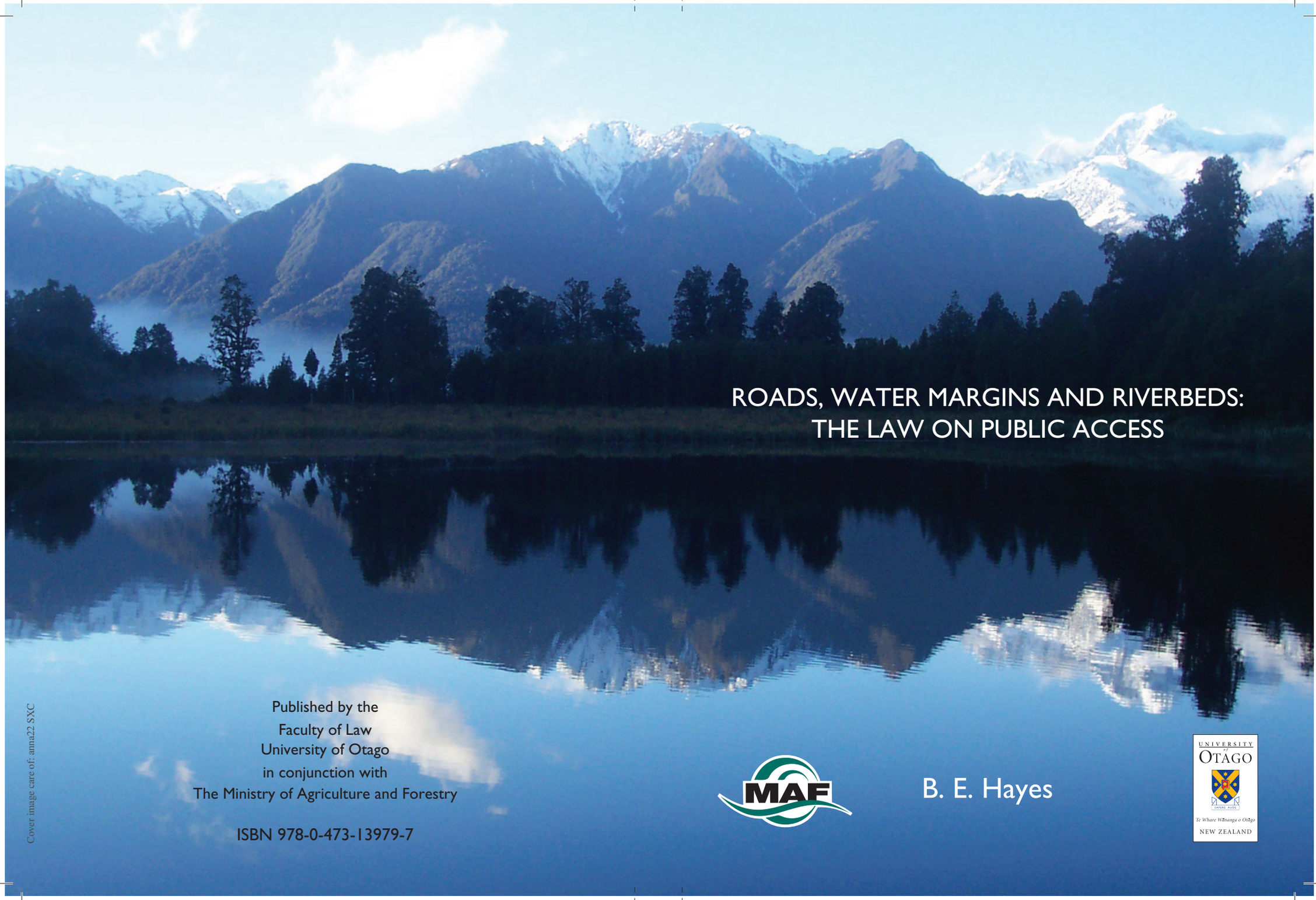

ROADS, WATER MARGINS AND RIVERBEDS: THE LAW ON PUBLIC ACCESS

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B. E. Hayes

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Te Whare Wānanga o Otāgo
NEW ZEALAND

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ABOUT THE AUTHOR

Brian has spent a professional lifetime in land law. He was Registrar-General of Land from 1980 to 1996, having been a District Land Registrar since 1967. He has published a wide range of land law topics and was a founding author for Butterworth's Conveyancing Bulletin. He is a barrister and solicitor (a graduate of Otago University) and, as an angler and a hunter, has a keen interest in the outdoors.

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Brian Hayes
August 2008

FOREWORD

I welcome this publication, which reflects years of scholarship and dedication, and brings together a series of comprehensive and authoritative research papers on the law on public access to water margins, unformed legal roads, and riverbeds in New Zealand.

Mr Hayes' research was undertaken to inform the development of public policy options on walking access to land. Much of the content has already been published in three separate reports. The first of these, *The law on public access along water margins,* was published in August 2003 in association with the report of the Land Access Ministerial Reference Group, *Walking access in the New Zealand outdoors*. Mr Hayes was a member of that Group.

In 2005 following further consideration of the policy options my predecessor, the Associate Minister for Rural Affairs, Hon Jim Sutton, set up the Walking Access Consultation Panel with a view to seeking a more consensual approach to addressing concerns about walking access to land.

Two further research papers were commissioned from Mr Hayes, and were published in March 2007 in association with the Panel's report. These two papers, *Elements of the law on movable water boundaries* and *Roading law as it applies to unformed roads* provided a sound basis for much of the work of the Panel.

Mr Hayes' work is comprehensive, and provides an in-depth analysis of the complexities of this area of law. I expect that the publication will be an important and frequently cited work of reference for many years to come. I congratulate Mr Hayes for his valuable contribution to New Zealand law and public policy.

Hon Damien O'Connor
Minister for Rural Affairs

CONTENTS

INTRODUCTION

There has long been a close affinity in New Zealand between roads along water, unformed roads, waterside reservations of public land in lieu of roads, and the publicly owned riverbeds which together provide our recreational highways. The intention of the Crown and the Colonial Office when founding New Zealand was to provide a new open country where the outdoors should be the preserve of the people rather than the privilege of the land owners. At the same time, land in New Zealand was to become a free market commodity, and private rights had to be respected.

I have found the study required to draw together the strands of law and experience which have tailored public rights of access in the outdoors, to be rewarding both in the legal issues raised, and, in microcosm, the social history uncovered. The primary purpose of this book is the identification of the law, past and present, which underpins access to the outdoors. Significant social issues allied to access, say land purchases from Maori prior to the Treaty of Waitangi, the special place of Maori in relation to access on Maori land, and the reason for the Crown taking back the beds of navigable rivers also form part of the analysis.

There may have been an inherent tension between public access and the goal of placing a landowning settler class on the land under private title. Public access in New Zealand as a statutory right did not get off to a good start. There was an early legal obligation, formed initially in New South Wales under imperial instructions when New Zealand was a territory of that colony, to reserve a chain strip along the coast from land granted by the Crown. In February 1842, the Governor and the Legislative Council yielding to pressure from the settlers, repealed the ordinance which imposed that requirement.

However, Queen Victoria disallowed the amending ordinance and insisted on the reinstatement of the requirement for a reserved strip. The first Queen's chain.[1] The imperial rebuke doubtless reinforced the instructions previously given to the Governor[2] in respect of the reservation of public land for thereafter as settlement

[1] A commonly used expression for a strip of land (usually 20 metres wide) reserved for public use alongside a water margin, including the seashore, lakes and rivers. The popular term "Queen's chain" has not been widely used in the text for it is the expression of an ideal rather than a legal concept.
[2] Queen's Instructions 5 December 1840 (Appendix 1)

proceeded public land was extensively although inconsistently reserved. Reservations for access up until 1892, by which almost all of the best land had been sold by the Crown, were achieved primarily through the laying off of roads even though it would have been clear at the time that a great many of these roads would never be formed.

