitat/Environmental Degradation

Potential habitat/environmental degradation is a particular concern in areas where resources are subject to abuse. Examples were received from coastal landowners concerned at paua beds being pillaged, aided by easy vehicular access. Maori landowners who see their role as custodians of the land, or as kaitiaki, may choose to exercise custodianship beyond the productive land to the protection of the wildlife and natural environment.

Provision of Facilities

The provision of services such as refuse bins (and collection), toilets and running water has the potential to minimise adverse impacts associated with public access. The expense of providing and maintaining these may discourage the landowner from allowing access in the first instance.

Personal Safety

Farmhouses, farm-work and forestry situations are typically isolated. A submitter noted that farming families are vulnerable when dealing with unknown individuals on their properties. Submitters cited examples of being confronted in a threatening manner by members of the public demanding access. Fear of such encounters, particularly in the home situation, discourages a favourable response to requests for access. Landowners may discourage public access through signs (e.g., “No Trespassing” and “Private Property”) or by not clearly marking legal public roads through their properties.

Security and Theft

The Group was advised by one submitter that it found no direct correlation between the occurrence of theft. There are, however, instances of people accessing private properties for illegal purposes (e.g., stock rustling and cannabis growing). Theft and property damage are criminal offences that provide valid reasons for property owners wanting to discourage some members of the public from accessing their property.

Fire Risk

A discarded cigarette or carelessly lit fire is the cause of many expensive fire control operations. Forestry companies monitor public access carefully and may restrict access altogether during the extreme fire risk period. The cost resulting from a fire outbreak lies with the owner of the land on which the fire ignited, if the cause and person responsible are not identified. Liability insurance for fire risk is costly. Recreational users may be the first to see or report a fire.

Health and Safety

The HSEA was ambiguous as to landowner responsibilities for visitors such as non-paying recreationalists. The Health and Safety in Employment Amendment Act 1998 sought to allay some of the concerns of landowners by clarifying their responsibilities under the HSEA. Chapter 3 discusses this topic in more detail.

Summary

Notwithstanding the benefits associated with access, the Group notes that there are a wide variety of potential and indirect costs to rural landowners. Submissions from landowners emphasise that, by providing public access, they are providing a public good, often at a personal cost. This cost involves compliance with statutory obligations, the acceptance of risk, and time and money spent in dealing with access requests or responding to the effects of irresponsible access. By controlling who enters their property they are able to minimise costs and risks. For this reason, landowners place importance on having the right to decline or consent to access. Maintaining this right would acknowledge their responsibilities[5] as landowners and allow them to carry these out without undue disruption.

The submissions suggest that biosecurity risks may be overstated, while fears and concerns for personal safety and impact on farming operations were widely held and supported by anecdotal comment. The personal safety concern may be difficult to manage, no matter whether access rules change or remain the same. This concern is beyond the scope of any set of rules to manage. On the other hand, impacts on farm operations may result from lack of knowledge and understanding – a conduct and knowledge matter. Negative behaviours of users may reflect their lack of awareness and feeling of being unwelcome. A greater emphasis on responsible conduct would be essential if access rules were changed and if the opportunities for conflict canvassed in this section were to be better managed.

[5] This includes their obligations under the HSE Act, the RMA, and the Biosecurity Act (weed and pests).

Maori Concerns

The Group met with Maori both formally and informally. Written and oral views expressed by Maori included:

Treaty

- public access protocols to be fully compliant with the principles of the Treaty of Waitangi and the Crown's obligations to these principles;
- the Crown as a Treaty partner has an obligation to actively protect the property interests of Maori land;
- in terms of public access there is both a duty on the Crown to make informed decisions through consultation and to actively protect taonga and Maori interests;
- the Crown should set up a Maori advisory group to work alongside the primary reference group; and
- proposals for resolving access concerns should be principle-based (it is a land issue not just a Maori one).

Governance

- public access policy and its implementation over Maori lands to be made at the complete discretion of Maori landowners;
- access arrangements to be negotiated directly with Maori landowners; and
- with many Maori not resident on their lands this poses problems for small entities as they are not able to control access themselves.

Economic

- Maori should not be deprived of wealth-generating opportunities;
- traditional conventions for obtaining access work well and farmers should have the right to decline access;
- "right to roam" would be incompatible with farming;
- if there is any land that has public access this access should only be for recreational purposes;
- costs fall disproportionately on Maori landowners;
- the community should cover the costs and liabilities a landowner bears in providing recreation areas on private land; and
- usually no quantifiable benefit to Maori landowners but huge benefits to the public, private operators and the nation.

Compensation

- the Crown should fund maintenance or compensation for land that has been vested in the public.

Other

- there are other interesting ways to allow and develop access (covenants); and
- mechanisms are needed to protect the environment, and recognition and protection of tapu, rahui.

Maori Land

There are 1.54 million hectares of Maori land, equalling 5.7 percent of New Zealand's total land area and around 8.6 percent of all private land. A large proportion of Maori land is rural and of poor land classification capability; an estimated 600,000 hectares is underdeveloped.[6] The majority of Maori land is in multiple ownership, characterised by absentee shareholders and beneficial owners who rely on trust and incorporation managers and boards to control activity on their land. There are also 16,000 titles that have no legal management structure. Without a legal entity they cannot act collectively and, therefore, appointing a person(s) or organisation with authority to control or monitor access will prove difficult.

As with other landowners, trust and incorporation managers are equally bound by requirements and obligations imposed by legislation such as occupational health and safety. Trust and incorporation managers may adopt management policies that may prevent all shareholders (beneficial owners) entering the land, effectively giving them the same status for access purposes as the general public. Shareholders do not have rights greater than those of the public unless an access permit/permission is granted for a specified period of time and for a specified purpose (e.g., to exercise mahinga kai).

Forestry and rural tourism present new opportunities to develop a sustainable revenue stream from this "underdeveloped" land. Initiatives include the Mt Tarawera guided walk, which has proven controversial but, for the iwi/hapu involved, provides a steady stream of income. Owners of Maori land would strongly oppose any proposals that would disrupt or constrain their future ability to benefit economically from the land.

Maori submitters and those who met with the Group expressed strong opposition to any "taking" without consultation and compensation. Facilitating greater access for the public has particular consequences for Maori, with examples where open public access has resulted in the desecration of taonga. Wahi tapu, and sacred sites not identified on legal plans, may be subject to damage.

User Concerns

User concerns regarding access that were raised with the Group included:

- *closure of marginal strips*: these strips may provide public access but there is no public consultation process if the Crown considers that they

[6] Statistics provided by Te Puni Kokiri. (Ministry of Maori Development)

should be closed. Likewise, walkways, especially ungazetted ones, may be closed without public involvement;

- *unmanaged accessways*: lands may provide for legal access but, unless maintenance of them is ongoing, vegetation may close in. This aspect is particularly pertinent for marginal strips where management is not a requirement of ownership;
- *obstructions on legal roads*: the Group was informed of many situations where despite it being illegal, legal roads have been obstructed (deliberately or otherwise) by the placement of fencelines, locked gates or other obstacles;
- *tenure review*: access to land which is not freeholded through the tenure review process is facilitated through an agreement with the lessee. There is, however, no certainty under the review process that these access ways will actually be marked on the ground;
- *loss of tradition*: New Zealanders have a long history of engaging with the surrounding natural environment (coastline, lakes, rivers, countryside and mountains), whether for mahinga kai, orienteering, tramping or other forms of recreation. These traditions are threatened where consent is no longer given;
- *privatisation of resources*: "exclusive capture" of public natural resources is addressed in later in this chapter. Wharves and jetties that have previously being available for use and as a means to access the sea are being privatised or restrictions placed on their use (e.g., no fishing); and
- *poor access to information*: restructuring, new roles and privatisation of government agencies mean that the public sector is no longer providing helpful information to the public (particularly cadastral maps). Poor signage and difficulty in ascertaining landowner contact details further hinder users' ability to access land for recreation.

Some user organisations referred to the report *Getting Set for an Active Nation – Report of the Sport, Fitness and Leisure Ministerial Taskforce* (the Graham Report, 2001), which identified the lack of coordination of outdoors recreation access as a significant policy concern. The Report questioned the focus of local government on providing recreational resources such as playing fields, and not using its considerable potential to provide improved access to natural resources via esplanade reserves and strips or road reserves and walkways.

Exclusive Capture

"Exclusive capture" provides an interesting example of the complexity of property rights in the access debate. Exclusivity provides financial benefits, particularly when tapping into the overseas tourism market. The potential commercial opportunities are particularly relevant for Maori marginal land under multiple ownership. Some submitters believe that access to publicly owned natural resources is being denied for exclusive commercial use, which raises fundamental questions regarding the right of access to public resources. Exclusivity is likely to become more predominant with the increasing commercial value of recreation.

Freshwater, fish and wildlife do not attach to land title in New Zealand. The sale of hunting and fishing rights is prohibited, but individuals and organisations informed the Group that, contrary to the prohibition, the sale of hunting and fishing rights has increased. Some landowners have elected to use the provisions in the Trespass Act to restrict access and effectively obtain exclusive capture of these public resources. Information was provided regarding exclusive capture of sports fisheries where permission for access is required to cross private land. This generally occurs in situations where the Queen's Chain does not exist or where there is no access to that area of public land. The absence of the Queen's Chain along rivers can also result in the de facto exclusive capture of public resources.

Exclusive capture occurs in two situations. Firstly, an adjacent private landowner may provide limited access close to a boundary of DOC land which may also have access restricted for environmental reasons (i.e., wilderness zones which limit helicopter landings). This capture appears particularly inequitable, as only some people can gain access to the conservation estate (i.e., the ability to use public land and public resources) through adjacent private land, in part due to the policy position held by DOC on helicopter access.

The second example is the angling and game hunting industries. Fishing is an activity provided for under the Conservation Act and freshwater fisheries regulations, while the Wildlife Act 1953 and its regulations cover hunting. In each case, the legislation provides that fishing and hunting rights shall not be sold. There is, however, anecdotal evidence that access to hunting and fishing is being sold, which is contrary to legislation.

Crown-owned Land

Freshwater anglers voice strong concerns about changes to legislation which enable DOC to require commercial users to obtain a concession for access to publicly administered lands. They question whether it is reasonable to require fishing guides to have to pay DOC to cross the conservation estate simply to access the waterways for fishing.

Until the Conservation Amendment Act 1996 was enacted, fishing guides, their clients and recreational anglers were treated equally. Fee structures, fishing regulations and access entitlements applied equally to all anglers. Under section 17O of Part IIIB of the Conservation Amendment Act, fishing guides must now obtain a concession from DOC to fish from lands managed by DOC or to cross conservation land to obtain access to a river or lake. Similar inconsistencies exist with "recreational" and "guided" walking access on DOC land.

Fishing guides are concerned that their concession fee is not returned to the fishery but is applied to wider conservation objectives. It could be argued, however, that the conservation objectives include habitat protection that is necessary for a sustainable fishery.

The Group considers that foot access should remain available to the public when Crown forests are sold or leased to a forest company.

Crown Pastoral Land Act, Land Tenure Review

The Crown pastoral lease lands in the South Island cover 2.4 million hectares, which equates to 20 percent of the land area of the South Island or 10 percent of New Zealand. Because the Crown owns the land, even though it is leased for pastoral farming (and, by consent, other activities), there are both expectations and tensions between the lessees and the public in terms of rights and obligations regarding access.

Information provided to the Group suggests that access to the high country onto or across pastoral leases has traditionally been permitted, with few exceptions. As ownership passes, however, from traditional farming families to new owners who may not hold this traditional view, access appears to be increasingly restricted.

Other concerns relating to pastoral leases were mainly those around the tenure review process, carried out under the Crown Pastoral Land Act 1998 (CPLA). There is a high expectation among users that the tenure review process will be a major tool to deliver secure public access to the South Island high country. One of the objectives of the tenure review process is to secure public access, especially to Crown conservation land that may lie beyond the land being converted to freehold title. Those with an interest in access argue that "securing" access is distinct from "permitting" or "allowing" access, because these terms imply that prior permission is required before use. Users believe that the duty under the CPLA is far more onerous than merely providing access, subject to constraints and exceptions.

There were comments also about perceived failures of government agencies to obtain adequate and secure access across freeholded land during the tenure process.

Roads

The Group received a large amount of information and comment on the problems associated with using unformed roads (obstructions, difficulty in ascertaining surveyed position) for which local authorities are responsible. There were useful suggestions about how this network of unformed roads could be used as part of a strategy to improve access, including using roads as a bargaining tool to provide for appropriate access to public land, waterways, the coast and other sites of interest. The Group notes, however, that using unformed roads in this manner is not supported by many organisations and users. It is a matter that would need careful consideration, as substantial risks exist if this idea is not well managed.

This network of roads provides scope to greatly improve access to sites of interest or other areas of public land. While the alignment of such roads is often not very practicable for today's needs, it is important that the intent behind unformed roads is not lost in the future. In many instances, the roads were simply an indication to travellers of a route from one location to the other, on horseback or dray, even if the exact line was never used.

Charging for Access

The Group notes that DOC charges concession fees for commercial businesses that operate tramping and walking activities on public land. As at March 2002, there were 529 concessions approved for commercial guiding operations (e.g., tramping, fishing, hunting, biking and canoeing). Charging for access to public resources sets a precedent as it may encourage other landowners to claim similar rights. Users argue that it would be incongruous for private landowners to be restricted from obtaining income from their resource when this is already occurring on public land. The public believes that access to New Zealand's outdoors should be free.

Conclusion

This chapter and the previous discussion on property rights highlight the implications for granting access on both private rural land and public land. The continual evolution of property rights and responsibilities of landowners (legislative and voluntary) have swayed landowners to restrict or even deny access. It is generally accepted that there are genuine reasons for restricting access.

Conflict occurs when access is denied on what are considered by users to be unreasonable grounds (resulting from perceptions and expectations). Over time, expectations change and what was once considered a privilege may now increasingly be considered a right that can be asserted regardless of the consequences to those who have to deal with the immediate and long-term implications of that access.

The reasons for blocking access are not always directly related to access per se. Obstructing access, and the consequent response from the public, may be used to highlight other issues. Some Maori who have a grievance against the Crown for inaction or other perceived transgressions have adopted this stance to highlight the issue and create a negotiation position. Similarly, access is an important consideration for some high country farmers in the tenure review process. This illustrates that access has a value not only for the public but also for the landowner and government.

There is a real concern that access to public resources will become a pastime for the wealthy and the paying tourist, as landowners limit access across private land by selling access rights to the highest bidder. New Zealand benefited from the foresight of early lawmakers who sought to preserve public access to enjoy the recreational value of its waterways. Their motivation was from their personal experiences of the inequity imposed by large estate owners in Scotland and England.

7 Access To and Along Water Margins

Background

Having unrestricted access to and along water margins has long been an expectation of the public. Maori expectations for access are based on customary access and use of coastal resources, confirmed by the Treaty of Waitangi. For Europeans this expectation is founded on a legal history of reservations along water margins for public use.

For the purposes of this report, reference to the "Queen's Chain" is used to describe land under various mechanisms and legislation that have created areas of public land alongside rivers, lakes and the coast or foreshore (water margins). This chapter examines the access along water margins from historical and cultural perspective.

Most people understand the Queen's Chain to be a 20 metre (or one chain, which was determined at the time of settlement to be the road width) strip along the edge of substantial rivers, lakes and the coastline, and owned by the Crown or a local authority. It is assumed that the public has a right of access along this strip. It is this notion of accessibility along the coast and waterways that New Zealand society has long held to be a sacrosanct right of the public.

The legal reality, however, is substantially different. At no stage has New Zealand law established that the public has full rights of access to, or use of, land alongside all rivers, lakes and the coastline. The practice throughout New Zealand from early colonial times was partial rather than complete reservation along water boundaries. This point is commonly misunderstood.

Over time, a number of different legislative solutions have established partial public ownership of land along water boundaries. Literature commonly cites that 70 percent of what would be regarded as the Queen's Chain is in public ownership. The remaining 30 percent is in private ownership because:

- inconsistent practices have led to unexplained omissions from the Crown grant record maps, particularly in the period 1840 – 1892.
- tracts of Maori land after 1865 were sold direct to private individuals rather than to the Crown, negating the opportunity to create public reserves alongside water; and
- no reserve exists on the land title because a strip was not excluded from the Crown grant, even though, in some cases, cadastral maps may indicate that a reserve has been created.

Figure 2 shows the inconsistencies on the Otago Peninsula. Of the length of coastline, 66.71 kilometres or 61.6 percent is in public ownership. As Clark and Hilton (2003) note, public ownership is not an authoritative indicator of actual access. In this case 32.19 kilometres (29.8 percent) has physical restrictions (road, seawall, topography).

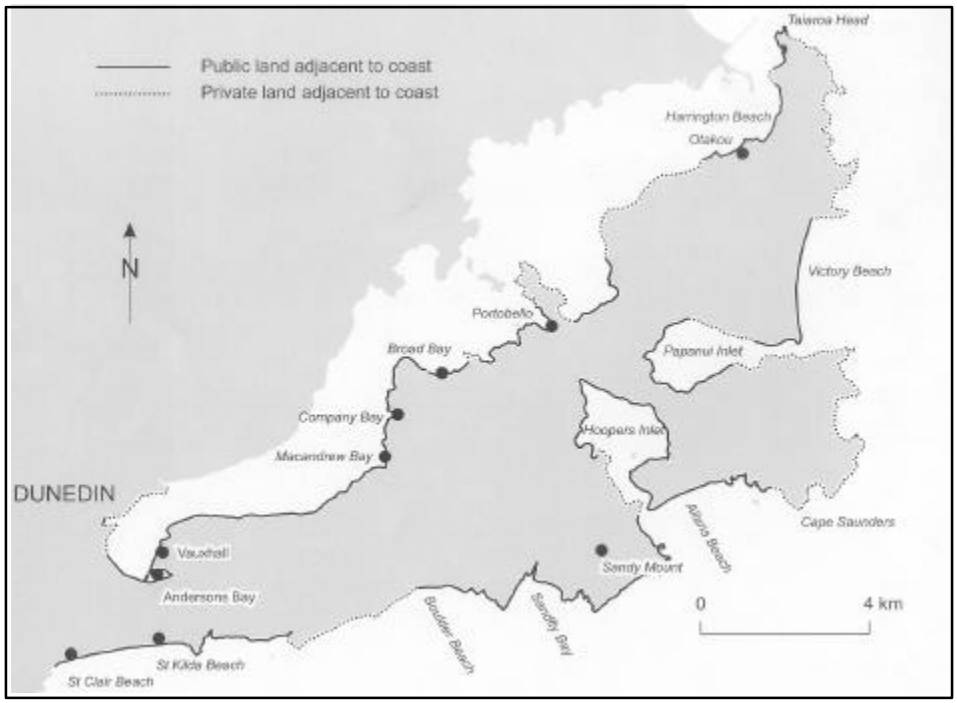

Figure 2: Public Land Along Water Margins, Coast of Otago Peninsula

Source: Clark, E L and Hilton M J (2003) Measuring and Reporting Changing Public Access to and Along the Coast, *New Zealand Geographer* 59(1), p. 7.