Although roads were extensively authorised in the general legislation applying at the time of settlement, I can find no evidence of a requirement to reserve roads along the coast, rivers and around lakes, in any of the statutes, acts and ordinances applying in the period 1840 – 1892 and listed in Appendix 21. In Canada, at the same time as in New Zealand, roads were being extensively laid out along water boundaries. Professor David W Lambden, Emeritus Professor of Surveying, University of Toronto and Izaak de Rijcke of the Canadian Bar say that "Documentation has not been found in the authors' research giving the official reason for placing a road allowance…".[3]

Documentation to explain the selection of roads as an access medium when the roads were never intended to be formed may not be discoverable. (Canadian experience in this regard would tend to confirm the difficulties I have encountered in New Zealand). However, the use of a road as an access medium, whether intersecting land in a state of nature or along water, adds distinction to the rights provided for the public, and an important element of certainty for the adjoining owner.

Firstly, a road provides a right of access superior to any other right. Fogarty J in in *Abbott v Police*, High Court, Christchurch 27 May 2008 said:

> "…I agree that the ancient right of passing and repassing on the highway is the most critical right and always has been. It is the right which is central to our constitutional history. The right … to travel on the highway has always been regarded by the law as a key protection for every individual to live the life he or she wants…

The early selection of roads as a means of access for recreational use, elevated the rights of the community to the highest right the law could provide.

Secondly, the passerby is restricted to a prescribed way. There is no right to enter on the land of the adjoining owner whose private rights of property are respected.

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[3] *Legal Aspects of Surveying Water Boundaries* (Carswell, 1996) at p45.

While unformed roads provide the best access the law may allow to rivers, lakes, the sea and the land, the European concept of a right to roam on private land is emphatically excluded.

The author has formed the opinion that the roading pattern set out by the early surveyors along water and over land to be Crown granted is and continues to be the foundation of free, public and permanent access in New Zealand. The intention was that most of these roads would remain in a state of nature. Next to the rivers, mountains, lakes, and the sea, the unformed roading network originally held in trust by the Crown for the people and now administered by local councils, is one of the greatest recreational assets of the nation, for it is the one mechanism that provides an unqualified guarantee of access for everyone.

Many other reservations for public access now serve as well and are noted in the text. However, the unformed roading network is the true anchor of rights of access to the outdoors.

Bryan Garner observes at p392 of *A Dictionary of Modern Legal Usage*[4] that generally not all of the uncertainties relating to a given subject can be plumbed by any author writing an opinion on a legal matter. This book does not purport to be a definitive work. It is written to stimulate interest (and better, some action) in an area of law which previously has received scant attention, and secondly, to provide some certainty in a part of our land law, which for so long, has been subject to so many misconceptions.

[4] B Garner, *A Dictionary of Modern Legal Usage* (Oxford University Press, 1987)

PART A: PUBLICLY OWNED WATER MARGINS

CHAPTER 1: HISTORY

Introduction

The Queen's Chain as a principle – an expression of intent – is popularly extracted from the instructions from the Queen to Governor Hobson dated 5 December 1840.

Clause 43 of the instructions said[5]:

> And it is our pleasure and we do further direct you … to report … what particular lands it may be proper to reserve … as places fit to be set apart for the recreation and amusement of the inhabitants … or which it may be desirable to reserve for any other purpose of public convenience, utility, health or 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 … any of the lands specified … nor permit or suffer any such lands to be occupied by any private person for any private purpose.

The instructions do not refer to a strip of water margin land. However, clause 56 required that no land shall be sold "… which the Surveyor-General may report to you as proper to be reserved". There is no evidence that the Surveyor-General opted to reserve all water margin land i.e. the coast, rivers and streams and lakes. Observed practice throughout New Zealand confirms from early times that there was partial rather than complete reservation along water boundaries. The early situation concerning reserved land along water is made complex by colonial instructions which were given to the Governor of New South Wales at a time when New Zealand was a territory of that colony[6]. These instructions pre-dated the instructions to Hobson.

While the Colonial Office was preparing the instructions which ultimately formed the Queen's Instructions of 5 December 1840, a New Zealand Land Bill was drawn up and enacted in New South Wales, in accordance with earlier instructions from the Colonial Office, London. Clause 5 of the bill said:

> "… no grant of land is to be recommended which exceeds 2560 acres, unless specially authorised …; or which shall comprehend any headland, promontory, bay, or island, that may hereafter be required for any purpose of defence or for the site of

[5] This is the instruction to the Governor which may be construed to authorise a reservation of a strip along water boundaries. Clauses 37 to 56 of the Instructions are set out as Appendix 1.

[6] The constitutional basis for an enactment of the New South Wales legislation to apply in New Zealand is set out in Appendix 2 being an extract from Reed and Methuen, *The New Zealand Book of Events*, at p275.

> any town or for any other purpose of public utility; nor of any land situated on the sea shore within 100 feet of high water …"

Captain Hobson, who had accepted the position of New Zealand Consul in February 1839, received on his embarkation for New Zealand a letter from Lord Normanby, the then Secretary for the Colonies, which read in part:

> "Her Majesty is not unaware of the great natural resources by which that country (NZ) is distinguished … On the other hand the Ministers of the Crown have deferred to the advice of the Committee appointed by the House of Commons in 1836 … in thinking that the increase of national wealth and power promised by the acquisition of NZ would be inadequate compensation for the injury which must be inflicted on a numerous and inoffensive people whose title to the soil in indisputable …"

> "The Governor of NSW will, with the advice of the legislative council, be instructed to appoint a Legislative Commission to investigate and ascertain what are the lands in NZ held by British subjects under grants from the Natives ... and it will then be decided by him how far the claimants ... may be entitled to confirmatory grants from the Crown and in what conditions."[7]

On 16 April 1941[8] the new Secretary for the Colonies, Lord John Russell wrote to Hobson informing him that as New Zealand had become an independent colony prior to the passing of the New South Wales New Zealand Land Act that Act had been disallowed by Her Majesty the Queen. Subject to meeting exigencies the experience of Hobson may have brought to light the New South Wales Act was to be followed as "a safe and proper guide." Her Majesty directed that Hobson postpone the notification of her disallowance of the New South Wales Act and Lord Russell directed that until Hobson received further instructions the Act would continue in force in New Zealand "… although subject of course to any amendments which may in the interval have been made by yourself with the advice of the legislative council of New Zealand". In June 1841 Hobson repealed the New South Wales Act and the new New Zealand ordinance authorised the Governor for the time being of the New Zealand Colony to appoint Land Commissioners who were to hear and to validate

[7] Governor Gipps of New South Wales was given a discretion to impose conditions to apply to Crown grants in New Zealand for land previously purchased from Maori. The area restriction of 2,560 acres (4 square miles) along with the 100 foot (1 chain) coastal reservation originate in the Act he passed.

[8] Copies of the letters Lord Russell wrote to Hobson and also to Governor Gipps of New South Wales are included in Appendix 4.

claims of direct purchase made prior to the Treaty of Waitangi[9]. The Ordinance enacted as No 2 on 9 June 1841 (NZ Legislative Council Ordinances 1841-1853 at p5) following in part and substantially re-enacting the New South Wales Act, required by the proviso to section 6 in respect of purchases validated by the Commissioners, that

> … no grant of land shall be recommended by the said Commissioners which shall exceed in extent two thousand five hundred and sixty acres, unless specially authorised thereto by the Governor with the advice of the Executive Council, or which shall comprehend any headland promontory bay or island that may hereafter be required for any purpose of defence or for the site of any town or village reserve or for any other purpose of public utility, nor of any land situate on the sea-shore within one hundred feet of high water-mark: Provided also that nothing herein contained shall be held to oblige the said Governor to make and deliver any such grants as aforesaid unless His Excellency shall deem it proper so to do.

In addition to being the first New Zealand enactment to provide for a marginal strip along water this Ordinance in following article 2 of the Treaty of Waitangi provided that all land is exclusively derived from the Crown and thus establishes one of the fundamental principles of New Zealand land law. The preamble to the Ordinance and sections 1 and 2 are reproduced as Appendix 3.

The stance of the Governor and Legislative Council on the requirement for reserving a strip along the sea shore was soon to weaken. The following year Ordinance No 14 was enacted on 21 February 1842 (NZ Legislative Council Ordinances 1841-1853 p112) to amend Ordinance No 2 principally by removing the limitation of area and prescribing a new formula for describing land adjoining rivers and the sea. Section 5 said:

> **5.** The land to be granted at the recommendation of the Commissioner may be selected by the person entitled to such grant out of the land claimed by him: Provided that the land so to be selected shall be in one block, to be as nearly as possible a rectangular figure the breadth of which shall not be more than half its length: Provided also that when the block so to be granted shall be bounded by the sea or a river, the rectangle aforesaid shall be so placed that the narrow side or breadth shall be bounded by the sea or any such river, and that the length of the rectangle shall run back from the sea or river as near as possible at right angles to their general direction.

[9] Claims had in fact been lodged under the NSW Act. These were subsumed into the work of the Commissioners appointed under the New Zealand ordinance.

There was no area restriction and no requirement to create a 100 foot wide strip along the high water-mark. Ordinance No 14 was disallowed by Her Majesty on 6 September 1843[10]. By royal decree the original legislation requiring a coastal reservation was reinstated. Undaunted, the Governor and Legislative Council in session 3 of the Council, in 1844, by Ordinance No 3 amended Ordinance No 2 of 1841 to make formal provision again for the area restriction of 2,560 acres and also provide for the 100 foot strip along the coast as required by the Queen. The New South Wales Ordinance and the New Zealand Ordinances of 1841 and 1844 were not however legislation of general application. They were enacted to apply to land previously purchased directly from Maori by private deeds and provided a means whereby claims could either be rejected or approved of by the Crown and if accepted as valid could be perfected by a Crown grant. The NSW Act and the New Zealand Ordinances were therefore of a narrow compass applying to land claims which were reviewed by the Land Claims Commissioners. Except for a handful of claims the work of the Commissioners was completed by 1862. 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 Queens Chain.

Notwithstanding the occasional purchase of land to low water-mark from Maori[11] the Commissioners nevertheless reserved the full 100 foot strip from high water-mark indicating a strict compliance with the ordinance, the ordinance being preferred over the terms of the deed. A copy of a deed of purchase which was approved as the basis of a Crown grant to Bishop Pompallier excluding 100 feet from high water mark notwithstanding that the boundary in terms of the deed ran "… along the Beach at low water mark …" is included a Appendix 5. A Crown grant when issued is not a confirmation of the terms of the prior deed for a Crown grant is not a deed inter partes. Rather "the statements in it are the statements of the Crown" – *Wallis v Solicitor General* (New Zealand Privy Council Cases 1840-1932) 23 at 31. The boundary along the sea is determined by the terms of the grant[12]. The application of

[10] Extracts from Titles of Ordinances (1841-1853). Session 1 1841, 4 Victoria, and Titles of Statutes Session 2, 1841-2, 5 Victoria record the enactment of Ordinance No 2, 1841 and of Ordinance No 14, 1842 and show that the latter Ordinance was disallowed. These extracts are included as Appendix 6.

[11] In about 3 out of every one hundred deeds considered by the Commissioners (estimated by a reading of the deeds) the seaward boundary is stated to extend to low water-mark. There is extensive use of the sea or the shore of the sea as a boundary not specifying either high or low water.

[12] Early legislation also recognised this principle. Take for example s48 of the Native Lands Act 1865:

> Such grants … shall vest in the persons therein named such estate or interest in the lands therein described as shall be expressed therein subject nevertheless to such restrictions limitations and conditions (if any) as shall be contained therein in manner aforesaid and shall

a doctrine of coastal reservation dates back to the beginning of New Zealand land law.

The Royal intention to reserve a margin along the coast for the use of the public was made clear. The general expression of an intention as couched in instructions 43 and 56 (supra) in relation to water boundary reservation is not explicit. What is significant today is the fact that following action of the Crown in 1843, 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 over-stressed 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 which would otherwise have applied[13]. The reservations created the ethos so very much a part of New Zealand life that the general 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.

Pre 1840

Purchases of land from Maori date as far back as 1815 but most were made in 1837, 38 and 39 when the intention of the Government of England to claim sovereignty encouraged speculators to obtain bargains. These purchases were on a grand scale and 20 years elapsed before all claims were settled by the Land Claims Commissioners. In his report to the General Assembly dated 8 July 1862 "The Report of the Land Claims Commissioner" Francis Dillon Bell the Chief Commissioner noted at p636 that "The whole extent claimed by all classes (classes of claimants) was 10, 322, 454 acres" and went on to say however that "The total quantity of land awarded or granted is 292, 475 acres. He said that the total number of claims numbered 1,376. To these private claims there must be added the 20,000,000 acres claimed by the New Zealand Company. This acreage was reduced by the Commissioner separately hearing this claim to 283,000 acres[14]. Certified copies of the deeds are published with the report of the Land Claims Commissioner.

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be conclusive as to the particulars limits and extent of such land and as to the proprietors thereof and shall in all other respects have the legal effect and consequences of an ordinary grant from the Crown.

[13] The English Laws Act 1858 (UK) provided that the laws of England as they existed on 14 January 1840 should, so far as applicable to the circumstances of New Zealand, be deemed to have been in force here on and from that date.

[14] G H Scholefield, *New Zealand in Evolution*, 1909 at p175.

In some instances the report of the Commissioners on an individual deed is annexed to the copy of the deed. Invariably when the Commissioners approved a grant of the land by the Crown of land fronting the sea a reservation of 100 feet was made by the Commissioners along the shore of the sea. Most of the early purchases from Maori were bounded by rivers, streams, natural features and the sea. There is no evidence in the deeds or reports of the Commissioners of a reservation of a strip along rivers or streams.

Post 1840 - Including the Period of Provincial Government 1854-1876

The reservation of a coastal marginal strip in Crown grants issued for early private purchases from Maori was effected by a direction from the Queen. However, neither the colonial administrators in London, nor the early New Zealand administrators in passing the ordinances and statutes of central government, and later, the ordinances of the provincial governments legislated for marginal reservations along water frontages when land was authorised to be sold by the Crown to settlers. It would be tedious in the context of public access along water to follow the changes and vicissitudes of the New Zealand land laws over the first 35 years of colonial history except in summary form. The law of New Zealand has its origin in the laws of England and the record is not complete without a description of the legal basis for the subdivision and sale of Crown land under powers granted by the Crown.

The most succinct summary available of the historical land law of New Zealand is that given by A E Currie at p96 of *Crown and Subject* (Legal Publications, Wellington, 1953). While he states the law up to 1953, unfortunately there are some omissions in his text; these have been supplied as indicated in heavier type.

> Authority to the Governor to make grants of waste land in the name of the Sovereign and under the public seal of the colony was conferred by the Charter of 1840, the enabling authority for which was the United Kingdom Act of 17th August, 1840, 3 & 4 Vict. C.62. The accompanying Royal Instructions of December 1840 made detailed provision for the sale of land and the issue of grants to purchasers: clauses 37 to 56. Cf. *R.* v. *Symonds,* (1847), N.Z. P.C.C. 387 at p.389. By the Australian Waste Lands Act of 1842 (U.K.), 5 & 6 Vict. C.36, s.5, the Governor was directed to convey lands in the name and on behalf of Her Majesty in such form and with such solemnities as might be prescribed by Her Majesty. In 1846, by 9 & 10 Vict. C.104, s.11, passed on the same day as the Constitution Act of 1846, it was declared that the Australian Waste Lands Act of 1842 should no longer apply to land in New Zealand. By clause

> 14 of the Letters Patent or Charter of 23rd December 1946, issued under the authority of the Constitution Act of 1846, 9 & 10 Vict. C.103, the authorities authorised to issue grants were the Governors of the Provinces of New Ulster and New Munster, using the public seals of their provinces. **The 1846 legislation was opposed in New Zealand by the Governor and not put in place and repealed in 1848. The Constitution Act 1852 (UK) in substitution for the Act of 1846 was preceded by the English laws Act 1854 later replaced by the English laws Act 1858 (UK) and subsequently by the English Laws Act 1908 (NZ). The authority of the Governor to make grants of land was conferred by the Letters Patent creating his office. However**, subsequent exercise and delegation by the General Assembly of the powers conferred by the Constitution Act appear from the Waste Lands Act 1854, the preambles to that Act, the Provincial Waste Lands Act 1854, and a chain of subsequent legislation – **principally the Lands Acts** – down to the present day.