Origins of the Queen's Chain

The "Queen's Chain" is the popular term used to describe publicly owned land along the banks of rivers and the shores of lakes and the sea. The term arises from a common belief that, in 1840, Queen Victoria gave Governor Hobson an instruction to reserve chain-wide strips along water margins when the colony of New Zealand was first established. The instructions were to:

> "reserve … for public roads and other internal communications, whether by land or water … places fit to be set apart for the recreation and amusement of the inhabitants …, or as the sites of quays or landing-places which may at any future time be expedient to erect, form, or establish on the sea coast or in the neighbourhood of navigable streams, or which it may be desirable to reserve for any other purpose of public enjoyment; … and it is our will and pleasure, and we do strictly enjoin and require you that you do not on any account, or on any pretence whatsoever, grant, convey, or demise to any person or persons any of the lands so specified as fit to be

> reserves as aforesaid nor permit or suffer any such lands to be occupied by any private person for any private purposes." [7]

This instruction formed part of a series of instructions directing how surveys for reserves were to be undertaken prior to settlement of the colony. However, no water margins are provided for and it is debatable, despite the faith placed in this instruction, that it is the source of public rights along water boundaries. To understand the proper origins of the Queen's Chain it is appropriate to canvass, albeit briefly, a history of public ownership of land along water margins. A schematic history is, in Appendix 3 ("The Queen's Chain at a Glance").

The first New Zealand enactment to provide for a marginal strip along water was Ordinance No 2 passed on 9 June 1841, which restricted grants to parcels not larger than 2560 acres and provided that a strip of land 100 feet wide was to be reserved from sale along the coast. This ordinance repealed an earlier Act that had been enacted in Sydney when New Zealand was, for a short time, part of New South Wales prior to Governor Hobson taking up his appointment in 1840. The ordinance and preceding Act were greatly resented by the settlers who had made direct purchases from Maori prior to the Treaty of Waitangi. In 1842 a further ordinance was enacted (Ordinance No 14, 21 February 1842), which removed both the maximum area restriction and the requirement for a reservation along the coast. However, when this ordinance was transmitted to London in 1843 for the royal assent, Queen Victoria declined to provide the assent and it was disallowed.

By royal decree the original legislation requiring a coastal reservation was reinstated. The ordinances described were not legislation of general application, but rather were enacted to apply to land previously purchased directly from Maori by private deeds, this amounted to 1,376 land claims reviewed by the Land Claims Commissioners. Notwithstanding the occasional purchase of land to low-water mark from Maori, the Commissioners nevertheless reserved the full 100 foot strip from high-watermark indicating a strict compliance with the ordinance. The concept of a coastal reserved strip (but not for rivers, streams and lakes) had been preserved in New Zealand for early purchases from Maori by the action of the Crown – the first Queen's Chain.

The royal intention to reserve a margin along the coast for the use of the public was made clear, unlike the general instructions referred to above, which are not explicit in relation to water boundary reservation. What is significant today is the fact that, following action of the Crown in 1843,

[7] *Royal Instructions* 5 December 1840. Ordinances of New Zealand, 1841 – 1849, Wellington, p. 19.

over the period 1843-1892 water margins were extensively, though not comprehensively, reserved by the early administrators of the land law.

The importance of these early reservations cannot be overstressed, for the inclusion of a large proportion of our waterways and the coast in the scheme of marginal reservation kept at bay the English law of private ownership of waterways that would otherwise have applied. The reservations created the ethos so very much a part of New Zealand: that the public has access to our rivers, lakes and the sea. Many other laws and practices now serve as well, but the law-based origin of the reservation along water boundaries lies in the action of the Crown in 1843.

The example of the decision by Queen Victoria to preserve a margin along the coast was no doubt binding on the collective conscience of the Governors and, later the land law administrators in central and provincial government.

Aside from the ordinance reinstated by Queen Victoria in 1843, and a special ordinance by the Governor and Legislative Council in 1844 incorporating the decision of the Queen in New Zealand law, there were no legislative requirements for water boundary reservations enacted until 1892. The extensive, although incomplete, pattern of water margin reservation by laying out public roads along water is a remarkable phenomenon given the absence of statutory backing for the concept. Decisions made subsequently to extend the principle from the coast only to water boundaries along rivers and around lakes were in keeping with the spirit if not the letter of the original instructions by the Queen. Today, the only matter of significance is the factual position: these roads legally exist as public roads.

Provincial government was introduced in 1854. Under the general and at first nominal supervision of the central government, the provinces were able to sell public lands of the Crown. Provincial government was able to control all aspects of the sale (price, size of holding, method of sale) and retain profits there of, although still subject to the Waste Land Regulations of 1853 and the subsequent Waste Land Act 1854, which retained some discretion for the Governor and Executive Council.

The powers of the provinces were made very comprehensive. One of the notable features of the Reserves Act 1854, enacted at the time when provincial government was introduced, was the protection given to the foreshore. While harbour and industrial development along selected water margins was obviously an important consideration in the fledgling colony, the transfer of powers of Crown alienation of Crown lands to the provinces was not to disregard the importance of a national resource – the foreshore, the land below mean high-water mark. A four-step process ensured that provincial government could not easily sell the foreshore.

During the time of provincial government (1854-1876) there were extensive sales of the most accessible Crown land. As the laying off of reservations along water was governed by Acts in specific provinces rather than legislation or ordinances of central government, it is not surprising that practices varied in the provinces. Nevertheless, the practice of providing roads along water boundaries was extensively applied. The problem is that it was inconsistently applied, both within individual provinces and generally across the provinces. As a result there is no cohesive national network, given the vast areas of land which were taken up by the settlers in provincial times. It was not until the abolition of provincial government in 1876, when all powers of provincial governments revested in the Crown, that a consolidated approach was developed in the first instance to protect roads along rivers and foreshore, and later extended to include roads along the coast and lakes.

Provisions for Access Along Water Margins on Maori Land

The historical development of Maori land presents a unique situation for access. The majority of land reserved for public roads along water margins was established over general land in the period 1853-1892. A coastal or riverside reservation would thus be created when the land was surveyed and given a Crown grant.

Concurrently, during the period 1862-1909, almost all Maori customary land was converted to Maori freehold land. This process differed from general (non-Maori) land, which permitted a coastal or riverside reservation to the Crown. The conversion to Maori freehold land was through an investigation of ownership rights by the Maori Land Court and subsequent formal grant of the land from the Crown. The Crown did not at any stage own the land, thus there was never power to grant customary title as freehold to anyone other than the customary owners. A coastal or riverside strip would have to be taken (i.e., acquired from Maori), rather than reserved.

When Maori titles had been converted to general title, Maori owners could sell the land free of tribal constraints. Large areas, including riparian titles, were sold to settlers through direct sales from Maori.

Understanding this history is important for an understanding of why reserves often do not exist on the majority of Maori land – statute did not require or authorise a marginal strip along water boundaries. Subsequent legislation, such as the Land Subdivision in Counties Act 1946, continued to exempt Maori land from providing reserves for public purposes along water

boundaries if such land was subdivided. It has only been in the period 1993-2002 that restricted provisions for esplanade reserves, and later for waterside reservations when land is partitioned, have been introduced.

This history explains why there is strong opposition in submissions to extending the Queen's Chain to Maori land, as it has not been subject to the same legislative mechanisms as other private land or land sold by the Crown. Proposals advanced in submissions by Maori for creating access over Maori land include: creating a right of way that does not impact on land title; and restricting the purpose for access to non-commercial recreation only.

Historical Development of Marginal Strip Law

Instructions under the early Land Acts (1885 and 1887) provided more specifically for reserves along all navigable rivers. It is perhaps the Land Act 1892, introduced into Parliament by the then Minister of Lands, Sir John McKenzie MHR (Waitaki), that initiated the modern era of law relating to marginal strips along water boundaries. While the main thrust of the Act was to get settler farmers onto the land quickly, it also enshrined in legislation the belief that public access should be available to and along waterways and to public resources, including publicly held land, the coast, water, wildlife and fisheries. Scottish born, McKenzie was anxious to ensure that New Zealand did not replicate the Scottish and English laws which gave landowners riparian rights and prevented public access to waterways for fishing and recreation (Brooking, 1996, p. 322). His philosophy, captured in the 1892 Act, was to ensure that all New Zealanders had free access to fish and other game along waterways and the foreshore of lakes and the coast.

At the time of the passing of the Bill in Parliament, P A Buckley (MLC) supported McKenzie's proposal and observed:

> "… in the past we have parted with rights to the foreshore – a proceeding which has given rise, I am satisfied, to more litigation in this colony than any one could possibly have contemplated." [8]

The statute is of great importance, for it sets the foundation and philosophy for New Zealand in respect of providing public access to rivers and the coast. The principles contained therein have heavily influenced the legislation in force today. The Act set out a requirement for a one-chain wide strip of land to be reserved, when Crown land was sold or otherwise disposed of, along the sea coast, significant rivers, streams and lakes.

[8] Hansard 1891, Vol 74, p 236 Mr Buckley.

The Act made it clear that marginal strips were to have a new status of land reserved from sale. Subsequent case law confirmed that the position of roads previously laid out did not move with any meandering of the river or alteration (erosion or accretion) of the coastline. This principle would also apply to the then new marginal strips, which were fixed in position by a survey of the land.

McKenzie's initiative remained largely unchanged until the Land Act 1948. This later Act retained the basic principles of earlier legislation but enlarged the scope of reservations on Crown land. It reserved land from sales of Crown land along the coastline, along lakes of a specified size, and along rivers and streams of a specified width. The requirement to reserve strips applied to any leased land or lease renewal as well as to unsurveyed farmland. The Act did not apply to private subdivisions – the Land Subdivision in Counties Act 1946 covered these.

Hayes (2003) notes that, if the principle of reservation of a strip along water boundaries had been applied from the inception of the colony, there would be no need for the development of water margins legislation relating to private land. While extensive reservations were made as road along the coastline, some lakes and along major waterways, inconsistencies, possibly a failure of knowledge, and an incomplete commitment have created a large number of privately owned riparian titles.

Jock McKenzie and the Queen's Chain

The Hon Sir John (Jock) McKenzie gave the Queen's Chain full legislative expression in section 110 of the 1892 Land Act. He was Minister of Lands and Minister of Agriculture (1891-1900).

Like many Scots, he believed that the beasts of the field, the air and the water belonged to God and not man and therefore all men had the right to hunt them for food. This belief came from an earlier biblical injunction and was taken up by various reform groups in Scotland such as the Chamber of Agriculture from 1870's.

As an avid salmon fisherman, he wanted to be able to engage in his favourite hobby without fear of being transported to Australia. He also believed that the poor should be able to supplement their diet with rabbits and fish as he had in Scotland.

McKenzie, like most Highlanders, hated the deer parks which locked up farming land for the use and pleasure of a few wealthy and privileged British aristocrats, and European and American industrialists and financiers. In his view, a Queen's Chain would make it harder for such areas of privilege to develop.

While a backbench MP, he learned that Crown tenants could not fish the rivers that ran through their leasehold farms and he was incensed by this discovery. He believed, like others in the Liberal Party, that the State should be a benevolent rather than an oppressive landlord. The Queen's Chain made such contradictions impossible and ensured that lease holders were guaranteed the same rights and privileges as freeholders.

As a backbench MP, he also opposed several attempts to introduce modified versions of the English game laws. Once again, giving the Queen's Chain full legal codification made such an eventuality impossible.

His main concern was with equality of all before the law and rights of access. He was less concerned with conservation although he did make provision for scenery preservation in his 1892 Land Act. He held firm to the belief that the State could act as a caring guardian of the Crown estate for the use of future generations.

"Use" usually meant farming to him, but he felt that the "people" would be better served by the Crown than big estate owners when it came to access for the purposes of hunting. Like most nineteenth century Liberals in New Zealand, he believed that the new land should be free of the feudal restrictions on access which undermined the liberties of people in England, Scotland and Ireland.

He interpreted freedom of access to the coast, rivers and lakes, promised in Queen Victoria's instructions to Governor Hobson as a founding right of all New Zealanders. Giving this right legal embodiment in the 1892 Land Act was meant to ensure survival of that right in perpetuity concept (of at least 1000 years, judging by his lease-in-perpetuity), in the Land Act 1892.

Source: Brooking T (1995) Lands for the People? A biography of John Mckenzie. University of Otago Press: Dunedin.

Current Mechanisms for Providing Access Along Water Margins

The complexity of the history of the Queen's Chain means that an understanding of the rights and privileges associated with each reservation is incomplete and problematic. As Chapter 3 outlined, there are eight basic types of reservation. The reservations described below include reserves and strips (marginal, esplanade) and a patchwork of public roads (formed and unformed), which effectively constitute the current mechanisms for providing the Queen's Chain. Together, these reservations form an historical accumulation rather than a logical network. There has never been a strategy, or agency responsible to oversee the implementation of the mechanisms. As a consequence, the right of access is often discontinuous along the edge of a waterway or the coast; private land interspersed effectively prevents continuous legal access.

Roads

The provision of access was initially granted by the creation of public roads, formed and unformed, along the margins of waterways as Crown land was sold to settlers. These were originally vested in the Crown and have since been vested in local authorities. There is a right to assert unhindered passage at all times. This right extends to the ability to remove obstructions and to prosecute those who prevent access. Public roads offer the greatest degree of public access of all the reservations and the highest level of rights.

There is a statutory process for disposing of ("stopping") public roads; this involves a public submission process and is not often used. In a recent case where a local authority sought to stop an unformed road to facilitate a private subdivision and not make alternative arrangements for public access, the Environment Court determined that to stop the road in question for the private benefit of a subdivision was not consistent with the legal principle that statutory powers are to be exercised for public purposes. In the Court's view:

> "A public road, even one that is unformed, may be an asset. It would be difficult to replace. If a public road is valued by the public, or sections of it, for use within the scope of the purpose of a public road, that value deserves to be weighted against whatever cause is shown for stopping it as road and disposing of the land". [9]

[9] *Upper Hutt City Council v Akatarawa Recreational Access Committee Inc*, Environment Court, Wellington, W21/03, 17 – 19 February 2003, D F G Sheppard.

Esplanade Reserves/Strips

Subdivision is the main trigger for extending of the Queen's Chain. When local authorities give consent for subdivision of private land they can require, through rules in a district plan, the creation of esplanade reserves with ownership vesting in councils. Esplanade reserves are usually vested in the local authority and are subject to the protection of the Reserves Act 1977. These reserves allow public access or recreational use where it is compatible with conservation values.

In rural areas, where lot sizes are typically over four hectares, there may not be an esplanade reserve on water margins because past subdivision will not have triggered the requirement to vest a reserve. Under the current planning regime, territorial authorities have the discretion to make provisions in the district plan to waive or reduce the width of a reserve.

Esplanade strips under the RMA (section 232, amended in 1993) are also triggered by subdivision. These strips provide public access through private property when an easement is created on the land title. The local authority can choose whether to require an esplanade reserve or negotiate an esplanade strip, without public involvement. The landowner retains ownership and responsibility for managing the land. There is no recourse for the district council if esplanade strips are not managed in a manner that allows foot access (e.g., the strip becomes overgrown with vegetation). Depending on the conditions of the easement, closures may be appropriate (e.g., lambing, rahui, tapu, emergency or public risk) for a period.

These strips are unique in that the strip boundary moves simultaneously with every alteration to the bank of a river or margin of a lake. No surveying is required; however, the water bodies adjacent to the strip are identified in the plan. Esplanade strips are commonly used as they are preferable to the establishment of reserves, which have a high initial capital expenditure (survey costs) and ongoing maintenance costs for the council.

Access Strips

Access strips are created by an agreement between a local authority and a landowner, and are easements over land for a defined purpose and for specified users, rather than for general public access. They are similar to gazetted walkways in that they are surveyed, recorded on the land title and do not move if the waterway moves, and ownership remains with the land-owner. Many of the reserves and strips are created for conservation purposes, which may be incompatible with access or recreational use. The strips could also be used to provide access to public land across private land.

Where there is any disposition to State-owned enterprises or private interests of any Crown lands, either by sale or lease, a marginal strip is required. The Conservation Law Reform Act 1990 made DOC responsible for all marginal strip land. The Act assigned a fresh purpose for these strips. They are administered first and foremost for conservation purposes, and secondly, to enable public access to adjacent waterbodies and public recreational use of the strips and waterbodies.

Other mechanisms also have access as a feature. For example, conservation covenants (established under section 77 of the Reserves Act) may provide for a broad range of features, including public access. Covenants detail the respective rights of the landowner and the public.

Summary

The presence of public land along waterways or the coast does not necessarily exist to facilitate or allow public access. The purpose of creating reservations may include environmental management and conservation as well as public access reasons. For instance, the esplanade reserve and strip provisions in the RMA (as amended in 1993) outline five different conservation purposes, a public access right and a recreational access right as the basis for creating these reserves or strips. Many reserves and strips are created for conservation purposes, which may be incompatible with access or recreational use. In some instances, where reserves or strips are retired from production and the vegetation left to regenerate into scrub or bush, providing access may prove impossible.

The advantage of the current institutional arrangements outlined above is that they are fixed in place by legislation, unlike other informal arrangements which are subject to change over time. Further, mechanisms such as public roads offer the greatest degree of public access of all reservations and the highest level of rights, with the right to use vehicles on that land, carry firearms or take dogs.

The Group believes that legislative arrangements are the best to ensure long-term certainty of access. However, its investigations have also exposed some of their functioning difficulties. The remainder of this chapter considers the current issues surrounding access to water margins and how these may be addressed.

Factors Inhibiting Public Access to Water Margins

Mapping

Without reliable, readily accessible information available at a reasonable cost, the exact location of public land to and along waterways, lakes and the coastline is difficult to determine. Submissions to the Group highlight some of the information problems when endeavouring to gain access along the Queen's Chain. Understanding where the right of access does and does not exist is not a simple matter of using a map to locate the public land, road or reserve. For instance, while a right of access may be shown on the cadastral map (i.e., maps that indicate property types and boundaries), these maps are indicative only and are not an authoritative legal record. To be completely certain of the existence of a reservation or right of way, it is necessary to search the original Crown grant (or equivalent) documents and plans, which are the most accurate and authoritative source. Property title and Crown grant searches may be costly, time consuming and difficult to access (even for experts) and consequently not generally undertaken by the casual recreationalist.