The ordinances and statutes of the colonial central government of New Zealand relating to land alienation after 1843 up until and including the introduction of provincial government are Ordinance No 20, 17 July 1844 Land Claimants Estates; Ordinance No 4, 25 August 1849 Crown Titles; Ordinance No 15, 2 August 1851 New Zealand Company's Land Claimants; Regulations for the Sale and Disposal of the Waste Lands of the Crown in New Zealand 1853, Waste Lands Act 1854; Public Reserves Act 1854; Provincial Waste Lands Act 1856; Land Claims Settlement Act 1856, Waste Lands Act 1858.

In neither the Imperial legislation nor the ordinances and statutes of the New Zealand Government with the exception of NZ Ordinance No 2, 1841 reinstated by Her Majesty Queen Victoria 6 September 1843 and NZ Ordinance No 3, 1844 were there any references to a requirement to lay off reservations along water boundaries. Nor for that matter was there any truly large scale Crown granting of rural land in the period 1840-1953. In *New Zealand in the Making* J B Condliffe said:

> The first sales in New Zealand were of town sections, for which speculative prices were paid. The revenue derived from land sales in 1841, indeed, though relatively small (£28,540), was more than the total received from sales for the eight years following. After 1842, sales were negligible until they began slowly to pick up in 1848. At the lowest depth of the economic difficulties of the first decade, in 1845, the revenue from this source was only £155. It is to be remembered that land was obtainable also from the Company in its various settlements, but even so, the areas taken up must have been small. In 1852 the total area fenced was only 40,625 acres and the area under crop 29,140 acres …

> As far as land sales were concerned, therefore, in this period before self-government, the areas disposed of were small. Both in the Company lands and the Crown lands outside the Company areas, the principle was adhered to of sale at a price not below £1 per acre. No statistics exist which make possible any accurate estimate of the area so alienated.

The example of the decision by Her Majesty 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. The extensive although incomplete pattern of water margin reservation by employing the device of 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. The roads legally exist as public roads.

Provincial Government

The New Zealand Constitution Act 1852 (Imperial) which established autonomous government in the colony, concluded the era of government by ordinance and paved the way for the introduction of provincial government. Section 72 says:

> "**General Assembly may regulate sales, etc., of waste lands** – Subject to the provisions herein contained, it shall be lawful for the said General Assembly to make laws for regulating the sale, letting, disposal, and occupation of the waste lands of the Crown in New Zealand; and all lands wherein the title of **[**Maori**]** shall be extinguished as hereinafter mentioned, and all such other lands as are described in an Act of the session holden in the tenth and eleventh years of Her Majesty, chapter 112, to promote colonisation in New Zealand, and to authorise a loan to the New Zealand Company, as demense lands of the Crown, shall be deemed and taken to be waste lands of the Crown within the meaning of this Act …"

Provincial Government was introduced in 1854. Under the general and at first nominal supervision of the central government the provinces were to sell the public lands of the Crown at the price they decided upon, control the size of holdings and the method of sale, and retain the profits. Prior to the introduction of Provincial government the Governor promulgated the Waste Land Regulations of 1853 which established comprehensive rules for the sale of Crown land. The Waste Land Act 1854 which confirmed the Regulations of 1853 and other regulations then in force was enacted (inter alia) to enable the Superintendent and Council of the Province to

recommend specific land sales regulations for the Province for the approval of the Governor and Executive Council. The powers of the Provinces were made very comprehensive.

In relation to water boundaries Reg 10 of the Waste Land Regulations 1853 says:

> Every allotment of Rural Land must so far as circumstances and the material features of the country will admit be selected of a rectangular form, and where fronting upon a river, road, lake, or coast, be of a depth from the front of at least half a mile. No such allotment must be selected as to monopolise the wood or water in any particular location.

Regulation 12 says:

> In districts to where the lines of road are not laid out, a right of road reserved and allowance made in land of three to five percent.
>
> Where lands shall be purchased in districts in which future lines of road have not been determined and laid out, a right of road will be reserved in the Grant, an allowance being made to the purchase for such reserve according to the annexed scale …"

Until the Provinces could promulgate province specific regulations (or take advantage of an existing province specific regulation act or ordinance) these general regulations were in force. They clearly envisaged allotments fronting water boundaries and the reservation of roads as appropriate. There were no express regulations for reserves along water boundaries but there was a general power to lay out roads which could include a road along water.

The Provinces were quick to exercise their independence and promulgate their own regulations. Representative of the provincial regulations are the Land Regulations 1856 for Auckland and Otago respectively.

Auckland, New Zealand Gazette 1 May 1856 at p81.

Reg 5 The Superintendent of the said province may, from time to time, and as to him it shall seem meet, reserve portion of the said land for public roads or other internal communication … or for the inhabitants at any town or village or as the sites of public quays or landing places or on the sea coast or shores of navigable streams, or for any other purpose of convenience, health or enjoyment.

Reg 17 In the case of such allotment being unsurveyed, and bounding a river, road, lake or coast it must be as nearly as possible of a rectangular form, and the depth thereof must be at least three times the length of such frontage and in all cases not to interfere with ... dividing the adjoining land into convenient allotments.

Otago, New Zealand Gazette 12 February 1856 at p34.

Reg 12 … and the land specified in every application shall so far as the features of the country and the survey of the Province will admit, be of a regular form, and when fronting a river, lake, road or coast be of a depth not less than twice the length of the frontage …

Reg 16 It shall be lawful for the Superintendent with the advice and consent of the Provincial Council, to reserve from sale and set aside for public use, any land within the province of Otago, and such reserves shall be dealt with by Ordinances of the Superintendent and Provincial Council.

In neither province were there express requirements for reservations along water.

The Waste Lands Act 1854 was followed by the Provincial Waste Lands Act 1856 which was disallowed over doubts concerning the powers of the General Assembly to delegate the powers it purported to give the Provinces. The Waste Lands Act 1858 repealed the Act of 1854 and provided clear powers of delegation from the Governor to the Provinces. Thereafter the General Assembly at the request of the Provinces enacted statutes to empower the Provinces with specific powers in relation to the sale of Crown land.

In this respect a selection of the legislation applying in the provinces after the Act of 1858 illustrates the diversity in the provinces.

Section 33 of the Taranaki Waste Lands Act 1874 says:

> **33.** All land reserved from sale for public highways under the provisions of this Act shall be vested in the Superintendent in trust for the purpose of public highways but so as that such highways may be diverted and otherwise dealt with under the provisions of "The Highways and Watercourses Diversion Act, 1858.

Section 20 of the Auckland Waste lands Act 1874 stipulates:

> **20.** Reserves for public highways bridle-paths and footpaths shall be made by the Superintendent, and shall be set forth on the authenticated maps of the Land Office; and the Superintendent and the Provincial Council may by Act alter the line of any

> such highways, bridle-paths or footpaths, and may dispose of the land theretofore used for the same.

In Canterbury a different approach was taken as expressed in provisions of the Canterbury Waste Lands Act 1873:

> **7.** Clause numbered twenty is hereby repealed, and in lieu thereof the following provision is made:- Reserves for public highways, bridle-paths and footpaths shall be made at any time whatever by the Superintendent or the Board, or by the Chief Surveyor under the authority of the Superintendent, and shall be set forth on the authenticated maps in the Land Office. The Superintendent and the Provincial Council may by Ordinance alter the line of any such highways, bridle-paths and footpaths, and dispose of the land theretofore used for the same.
>
> **10.** All rural land in the said Province shall be sold subject to a right of laying out a road or roads over the same, if found necessary or expedient on survey; and a Crown grant shall issue to the purchaser or purchasers of any such land, excepting thereout so much thereof as may be required for such road or roads.

Marginal land in the guise of roads along water boundaries was extensively but not consistently applied in the Provincial Period. In this period Central Government codified the law on Crown grants in the Crown Grants Act 1866. Section 12 in respect of water boundaries said:

> XII. Whenever in any grant the ocean sea or any sound bay or creek or any part thereof affected by the ebb or flow of the tide shall be described as forming the whole or part of the boundary of the land to be granted such boundary or part thereof shall be deemed and taken to be the line of high water mark at ordinary tides.

This provision clearly was to cover grants where no land along a water boundary was reserved and implicitly recognised that situation.

Short's Law of Roads and Bridges (1907) written at a time when independent commentaries were scarce states the early position on roads along water at p53:

> "As a rule a road is reserved, one chain wide, by the Crown along all high water lines of the sea and of its bays, inlets, and creeks, and along the margin of all lakes exceeding 50 acres in area, and along the banks of all rivers and streams of an average width of 33 fee (see Section 110 of "The Land Act 1892"). This provision has, however, not been always in force, and there are some cases where Crown Grants have been issued which give riparian rights. Thus, if the Crown Grant describes a river as one of the boundaries of the land granted thereby, and such river

> is a non-navigable one, the title of the owner extends to the centre line of the river. The question as to whether a road exists at any place can be answered by reference to the record maps in the office of the Chief Surveyor of the district."

Short was a qualified lawyer, a Commissioner under the Commissioners Act 1903, The Public Works Act 1905, The Municipal Corporations Act 1900 and other Acts. At the time of publication he was Chief Clerk of the Department of Roads and had specialised in the law relating to roads in New Zealand for 23 years. His observation is deserving of great respect and in any event the records of the public offices dealing with surveys and land titles would confirm the accuracy of the statement he made. The problem with sales of Crown land in this period – at a time of extensive alienation of the most accessible land – is that there was a lack of consistency even in some instances along the same waterway.

The legislation that was enacted in the first 50 years of settlement to apply to the alienation of Crown Land is listed in Appendix 21. Each province had a separate set of ordinances. In the period 1857 – 1876 the office of Surveyor-General was vacant, provincial control being preferred ahead of national co-ordination. Each province had a Chief Surveyor to control provincial surveying practice. Variations in surveying practice and in reservations of land for the Crown were therefore to be expected in the haste to place settlers on the land.

The Early Land Acts

After the abolition of provincial government the legislative structures which have influenced public administration to the present time began to emerge as consolidated statutes.

The first consolidated Land Act (the forerunner of the current Land Act 1948) was enacted in 1877. This Act was superseded by the Land Act 1885. Instructions were made under the authority of s169 of the Land Act 1877[15] – The Instructions for Settlement Surveyors on Demesne Lands of the Crown – requiring land to be reserved along all navigable rivers at a width of 100 links. Under the authority of s244 of that Act a range of sites for docks, quays, landing places etc could be reserved along water margins.

[15] Relevant sections of the Land Act 1877 and the Land Act 1885 are set out as Appendix 7

In 1886 Survey Regulations under the Land Act 1885 (New Zealand Gazette 1886 Vol 1 p634) were enacted to apply to Crown land[16].

Reg 27 said:

> "Suitable sites for schools are to be reserved, about 10 acres in rural districts under 5 acres in suburban districts. Also at least 100 links frontage to all navigable rivers and coasts making the traverse lines if possible the boundary of such reservation. Bushes in sparsely-timbered country are to be reserved, and in bush country all clumps of valuable timber; also stone quarries, gravel and sand pits for road making where conveniently situated, for trunk and district lines."

These instructions to settlement surveyors and Reg. 27 of the Survey Regulations 1886 were the first national riverside requirements to be put in place.

A perusal of s169 and 244 of the Act of 1877 and of s4 and s227 of the Act of 1885 may indicate that in respect of the marginal strip requirements along rivers these regulations could be ultra vires and unlawful as the reservations were not specifically authorised. However, as in the period before 1892 these strips were reserved as roads – and there was ample authority to lay off roads[17] – the issue of the legality of the regulations which in context are instructions by the Government to its employee surveyors may not be of great importance. What the regulations did show was an awareness of a need for a national policy. That policy was to authoritatively emerge as section 110 of the Land Act 1892.

Probably the best summary of the alienations made up until 1892 is contained in an appendix to the first Official Year Book (1892) which includes the following table[18]:

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[16] It is worth noting that at the time when the survey regulations under the Land Act 1885 were gazetted, regulations under The Land Transfer Act 1885 were also put in place effectively as part of the Land Act regulations. The Land Transfer Regulations (to apply to the survey and subdivision of private land) commenced at Reg 112 following on from Reg 111 of the Land Act regulations as a subset of the detailed Land Act regulations.
Regulation 112 says:

> "The Regulations 1 to 85 of even date herewith under "The Land Act 1885" shall apply equally to surveys under "The Land Transfer Act 1885" whenever they are not inconsistent with these sales."
> There is no rule of statutory construction which would make Reg 27 of the Land Act Regulations apply to surveys undertaken for the purposes of the Land Transfer Act. Legislation would be required to take reserves etc out of privately owned guaranteed land titles. Regulations could not achieve that result. It was not until 1946 that general legislation (The Land Subdivision in Counties Act 1946 ante) authorised the compulsory taking of water boundary reserves in private subdivisions.

[17] Refer to Royal Instruction 1840 para 37 (Appendix 1) and the section on Provincial Government.

[18] J B Condliffe D.Sc (Research Secretary, Institute of Pacific Relations, formerly Professor of Economics, Canterbury College, Christchurch, New Zealand; Sometime Sir Thomas Gresham Student,

	Million Acres
Freehold	13.6
Held by lease and with right of purchase	1.7
Held on lease from the Crown	12.5*
Reserved for public purposes	6.6
Crown lands	8.4
Midland Railway Company	4.0
Native lands	10.8
Barren, lakes, etc.	9.0
	66.7

* Of this area, 11.8 million acres were held on pastoral lease.

Land Act 1892 – The Law Applying for the Next 56 years

The enactment of s110 and the companion s15 of the Land Act 1892 initiated the modern era of law relating to marginal strips along water boundaries. For the first time legislation directed that land was to be reserved from sale or other disposal of Crown land along the sea coast, rivers and streams of a specified width and around lakes of a stated area.

Section 15 reads:

> **15.** Notwithstanding any sale or other disposal of any unsurveyed rural or pastoral land, for cash, or on deferred payments, or for occupation with right of purchase, or perpetual lease, or lease in perpetuity, or in any manner whatsoever, and at any time previous to the approval of the plan of the survey of the same by the Chief Surveyor of the district, the Governor shall have the right to exclude from such sale or other disposal any road-lines which may be required through or over any such lands and to reserve any of

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Gonville and Caius College, Cambridge) in his text *New Zealand in the Making* 1927, George Allen & Unwin Ltd, London in commenting on this table went on to say:

> "The Crown lands sold for cash between 1856 and 1891 totalled 10.7 million acres. To this total should be added the area sold before 1856, approximately 3 million acres. In 1927 the total area made freehold by sale amounted to 17½ million acres, so that in the twenty-six years from 1891-1927 less than 4 million acres were sold in all the various ways in which sale was possible. Sales of Crown land, which in the five years 1873-7 averaged 607,000 acres annually, have dropped in the five years 1923-7 to 20,000 acres annually, supplemented by leases of various kinds (which may later be turned into freehold) to the annual extent of 105,000 acres. Very little of the land now being disposed of can be compared either in quality or in accessibility with the land sold in earlier periods. It is to be remembered also that very large areas, totalling five million acres in 1892, were disposed of by free grants in the earlier period, a system that has entirely ceased since the policy of conservation was introduced … a sense of proportion can be maintained only when it is remembered that the overwhelming bulk of the best land of New Zealand had passed into private ownership before 1892."

> the said lands which are situate on the seashore, the margin of lakes, or on river-banks, or which are required for any of the purposes mentioned in section two hundred and thirty-three, without paying compensation for any land so excluded and reserved.

Section 110 says:

> **110.** There shall be reserved from sale or other disposition a strip of land not less than sixty-six feet in width along all high-water lines of the sea, and of its bays, inlets, or creeks, and along the margins of all lakes exceeding fifty acres in area, and along the banks of all rivers and streams of an average width exceeding thirty-three feet, and, in the discretion of the Commissioner, along the bank of any river or stream of less width than thirty-three feet.

The law stated in these sections was significant and substantive and proved to be durable. The requirement for special sites to be reserved which was first expressed in the Royal Instructions of 1840 was embodied in s15. Section 110 was new. The law as stated in these sections remained the law for the next 56 years until amended by s58 of the Land Act 1948. In the meantime, when the Land Act 1892 was replaced by the Land Act 1908 sections 13 and 122 of the latter statute were identical to sections 15 and 110 of the Act of 1892. When the Land Act 1908 was repealed and replaced by the Land Act 1924, section 14 repeated s13 of the Act of 1908 with minor drafting amendments and s129 is identical to the previous s122. While s58 of the land Act 1948, the statute which repealed and replaced the Land Act 1924, retained the structure of s129 of the Act of 1924 and its predecessors, the new provision in 1948, made some significant changes to the law (dealt with later). Sections 13 and 122 of the Land Act 1908 and sections 14 and 129 of the Land Act 1924 are included in full as Appendix 8.