Printed cadastral maps are likely to become less accurate over time, particularly as up-to-date information is now held on computer databases. Historically, the Department of Lands and Survey collected, generated and disseminated all information based on survey plans and topographical records. The functions of Land Information New Zealand (LINZ, successor to the Department of Survey and Land Information) are primarily directed at data collection, while commercial businesses use data from LINZ to generate and publish material that meets market needs. Consequently, there is no central information provider where the public can access information easily and at minimal or no cost. Anecdotal evidence mentioned the usefulness of DOC as holding information on legal public access. While DOC does not have a role to provide information on access, it makes the information that it holds available on request.

Physical Changes and Obstacles

The rigidity of legal arrangements does not always account for the changing nature of the coastal and riparian environment. Erosion and accretion are natural processes that may cut off legal access to or along a waterway. For example, as Figure 3 illustrates, this portion of the Oreti River was surveyed with legal roads alongside both riverbanks to provide a right of passage. These roads remained fixed in place irrespective of the movement of this braided river, which has clearly changed its course since the original survey. Ready legal access is now prevented to sections of this river where the road and river edge no longer coincide.

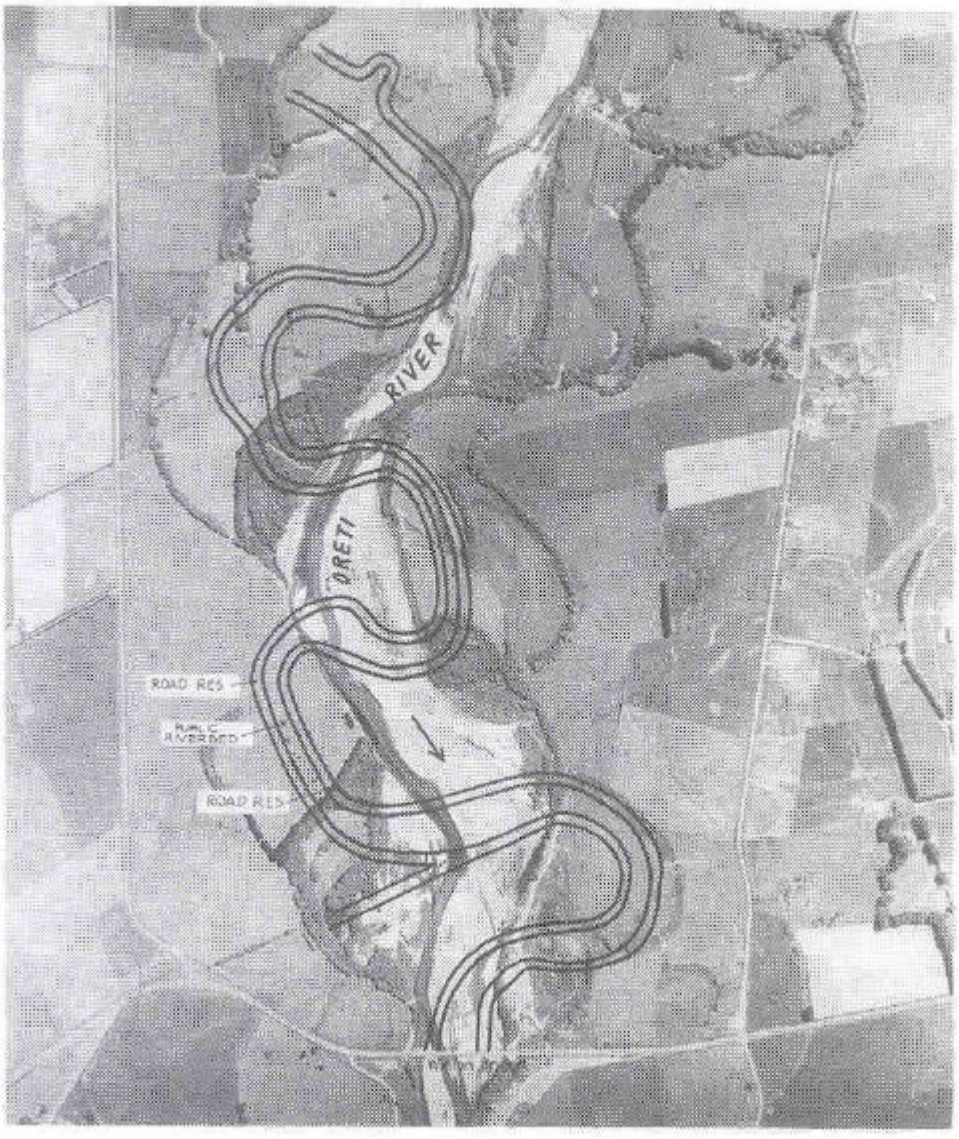

Figure 3: Example of how waterway movement prevents public access, Oreti River

Source: McMillan, N A (1985) The situation in Southland as it affects the catchment authority, with suggestions for improvement. *In The law relating to watercourses: seminar proceedings* Evans ed. NWASCA, Wellington.

The Group was given many other examples of situations where legal access is now no longer available because of physical changes in the environment. Consequently, there is much uncertainty regarding location of rights of way. This creates problems not only for those requiring access but also for landowners with properties adjoining public land. It is not clear whether the Crown has a duty of care to inform about "abnormal" hazards and whether it is liable under occupational safety and health obligations. Under the law, it is at the discretion of the land manager whether to inform users of hazards.

The introduction of marginal strip legislation in the RMA that allows movement in marginal strip boundaries seeks to overcome some of these difficulties. The Group surmises that the liability issue remains, as on the ground it is virtually impossible to determine whether a person is on the strip or on private property and where liability resides.

Physical access may also be prevented because the original surveys for reserve land were marked on maps, without regard to the physical attributes of the land. On Banks Peninsula and along many rivers there are examples where the legal access is literally on a cliff face or otherwise unusable.

Signage

The amount of information in the form of signage on reserves and strips that have a public right of access or public roads varies among territorial authorities. Signage is often more prevalent in localities with higher tourist numbers and where local councils are more active about providing information for visitors. The degree to which the council is active depends on its reasons for creating the reserves (conservation, tourism or other), pressure from adjacent landowners, and the available resources to facilitate access and associated requirements (e.g., track maintenance, facilities and rubbish disposal).

The New Zealand Fish & Game Council has been active in providing signage to indicate angling access points. Its objective is to obtain practical walking access through consultation with landowners, authorities and other interested parties to identify public access points. Identification of access points through signage is then linked to printed map material that provides further information about the expectations of adjacent landowners (such as vehicles parking, and which fencelines to follow).

Power of Territorial Authorities

Under section 6(d) of the RMA, territorial authorities are required to provide for public access, and specifically "the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers". The Group observes that territorial authorities have not translated this priority into planning practice. Examples of access strategies are few (e.g., Waikato District Council, which is preparing a strategy for walkway development) and there is no consistent application of section 6(d) throughout New Zealand. RMA access provisions appear to be under-utilised by communities because of insufficient knowledge on how to invoke the RMA's processes (and provisions) to enable greater access.

The Group notes that territorial authorities have discretion under the RMA to create, waive or reduce the width of esplanade reserves when private land is subdivided, through the rules included in the district plan. There is increasing pressure for territorial authorities to waive or reduce this requirement when subdivision occurs, in the interests of development and cost savings for ongoing maintenance.

Department of Conservation and Marginal Strips

Similarly, DOC has not widely used the Conservation Act and Reserves Act provisions as a means to promote access, although it has negotiated for access in some areas to enable access to the DOC estate. The major focus by DOC on the marginal strips it manages is based on the direction provided by the Conservation Act, i.e. on conservation and biodiversity outcomes, rather than access per se. The Group notes that there is an overlap between marginal strip requirements and requirements in the RMA relating to esplanade reserves and strips. For instance, where a resource consent for a development or subdivision of land does not require an esplanade reserve, a marginal strip can still be required under the Conservation Act. This conflict needs to be resolved.

Conduct Issues

The promotion of riparian management and environmental care codes (such as DOC's Water Care Code) has increased environmental awareness of the impacts of people on both land and water. This is a common law right of possession only. Regrettably, there will be individuals who do not respect the environment and who take advantage of the privileges which public assess to private land confers. The Group heard examples of private coastal landowners who have restricted access in an effort to prevent pillaging of natural resources on the foreshore.

The Group believes that a higher level of awareness of acceptable conduct among the wider community is essential. The provision of information on conduct occurs to a certain extent with codes (as identified above), but awareness of or adherence to them can be improved. A "code of conduct" lies at the heart of better relationships between landowners and users.

Ad medium filum aquae Rights

A comparatively unknown but complex aspect of land law is the right of ad medium filum aquae (to the middle line of the water). Where a river abuts a property and connection is not interrupted by a legal road or other form of public land, the adjoining landowner may own the riverbed to the middle line of the river. Such land can offer valuable grazing or land use rights. Nearly all Maori land bordering waterways has ad medium filum aquae rights.

Whether this right exists can only be ascertained on a case-by-case basis. It is more prevalent in the braided rivers of the South Island. Submitters advised the Group that, if public access along water margins were enhanced, it might be of little benefit if the riverbed was privately owned. For example, if the public access way is not accessible, users may need to go onto the riverbed. This creates a risk of trespass if the riverbed is privately

owned. The Group considers this to be a valid concern. Nor is the concern a new one. The implications of rights of public access over riverbeds were noted in 1978 by the Property Law and Equity Reform Committee, when debating the law on water courses (Forbes, in Evans ed, 1985).

Conclusion

The practice of reserving land along water margins no doubt has contributed to the popularly held view of the Queen's Chain. However, from early colonial times reservations were partial, rather than complete. There are in fact substantial gaps in the public ownership of land along various water boundaries through inconsistent reservation. Erosion of the land along water may physically remove the original reserved strip, thereby creating gaps in access rights. A right of access may therefore not be presumed in every situation.

At the heart of this debate, the core issue appears to be whether:

- the concepts implied in Queen Victoria's instructions and articulated by McKenzie in the Land Act 1892 remain valid and need to be reinforced; or
- access is now subsidiary to property rights.

Various tools have been used to acquire the land in a piecemeal approach. The present mechanisms for securing public access to water margins under the RMA requires subdivision of the land as the trigger for the consideration of esplanade reserves or strips. The completion of the network comprising the Queen's Chain through this method will be dependent on whether land is subdivided in those areas where the network is incomplete.

The complexity of the current and past arrangements has resulted in many problems associated with practical and secure access to water margins, including:

- the location of, and rights of access to, these reserves are not always known;
- public misconceptions about the legal nature of the Queen's Chain;
- lack of continuity of access along the coast (e.g., Banks Peninsula, Marlborough Sounds, Coromandel Peninsula, Otago Peninsula);
- farming activities, fences and structures sometimes hinder access;
- physical barriers (cliffs, rivers, sea);
- the effects of accretion and erosion;
- ad medium filum aquae rights may, on close examination of a land title, extinguish previous public access;

- increased use of riparian areas could lead to the collapse of banks that have important water quality and biodiversity functions; and
- access affected by uncontrolled weed growth (e.g., blackberry, gorse, budleia).

The submissions received by the Group make it abundantly clear that New Zealanders believe very strongly that there should be practical and secure access to and along the nation's waterways, lakes and coastlines as enshrined in the commonly accepted view of the Queen's Chain. Submissions also make it quite clear that access along water margins should not be further eroded. Rather, it should be extended to include all beaches, waterways of public interest, and all rivers and streams of a specified size.

8 Access to Public Land

Background

Public land encompasses over 30 percent of New Zealand's land area. A large proportion of it is available for walking access. Public land may be administered at a central government level (e.g., national parks, conservation parks, reserves and marginal strips) or at a local government level (e.g., regional parks, recreational reserves, esplanade reserves and roads). The Group also received comments that an important part of retaining and protecting the Queen's Chain is requiring access across private land to get to it. If access is not possible then the value of the Queen's Chain is diminished.

This review considers the access to public land in particular across private land. Access issues relating to Crown pastoral lease land and the tenure review (freeholding) process are also covered in this chapter as the concerns relate mainly to obtaining access to the conservation estate adjoining the lease land.

Legal and practical access to public land can vary significantly, and is affected by the following factors:

- the degree of formation of public roads (unformed roads that cross private land may be obstructed or not well defined);
- public land may be landlocked by private land and permission required from the adjacent landowner(s); or
- physical changes to rivers or the coastline means that legal access is now through a water body or across private land.

As a consequence, public access may be inadequate in its current form.

Tangata whenua, landowners and users have differing levels of concern about landowners giving consent for access across their land to public land, which have been discussed in detail in Chapter 6. Submitters agreed that, where access is granted it is reasonable to expect that access is subject to conditions relating to farm or land management constraints. The response by landowners to any breach of the conditions set is to deny future permission to those users.

Institutional Direction

The Group received a large amount of information about the need for leadership on the issue of access to public land. Some organisations hold

the firm view that DOC, LINZ and local government are unwilling to improve access to public land.

Specific comments were received about the former New Zealand Walkways Commission, responsible for the NZWA prior to this role being passed to DOC and the New Zealand Conservation Authority (NZCA). Submitters considered the district committee structure with representation at a local level better suited to determining local access needs and requirements. There was a view that access problems had increased with the demise of the Commission. While DOC had been given the responsibilities of the former Commission for access across private land (and recreation), this does not naturally fit with its mission "to conserve New Zealand's natural and historic heritage for all to enjoy now and in the future". Advocacy for conservation on private land tends to be given a higher priority than access on private land.

Associated with the above, the Group received significant comment on problems with the mechanics of the NZWA. One of the reasons offered to the Group for the lack of walkways on private land were that mechanisms in the Act were too legalistic and inflexible, mainly due to survey requirements which gave rise to cost issues. Another comment was that the mechanisms did not reflect the adverse impacts on land management needs that the permanence of walkways have for landowners.

Information and Certainty

Gaps in information on present and future demand for access across private land to public land make it difficult to assess whether there is a need for more access. New Zealand's research needs have focused largely on "supply" rather than "demand" for recreation and access. Further research is required on areas of demand in order for appropriate responses to be determined. The comment was made that the collection and availability of information on access is a critical issue for improving access to public land. The Group is aware that the provision of information on access points, together with information on demand and reaction by landowners to those demands, is crucial for negotiation processes and for minimising tension.

Similarly, information is required about agreed access arrangements, where and when access is available and under what conditions (expected conduct), and what rights and responsibilities exist.

Landowners will seek an outcome that is supported by appropriate behaviour. Landowners raised many concerns about the need for appropriate behaviour in any new access arrangements with a code of conduct potentially adding value. If these expectations about conduct are not achieved or maintained then the less secure forms of access arrangement

will decline over time due to landowner dissatisfaction, leading to increased tension between landowners and users.

Roads

In situations where farmland surrounds public land, unformed roads provide access to the more remote public land. Submitters recounted some of the difficulties in using unformed roads as a means of accessing public land, and the lack of support from territorial authorities who are legally responsible for ensuring that these roads are fit for the purpose. In many situations where problems arise, it would appear that local and central government agencies, for the most part, were unwilling to assist the public to exercise their rights on these unformed roads to obtain access to the public land beyond. Submitters wanting access ask that information regarding the network of unformed roads be collated and made more readily available. Further, submitters ask that, where access is denied on these roads, councils are required to be proactive in ensuring that the situation is rectified.

The Group notes that it is often not clear where the boundaries of the unformed road are. Often, farmers and landowners use these routes as farm tracks. Such tracks often deviate from the paper roads for very practical terrain-based reasons. Some of these roads were never surveyed on the ground and were drawn on maps in the surveyor's office in town or even overseas. Often, the survey pegs are unlikely to be locatable or identifiable because of the length of time since the original survey. Resurveying may be required; however, this is an expensive exercise.

There are repercussions for the owners and managers of land where unformed roads have been laid or surveyed. Increasing the availability of these roads for public access may present land management problems. The effects of this may be mitigated though a clear statement of the expected conduct on land (a code) and, potentially, changes to the legislation on trespass and occupational safety and health.

Firearms

The Group considers that, while the issue of firearms was outside the terms of reference, the issue of responsible firearm use, especially when crossing private land to access public land, is an important matter that requires clarification and improvement. The Group received a large amount of material from landowners concerned with issues relating to firearms and dogs being taken across private property to public land. Similarly, there were many user groups that were concerned at the steady decline in opportunities for crossing private land to get to public land with firearms and dogs.

Motor Vehicles and Practical Access

Issues related to with the use of motor vehicles across private land to access public land are outside the terms of reference of the Group. There are, however, instances where the distances to be covered to get to public land are such that vehicles are desirable to reduce time spent on merely obtaining access (e.g., access over long river valleys). The Group considers that, in these instances, negotiating access will be complex and expensive as the negotiation of roads will be required in order to provide secure and quality access. While mountain bikes are classified as vehicles in the Transport Act 1962, they do not require roads and are usually treated separately by recreation providers.

Crown Pastoral Lease Land

The specific access issues raised regarding the Crown pastoral lease land relate to the provision of access:

- to the higher altitude conservation land – due to the lack of direct access routes that are not too difficult to negotiate;
- along waterways – which enables access to the waterway itself and also provides access to conservation land beyond the freehold or lease land; and
- for vehicles – to enable more practical access where the distances to public land are too great for pedestrian access only.

The Group received information that access routes (e.g., marginal strips or access easements) created through the tenure review process are not always being adequately marked or publicised, and therefore there are information and certainty issues relating to the extent and exact location of these routes.

Concerns were raised that easements, which are used as a mechanism to delineate access across freeholded land can be varied by section 126G of the Property Law Act 1952, which enables them to be modified or extinguished through the Courts, without any public process. The Group was advised that the Courts are unlikely to alter or extinguish these arrangements without involving the public, because of natural justice. The public would be represented by the Crown if the matter went before the Courts. If this is not the case, the Group considers that the access being formalised through the tenure view process is insufficiently secure.

Conclusion

Gaining practical and secure access to public land often relies heavily on the agreement of adjoining landowners. Public roads (unformed) may provide

legal access, but there is not the institutional support to ensure that unimpeded access can occur. Policy proposals need to address the certainty of access over these roads, through both the provision of accurate information and signage on the ground.