Although from 1892 onwards the law was clearly stated the actual status of marginal strips has nevertheless been a cause of some confusion. Prior to 1892 marginal strips had been shown on the record plans as roads. What was the status of marginal strips after 1892? Were they roads or reserves? From an administrative perspective the issue was clarified in 1914 when the Surveyor-General, E H Wilmot introduced the modern concept of distinguishing the strips from roads, colouring them red or pink on the plan. If possible the strip should be labelled “River-bank Reserve”. The language of s110 and subsequent sections “These shall be reserved from sale or other disposition …” does not create a “reserve” in the sense of a reserve subject to the early Public Reserves and Domains Acts and succeeding statutes. J A B

O'Keefe in *The Law and Practice relating to Crown Land* (Butterworths, Wellington, 1967) notes at p8 in respect of reservations from sale "These are not "reserves" *stricto sensu*, but remain part of the allodium until another step is taken e.g. setting apart as a reserve or proclamation as road etc". In other words the marginal strips which are not road are strips of Crown land and not reserves dedicated to some specific public purpose. Reserving land from "… sale or other disposition …" does not create a legal reserve; the land is merely retained by the Crown.

The legal distinction between these strips and roads and is so important that the law relating to roads should briefly be enlarged upon. Section 43 of Transit New Zealand Act 1989 currently contains the definition of what is a "road" as previously was included in the Public Works Acts[19] i.e.

> *"Road means a public highway whether carriageway, bridle path, or footpath; and includes the soil of:*
>
> > *(a) Crown land over which a road is laid out and marked on the record maps …"*

From a brief consideration of the law relating to roads and the law relating to reservations from sale or other disposal of Crown land two principles emerge.

1. If a marginal strip is shown on the record plans as road whether before or after 1892 the status of that land is public road. In this respect, despite the provisions of the Act of 1892 authorising the exclusion of a marginal strip as Crown land if a surveyor over the period 1892-1914 showed the strip as road i.e. coloured it burnt sienna on the record plans that strip is legally a road. If a strip alongside water at any time up to the present is shown as a road that strip is a road not a "reserve".

2. If land is shown as a strip reserved from sale along water on Crown plans whether before or after 1892 that strip is Crown land.

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[19] (i) Public Works Act 1981: s121
(ii) Public Works Act 1928: s110
(iii) Public Works Act 1908: s101
(iv) Public Works Act 1905: s101
(v) Public Works Act 1894: s100
(vi) Public Works Act 1876: s79

Land Act 1948

After 56 years of administration in terms of the provisions introduced in 1892 in respect of water margins, the new Land Act of 1948 in s58 retained the basic principles of the earlier legislation but enlarged the scope of reservations. The new section required strips 66 feet wide (20 metres) along the coast, along rivers and streams more than 10 feet wide (3 metres) down from 33 feet (10 metres) in earlier legislation and on the margins of lakes more than 20 acres (8 hectares) down from 40 acres (20 hectares).

The Minister had the power to approve a reduction of the 20 metre strip width to 3 metres (proviso to subsection (1) (c). The obligation to reserve the strips also related to unsurveyed Crown land and to pastoral land being leased long-term. Strips were required on any leased land and could be created at lease renewal without compensation.

Section 58 was to apply for over 40 years. It was repealed by the Conservation Law Reform Act 1990 (s37 and the Schedule to that Act).

Section 58 is set out below.

58. **Land reserved from sale** - (1) There shall be reserved from sale or other disposition of Crown land under this Act a strip of land not less than **[**20 metres**]** in width –

(a) Along the mean high-water mark of the sea and of its bays, inlets, and creeks:

(b) Along the margin of every lake with an area in excess of **[**8 hectares**]**:

(c) Unless the Minister of Conservation considers it unnecessary to do so, along the banks of all rivers and streams which have an average width of not less than 3 metres:

Provided that the Minister of Conservation may approve the reduction of the width of the strip of land to not less than 3 metres if in his opinion the reduced width will be sufficient for reasonable access to the sea, lake, river, or stream.

(2) The Board may in its discretion determine that the provisions of the last preceding subsection shall not apply to any specified land comprised in a closed road or street which is disposed of under this Act.

(3) Where any unsurveyed farm land or pastoral land is disposed of on any tenure under this Act the Board may at any time before the approval by the Chief Surveyor of the plan of the survey of the land, and without liability to pay compensation, exclude from the disposition –

(a) Any land which may be required for a road:

(b) Any part of the land which is situated along the mean high-water mark of the sea or along the margin of any lake or along the bank of any river or stream, and which is required to be reserved under subsection (1) of this section:

(c) Any part of the land which is required for a reserve for any public purpose within the meaning of section 167 of this Act.

[(4) The renewal under this Act of any lease or licence granted under any former Land Act shall if the Board considers it to be equitable and in the public interest and so determines, be deemed to be a disposition of land for the purposes of subsection (1) of this section.**]**

[(5) Nothing in this section shall limit the provisions of section 60 of this Act in relation to any land reserved from sale or other disposition under this section.**]**

In subs. (1) (b) the expression “8 hectares” was substituted for the expression “20 acres” by s. 3(1) (b) of the Land Amendment Act 1972.

In subs. (1) (c) and the proviso thereto the words “of Conservation” were inserted by s. 65(1) of the Conservation Act 1987, and the expression “3 metres” was substituted for the expression “10 feet” by s. 3 (1) (c) of the Land Amendment Act 1972. Subs. (4) was added by s. 2 of the Land Amendment Act 1960.

Subs. (5) was added by s. 2 of the Land Amendment Act 1962.

The Conservation Act

The Department of Conservation was formed in 1987 under the Conservation Act 1987. In that Act a definition of marginal strip was inserted in s2 and s24 dealt with marginal strips. At this point in time s58 of the land Act 1948 was left untouched and continued to apply in an uneasy relationship with the new s24. The provisions of the Conservation Act relating to marginal strips were untidy and unsatisfactory but

noteworthy in that s24(2) placed primary emphasis on conservation values and made public access subordinate to conservation principles. There is little point in pursuing the provisions of the Conservation Act 1987 any further for in 1990 section 24 was repealed by s15 of the Conservation Law Reform Act 1990 which in substitution inserted a new Part IVA in the Principal Act. Please refer to Appendix 9, where Part IVA is set out in full together with amendments.

Section 58 of the land Act 1948 is repealed by s37 and the Schedule to the Conservation Law Reform Act 1990.

Part IVA is highly prescriptive and cannot easily be summarised. The following points may highlight some key provisions.

1. *Unders24(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 strips of the same width".*

   Legal but unformed roads are not included in the strips which are marginal strips under the Conservation Act. The maxim is "Once a road always a road".

2. A very wide range of dispositions by the Crown trigger the marginal strip requirements. Note subsections (6), (7), (7A), (8) and (9) of s24.

3. There is power to reduce the width of a marginal strip. s24A.

4. There is power to increase the width of a marginal strip: s24AA.

5. There is power to exempt a disposition from marginal strip requirements: s24B.

6. The purposes for which marginal strips are held are prescribed in s24(C). Among the six stated purposes is "To enable public access to any adjacent watercourses or bodies of water …" The emphasis is however on conservation values although in fairness the access aspect is stated more strongly than it was in the original s24 of the Act of 1987.

The Conservation Act was enacted at a time when the Government wished to transfer the bulk of the commercially viable Crown estate to State-owned Enterprises with an intention that much of the land eventually should pass into private hands. It was clear that the transfer of the land could not proceed under existing rules relating to reserved land along water boundaries. Surveys of reserved land would have been required and given the number of land parcels involved surveys could not have been completed in a reasonable time-frame and at a reasonable cost. The concept of an ambulatory marginal strip not fixed by a survey but noted on the title to the land was devised to allow the transfers to proceed. The concept was extended to all Crown alienations. Sections 24D and 24G have particular application. Provision was made in s24H for managers to be appointed to manage marginal strips and by s24H (4)(b) the manager of a marginal strip shall – "enable members of the public to have access along the strip".