9 Access Onto Private Land

Background

This chapter discusses "access onto private rural land to better facilitate public access to and enjoyment of New Zealand's natural environment". The Group has interpreted this as meaning that it has been asked to consider a range of options, from the status quo where the landowner allows access after permission has been sought through to "as of right" access.

Views on this issue, unsurprisingly, raised some of the most varied opinions encountered by the Group. There appear to be two groupings – the majority for maintaining the status quo and the need to obtain permission for access – and a small number for developing a New Zealand form of "as of right" access to facilitate free and ready access to the countryside.

"As of Right" Access

The Group considers that access onto private land could be enhanced without implementing general "as of right" access. The Group has not identified a strong demand for a greater level of access to private land for recreation, although it notes concerns about "traditional" access being reduced.

The Group understands that there has been some research undertaken by local government and DOC on the demand for recreational access on public land, whereas there has been little research on the demand for access to private land for recreational purposes. The Group is aware of a demand for private walkways where accommodation, transport and other services are provided; the demand is significant but is limited by cost, supply and marketing.

There is uncertainty about future requirements for public access to private land, but the Group considers that access arrangements will require two approaches, which could be implemented in tandem or separately.

Firstly, retention of and support for the social conventions will require tangata whenua, landowners and users to show tolerance and understanding. Secondly, legislation is needed that is compatible with the goodwill component of social conventions (such as addressing liabilities in the HSEA). Legislation that causes concerns regarding liabilities or creates

uncertainties will place increasing pressure on the continuation of the social conventions.

The Group notes, however, that a more liberal approach to access may be needed in the future, given the pressures facing existing social conventions. The topic and its implications are very complex. The property rights ethos predominates in New Zealand. It cannot realistically be expected that this will change quickly to accommodate access pressures. Nevertheless, society needs to be willing to debate the complexities and implications of those pressures.

The Current Situation

Notwithstanding the fact that the Group does not yet see a need for "as of right" access, the current situation, as discussed in Chapters 2 and 6, is far from perfect. The balance of this chapter describes the pressures on the status quo.

The legal situation in New Zealand requires that permission be obtained from a landowner or current occupier, otherwise a risk of trespass occurs. There is no public right of access.

Development of Social Conventions

Social conventions develop over time in communities in order to create arrangements that benefit everyone. These informal arrangements may involve elements of legislation, such as the Trespass Act, which have formed part of the social expectations (such as people leaving gates as they find them). Parties within the community usually understand the obligations inherent in these informal arrangements, including payment of a fee (e.g., for vehicle access) or obtaining a key to a locked gate.

These conventions are based on the etiquette which pertains to different groups (e.g., anglers, trampers and now, frequently, mountainbikers). The more experienced people making up these user groups understand the etiquette, but the less experienced are often not so competent. Hunter (in McDonald, 2003) suggests that "individuals and other small, informal, 'non-paying' groups who lack the knowledge of opportunities and/or acceptance by landowners may be less well served by private land ownership".

These conventions rely strongly, however, on the existence of a stable community which is knowledgeable about information relevant to land access in that locality (e.g., the social rules that may apply during lambing). This inherent community understanding among private landowners is also

required for landowners to appreciate their obligations towards tangata whenua concerning customary use.

If the community structure changes, differing expectations arise regarding access, or the community is no longer aware of this information, and informal arrangements become subject to increased tension leading to possible conflict. Similarly, on the part of landowners, lack of knowledge about the customary rights of tangata whenua can lead to tension and possible conflict.

The problem of a lack of information about whom to ask in order to obtain access to a property was raised as an issue by a number of submitters. It is often not clear which house aligns with a property to which a user is seeking access, making it very difficult for a person to obtain permission in advance of a visit. The increase in concerns regarding privacy and safety on rural properties means that the published forms of information on property owners that were used in the past are no longer readily available.

Pressures from Change

There are increasing pressures on these social conventions through uncertainties relating to information, liability and conduct issues that require clarification in order to ensure that the social convention approach remains appropriate and workable.

The need to seek permission from a landowner before accessing private land is not as well recognised by users as it once was, which puts pressure on the relationship between landowners and responsible users who seek, and obtain permission. While many users are aware of the need to seek permission and act on landowner requests regarding behaviour, other users have a poor understanding of how to secure a welcome from the landowner or be allowed a return visit on the property. This may be compounded by difficulties in identifying landowners.

As noted in Chapter 2, one factor is the change in social dynamics, with new immigrants, greater mobility, increased urbanisation and a greater concentration of population in the North Island. In addition, the number of people with relatives or friends on farms is declining. These issues have led to a loss of connection with rural areas and the cultural understandings that are important, especially those about farming systems and expected conduct.

Similarly, farming systems and land uses are changing. The management practices of today are vastly different from those 30 years ago, and will be different again in another 30 years.

The Group notes that all these changes affect the "social conventions" and arrangements between tangata whenua and landowners. This can lead to reduced access to places of customary importance as new owners may not understand the significance of these arrangements and be disconnected from "understandings" that have survived, in some instances, for generations.

Need for Goodwill

The goodwill on which these social conventions are based is compromised when people regard access as a right rather than a privilege, or when users fail to uphold their side of the social convention (e.g., by leaving a gate open or going somewhere on the property that they said they would not). Reasons for this include a lack of appreciation, by an increasingly urban population, that these productive landscapes are a workplace and not merely open space.

The Group considers there to be decreased goodwill towards giving "general access" (i.e., people not known to the landowner). Reasons include the increasing numbers of people seeking access and increased opportunities for non-farming commercial activities on rural land. There can also be legislative initiatives, such as the HSEA, that create uncertainty and place pressure on the goodwill required to make these social conventions work. The Group, however, considers that there is no change in goodwill towards clubs and groups who become known to the landowner, and who take some responsibility for their members.

The "social convention" approach requires a high level of respect and trust among all parties. Responding to a large number of requests for the provision of access can be a burden for landowners, particularly those in remote areas and close to public land. While there is a legacy of goodwill among landowners towards providing access, this can quickly be eroded where those who have acted irresponsibly have affected landowners. Hunter (unpublished) notes that landowners appear to favour organised ventures because they reduce transaction costs, especially time spent arranging visits and monitoring users.

On the other hand, recreational users who are prepared to act in a responsible manner would like to have reasonable access onto private land. This expectation is increasingly rejected as some foreign owners, new owners with no family attachment to the locality, absentee owners, lifestyle blocks and other economic and land tenure changes create new barriers to access. The Group received comment that there is an increasing prevalence of refusal of access, sometimes with no reason offered or, possibly, using the uncertainty of HSEA obligations as a reason.

Pressures on Landowners to Reduce the Provision of Access

Many landowners feel under increasing pressure to deny access for various reasons. The increase in intensity of land use in order to diversify income creates situations where access is not appropriate and is incompatible with the land use. In addition, there are concerns regarding personal security, crime, animal welfare, and simply the increasing number of users and visitors which places pressure on time to manage and respond to requests.

The growth of tourism and other non-farming commercial activities places pressure on the previous provision of access at no cost. Furthermore, a new generation of landowners with a different culture/ownership ethic (such as investors, expatriate New Zealanders and foreign owners) places pressure on established social conventions.

The same issue arises for tangata whenua (in this context meaning those people and extended whanau who hold customary rights to a lake, a river, or the coast and beach of a particular area). This is not to be confused with those who may live in that locality, but who are tanagata whenua from another part of the country and therefore not holders of that customary right.

The problem with the social convention arrangement is that the most straightforward option available to the landowner if problems arise may be to close access. The Group considers that there is no process to help facilitate resolution between affected parties.

Conduct of those Seeking Access

The Group notes that there is a lack of information on expected conduct for people seeking access to areas where there may be sites of significance to tangata whenua. These areas include wahi tapu and wahi tupuna (sacred sites) examples being urupu (burial grounds), old battlegrounds, pä (old fortified villages), marae (settlements) and papa kainga (ancient settlements and reserve areas).

Maori values also apply to important archaeological sites such as areas associated with artefact finds (e.g., adzes, waka/canoes, rock art), and natural resource areas including important types of vegetation, animal and bird life, and rock and mineral source areas (e.g., pounamu/nephrite). Other special resource sites, such as mahinga kai and mahinga mataitai (traditional food source areas), also require consideration.

There is no mechanism to define, or inform on, “reasonable” and “un-reasonable” access in order to avoid conflict before it happens. Users may be able to obtain this information from the landowner when permission is

sought (if they are able to identify or locate the landowner). Any prior information, however, that helps the user to be better informed about appropriate behaviour on rural land could allay some fears for the landowner about how well informed and sensible the user will be.

Barriers to Casual Recreation

There is also the matter of the casual yet responsible visitor to an area who wishes to cross land for walking, to observe a view or to rest. With "driving for pleasure" being one of the more significant recreational activities, and with increasing urbanisation, this activity and the consequent demand will increase. The Group was given an example of where private forest owners are providing for mountain biking at considerable cost with little revenue to offset those costs. In essence, they are providing a public good.

The demand for casual visits to sites of recreational value and interest can be seen in the high use of parks, rivers and coastlines near major cities and urban areas. It is likely that this type of user activity will place greater stresses on the current social conventions than the more "traditional" user such as trampers and anglers.

Conclusion

The Group has not identified a demand for "as of right" access. It may eventuate, given the pressures that existing social conventions are under. The property rights ethos predominates in New Zealand, and it cannot realistically be expected that this will change quickly to accommodate access pressures. Nevertheless, society needs to be willing to debate the complexities and implications of those pressures.

In the meantime, there are many initiatives that can be taken that will enhance access. These are discussed in detail in the next chapter.

10 Objectives for Enhancing Access

Background

The three preceding chapters described the nature of public access in three situations:

- access to the lakes and the sea and along rivers;
- access to public land across private land; and
- access onto private rural land.

The Group has identified a range of issues and problems that affect current and future access to the New Zealand outdoors. Resolving these has practical, policy and legislative implications. In order to identify a way forward to improve access matters for both users and landholders, the Group endorses **five objectives** that need to be addressed:

- to **strengthen leadership** and to provide direction for, and co-ordination of, access arrangements nationwide;
- to provide greater **clarity and certainty of access** by locating and publising what is acceptable and where it may occur;
- to affirm the validity and **embrace the ethos of the Queen's Chain** by providing mechanisms for its promotion and enhancement;
- to **encourage negotiated solutions**; and
- to find ways to **improve current legislation** provisions for access.

For each objective, a range of options is presented. These are not presented in order of priority, neither are all the possible options covered. The options given range from the innovative to adjustments to the status quo. Success in improving access issues will require a coherent package that can only be developed through extensive consultation with all parties.

Objective: To Strengthen Leadership

First and foremost, a strategic approach to providing for public access is needed. The gradual erosion of social conventions and changing economic and social environments have affected the way in which access occurs and the Group believe it that this erosion will continue. As a nation we need to respond. This investigation shows that the ad hoc measures currently used to provide for access are not sufficient. Many agencies involved and, at times, these agencies and the mechanisms they employ work against each other. The Group notes that the RMA provides a mandate for access to

water margins, but questions whether this is sufficiently robust. Few district councils take a coordinated or strategic approach to developing or managing access. There is wide variability in the degree of emphasis placed on access by local government.

Few initiatives have been undertaken to foster and promote public access nationally and in a strategic manner. Earlier chapters in this report highlight the disparate legislative and non-legislative tools to provide access. Interested groups have usually initiated attempts. The Federated Mountain Clubs was the prime driver behind the original walkways concept in the 1970s, and the Te Araroa Trust is now promoting the Te Araroa network of tracks and trails from Cape Reinga to Bluff.

The Group considers that a New Zealand access strategy needs to be developed, to give a framework for leadership, coordination and coherence to the various approaches, programmes and initiatives for improving public access.

Developing and implementing a strategic approach to access requires both robust information on demand and involvement by tangata whenua and stakeholders (landowners, users).

Access Agency

The Group agrees that a separate access agency is an appropriate mechanism to develop and help to implement an access plan and would address the lack of direction and strategy illustrated by many of the issues relating to access.

The functions of an access agency could be to:

- build a relationship with tangata whenua (i.e., the people of the land; the Maori iwi, hapu or whanau that has manawhenua over a particular area);
- develop a national plan for access – with regional and/or district components;
- administer any relevant access legislation;
- ensure that useful codes of conduct are developed in conjunction with tangata whenua, landowners, users, and central and local government;
- negotiate for the provision of access (and possibly any compensation);
- promote the need for access with local government and other agencies to ensure local solutions for the provision of access;

- provide for, and support, the dissemination of information on access for users and the general public; and
- provide a mediation service where problems associated with access arise.

This access agency would require a statutory charter and a strong link to a ministerial portfolio to provide the accountability that has been lost within other central and local government agencies with an access role. A strong ministerial link would also provide political impetus for other agencies, such as local government, to take the topic seriously.

This strong link to the Crown should help to enhance the relationship between tangata whenua and the Crown on access issues, especially access for customary use.

The Group considers that the access agency could be an independent organisation that is responsible solely for access or, alternatively, part of an existing government entity. If it is part of an existing agency, the function would need a high degree of autonomy. The access agency should be separate from other roles, such as environmental or conservation, which have subjugated access objectives in existing agencies. A small stand-alone access agency could give the profile, national leadership and focus that is missing at present. On the other hand, the agency would need to be viable. Depending on the designated functions, it would require local systems and staff with sound technical skills to ensure that improved and responsible access was achieved.

The agency would need sound legislative backing to ensure that it has the necessary powers and ability to improve public access. The Group considers the role, functions and structure of the former New Zealand Walkways Commission to be a good model for an agency that could achieve practical outcomes tailored to suit local conditions. The former Commission was limited by a regime that lacked the flexibility to achieve sound results. The Group believes that the disestablishment of that Commission and its local committee system, and its incorporation into the day-to-day work of DOC and the NZCA, has been a contributing factor to access no longer being a "serious" policy issue. Important conservation tasks such as endangered species recovery are higher priorities than access, for both DOC and the NZCA.

The agency would need to work very closely with tangata whenua, landowners, local government and users who are well placed to understand local demand, and local social arrangements for access. This is particularly important, as most access problems occur in a local setting, and while the demand often comes from non-residents, the cost of resolution is borne by

the local ratepayers. Local government is often reluctant to spend money on access problems that may have little benefit or value for ratepayers.

Local government has processes through existing legislation, such as the subdivision provisions under the RMA, that could be used to improve access. Territorial authorities are also responsible for local roads, both formed and unformed, which have a crucial role in providing access. These, along with obvious strong linkages to local communities, highlight the integral role of territorial authorities.

Comments were made to the Group about the need to ensure that territorial authorities fulfil their responsibilities to remove obstructions on unformed, and even formed, public roads. An access agency could have a role in resolving those problems bought to its attention.

Determining the final functions, nature and structure of an access agency requires a thorough scoping and costing of intended roles and how closely it would work with other agencies that have access as one of their many roles.

The Group considers that tangata whenua often negotiate with landowners to obtain access and that this is a private undertaking and the responsibility of tangata whenua to negotiate. The Group believes that neither the access agency nor local government should get involved in these negotiations or to replace an individual negotiation process unless requested. The access agency would need to build strong relationships with tangata whenua.

The access agency could be responsible for providing adequate and usable information through printed and electronic systems for landowners and users. It could do so through printed access maps or a website. The information would need to be made available to all parties at little or no cost if it is realistically expected that it be used widely.

Objective: To Provide Certainty

It is clear from submissions that access arrangements must provide surety of access outcomes for all parties. Surety means legal and practical access. The amount of time and resources (especially public) that will be invested in the process need to result in long-term access arrangements.

Landowners will want an outcome that is supported by appropriate behaviour. A code of conduct (as discussed below) could improve access arrangements by establishing the expectations for appropriate behaviour. If landowner expectations about conduct are not achieved, less secure forms

of access arrangements could decline over time, due to landowner dissatisfaction and reluctance to allow access.

Provision of Accurate Information on Location and Type of Access

The Group was advised that cadastral maps are not always accurate but are a simpler option than the costly process of checking property titles, or even the original Crown grants, to ascertain whether access exists (e.g., the location, the kind of rights that exist, and whether the access right is contiguous along the length of waterway). The Group considers that cadastral maps should be used as the basis for information in order to make the best use of reasonably accessible current information. While information on cadastral maps is only indicative, it is reasonably accessible. If problems arise (due to disagreements over this information between tangata whenua, landowners, and users), then the access agency, in conjunction with LINZ, would need to determine the exact situation using the most accurate information.

The Group was advised that, with the changing role of LINZ and the demise of Terralink, there is no longer a government agency responsible for ensuring that cadastral information is readily available in both electronic and paper form for the public at minimal cost. This appears to be directly related to LINZ now being the holder of information only. LINZ does not publish maps. While the public can visit LINZ offices to search electronic databases, the land title system is geared to meeting the needs of commercial and professional users (e.g., surveyors and lawyers). LINZ makes its data available to third parties who can publish the information if they identify a market.

The Group considers that information relating to individual land titles should be easily available, as it is the authoritative legal document. The collation of this information into a usable and comprehensive form would be very useful, as lack of reliable information has been identified as a key issue for all parties involved. Electronic computer titles do not bear the endorsement of a plan or diagram on a print of the title: they use a notation system to indicate what access is available, but often do not include information stating which waterways this access is located on within a property title.

The Group regards these situations as serious impediments to ensuring that tangata whenua, landowners and users have accurate and readily available information that might facilitate better access arrangements.

The Group believes that the Government and LINZ should address these concerns as a priority. It is not satisfactory for major sections of the community to be excluded from being able to access public information

conveniently and at minimal cost. The Group sees provision of this information as a public interest activity that benefits all parties, and should be funded as a public good.

Landowner Contact Information

A real concern raised by users was lack of information about whom to ask in order to obtain access to a property. In rural areas it is often not clear which house aligns with a property to which a user is seeking access, making it very difficult to obtain permission (especially in advance of a visit). The increase in concerns regarding privacy and safety on rural properties means that the published information on property owners that was previously compiled locally is no longer readily available. The Group does not see a ready solution to this problem, due to the obvious safety and privacy concerns.

Maori land can often have absentee owners, so asking permission in these instances is very difficult, if not logistically impossible. In addition, there are parcels of land (in the order of 16,000 titles) with no ownership structure and therefore no "owner" to ask. Likewise, seeking permission from absentee owners or property managers on non-Maori land can also be a problem.

An access agency could perhaps have a role in providing solutions to these information needs.

Signage

The Group considers that greater use of signposting needs to be undertaken where access is available. Providing better and useful signage to indicate access ways and associated rights and responsibilities would be of great benefit to all parties. This could involve, for example, colour-coded waymarks.

The Group notes that freshwater fishing organisations are particularly concerned that defined access to angling spots be identified and signposted at regular intervals. Submitters have suggested how this could be achieved thorough negotiated access points and markers, adhering to fixed routes through properties and the provision of stiles to avoid damage to fences or gates.

Information and signs could be tailored to suit local and regional differences in land management and to reflect any local arrangements. Information needs to reflect the realities associated with different farming systems and be sufficiently flexible to meet the needs of different landuses,

and the seasonal timing of agricultural events (e.g., lambing, roar season for deer) in different parts of the country.

Signs could be used to indicate access along waterways and the coast. A presumption could be that public access is available unless signposted otherwise. This would lessen the costs of placing a large amount of signage along the waterways and the coast.

Code of Conduct

The Group notes that there is solid support for a code(s) of conduct that would inform all parties of their responsibilities. To be successful, a code needs wide acceptance and this can be best assured by all interested parties being involved in its development.

The Group agrees that such code(s) could assist in building the confidence of private landowners and could be applicable to both public and private land, thus covering all three situations under investigation. Where users demonstrate appropriate conduct, the outcome is a lower risk to land-owners of irresponsible behaviour resulting in possible damage to property. A code would provide a baseline for the type of behaviour that could reasonably be expected on property, and would guide members of the public as to what is acceptable and expected.

A code(s) would need to ensure that users are aware of, and able to appreciate, the results of their actions on tangata whenua. A code would need to be developed in a way that meets the needs and views of tangata whenua.

The Group considers that there is a lack of information on expected conduct for people seeking access to areas where there may be sites of significance to tangata whenua. These areas include wahi tapu and wahi tupuna (sacred sites), examples being urupa (burial grounds), old battlegrounds, pa (old fortified villages), marae (settlements), and papa kainga (ancient settlements and reserve areas). Certain behaviour is expected for archaeological sites(artefact finds, e.g.,, adzes, waka/canoe, rock art), and in natural resource areas including important types of vegetation, animal and bird life, and rock and mineral sources (e.g., pounamu/nephrite).

Other special resource sites such as mahinga kai and mahinga mataitai (traditional food source areas) also require consideration. There will be information issues for disclosing the location of sensitive sites.

There are also risks associated with publicising some of the informal arrangements that currently exist, due to the potential pressure on mahinga kai and mahinga mataitai if used by people who are not tangata whenua to a specific area and who do not hold customary rights.

The Group considers that a cultural template could be beneficial to the implementation of a code(s) and could cover many of the issues above so that users were more aware of, and sensitive to, the concerns of tangata whenua.

There is limited generic guidance, advice or information available on the expected conduct for those seeking access across or onto private land. No mechanism or readily available information exists to define reasonable and unreasonable access in order to avoid conflict before it happens. Users can obtain this information from a landowner when permission is sought, if they are able to identify or locate the landowner.

The Group considers that any prior information that assists the user to be better informed about appropriate behaviour on private land could allay some fears for landowners about how well informed and sensible the user will be.

While a code could be generic, there will be elements within these codes that will vary according to local or regional needs and whether the user will be on public land or private land. Private land will have different presumptions from those for public land.

Added to this complexity is the fact that particular farming systems, such as sheep farming, differ between regions. The timing of aspects of the farming cycle, such as lambing, vary. Therefore, even if a local user has an "above average" level of understanding of farming in his or her locality, this may not be useful elsewhere in the country. Furthermore, farming systems within districts vary, with practices such as different lambing dates, split lambing mobs, lambing twice in 18 months and split calvings.

Chapters 3 and 4 looked at examples of codes in New Zealand and overseas and how "responsible access" is defined and applied. The Group believes that the content and purpose of the Scottish Countryside Access Code (summarised in Chapter 4) has merit. That code is required by legislation, although it does not have the force of law.

The Group notes a suggestion, supported by some recreational groups of a code of conduct that has an associated card to indicates that the user adheres to the code. The card could be left on the dashboard of parked vehicles, or carried, to indicate that the user was adhering to the code. A

landowner could decline access to a person who did not have such a card. This self-regulating mechanism could allow traceback (e.g., a contact number for landowners to call to check details of the user). This proposal appears to have some merit but requires much more analysis. It raises issues of privacy, cost, misuse of information and whether it could be construed as a "licence".

There is a growing trend towards use of alternative resolution processes, such as mediation, to deal with conflicts between parties, both individuals and groups. An interest-based dispute resolution process (mediation), rather than a rights-based process (courts), would seem an appropriate mechanism for dealing with conflicts over access in the first instance. Failure to resolve conflict by mediation could require the matter to be dealt with by some other process, perhaps another third party with knowledge and awareness of the issues, to decide or recommend an outcome consistent with general practice. This could be an appropriate role for the lead person or skilled mediator in an access agency.

Objective: To Embrace the Queen's Chain Ethos

The Land Act 1892 was the first effective legislative endorsement of the concept generally known as the Queen's Chain. This concept has heavily influenced the now commonly held view that access should be available to and along waterways, and to public resources including publicly held land, the coast, water, wildlife and fisheries.

The Group received a very clear direction that the public should have legally certain and practical access to New Zealand's waterways, lakes and coastlines, as held in the commonly accepted view of the Queen's Chain. The bottom line is that public access along the Queen's Chain should not be further eroded. Many submitters argued for the Queen's Chain to be extended and completed to include all beaches, waterways of public interest and all rivers and streams of a specified size.

The Group concurs with submitters that traditional expectations regarding public access to the "Queen's Chain" are fundamental to decisions about the provision of access in the future. In doing so, the customary rights of tangata whenua would need to be considered. In some areas extended public access may place additional pressure on mahinga kai and mahinga mataitai.

Currently, the extension of access to and along waterways using existing legislation relies on subdivision as the principal trigger for private land. In areas of the South Island high country, the trigger might be tenure review

and the consequent creation of marginal strips or access easements. Improving the present level of access by relying on the status quo is probably unrealistic. The length of time to make advances in the amount of access to and along waterways will be many decades, if ever, at the current pace. Some possible initiatives for embracing the Queen's Chain ethos in a practical manner are outlined below.

An important consideration would be whether any of the following approaches would apply to all land or all land apart from Maori land. Considerations would need to be given to Treaty obligations as customary Maori land and some freeholded customary Maori land were never subject to the Queen's Chain reservation.

Deeming

One of the first considerations would be to determine what rights would be deemed to exist along water margins and how these dovetail with existing rights. "Deeming" access could apply in various ways:

Firstly, deeming could apply in situations where unformed roads or marginal strips have already provided for access, but which have not moved when a waterway has moved. Deeming access along these waterways would simply rectify the situation and be consistent with the previous intentions. The intent of the past mechanisms was to provide practical and legal access, but this is no longer possible due to natural processes. (Refer to Figure 3 – Oreti River.)

Secondly, deemed access could be undertaken along all waterways of a specific size or width, the margins of lakes and the coast in order to complete the Queen's Chain. This has property rights implications for all landowners, and Treaty implications if proposed for Maori land. The intention would be to secure access rather than ownership. The landowner would retain title and use of the land. The access right would need to be flexible so that it moved to accommodate land management needs and natural erosion/accretion processes. It would achieve the original intention of the Queen's Chain.

Thirdly, an access right along waterways or to public land when land is sold could be created. This approach could hinder land sales. This option is advanced as a way of addressing public concerns raised by the sale of land to overseas purchasers. Such sales would, to be equitable, need to apply to all land. The sale could also trigger a review of access to areas of value to tangata whenua to protect places of significant value to them.

Fourthly, a sunset provision could be applied whereby the Queen's Chain would be deemed to exist where no other trigger has been activated, such as

subdivision, after a defined period of time. After that period, a right of access would be deemed along specified waterways where there is no current right of access. This approach clearly signals the intent of the Government of enhancing access, yet provides other mechanisms to be used in the interim should a landowner wish to pursue them.

Statutory Trust

In this option, landowners could, by statute, be deemed to hold the land under a statutory "trust" for access for the benefit of the public. Landowners would retain full legal title, but that title would be subject to the right of access to and along waterways and to other public land where no access is currently available.

Access would be restricted to routes identified by the landowner. In the event that no route is nominated by the landowner the right of access may be a general right over the whole property (exceptions may exist for homes, surrounding yards, etc). This approach provides the owner with a strong measure of control and is a strong incentive to identify access lines.

It would be an inexpensive option and would be particularly applicable to situations where legal access is at risk of erosion, river changes, yet sufficiently flexible to accommodate land management needs. It is recognised, however, that there could be costs to individual landowners.

It would be consistent with a shift of property law into rights of a more general kind than traditional values permit, but is not inconsistent with traditional values in that the owner may minimise interference. The question arises whether this proposal would be a "taking". On the one hand it affects the "bundle" of rights, while, on the other hand, the landowner retains title and use of the land.

Objective: To Encourage Negotiated Solutions

Access arrangements need to be practical, legally certain and in the right place. Sound processes for determining local access needs and the mechanisms best suited to meeting those needs are crucial for the improvement of access. Any processes for determining local access needs will require the involvement of tangata whenua, landowners, users, a proposed access agency and local government.

The process for improving access must address tangata whenua and landowner concerns in order to achieve favourable outcomes. Minimising inconvenience and the responsibilities of landowners, not increasing their

responsibilities or causing problems with stock and property, are legitimate concerns. The sustainability of any result depends heavily on processes that engender mutual respect between all parties in terms of their rights and responsibilities for the land they are crossing. This respect is required both during negotiation and afterwards.

There is a wide range of existing and new mechanisms that could be used to achieve the desired outcomes through negotiation. These mechanisms need to:

- recognise existing arrangements;
- achieve routes or accessways that are satisfactory for all parties;
- provide public access to rural and conservation settings;
- meet local circumstances;
- provide legal certainty and practical access;
- be flexible, with the ability to shift the route (or temporarily closed) if required for land management purposes or changes to the physical environment (e.g., erosion); and
- be compatible with the negotiation-based process.

A strength of the New Zealand Walkways Commission district committee model was participation by committee members, who themselves represented stakeholders, in negotiation processes. Many issues can be best managed and resolved at a local level by involving all relevant parties.

Role of Roads in Negotiations

Formed and unformed legal roads have the greatest degree of access rights and were surveyed so that their location is well defined on paper. Because they are public land responsibilities and liabilities are clear. Unformed roads are often difficult to locate on the ground, as century-old survey markers no longer exist. Territorial authorities do not have an unfettered ability to dispose of roads – statutory public processes are involved – and, when actioned by a territorial authority, public interest can be expected.

Unformed roads may, however, be more expensive than other options should they need to be moved for any reason (e.g., to obtain practical access) because of the costs involved in defining their location, land transfers, and inflexibility. New roads can be created for pedestrian/cycle use only, of a suitable width as opposed to vehicle use.

The Group considers that unformed roads could provide leverage in negotiations for improving access. Unformed roads could be used to ensure better access outcomes. Unformed roads that do not provide reasonable access now, or in the reasonably foreseeable future, could be closed and

relocated. This would increase the net worth of the adjoining property concerned. Case law has determined that such action can occur only if public access is improved, maintained or provided by the territorial authority elsewhere. This provides a check between the interests of the tangata whenua, landowner and users. The Group notes that this proposal has risks in that it could be misused, nevertheless it may be appropriate in some situations.

New Technologies

The wider availability of new technologies provides new options. Hand-held global positioning systems mean that people can follow map coordinates if instructed by a landowner. This allows greater flexibility because a landowner could adjust the coordinates to suit farm management needs. Obviously there is less certainty with this approach and, without markers or signage, it relies on landowners and users both having and being able to use new technologies. The information on the routes would need to be updated; the question, though, is who would be responsible for doing so.

Development of Marked Routes

There are quite informal, but less certain, options for providing access, such as through poled routes, that the Group believes should be considered by the proposed access agency and existing agencies. It was suggested to the Group that, where public access is required to assist access to public land, landowners could be required, by law, to mark (pole and/or blaze) an access route. The landowner could choose the route and adjust the location to suit management needs, but would need to assure continued access. This approach allows a landowner to move the access route should changes in farm management require it.

This highlights the importance of the process of negotiation between landowners and users, to ensure that access outcomes achieve the requirements of all parties as far as is possible. There are costs associated with placing poles along a route and, as with other options, responsibility and liability issues arise if the route becomes impassable or dangerous.

Waymarks

Another option involves using coloured access waymarks, signage or code labels that indicate, on a graded scale, the type of access available. The scale could take into account the level of access available and the constraints: whether permission is required or not; type of user permitted (e.g., the public generally or restricted).

Rights of Way

The implementation of public rights of way could create well-defined access routes. Rights of way would remain private land, with the public being granted the privilege of access with or without conditions. Rights of way are not as formal as roads and do not require change in ownership. Rights of way may be of sufficient width for pedestrian-based access only. These could be developed as part of resource consent conditions or during subdivision of land.

Objective: To Improve Current Legislation

The purpose of this objective is to encourage change to existing legislation and rules that hinder public access. In some case the legislative restrictions are very generic and do not allow for exceptions for foot based access where risks are low. This objective can be pursued in conjunction with or separately from other objectives. Work on implementing this objective could begin immediately.

Public Works Act

The Group does not believe that the PWA is an appropriate compulsory acquisition tool for obtaining access, but it does offer opportunities as a compensation tool. The Group considers that current compensation mechanisms within the Act are too narrow to provide for the purchase of land for the purpose of public foot access. The test in the Act for acquiring land can be met for the purpose of roads used for normal vehicular transport, but not for other access routes across private land such as pedestrian rights of way.

The Group is aware of dissatisfaction, especially among tangata whenua, regarding past uses of this Act for compulsorily acquiring land. Therefore, the manner in which it might be used is crucially important: if used, it should sit within an approach based on negotiation and goodwill.

The Group believes that the current review of the PWA is an ideal opportunity to determine whether the Act should be amended so that acquiring land for the purpose of public foot access could trigger the compensation provisions.

Resource Management Act

The Group is aware that it is difficult and challenging for local government to meet competing obligations under the RMA. There are tensions between higher order obligations within Part II of the Act (especially within section

6), such as the protection of significant indigenous vegetation, outstanding landscapes and maintenance and enhancement of public access. The Group considers, however, that emphasis on protection of significant vegetation and outstanding landscapes has meant that the implementation of section 6(d) of the RMA (the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers) has been a lower priority for most councils. This priority-setting occurs in a de facto manner and not overtly.

The Group proposes that a review be undertaken on whether access provisions within the RMA have been satisfactorily implemented. The Parliamentary Commissioner for the Environment (PCE) could be asked to investigate the implementation of section 6(d) of the RMA. This investigation would also include whether the esplanade reserve/strip provisions in the Act are being used to satisfy access requirements under section 6(d). Futhermore, the Group considers that this review needs to include aspects relating to the wide discretionary powers for territorial authorities under the RMA for creating esplanade reserves/strips, and whether this discretion impacts on the achievement of section 6(d) obligations.

Another option would be to use the RMA to develop a National Policy Statement (NPS) on access. An NPS is the highest-level policy document under the RMA and provides direction to local authorities on matters of national importance, such as public access.

Once in place, an NPS influences other documents prepared under the Act, such as regional policy statements and regional and district plans. In the case of public access, this would influence local government rules relating to the provision of esplanade reserves and strips in subdivision controls. Local government is also required to have regard to an NPS when considering applications for resource consent which, again, would influence the discretion territorial authorities have under esplanade reserve/strip provisions in their plans.

An NPS would, however, only affect the implementation of the RMA in relation to access. It would not influence the implementation of other statutes or the non-statutory mechanisms used to negotiate or manage access. The suitability of an NPS as a policy tool is dependent on whether the RMA is perceived or used as the main statute relating to access. As the report has illustrated, there are many statutes that affect access, and the use of an NPS under the RMA would not address the problems relating to the lack of coordination between different statutes and organisations.

Conservation Act

The Group considers that there are provisions relating to access in the Conservation Act that require further investigation.

This includes whether section 4 of the Act, which gives effect to the principles of the Treaty of Waitangi, is being undertaken by DOC and Fish and Game New Zealand in relation to the discharge of their responsibilities under the Act.

Conservation covenants can also be an option for providing access (e.g., Auckland's Viaduct Harbour).

The Group understands that customary rights and use by tangata whenua on public conservation and reserve land is heavily constrained by legislation and controlled by DOC, and this has been a source of national debate under the "customary use" heading.

A detailed study is required on whether marginal strip provisions within the Act satisfy present and future access requirements. A study would need to address:

- the use of other mechanisms, as appropriate, for the disposition of Crown land which are more suited to the access required;
- the competing tensions within the Conservation Act between achieving conservation outcomes and the provision of public access; and
- the overlap with the requirements under the RMA relating to esplanade reserves and strips.

The Group considers that, when disposing of Crown land, obtaining a secure public right of access without requiring that ownership of the land remain in the Crown could, in some circumstances, be a preferable option to requiring the creation of marginal strips (and thus Crown ownership). It is important, however, that any methods secure access, even if without public ownership, particularly where ongoing maintenance of that access is required.

Trespass Act

The Group received proposals for amending the Trespass Act which are described below. Any proposals might be best advanced within a discrete "access statute" rather than by amending the Trespass Act itself. The Trespass Act has a more generic application, and amendments to it could prove difficult to provide exemptions for recreational access exceptions.

The offence of trespass occurs after a trespass notice has been served on a person(s) in accordance with the Act. At present, the threshold for proving that an offence has occurred – after trespass notices have been served – is probably too high in order for the Act to deal with misconduct.

The Group received useful proposals regarding the need for the offence of trespass under the Trespass Act to be decriminalised and made a misdemeanour, along with a suitable defence of undertaking reasonable recreational activity. Additionally, the use of a fines structure would mean that the penalty provisions would more likely be used, in the case of rural areas, to deal with misconduct – which is not occurring at present. There are problems with policing the Trespass Act in remote rural areas, and the Group considers it likely that these problems will continue despite any possible changes to the Act. Enforcement problems will remain, even if the lower civil threshold of balance of probabilities was used rather than the criminal threshold of beyond reasonable doubt.

A further issue arises where users unintentionally stray off unformed public roads onto private land. Police action is unlikely, given the apparent lower-level importance of this offence compared with other criminal activity and the uncertainty over exact location of the "road" and the adjacent private land.

There were other proposals that argue that a reasonable request for access should not be turned down on an unreasonable basis. Access should be permitted, on request, for reasonable non-commercial access for customary or recreational purposes.

Doing so should not be an offence under the Act and no trespass notice should be served against the person(s). This would require amending the Trespass Act to provide for a defence based on reasonableness. This would impact on the landowner's right to exclude, and so has implications for the "bundle" of property rights outlined in Chapter 5.