Reserves Along Privately-Owned Water Boundaries

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 margin legislation relating to private land. Whilst extensive reservations were made as road along the seacoast, some lakes and along major flowing waterways in the period 1840-1914, inconsistencies, possibly a failure of knowledge, and an incomplete commitment have created a large number of privately owned riparian titles.

The Land Subdivision in Counties Act 1946

Rural subdivision (i.e. outside of Cities and Boroughs) was controlled under the Land Acts[20] until the Land Subdivision in Counties Act 1946 came into force on 1 January 1947. Land subdivision laws initially related to subdivisions of Crown land and the language of the early sections was precise "There shall be reserved from sale or other disposition …" The strip was reserved from sale – it was not however a public reserve. The Land Subdivision in Counties Act applied to privately owned land. Section 11 of the Land Subdivision in Counties Act stated "On every scheme plan submitted under the foregoing provisions of this Act there shall be set aside as reserved for public purposes a strip of land not less than sixty-six feet in width along

[20] This was a very limited form of control applying to Towns in rural areas. See for example s16 of the Land Act 1924. In the context of reserves along water there would be a very limited application and these subdivisions are not included in this discussion.

the mean high-water mark of the sea …" etc. This land by virtue of s13(2) vested in the Crown as a reserve subject to the Reserves and Domains Act 1953. The legal status of the new type of reserves (as an "official" reserve dedicated to a public purpose) is quite different from the land reserved from sale on the sale of Crown land.

The Land Subdivision in Counties Act required a scheme plan to be approved by the Minister of Lands when land was subdivided into allotments of less than 10 acres. The Act did not apply to the creation of allotments larger than ten acres which could be established as of right without any consent of either the county or the Minister. Marginal strips were therefore required to be reserved along water boundaries of allotments under 10 acres and not otherwise. The marginal strip requirements did not apply to Maori land (s11(1) second proviso).

Section 11 is reproduced as Appendix 10.

Municipalities

Subdivisional legalisation applying in cities and boroughs up until The Local Government Amendment Act 1978 came into effect on 1 April 1979 did not compel private subdividers to provide reserves along water boundaries. Reserves along water were optional. The sections applying to subdivision in the Municipal Corporations Acts did not specify any water boundary requirements: s335 Municipal Corporations Act 1920; s332 Municipal Corporations Act 1933; ss350-353 Municipal Corporations Act 1954. The Local Government Act 1974 was the first subdivisional legislation to apply compulsory water margin requirements in Municipalities (see below).

Counties Amendment Act 1961

The Counties Amendment Act 1961 phased out the control of the Minister of Lands over subdivisions in Counties by repealing the Land Subdivision in Counties Act 1946. Section 29 of the Counties Amendment replaced s11 of the Land Subdivision Act in respect of reserves along water margins. In 1964 the Counties Amendment Act inserted a new section (1A) in section 29 to restrict the creation of water boundary reserves to allotments of less than 10 acres in area. In 1974 the Government decided to repeal section 1A to speed the process of providing access along water. In other words the reserves legislation was to apply to all allotments in a subdivision regardless of size providing the intersecting or adjoining river or stream

had an average width of more than five metres. If the waterway had an average width of between three and five metres reserves were to be restricted to allotments of less than four hectares. Section 28 of the Counties Amendment Act 1974 which effected the change in the law is included along with s29 of the Counties Amendment Act 1961 in Appendix 11.

The decision to apply the reserves requirement to all allotments regardless of size created great animosity in the rural community. Because of the requirement that the full length of the reserved strip be surveyed the cost of rural subdivisions of larger farms was greatly increased. The exemption from reserve requirements for allotments of over 4 hectares was reinstated in section 4(3) of the Counties Amendment Act 1977 and maintained in s289(3) of the Local Government Act 1974 (as inserted by the Local Government Amendment Act 1978).

Section 29(4) empowered the Minister of Lands to exempt from reserve requirements the banks of any specified river or stream.

The Local Government Act 1974

The Local Government Amendment Act 1978 inserted a new Part XX of the Local Government Act 1974 which repealed the subdivisional parts of the Counties Amendment Act 1961 and the Municipal Corporations Act 1954. Thenceforth counties, cities and boroughs were to apply identical legislation.

Section 289 of the Local Government Act 1974 (reproduced as Appendix 12) provides a code for reserves along water. Originally these reserves were under subsection (1) to be local purpose reserves subject to the Reserves Act 1977 "… for the purpose of providing access to the sea, lake river or stream as the case may be and to protect the environment …" Later, by the Reserves Amendment Act 1979 these reserves become esplanade reserves.

The exemption for allotments over 4 hectares was reafirmed in s289(3) but in cases where an owner voluntarily provides a marginal strip along a water boundary where the allotment does have an area of over four hectares, under the authority of s290, compensation may be paid to the owner.

Section 289 built on the principles established in the Land Subdivision in Counties Act 1946 and the Counties Amendment Act 1961. In retrospect it established a holding pattern rather than new law. That was to come in the Resource Management

Act 1991 where a radical review produced new concepts. The focus is shifting from ownership of strips (whether by the Crown or the local authority) to the provision of access.

The Resource Management Act 1991

This is a highly prescriptive piece of legislation which is better considered by a direct reading of its provisions. The Resource Management Act commences in resounding terms. Section 6 sets the stage:

> **6. Matters of national importance** – 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:
>
> (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
>
> (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
>
> **(d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:**
>
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

The provisions dealing with access inserted in the Act as originally enacted were found to be wanting and section 124 of the Resource Management Act 1993 repealed sections 229 to 237 and inserted substitute sections 229 to 237 and new sections 237A to H. These sections are reproduced as Appendix 13.

The devolution of responsibilities in recent years by central government to local government in the context of water margin provisions has included powers to create, waive or reduce esplanade reserves along water margins by way of district plan rules. Formerly, waivers or reductions had been a responsibility of the Minister of Conservation, in a line of responsibility that reaches back to the Land Subdivision in Counties Act 1946 and previously had been a function of the Minister of Lands before

counties were permitted to approve subdivisions. The breadth of discretion provided in s230 – Requirements for esplanade reserves or esplanade strips – could lead to some uncertainty as to when an esplanade reserve a strip will be required. The district plan review process would however provide the Department of Conservation or the citizen with the opportunity to make submissions if reserves are not intended for creation in places where they may consider a reservation to be appropriate.

The contention which surrounds the creation of reserves is illustrated yet again in the Resource Management Act 1991 as originally enacted. Although the debate which surrounded the imposition of reserve requirements in 1974 to affect lots of over four hectares and the repeal of that requirement a few years later was comparatively recent in legislative terms, section 230(1)(a) enacted in 1991 applied the esplanade reserve provisions to any land being subdivided. Section 230(3) as enacted by the Resource Management Amendment Act 1993 restored the requirement that a reservation may be imposed on subdivision against an allotment of under 4 hectares. The result is of course a slowing of the establishment of continuous access along water margins.

Section 229 in the form enacted in 1993 details five conservation principles, and an access right for the public, and a recreational use right, as the basis of establishing either esplanade reserves or esplanade strips. An esplanade reserve by s231(1) shall be set aside as a local purpose reserve for esplanade purposes under the Reserves Act 1977 and shall vest in and be administered by the territorial authority. Section 23 of the Reserves Act 1977 says:

> … nothing in this paragraph shall authorise the doing of anything with respect to any esplanade reserve … that would impede the right of the public freely to pass and repass over the reserve 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.

The Resource Management Act in making provision for esplanade reserves carries forward existing law which makes esplanade reserves public purpose reserves subject to the Reserves Act. There are special provisions applicable. For example section 237D authorises transfers of esplanade reserves to the Crown or regional council.

Whilst the reserve concept is an old one the Resource Management Act provides for new means of securing access along and to water. Section 232 authorises the

creation of esplanade strips of a width specified in a rule in a district plan. An instrument made between the territorial authority and the subdividing owner may be registered under the Land Transfer Act 1952. Under s233 when a water boundary moves "a new esplanade strip coinciding with such alteration shall be deemed to have been created simultaneously with each and every such alteration within the allotment. Esplanade strips may be varied or cancelled: s234. Esplanade strips may be created by agreement: s235 (amended by Resource Management Amendment Act 2003). Such strips need not be surveyed: s237.