The Group is aware that landowners have elected to use the provisions in the Trespass Act to restrict access and effectively obtain "exclusive capture" over fish and wildlife, which is inconsistent with the prohibition on sale of rights under the Conservation Act and the Wildlife Act, respectively. Fishing is an activity provided for under the Conservation Act and freshwater fisheries regulations, while the Wildlife Act and its regulations cover hunting. There is concrete evidence of landowners selling "access rights" or retaining the privilege of access for themselves. In each case, the legislation provides that fishing and hunting rights shall not be sold. These are colloquially known as the "sale of angler or hunting access" loopholes. Submitters requested that these loopholes be closed. The Group considers that this is an issue that warrants investigation and review.

New Zealand Walkways Act

The Group considers that the creation of walkways under the NZWA is a useful option for achieving access on private land. These need, however, to be undertaken in a less costly and more flexible manner. A reduction in the survey costs and the need for more flexible options including shorter-term registrations or arrangements (with lower survey and legal costs) are required if the Act is to be useful in the future. The question of permanence creates concerns for some landowners and the lack of flexibility is a hindrance. The ability to use global positioning systems and aerial photographs for surveying and registering walkways against the title provides more opportunities for reducing the survey costs associated with walkways.

The Group was advised that, although the concept of the NZWA is commendable, its implementation is heavily deficient. The Group considers that the NZWA and its administration needs a fundamental review. One commentator has suggested that the Act was "moribund" before it was passed (McDonald, 2003).

Health and Safety in Employment Act

Many concerns were raised with the Group regarding the impact of the HSEA on access. There appears to be a high level of uncertainty and misinformation about obligations under this Act. The responsibility of the landowner is to warn people coming onto the property about all "abnormal" dangers.

The HSEA does not sit well with the social convention, where access traditionally has been achieved with the goodwill of the landowner and without charge. The HSEA approach creates uncertainties regarding cost and liabilities, thereby undermining the social covenant. It pushes the parties into more confrontational situations.

The nature and extent of landowner responsibilities is often misunderstood and sometimes misconstrued, and is often given as a reason to deny access. The Group considers that this legislation causes problems because it raises uncertainties, and the degree of landowner liability has not been tested for recreational or other non-work-related access on farms. The Group considers that this issue is made worse by the fact that many users do not adequately understand the risks that exist on farmland and in forestry areas.

The Group considers that the HSEA is primarily about safety for workers and employees in the workplace. The Group considers that the scope of the HSEA is too broad and raises many uncertainties about liabilities for non-work related visitors on a property.

The Group therefore considers that using land for non-commercial recreational purposes should be an exemption to the HSE Act, with the user rather than the landowner holding any responsibility for risks entering onto a property.

The issue of liability of owners in the case of multiple ownership (i.e., Maori land) needs to be addressed. The present situation creates much uncertainty for multiple owners and more so for trustees. This risk, as with others discussed above, is presently resolved by often not permitting access in order to minimise risks and liabilities, regardless of size of or probability of occurrence.

The Group considers that any "access" code of conduct that might be developed needs to clearly state the landowner's responsibilities about "abnormal risks". The Department of Labour (as the department responsible for the HSEA) is best placed to assist with the development of a code. The Group also proposes that the Department provide, as a priority, clear information for all parties (landowners, tangata whenua and users) about the liabilities and responsibilities under the HSEA. The Group acknowledges that the landowner should not be liable under HSEA for public users. The responsibilities and obligations of both landowners and users for health and safety issues need to be addressed.

The Group also notes that there appears to be no clear rules about the application of the HSEA for users of public land because permission for access is not required and, if there is no point of contact, there appears to be no opportunity to inform users of any "abnormal" hazards. The Group draws this apparent anomaly to the attention of the Department of Labour, DOC and other managers of public land.

Forest and Rural Fires Act

There appear to be similarities in the liability issues between those for the HSEA and the Forest and Rural Fires Act. The Group has noted the need for an exemption for landowners from HSEA where recreational users are concerned. The Group believes that liability for fire should be addressed in a similar way.

The Group believes that legislation that imposes these types of liability overlooks the health and other social benefits that come from encouraging recreation. If a recreational user lit a fire and cannot be located, the Group does not believe the landowner should be held responsible for consequent costs. The Group recognises, however, that this is not a simple issue, as it could be easy for an irresponsible landowner to deny liability by claiming that the fire resulted from a recreational user.

The potential impact of this type of liability is greater for individual users or small groups, as clubs can often obtain insurance for their members.

Conclusion

If access is to be improved, both extending the amount of access available and upgrading the mechanisms through which access is formalised need to be considered. Legislation and/or negotiated agreements could achieve this outcome. Any new mechanisms need to provide certainty for users and recognise property rights. Many of the solutions discussed in this chapter do not, in the main, need to involve ownership of the land. Many options are about clarifying liabilities, providing for easy access to reliable information and providing mechanisms for negotiating access.

For example, a right of public access may be deemed by legislation, without requiring the subdivision trigger (or disposal of land in the case of Crown land). It can be argued that such a proposal would not constitute a "taking" as it would create a new right rather than a transfer of ownership. On the other hand, reducing the "bundle" of rights normally understood to be associated with ownership could be considered a taking.

Governments often constrain the "bundle" of rights associated with property for public good reasons (e.g., the RMA places limitations and restrictions on the use of all private land). There is a range of views about whether these "public good" reasons make such legislation morally "right". The Group considers that, if any rights of access are transferred, the associated liabilities should also be transferred. This will also ensure that new access arrangements are more likely to be adopted in local areas during a negotiation process, if landowner concerns about liability are addressed.

In the context of waterways and the coastline, current public access is commonly prevented by water boundaries moving, thus preventing legal physical access. The Group's investigations show that the cost of surveys and the rigidness of existing legal mechanisms restrains the provision of better access. To this end, the Group favours solutions that are not reliant on survey mechanisms but instead follow the principle of marginal strips. Marginal strips move with changes within the riparian environment (such as coastal erosion or riverbed changes), providing the flexibility needed.

Chapter 11 discusses other topics that were raised with the Group, but are not core to the terms of reference.

11 Additional Matters

Background

The terms of reference invited the Group "to report on any other matters that related to access appear to require consideration by the Minister". This chapter discusses topics that the Group believes are pertinent to the access debate.

Firearms

The issue of responsible firearm use, especially when crossing private land to access public land, requires clarification. The Group received a large amount of material from landowners concerned with firearms, and from users who were concerned at the steadying decline in opportunities for crossing private land to get to public land while carrying firearms.

Bicycles, Vehicles and Animals

The Group also considers that access issues related to the use of motorised vehicles, especially the off-road use of these, need to be further investigated. In addition, provisions relating to dogs and horses need to be investigated. Bicycle access could be considered alongside pedestrian access.

Land Management

In many areas, legal access is only of benefit to recreational users if it is supported by ongoing management of land to ensure that the accessway is maintained (e.g., that structures such as bridges are safe, and that weeds, slips, etc do not block the access). The impacts of access on other values (e.g., conservation and wildlife) can be minimised with well-planned tracks that keep users away from sensitive areas. Ensuring that management is carried out, either by the responsible agency or by volunteers, may be a role for the suggested access agency.

Fisheries Management

The Group considers that any sports fisheries that have increased access require management to ensure sustainability from increasing pressure from fishers. The Group considers that the development of a fisheries management plans for these rivers should be mandatory, as this can provide the appropriate limits for use by fishers, through the implementation of daily bag limits and other barriers to over-fishing. Suggestions were made to the Group how controls within fisheries legislation could achieve a more

integrated approach for managing sports fisheries. The Group considers that Fish and Game New Zealand should investigate this issue further.

There are issues relating to the management of indigenous fisheries. There are species that are significant to tangata whenua, where more active management may be required with any increase in access. The Group considers that DOC should investigate the management of indigenous fisheries and ensure that the concepts of sustainable use and customary use are incorporated into the management framework.

Crown Pastoral Land Act

The Group notes the concerns raised by some submitters in relation to the process for tenure review in the South Island high country under the CPLA. There are high expectations about the outcomes for access that the tenure review process is expected to deliver. The Group notes that the CPLA objectives include "the securing of public access to and enjoyment of reviewable land".

The Group considers that the Commissioner for Crown Lands should review the use of "access easements" to confirm whether or not this mechanism provides secure ongoing access as required under the CPLA.

The Group also considers that better information needs to be made available about formal access easements that are being provided under tenure review. This would require resources to be provided to implement and maintain access over the longer term.

Ad medium filum aquae Rights

The Group considers that the question of whether ad medium filum aquae rights should continue to exist under New Zealand law requires review. It would be anomalous for actions to be taken to give better access along waterways if private ownership of the riverbed hindered this.

A review would need to consider the position of landowners who already hold title to riverbeds. In those cases, access could be achieved by the options discussed earlier in this chapter. For those who do not know whether they have title, there may not be an issue.

Charging Issues

The Group recognises that there are issues related to charging for access. This is a vexed issue, compounded by the fact that in various circumstances DOC charges commercial businesses and private users for access on

conservation land. The Group does not intend to enter into a debate on whether or not services should be charged. However, charging for public goods and free goods, which do not attach to title, such as water, fisheries and wildlife is not acceptable. The issues that concern the Group relate to what charges are envisaged over the next 20 or 200 years, and whether these will hinder the ability of tangata whenua and users to obtain access.

The Group does believe that charges should relate only to actual services provided, the maintaining of private tracks or accommodation. The Group does not support charging for foot access per se. Many of the user concerns stem from the proliferation of charges. Much angst arises over charges on tracks that are unformed public roads, with a charge for access to a key for a padlocked gate. The Group would be concerned if this practice were to continue.

Another view from submissions is that, because DOC charges for access onto public land and receives funding to manage public land for recreational and access purposes, then private landowners making a profit or earning income from access should be perfectly legitimate also. Some submitters noted that private landowners may feel justified in charging because of the example given by DOC.

Commercial recreation raises a number of separate issues. These include being able to prove whether the activity is commercial or not – the Group is aware of instances where overseas groups with a guide in the party do not pay concessions on DOC land, whereas domestic commercial businesses do. The Group considers that concession processes should be aimed at managing impacts and safety issues. Other issues with commercial recreation relate to the operator indemnifying the landowner against any damages and claims arising from the activity.

Overseas Investment Commission

There are concerns regarding whether the Overseas Investment Commission (OIC) and CPLA should give greater consideration to access when assessing sales of heritage properties and the perceived cultural changes that might arise. As discussed earlier in the report, there are issues about pressures on the social covenant arising from new owners who are expatriate New Zealanders and urbanites. The intent would not be to prevent or preclude sales, but to take into account the continued provision of public access once the sale has gone through.

The use of some sort of covenant or flag could be registered against the title. There are also World Trade Organisation implications if requirements relate to international purchase and not domestic purchase. The Group considers that there is no obvious solution for this issue, but that the OIC,

in conjunction with interested parties, should consider a process for notification that could fit within a wider arrangement for notifying owners of access arrangements.

Oceans Policy

The Oceans Policy Secretariat is currently considering the provision of public access, use and enjoyment of both the oceans and the coastal environment. The objective of Oceans Policy is to safeguard these values against unreasonable erosion by other activities. This process raises issues for Maori in that the nature and extent of customary use remains undefined. The Group believes that its report may contribute to the work being completed by the Oceans Policy Secretariat.

Conclusion

The points discussed in this chapter are pertinent, although not core to the access debate. Nevertheless, if addressed, they have the potential to improve access to New Zealand's outdoors. The next chapter brings the discussions in all of the previous chapters into a proposed strategy for access in New Zealand.

12 Towards a New Zealand Access Strategy

"The land and waters of New Zealand are a treasure to all those who feel they are New Zealanders and access to these, in part, historically defines the values of our society." (Submission)

"Time will not dim the memory of the special class of Rangatira of the past who braved the wide expanse of ocean and land. Their sacred footprints are scattered over the surface of the land, treasured and sacred." (Sir James Henare)

This review of the extent and nature of problems of access to waterways, the coastline and the countryside provides New Zealanders with an opportunity to make timely decisions about how access will occur and be managed in the future. There is growing public debate and concern that access to New Zealand's outdoors is becoming increasingly restricted. Many factors influence this debate.

Social conventions that traditionally determine access arrangements, particularly negotiated agreements for access onto private rural land, are under increasing stress as a consequence of continued uncertainty about the rights of tangata whenua; increased responsibilities on landowners; and change in communities, land uses and recreation patterns. This has led to conflict between tangata whenua, agencies, users and landowners.

The current legislative mechanisms for access and institutional arrangements are proving to be inflexible and insufficient to meet the expectations for access, today and in the future. There is a considerable disjunct between the ideal (the belief) as understood by New Zealanders in respect of their rights of access to enjoy the natural environment and the legal reality.

The most obvious example of this disparity is the Queen's Chain, a concept popularly believed to exist but which lacks a solid legal foundation. The existence of a wide range of statutory provisions over a period of 150 years has given rise to inconsistency of practices and mechanisms providing access along water margins.

The Group considers that the most important initial step for improving public access to and along water margins is a high-level policy decision as to whether:

- the popular expectation of unrestricted public access to and along water margins (especially), implied by Queen Victoria's decree in 1843 and articulated in the Land Act 1892, remains valid and needs to be reinforced, promoted and extended; or

- property rights, as currently understood, should not be adjusted and subdivision should remain the primary trigger for improving public access to and along water margins.

Based on the parameters set by the above decision, the Group supports the development of a **New Zealand access strategy**. The Group believes that such a strategy is essential if traditional social conventions and the expectations of tangata whenua and the public for access to public land and along the margins of rivers, lakes, the coast, mountains and forest, are to be maintained. This report could be the basis for such a strategy.

The strategy would have five objectives:

- strengthening leadership;
- improving certainty;
- embracing the Queen's Chain ethos;
- encouraging negotiated solutions; and
- improving current legislation.

Strengthening leadership: the absence of an obvious and interested "leader" is a significant factor in the deterioration of the social conventions that govern access. Access needs a champion with vision and drive, and a willingness to take responsibility and an ability to engage communities. It is a low priority compared with other objectives (conservation, urban-based sport and recreation). The decision to disestablish the former New Zealand Walkways Commission and its district committees is symptomatic of the low priority given to access and has led to further decline in interest and focus by existing agencies.

To address the leadership problem, the Group supports the establishment of an independent access agency. The agency could be part of an existing government organisation, subject to it having a high degree of autonomy guaranteed through specific legislation and clear accountability to a Minister. The Group proposes that a statutory consultative group consisting of people with an interest in improving access arrangements be formed. The former New Zealand Walkways Commission could still serve as a useful model.

A key function of the agency would be to develop a **national access plan** to bring focus and coherence to the topic. A national access plan would need to include mechanisms to **embrace the ethos of the Queen's Chain**. The Group believes that the Queen's Chain is an important institution entrenched in New Zealand's heritage and culture and as such, it should be safeguarded.

Submitters to the Group make it abundantly clear that New Zealanders believe strongly that there should be practical and secure (legal) access to and along the nation's waterways, lakes, and coastlines as enshrined in the commonly accepted view of the Queen's Chain. Submissions also make it quite clear that the Queen's Chain should not be further eroded. Rather, it should be extended to include all beaches, waterways of public interest and all rivers and streams of a specified size.

Pertinent to achieving this is the tenet that access is distinct from ownership. There is, however, an alternative view that the ability to give or refuse access is a component of the "bundle" of property rights. These alternative views need to be debated further. Inflexibility and slowness of current legal mechanisms mean that public access to many rivers and coastal areas might never occur. Public ownership of a complete Queen's Chain along all water margins is neither feasible nor acceptable in the current climate of rigorous assertion of property rights. The Group believes that, when it comes to considering how to enhance access to and along water margins, access will need to be considered separately from ownership if access for future users is to be certain.

To improve access arrangements, whether traditional or new, there must be greater clarity and **certainty** of what access is acceptable and where it may occur. This report offers a wide range of options to better ensure certainty of access. These range from the provision of accurate information on location of access, including unformed roads, to a code(s) of conduct that would inform all parties on their responsibilities.

The Group strongly supports **encouraging negotiated solutions** that will support and strengthen traditional conventions (such as access by negotiation with a landowner). The Group considers that there is no obvious demand for introducing a much broader right of public access over private rural land. This concept, often referred to as a right to roam or wander at will, while common in European settings, does not appear to have a place in New Zealand in the foreseeable future.

In conjunction with, or separately from, the above objectives, **improvements** could be made to aspects of **present legislation** which potentially hinder access. These changes could directly amend existing legislation or, and perhaps more efficiently, be amended as a consequence of a specific access statute.

Some options require legislative action. For example, there is a pressing need to address concerns about landowner liabilities (HSEA, fire) in return for offering better access arrangements. There appears to be a good case for removing landowner liabilities under occupational health and safety

legislation if a landowner is willing to facilitate unhindered access for mahinga kai, and recreation and leisure purposes.

Other factors have fired the access debate, such as the sale of property to overseas investors, 4WD vehicle usage and the "right" to natural resources. The Group considers that, while these are topical, they are not pertinent to the core question it was asked to address. The Group is not convinced that overseas investors are a primary reason for access restrictions in the South Island high country or coastal access in parts of the North Island. Information provided suggests that expatriate New Zealanders and investors are also responsible for many access restrictions. Further, the drive and encouragement given to landowners to diversify income is resulting in activities that in themselves are to be encouraged but have negative impacts on access.

Finally, in response the question that the Group was asked to consider:

> *"Whether there is sufficient certainty, information, mechanisms and awareness of expected conduct to ensure responsible public access to waterways and private rural land while providing for private land use, both now and in the future?"*

The Group concludes that a New Zealand strategy is required to protect and advance access arrangements if all New Zealanders are to access the outdoors.

If the social conventions that have traditionally determined access arrangements are to survive societal changes, then all participants need greater certainty of rights, privileges, expectations and conduct. Access needs to be legally secure yet flexible and practical, and the expectations of tangata whenua, landowners and users must be clear.

Glossary

Ad medium filum aquae — The literal translation is "to the centre thread of the river". The term refers to the English common law presumption that the beds of non-tidal rivers and lakes were owned by the adjoining landowners to the centre line or centre point.

Access strip — A strip of land created under the Resource Management Act 1991 for the purpose of allowing public access to or along any river, or lake, or the coast, or to any esplanade reserve, esplanade strip, other reserve, or land owned by the local authority or by the Crown (excluding land held for a public work).

Cadastral map — A representation at a scale of the boundary features relating to land in a district in a graphic or digital form.

Certainty — Knowledge of tenure is critical in determining certainty of access, when it can occur and under what conditions.

Conduct — How people behave when on private and public land and the expectations held by landowner.

Crown Grant — When the Crown originally sold land it was necessary to give the purchaser documentary evidence of ownership and to this end "Crown Grants" were issued.

Curtilage — An area that surrounds a building. This area could be subject to access restrictions in the interests of privacy and safety. The extent of a curtilage will depend on the size, setting and use of the building.

Esplanade reserve — Land reserved under the Resource Management Act 1991 for various listed purposes, of which public access may or may not be included. The land is owned by the territorial authority.

Esplanade strip — A strip of land registered under the Resource Management Act 1991 for various listed purposes, of which public access may, or may not be, included. The land remains vested in the private owner.

Hapu — Maori subtribe or groups of families within an iwi.

Information — The generation, collection, dissemination and accessibility of accurate and clear information relating to land access.

Iwi	Maori tribe.
kaitiaki	Guardians. An iwi, hapu or whanau group with the responsibilities to take care of the places, natural resources and other taonga in their territory.
Mahinga kai	Traditional food or resource areas.
Mahinga mataitai	Traditional fishing ground.
Manawhenua	Traditional status, rights and responsibilities of iwi, hapu or whanau as residents in their territory.
Mechanisms	Appropriate processes for avoiding and managing conflicts and concerns relating to access.
Marginal strip	Strip of land reserved from the sale of Crown land along banks of rivers and lakes and above the high tide mark held for conservation and access purposes. Reserved from disposition of land for Crown.
Pakeha	New Zealanders other than tangata whenua.
Private land	Is taken to mean, for the purposes of this report: • Any land (other than unformed legal road) that is for the time being held in fee simple by any person other than the Crown; • Any Maori land within the meaning of the Maori Affairs Act 1953; • Any land (other than unformed legal road) held by a person; under a lease or licence granted to that person by the Crown (without any requirement for the provision of public access).
Public land	Includes parks and reserves held by local government or the Department of Conservation for a variety of purposes, and Crown Lands and Forests held by LINZ, State-owned enterprises, and licensees which are available for public recreation.
Queen's Chain	Popular term used to describe land under various mechanisms and legislation that enables public access alongside rivers, lakes and the coast.
Riparian land	The land along side rivers or lakes.

Road	Defined in the Transit New Zealand Act 1989 as Crown land over which a road is laid out and marked on the record maps. A road allows a right of way regardless of whether it has been formed or unformed. The 'formation' of a road (section 2, Local Government Act 1974) has the same meaning as the construction of a road, by gravelling, metalling, sealing or permanent surfacing.
Social convention	The informal arrangements that have been developed and agreed between a private landowner and the community for access across private land which are understood and observed within that community.
Spatial View	Land Information New Zealand database showing property titles.
Submitter	Used in the report to describe a person or organisation that provided material to the Group as part of the information collection process (there was no formal consultation exercise or submission process).
Tangata whenua	People of the land. The Maori iwi, hapu or whanau that has manawhenua over a particular area.
Taonga	Valued resources, assets, prized possessions both material and non-material. Wahi taonga are places of historical and traditional significance.
Territorial Authority	A city council or a district council named in Part 2 of Schedule 2 of the Local Government Act 2002.
Wahi tapu	Special and sacred places.
Whakapapa	Genealogy, ancestry, identify with place, hapu and iwi.
Whanau	Family groups.

Appendix 1: Terms of Reference

Reference Group for Investigation of Matters Relating to Public Access Terms of Reference

Background

The Minister for Rural Affairs (the Minister) foresees significant future problems if appropriate action is not taken to clarify and enhance the legal situation pertaining to public access to the foreshore of lakes and the sea and along rivers (the "Queen's Chain") and over private land. The Minister considers that the legal situation is sometimes confusing, public understanding incomplete, and access over such land sometimes discouraged.

The Minister considers that three matters require review:

i. access to the foreshore of the lakes and the sea and along rivers;

ii. access to public land across private land; and

iii. access onto private rural land to better facilitate public access to and enjoyment of New Zealand's natural environment.

The purpose of the Reference Group is to bring different perspectives to bear on these matters.

The matters that are to form the basis of the considerations of the Reference Group are: (i) certainty (what land is accessible and under what conditions); (ii) the generation, collection and dissemination of accurate and clear information relating to access; (iii) whether the present level of understanding of what constitutes "responsible access" (conduct) is adequate and whether this approach could be applied in New Zealand; and (iv) appropriate mechanisms/processes for managing conflicts and concerns.

Terms of Reference

The Reference Group is asked to test the validity of the following indicative problem:

> "Whether there is sufficient certainty, information, mechanisms and awareness of expected conduct to ensure responsible public access to waterways and private rural land while providing for private land use, both now and in the future."

In doing so, the following constraints apply for any consideration of access to private land:

- recreation means by foot only – it excludes vehicles, mountain bikes or horses;
- access must be exercised responsibly and subject to reasonable constraints for cultural and social (wahi tapu, funerals) and land management purposes (e.g., lambing), privacy and safety purposes; and
- dogs, firearms and camping are not permitted as of right.

The Reference Group is invited to consider the following points in addressing the indicative problem:

1. The extent and nature of problems of access to waterways, the coastline and countryside;
2. Existing sources of information on access and methods for making this information more readily publicly available;
3. Whether the concept of "responsible access" is applicable to New Zealand and if so, what would the concept encompass and what legislative, regulatory, policy or other changes would be needed;
4. The current impact of access, along with the likely social, cultural, economic and environmental impacts of options for changing provisions on access. This includes the impact of increased access rights on commercial developments that rely on exclusive access;
5. Risks including:
    i. property rights (including the "right of undisturbed enjoyment, right to derive an income");
    ii. privacy and security of landowners;
6. The marginal benefits resulting from access to private rural land;
7. The "private" land that would be considered for greater public access, if any;
8. To advise on any issues associated with the development of any discussion paper on access issues;
9. Costs, including those associated with:
    - new mechanisms to establish responsible access rights
    - identifying, collecting, collating and providing information on access rights
    - legislative or other changes
    - enforcing codes of conduct if developed; and
    - legal liability issues – such as safety and health issues.
10. The Reference Group will be able to report on any other matters related to access that appear to require consideration by the Minister.

Process

1. The Reference Group will hold private working meetings in Wellington. It will meet on an "as needs" basis, expected to be of the order of five or six one-day meetings, at regular intervals. It will provide a written report to the Minister within 3 or 4 months of its first meeting with its response to the indicative problem. The Minister's officials servicing the Reference Group will assist the Reference Group in its report to the Minister on its deliberations.

2. Officials from the Ministry of Agriculture and Forestry (MAF) will prepare working papers, where required, for the Reference Group before each meeting. Where appropriate, those papers will be prepared in consultation with other agencies.

3. Individual members of the Reference Group will be free to put up any paper for the Reference Group to consider or provide other input they feel appropriate.

4. MAF will service the Reference Group.

5. MAF will obtain legal advice as the need arises and this will be made available to the Reference Group.

6. Each member of the Reference Group will be free to put forward the views and positions of their own constituency. They will, however, be expected to look for points of agreement with other positions and views and to help construct wording that can be accepted by the Reference Group as a whole and that makes for a coherent, understandable and usable outcome.

7. The Reference Group is expected to approach its tasks in a constructive and cooperative manner and work collectively towards wording that provides a meaningful, useful and complete document. It can provide advice on any issues that may be associated with the development of discussion papers on access issues.

8. Where agreement cannot be reached, options will be recorded for consideration by the Minister.

9. Final decisions about the wording of the Minister's paper to Cabinet on the results of the Reference Group's deliberations are the prerogative of the Minister and are subject to normal Cabinet procedures. The wording may be altered at any stage through the Ministerial and Cabinet processes.

10. The Minister reserves the right to disband the Reference Group or change its membership at any stage in the process.

Appendix 2: List of Iwi/Organisations approached by the Reference Group

(listed in alphabetical order)

Athletics New Zealand
Department for Courts
Department of Conservation
Federated Farmers of New Zealand
Federated Farmers of New Zealand - South Island High Country Committee
Federated Mountain Clubs of New Zealand
Federation of Maori Authorities
Fish and Game New Zealand
Game and Forest Foundation
Land Information New Zealand
Landcorp Farming
Local Government New Zealand
Ministry for the Environment
Ministry of Justice
Ministry of Tourism
New Zealand Alpine Club
New Zealand Conservation Authority
New Zealand Council of Outdoor Recreation Associations
New Zealand Farm Forestry Association
New Zealand Federation of Freshwater Anglers
New Zealand Forest Owners Association
New Zealand Mountain Bike Association
New Zealand Mountain Guides Association
New Zealand Police, National Headquarters
New Zealand Professional Flyfishing Guides Association
New Zealand Property Institute
New Zealand Rafting Association
New Zealand Recreation Association
New Zealand Recreational Canoeing Association
New Zealand Tourism Association
Outdoors New Zealand
Public Access New Zealand
Queen Elizabeth II National Trust
Real Estate Institute of New Zealand
Rotorua Professional Trout Fishing Guides Association
Royal Forest and Bird Protection Society
Rural Women New Zealand
Sport and Recreation New Zealand
Surf Life Saving New Zealand Inc
Surfing New Zealand
Te Arawa Maori Trust Board
Te Puni Kokiri
Te Runanga O Ngai Tahu
Te Runanga O Ngati Porou
Te Runanga o te Whanau Tribal Authority
Tuwharetoa Maori Trust Board
The Treasury
Yachting New Zealand

The Queen's Chain at a Glance

The Status of Publicly Owned Margins Along Water Boundaries

Margins Vested on Crown Alienation

Class	Alienation Period	Title to Margin	Public Rights
1. Roads Roads laid out on the record maps of the Survey Office by or under the authority of Her Majesty's Letters Patent or Royal Instruments, or of any Ordinance of New Zealand or of New Munster respectively, or of any Act of the General Assembly, or of any Provincial Ordinance, or by the Governor-in-Chief, Governor, or Lieutenant-Governor. Up until 1972 roads were shown coloured burnt sienna on the survey record maps. After 1972 roads were individually and appropriately labelled on the survey plans.[2]	1840 – 1892	[1]**Original Title:** Crown 1840 – 1892	Full Rights as on Public Highways The common law rights over roads are sent out in "Shorts Roads and Bridges" to include: "(a) … the rights of the public to use a public highway by day or night for any reasonable or legitimate purpose, without let or hindrance. (b) … the right of persons or the public to an injunction against anyone who interferes with such privilege. (c) … the power which private persons and others have, in certain cases, to abate nuisances on roads; and (d) … the liability in some cases for negligence in respect to things done, or omitted to be done, on roads or streets, which cause special damage to any person." These principles must be read subject to statute law and council by laws so that today by far the greater part of the law on public roads is to be gathered from statutory sources. But the common law continues to give guidance to basic rights on unformed roads.
	1892 – 1914 In this period there was a mix of roads and Crown owned marginal strips both of which were in Crown ownership.	**Original Title:** Crown 1892 – 1914	Roads subject to full rights as on Public Highways. Access rights by implied consent on Crown owned marginal strips.
	1914 - 1972	**Original Title:** Crown 1914 – 1972	Full Rights as on Public Highways
	1972 – present time	[3]**Current Title:** The Territorial Authority or Transit New Zealand for roads (if a government or state highway along water – s44 Transit New Zealand Act 1989). In 1972 by s191A(1) of the Counties Act 1956 as inserted by s2 of the Counties Amendment Act 1972 roads (to include waterside roads) vested in the then County Councils.	Full Rights as on Public Highways

[2] Roads along water boundaries were the first form of marginal reservation along water frontages being used extensively up until 1892 and in some instances thereafter. Section 110 of the Land Act 1892 provided for the reservation of Crown land rather than roads along water boundaries. The authorities to subdivide and sell Crown land and to lay off roads generally and also along water over the period 1840-1892 are listed at the end of this table on pages 43 – 46.

[1] Ownership at the time of reservation or vesting.

[2] *ibid*.

[3] Ownership by the Territorial Authority means City Council or District Council named in part 2 of schedule 2 Local Government ct 2002. District Councils replace earlier borough and county councils.

Class	AlienationPeriod	Title to Margin	Public Rights
2. Road Reserves Land granted reserved, or set apart by or under the authority of Her Majesty's Letters Patent or Royal Instruments, or of any Ordinance of New Zealand or of New Munster respectively, or of any Act of the General Assembly, or of any Provincial Ordinance, or by the Governor-in-Chief, Governor, or Lieutenant-Governor, or by the New Zealand Company or its agents, or the Canterbury Association or its agents.4	1840 – 1854	**Original Title**: Crown 1840 – 1854	Access rights by implied permission on Crown land.
	1854 – 1876 Provincial Government	Reservations in this period were generally completed by a grant of title to the Superintendent of the province. On abolition of the provinces in 1876 title revested in the Crown but later most reserves were granted to Councils etc though some reserves were retained by the Crown. Individual identification required.	Access rights by implied permission on provincial or Crown land.
The Land Acts of 1877, 1885, 1892, 1908, 1924 and 1948 all contain provisions enabling reserves to be set aside out of Crown land. From 1877 to 1924 there were specific powers in the Land Acts to set aside Crown land as reserves for road. Section 167 of the Land Act 1948 (now in force) originally included general powers to set aside Crown land as reserves and these powers would have included road. Section 167 was amended in 1994 to provide the widest power possible to vest reserves and would continue to provide for road reserved along water boundaries.	1877 – present time	**Original Title:** Crown or County Council **Current Title:** For all Road Reserves in Former Counties; Territorial Local Authority. In 1972 by s6 Counties Amendment Act 1972 all road reserves then vested in the Crown vested in the then County Council.	Access rights by implied permission on Council land.

[4] Refer to list of legislation on pp 43-46

Class	Alienation Period	Title to Margin	Public Rights
3. Marginal Strips Reserved from sale under: Land Act 1892; s110 Land Act 1908; s122 Land Act 1924; s129 Land Act 1948; s58 Conservation Act 1987; s24 Conservation Act 1987 as amended by Conservation Law Reform Act 1990; new part IVA	1892 – present time	**Original Title:** Crown **Current Title:** Crown	Up until 1987 a full right of access by implied permission over Crown land until the enactment of s24 Conservation Act 1987 making access subordinate to conservation values. (Note: These strips are not reserves subject to the Reserves Act 1977 which does not apply – the land is reserved from sale as Crown land and is not a formal "reserve"). The Conservation Law Reform Act 1990 repealed s58 of Land Act 1948 and s24 Conservation Act 1987. Section 24C of the Conservation Act which states the current law says: **Purposes of marginal strips** – Subject to this Act and any other Act, all marginal strips shall be held under this Act – (a) For conservation purposes, in particular – (i) The maintenance of adjacent watercourses or bodies of water; and (ii) The maintenance of water quality; and (iii) The maintenance of aquatic life and the control of harmful species of aquatic life; and (iv) The protection of the marginal strips and their natural values; and (b) To enable public access to any adjacent watercourses or bodies of water; and (c) For public recreational use of the marginal strips and adjacent watercourses or bodies of water. Section 24(3) Conservation Act 1987 makes the Conservation Act apply to all marginal strips: (3) Every strip of land of any width that immediately before the commencement of this section, was reserved from sale or other disposition on any Crown land by or under this Act or any other Act, whether or not the strip was reserved for any specified purpose, shall be deemed to be reserved to the Crown as marginal strip of the same width.

Class	Alienation Period	Title to Margin	Public Rights
4. Ambulatory Marginal Strips When s58 of the Land Act 1948 was repealed by The Conservation Law Reform Act 1990 (s37 and Schedule to the Act) a new concept was introduced. Marginal strips along water were to move as the water moved. Section 24G says: "Effect of change to boundary of marginal strips – (1) (Where, for any reason, the shape of any foreshore or of the margin of any lake or reservoir or of any bay or inlet of any lake or reservoir is altered and the alteration affects an existing marginal strip, a new marginal strip shall be deemed to have been reserved simultaneously with each and every such alteration. (2) Where, for any reason, the course of any river or stream is altered and the alteration affects an existing marginal strip, a new marginal strip shall be deemed to have been reserved simultaneously with each and every such alteration."	1990 – present time	Land remains included in the title of the owner (s24D(6)); deemed reservation of the strip is in favour of the Crown (s24(1)).	Section 24 (C) and s24(3) of the Conservation Act 1987 as set out immediately above also apply to ambulatory marginal strips. Section 24H provides for the appointment of managers of marginal strips. By subsection 4 the manager of a marginal strip shall – (a) Manage the strip in a way that best serves the purposes specified in section 24C of this Act; and (b) Enable members of the public to have access along the strip.

Class	Alienation Period	Title to Margin	Public Rights
5. Public Reserves Given the multiplicity of statutes applying to public reserves it is difficult to state other than general principles. In a broad sense public reserves include land granted, reserved, or set apart for public purposes by or under the authority of Her Majesty's Letter Patent or Royal Instructions, or of any Ordinance of New Zealand or of New Munster respectively, or of any Act of the General Assembly, or of any Provincial Ordinance, or by the Governor-in-Chief, Governor, or Lieutenant-Governor, or by the New Zealand Company or its agents, or the Canterbury[5] Association or its agents. The range of public purposes was codified in 1881 and 1908 and the second schedule to the Public Reserves and Domains Act 1908 remains at the heart of the definition of what is a public reserve. The Reserves Act 1977 which is the legislation now in force draws on that definition through the chain of reserves statutes dating back to 1908. The second schedule is reproduced as Appendix 16 (p118) Section (2) of the Reserves Act 1977 should be referred to for a full definition of "Reserve".	1840 – present time	**Original Title:** Crown; or Local Authority; or Trustees **Current Title:** Crown; or Local Authority; or Trustees	The rights of the public to enter on a reserve would have to be assessed in relation to the legal purpose for holding the reserve. Refer Appendix 16 (p118). Clearly some reserves would be exclusive of public access. Some reserves if abutting water could provide access. Section 3 of the Reserves Act 1977 says: **General purpose of this Act** – (1) It is hereby declared that, subject to the control of the Minister, this Act shall be administered in the Department of **[**Conservation**]** for the purpose of – (a) Providing for the preservation and management for the benefit and enjoyment of the public, areas of New Zealand possessing – (i) Recreational use or potential, whether active or passive; or (ii) Wildlife; or (iii) Indigenous flora or fauna; o (iv) Environmental and landscape amenity or interest; or (v) Natural, scenic, historic, cultural, archaeological, biological, geological, scientific, educational, community, or other special features or value. (b) … (c) **Ensuring, as far as possible, the preservation of access for the public to and along the sea coast, its bays and inlets and offshore islands, lakeshores, and riverbanks**, and fostering and promoting the preservation of the natural character of the coastal environment and of the margins of lakes and rivers and the protection of them from unnecessary subdivision and development. (Emphasis added)

[5] Refer list of legislation on pp 43-46

Margins Regained on Subdivision

Class	Subdivision Period	Title to Margin	Public Rights
Public reserves along water taken on the subdivision of private rural land as a town under		**Original Title:** Crown **Current Title**: Crown or Territorial Authority	Implied permission of Crown or (now) The Territorial Local Authority
(i) s3 Land Laws Amendment Act 1912; and	7.11.1912-6.11.1924		
(ii) s17 Land laws Amendment Act 1920; and	11.11.1920-6.11.1924		
(iii) s16 land Act 1924; Note this early **legislation did not require** reserves to be taken along water. Appropriate reserves could however be shown on private plans of subdivision to be subject to the Reserves and Domains Act 1908.	6.11.1924-1.1.1947		
Public Purpose Reserve under s11 Land Subdivision in Counties Act 1946 subject (now) to Reserves Act 1977 which in s23(2) acknowledges Esplanade status.[6]	1.1.1947 – 1.4.1962	**Original Title:** Crown **Current Title:** Territorial Authority. In 1961 by s44 Counties Amendment Act 1961 title vested in the then county council.	Clarified by s7 Reserves Amendment Act 1979 inserting a proviso to s23(2)(a) of the Reserves Act 1977. Public may pass and repass on foot unless the administering body determines that access should be prohibited or restricted to preserve the stability of the land or the biological values of the reserve.
Public reserves along water taken on the subdivision of private land in a city or borough.		**Original Title:** City or Borough Council **Current Title:** Territorial Authority	Implied permission (now) Territorial Local Authority for reserves taken under Municipal Corporations Acts of 1920 and 1924. Reserves taken by Municipal Corporations Act 1954 are classified by s7 Reserves Amendment Act 1979 inserting a proviso to s23(2)(a) of the Reserves Act 1977. Public may pass and repass on foot unless the administering body determines that access should be prohibited or restricted to preserve the stability of the land or the biological values of the reserve.
(i) Section 335 Municipal Corporations Act 1920;	1.4.1921–1.4.1934		
(ii) Section 332 Municipal Corporations Act 1933;	1.4.1934-1.4.1955		
(iii) Sections 350-353 Municipal Corporations Act 1954. This **legislation did not require reserves** to be taken along water. Appropriate reserves could however be shown on private plans of subdivision to be subject in turn to the Reserves and Domains Act 1908, The Public Reserves Domains and National Parks Act 1925, and The Reserves and Domains Act 1953. Now subject to Reserves Act 1977 which in s23(2) acknowledges Esplanade status.	1.4.1955-1.4.1979		
Public Purpose Reserve under s29 Counties Amendment Act 1961 subject (now) to Reserves Act 1977 which in s23(2) acknowledges Esplanade status.[7]	1.4.1962 – 23.12.1977	**Original Title:** County Council **Current Title:** Territorial Authority	Clarified by s7 Reserves Amendment Act 1979 inserting a proviso to s23(2)(a) of the Reserves Act 1977. Public may pass and repass on foot unless the administering body determines that access should be prohibited or restricted to preserve the stability of the land or the biological values of the reserve.

[6-7] Reserves along water **required to be taken** under the provisions of the statute named.

Class	Subdivision Period	Title to Margin	Public Rights
Recreation Reserve under s29 Counties Amendment Act 1961 as amended by s4 Counties Amendment Act 1977 subject to (now) Reserves Act 1977.[8]	23.12.1977 – 1.4.1979	**Original Title:** County Council **Current Title:** Territorial Authority	General right of recreation (Note: as a recreation reserve it is not subject to s7 Reserves Amendment Act 1979 which states a right to pass and repass on foot). Refer to s17 Reserves Act 1977.
Local Purpose Reserve under s289 Local Government Act 1974 "for the purpose of providing access and to protect the environment" as inserted by Local Government Amendment Act 1978 subject to Reserves Act 1977 which in s23(2) acknowledges Esplanade status.[9]	1.4.1979 – 1.10.1991	**Original Title:** Territorial Authority **Current Title:** Territorial Authority	Clarified by s7 Reserves Amendment Act 1979 inserting a proviso to s23(2)(a) of the Reserves Act 1977. Public may pass and repass on foot unless the administering body determines that access should be prohibited or restricted to preserve the stability of the land or the biological values of the reserve.
Local Purpose Reserve for Esplanade Purposes under s230 Resource Management Act 1991 subject to Reserves Act 1977.[10]	1.10.91 – 7.10.93	**Original Title:** Territorial Authority **Current Title:** Territorial Authority	As set out in original s229 Resource Management Act 1991. Now redundant – see commentary on s231 below.
Local Purpose Reserve for Esplanade Purposes under s231 Resource Management Act 1991 as inserted by s124 Resource Management Act 1993 subject to Reserves Act 1977.[11]	7.10.93 – present time	**Original Title:** Territorial Authority **Current Title:** Territorial Authority Note: Under s237D Resource Management Act 1991 an Esplanade Reserve may be trans-ferred from the Territorial Authority and vested in Crown or Regional Council.	By amendment in 1993 (s124 Resource Management Act Amendment) An esplanade reserve or an esplanade strip has one or more of the following purposes: (a) To contribute to the protection of conservation values by, in particular, - (i) Maintaining or enhancing the natural functioning of the adjacent sea, river, or lake; or (ii) Maintaining or enhancing water quality; or (iii) Maintaining or enhancing aquatic habitats; or (iv) Protecting the natural values associated with the esplanade reserve or esplanade strip; or (v) Mitigating natural hazards; or (b) To enable public access to or along any sea, river, or lake; or (c) To enable recreational use of the esplanade reserve or esplanade strip and adjacent sea, river, or lake, where the use is compatible with conservation values. Note: The sub-paragraphs (a) (b) and (c) are disjunctive meaning that an esplanade reserve or strip may be created for all or any one of these purposes. There may be no public access.
Esplanade Strip under s232 Resource Management Act 1991 as inserted by s124 Resource Management Amendment Act 1993[12]	7.10.93 to present time	Land remains vested in Owner. Instrument creating the strip is in favour of Territorial Authority	Do

[8-12] Reserves along water **required to be taken** under the provisions of the statute named.

Class	Subdivision Period	Title to Margin	Public Rights
Public (Esplanade) reserves along water taken on partition of Maori land in a city, borough or county.			
(i) Section 432 Maori Affairs Act 1953 – deems partition to be subdivision for purposes Municipal Corporations Act 1933 and later the Act of 1954.[13]	1.4.1954-1.4.1979	**Original Title:** City or Borough Council **Current Title:** Territorial Authority	Clarified by s7 Reserves Amendment Act 1979 inserting a proviso to s23(2)(a) of the Reserves Act 1977. Public may pass and repass on foot unless the administering body determines that access should be prohibited or restricted to preserve the stability of the land or the biological values of the reserve.
(ii) Section 432A Maori Affairs Act 1953 (inserted by s23(1) Maori Affairs Amendment 1967) deems partition to be a subdivision for purposes of Counties Amendment Act 1961.[14]	1.4.1968-1.4.1979	**Original Title:** County Council **Current Title:** Territorial Authority	"
(iii) The original s432 and also s432A were repealed by s3(4) and the second schedule to the Local Government Amendment Act 1978 which enacted a new s432 to apply to cities, boroughs and counties.[15]	1.4.1979-1.10.1991	**Original Title:** City, Borough or County Council **Current Title:** Territorial Authority	"
(iv) Section 432 was in turn repealed by and later from 1989 to city and district councils s362 and the 8th schedule to the Resource Management Act 1991 and a new s432 substituted to apply to partitions in all Territorial Authority districts.[16, 18]	1.10.1991-1.7.1993	**Original Title:** Territorial Authority **Current Title:** Territorial Authority	"
(v) Section 303 of Te Ture Whenua Maori Maori Land Act 1993 replaced s432 (as inserted by The Resource Management Act 1991) to apply to all partitions in all Territorial Authority districts.[17, 19] Section 303 vested esplanade strips in the Territorial Authority in the conventional way. This was soon to change in 2002 with Maori retaining title but dedicating a reservation to public usage.	1.7.1993-1.7.2002	**Original Title:** Territorial Authority **Current Title:** Territorial Authority	"

[13-17] Reserves along water **required to be taken** under the provisions of the statute named. Reserves vest subject to (now) Reserves Act 1977

[18,19] Applies only when partition is to be held by owners who are not members of the same hapu, otherwise exempt.

Class	Subdivision Period	Title to Margin	Public Rights
Maori Reservation for the common use and benefit of the people of New Zealand: s303 Te Ture Whenua Maori Maori Land Act 1993 as inserted by s47 Te Ture Whenua Maori Amendment 2002.[20]	1.7.2002 to present time	A reservation under s338 and 340 Te Ture Whenua Maori Maori Land Act 1993	General right of access.

[20] Applies only when partition is to be held by owners who are not members of the same hapu, otherwise exempt.

List of Legislation Applying to the Alienation of Crown Land 1840-1892

Legislation by The Imperial Government, Governor's Ordinances, and the General Assembly of New Zealand, 1840-76

New Zealand Act, 1840 (Imperial)
Royal Charter and Instructions of 1840 (Imperial)
New South Wales New Zealand Land Act 1840
New Zealand Land Claims Ordinance 1841
New Zealand Land Claims Ordinance 1842 (disallowed)
Land Claims Ordinance, 1844
Crown Titles Ordinances
Governor's Proclamation of 1842
Crown's Waiver of Right of Pre-emption
New Zealand Government Act, 1846 (Imperial)
Royal Charter and Instructions of 1846 (Imperial)
Additional Instructions of 1847, 1848, and 1849 (Imperial)
Governor's Proclamation of 1848
New Zealand Company's Colonisation Act, 1847
Crown Lands Ordinance (New Ulster), 1849
Crown Lands Amendment and Extension Ordinance 1851
Constitution Act, 1852 (Imperial)
General Land Regulations issued by the Governor, 1853
Waste Lands Act, 1854
Provincial Waste Lands Act, 1854
Waste Lands Act, 1858
Crown Lands Act, 1862
New Zealand Settlements Act, 1863, and amendments
Commissioners of Crown Lands Act, 1869, and Amendment Act, 1873
Waste Lands Administration Act, 1876

Legislation by the Provinces 1854-1876

Province of Auckland

The province was constituted by Proclamation dated the 20th February, 1853, made under the powers conferred by the Constitution Act, 1852.

Land Regulations 1855
Naval and Military Scrip Act 1856
Land Regulations 1856
Land Regulations 1859
Auckland Wast Lands Act 1858
Auckland Waste Lands Amendment Act 1862
Auckland Waste Lands Act 1867
Auckland Waste Lands Act 1874
Auckland Waste Lands Amendment Act 1875
Part II of the Waste Lands Act (NZ) 1876

Province of Hawke's Bay
An Order in Council dated the 1st November, 1858, established the above province and defined its boundaries.

The General Land Regulations 1853
Hawke's Bay Naval and Military Settlers Act 1861
Hawke's Bay Naval and Military Settlers Act 1863
The Hawke's Bay Waste Land Amendment Act 1865
Land Regulations Extension (Hawke's Bay) Act 1866
The Hawke's Bay Land Regulations Extension Act Amendment Act 1868
Hawke's Bay Crown Lands Sale Act 1870
The Hawke's Bay Special Settlements Act 1872
The Hawke's Bay Waste Lands Regulations Amendment Act 1874
Part IV of the Waste Lands Act (NZ) 1876

Province of Taranaki
Established by Proclamation dated 28th February, 1853, under the Constitution Act, 1852, under the name of the "Province of New Plymouth." Name changed to "Taranaki" by the Province of Taranaki Act, 1858.

Regulations for the Sale and Disposal of Waste Lands of the Crown 1855
The Taranaki Naval and Military Settlers Act 1865
The Taranaki Naval and Military Settlers Act 1867
The Land Orders and Scrip Act (Taranaki) 1866
The Taranaki Waste Lands Act 1874
The Taranaki Waste Lands Amendment Act 1875
The Taranaki Iron-smelting Waste Lands Act 1874
Part II of the Waste Lands Act (NZ) 1876

Province of Wellington
Established by Proclamation dated 28th February, 1853, under the Constitution Act, 1852.

The General Land Regulations 1853 as amended by the additional Land Regulations 1855
Wellington and Hawke's Bay Naval and Military Settlers Act 1863
Wellington Waste Lands Amendment Act 1865
Wellington Waste Lands Act 1870
Wellington Waste Lands Regulations Amendment Act 1871
Wellington Special Settlements Act 1871
Wellington Special Settlements Act 1874
The Douglas Special Settlement Act 1876
Part V of the Waste Lands Administration Act (NZ) 1876

Province of Marlborough
This was established by an Order in Council dated 1st November, 1859.

Nelson Waste Lands Regulations 1856
Marlborough Waste Lands Regulations Amendment Act 1863
Marlborough Waste Lands Act 1867
Marlborough Waste Lands Act Amendment Act 1874
Part VII Waste Lands Administration Act (NZ) 1876

Province of Nelson
Established by a Proclamation dated 28th February, 1853, under the Constitution Act, 1852.

Regulations for the Sale and Disposal of Waste lands 1856
Nelson Waste Lands Act 1858
Nelson Waste Lands Regulations Amendment Act 1861
Nelson Waste Lands Act 1863
Crown Lands (Nelson) Leasing Act 1865
Crown Lands (Nelson) Leasing Act 1867
Crown Lands (Nelson) Leasing Act 1869
Nelson Crown Lands Leasing Amendment Acts 1871 and 1872
Nelson Special Settlements Act 1872
Nelson Waste Lands Act Amendment Act 1872
Nelson Waste Lands Act 1874
Part VI Waste Lands Administration Act (NZ) 1876

Province of Westland
By virtue of the Province of Westland Act, 1873, this province was constituted as from the 29th September of that year.

Westland Waste Lands Act 1870
Westland Waste Lands Amendment Acts 1873 and 1874
Part XI Waste Lands Administration Act (NZ) 1876

Province of Canterbury
Established by Proclamation dated 28th February, 1853, under the Constitution Act, 1852.

An Act of the Imperial Parliament relating to the disposal of land in the Canterbury Settlement (13 & 14 Vict., c. 70). Dated 14th August 1850, empowered the Canterbury Association, for a term of ten years or longer, to dispose of land formerly in the possession of the New Zealand Company, estimated to contain 2,500,000 acres, excepting some special areas.

The Canterbury Association issued amended terms of purchase on the 3rd July 1850.

Land Regulations 1856
Waste Lands Regulations Amendment Ordinance 1856
Waste Lands Amendment Ordinance 1858
Waste Lands Act 1858
Canterbury Waste Lands Act 1864
Canterbury Waste Lands Acts 1865 and 1866
Canterbury Waste Lands Act 1867
Canterbury Waste Lands Act 1869
Canterbury Waste lands Act 1873
Part VIII Waste Lands Administration Act (NZ) 1876

Province of Otago
Established by a Proclamation dated 28th February, 1853, under the Constitution Act, 1852.

A Proclamation issued by the Governor on the 12th February, 1856, contained Land Regulations for the Province of Otago, which then included Southland.

Land Sales and Leases Ordinance 1856

Town Land Sales and Leases Ordinance 1857
Order in Council 19.9.1860
Otago Waste Lands Act (No 1) 1863
Otago Waste Lands Act (No 2) 1863
Otago Waste Lands Act 1866
Otago Waste Lands Amendment Act 1869
Otago Hundreds Regulations Act 1869
Otago Settlements Act 1869
Otago Waste Lands Act 1872
Otago Waste Lands Amendment Acts 1874 and 1875
Part IX Waste Lands Administration Act (NZ) 1876

Province of Southland
An Order in Council was issued on the 1st April, 1861, establishing the Province of Southland and defining its boundaries; whilst the Stewart Island Annexation Act, 1863, annexed Stewart Island to the Southland Province. The Otago and Southland Union Act, 1870, united the provinces of Otago and Southland. Whilst Southland was a separate province the following Acts were passed affecting the waste lands of the province.

The Southland Waste Lands Act 1863 partially repealed the Otago Order in Council of 19.9.1860 and Otago Land Regulations 1856
The Southland Waste Lands Act 1865
The Southland Waste Lands Amendment Act 1867
The Otago and Southland Union Act 1870
Southland Waste Lands Act 1872
Southland Waste Lands Amendment Act 1875
Part X Waste Lands Administration Act (NZ) 1876

Selected Bibliography

Ansley, Bruce (2002) This Land is Your Land, *The Listener*, 2 March 2002, pp. 18-22, Wellington.

Asher, G and Naulls, D (1987) *Maori Land*, New Zealand Planning Council, Planning Paper No. 29, Wellington.

Brooking, Tom (1996) *Lands for the People?* University of Otago Press: Dunedin.

Clark, E L and Hilton M J (2003) Measuring and Reporting Changing Public Access to and Along the Coast, *New Zealand Geographer* 59(1).

Crengle, Diane (1993) *Taking Into Account the Principles of the Treaty of Waitangi: Ideas for the Implementation of Section 8 Resource Management Act 1991*, Ministry for the Environment: Wellington.

Department of Conservation (1995) *New Zealand Walkways Policy*.

Evans, A S D (ed.) (1985) *The law relating to watercourses: seminar proceedings*, National Water and Soil Conservation Authority, Misc Pub. No. 86, Wellington.

Guerin, K (2002) Protection against Government Takings: Compensation for Regulation? *New Zealand Treasury Working Paper* 02/ 18 September 2002.

Hayes, B (2003) *The law on public access along water margins.* Companion report to Walking access in the New Zealand outdoors, Ministry of Agriculture and Forestry, Wellington.

House of Commons (England) (2000) *The Countryside and Rights of Way Bill: Access and Rights of Way Bill* 78 of 1999-2000. Research Paper 00/31, 17 March

Hunter, Grant (unpublished) *Recreational Access on Privately Owned Rural Land: A Case Study in Canterbury Hill Country*, Landcare Research: Lincoln.

McDonald, P (2003) *Going Out for a Bike Ride: An AOK Diary, 2002-3* PDF file http://homepages.paradise.net.nz/petemcd/gob/gob.htm.

Sport, Fitness and Leisure Ministerial Taskforce (2001) *Getting Set for an Active Nation*.

Tau, Te M et al (1990) *Ngai Tahu, Resource Management Strategy for the Canterbury Region*, Aoraki Press: Wellington.