Access strips may be created by agreement between the registered proprietor and the local authority in the nature of an easement over the land: s237B. Access may thus be provided over land to link with legal access along rural coastlines and along rivers and streams. The instrument may be registered under the Land Transfer Act.

Compensation must be paid under the Resource Management Act for the extra width of esplanade reserves or esplanade strips beyond 20 metres width, from a subdivision with lots smaller than 4 hectares. Where the lots are larger than 4 hectares, the council must negotiate compensation with the registered proprietor if it wants reserves or strips. These provisions greatly enhance the opportunities for the local authority to secure improved and continuous practical access for the public or to protect conservation areas.

Maori Land – A Category of Its Own

The greater part of the reserved water margin pattern which exists today was established over general land in the period 1853-1892 by the laying off of roads along significant water boundaries. This was the period when after Maori title had been extinguished settlers took Crown grants to the best and most accessible land. Concurrently (or nearly so) in the period 1862 to 1909 almost all Maori customary land was converted to Maori freehold land. But Maori customary land did not admit of the attributes which would permit a coastal or riverside reservation to the Crown. The reservation of boundary margins over general (non-Maori) land was based on plans of survey, and Crown grants which excluded the land reserved. There was underlying Crown title to both the land granted and the land reserved. Maori ownership according to ancient custom was obviously not based upon survey plans and Crown grants. Although the conversion of Maori customary land to Maori freehold (i.e. a written title) was perfected by a formal grant of the land from the Crown the basis of the paper title was an investigation of ownership rights by the

Maori Land Court. The Court provided the Governor with a certificate of ownership that authorised the Governor to make the grant. There has never been power to grant customary title as freehold to anyone other than the customary owners. If there were to be a strip it would have to be taken not reserved. In an nutshell this is the reason why the Queen's Chain was not established over Maori land.

The classic description of customary ownership along rivers was provided by Judge Browne of the Maori Land Court in the original proceedings for investigation of title to the bed of the Wanganui River in a judgment on 29 September 1939[21]:

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[21] No consideration of Maori ownership of riverbeds and banks may be placed in current perspective in the absence of reference to *In re the Bed of the Wanganui River* (1962) NZLR 600 and the 25 years of litigation which preceded that decision. In that time the Maori Land Court, The Maori Appellate Court, the then Supreme Court, a Royal Commission in 1950 and the Court of Appeal (on two occasions) considered the principles of law distilled from Maori custom and usage and the application of appropriate English freehold law. The above passage by Judge Browne was approved by the then Supreme Court in *The King v Morrison* (1950) NZLR 247 at 255, and in the second and final hearing in the Court of Appeal (1962) 600 at 608 per Gresson P, at 612 per Cleary J and 621 per Turner J.

The headnote (at p600) for the second hearing in the Court of Appeal (supra) provides a precise statement of the decision of the Court:

> "Where a block of land fronting on a non-tidal river has been held by Maoris under their customs and usages and later the title has been investigated and separate titles issued, the bed of the land adjoining the river becomes *ad medium filum* as part of that block and the property of the respective owners of that block.
>
> The fact that a whole tribe may have exercised a right of passage over the river and that eel weirs and fishing devices placed by individuals or *hapus* were not rigidly limited to the portion of the river immediately adjacent to the bank occupied by such individuals or *hapus* does not negative the application of the *ad medium filum* rule.
>
> *So held, by the Court of Appeal* (Gresson p., Cleary and Turner JJ.).
>
> Further held (per Turner J.). Whatever was originally the nature of the customary title to lands which have come before the Maori Land Court for investigation, the incidents of the titles which the same Court has issued and certified are, and always have been, the incidents of English freehold titles."

More recent judicial opinion has queried (in some respects) the correctness of the Court of Appeal decision in *re the Bed of the Wanganui River* – notably Cooke P in *Te Runanganui o Te Ika Whenua Inc Soc v Attorney-General* (1994) 2 NZLR 20 at 26 where he said "… the Waitangi Tribunal have adopted the concept of a river as being Taonga. One expression of the concept is "a whole and indivisible entity, not separated into bed, banks and waters". However, at this point in time the Wanganui case continues to state the law i.e. the second decision of the Court of Appeal. The adjoining owners of Maori land own the bank and the bed to the centre line if there are separate owners on either side and the whole of the bed if the river intersects the title.

The first of the Court of Appeal cases on the Wanganui River (reported at (1955) NZLR 419 was initiated under the authority of s36 of the Maori Purposes Act 1951 which conferred jurisdiction to determine questions relating to the bed of the Wanganui River. The Court required further information to deal with the matter comprehensively; the second case stated arose out of that requirement. However, the court in the first case did rule that "… the bed of the Wanganui River within the limits stated, was at the time of the Treaty of Waitangi and upon the acquisition of British Sovereignty, land

> "This Court in all its experience of native land and the investigation of the title thereto, never once heard it asserted by any Maori claimant that the ownership of the bed of a stream or river running through or along the boundaries of the land the subject of investigation, whether that stream or river was navigable or not, was in any way different from the ownership of the land on its banks. Nor has it ever heard it denied that the tribes or *hapus* that owned the land on the banks of a stream or river had not the exclusive right to construct eel weirs or fish traps in its bed or exercise rights of ownership over it. The river bed being a source of food in ancient times would be looked upon as a highly important asset to any tribe and the right to it would be very jealously guarded by the members of that tribe."

Marginal land along river and stream boundaries is part of the customary title of Maori and part of their freehold title when customary land becomes freehold land. Marginal land around lakes and along the coast on the upland of the water i.e. above mean high water mark or the upland margin of fluctuating inland lake beds would similarly originally have formed a part of the adjoining customary land and later the freehold of that same land.

The physical dimension of ownership of Maori land along water margins can be described with reference to the customary rights obtained by usage in the past. Has statute law made any impact?

Although the instructions from the Colonial Office in 1846 made provision for a Court to deal with Maori land nothing was done until the Native Land Act 1862 was enacted. The Court did not begin operations until 1865 when in that year a further Native Land Act repealed the Act of 1862. The Act of 1865 had far-reaching effects for the Court was empowered to issue a certificate converting land from customary to freehold tenure which could be sold. After receipt of the certificate of the Court the Governor could issue a Crown grant for the land in the certificate. Section LXXVI of

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held by Maoris – namely the Wanganui tribe – under their customs and usage." From that judgement FB Adams J dissented and provided an opinion which said the river was held ad medium filum aquae by individual Maori owners. Adams J in a very detailed judgement disagreed with the vagueness of the tribal case and his opinion is valuable for providing some balance between the rights of individual Maori owners and tribal claims. His decision was encapsulated in the second case when the three judges of the second Court of Appeal agreed with him.

In the context of the rights which do not arise along the riverbanks of Maori land when compared with reservations along rivers in general land, whether the land is tribally owned or individually owned may not matter – the land is of customary origin and is exempt from riverside margins.

the Act of 1865 provides for roads through land granted under the Act. "From and out of any land which may be granted under the provisions of this Act it shall be lawful for the Governor at any time thereafter to take and lay off for public purposes one or more lines of road …". Significantly at the point of taking the land would be freehold in status and no longer customary land. The Maori title had been converted to a general title, and the Maori owners could sell the land free of tribal constraints. Large areas were sold to the settlers[22].

The laying out of roads along water boundaries was the device employed by the Governor and early land administrators in respect of general land to secure a public margin. This was achieved under the statutes and ordinances relating to the sale of Crown land all of which where appropriate contained powers to lay off roads. In fact under sLXXVI the Governor could have laid out roads along Maori freeholds with frontage to water in the same way as in land sold directly by the Crown to the settlers. Clearly the Crown did not compromise the title of Maori but respected cultural and customary rights in relation to the land for which Maori retained title. Article 2 of the Treaty of Waitangi may be taken to have had a bearing on the matter.

The key period in relation to Maori land and water margins is 1862-1909. If legislation were to deal with any form of marginal strip along water it is the legislation enacted in that period which would provide authority. From time-to-time between the first Native land Act of 1862 and the year 1909 when for practical purposes the conversion from customary to freehold land was completed there were changes made in the legislation relating to the manner of giving effect to and the steps to be taken after an investigation of title by the Maori Land Court. The law and practice are authoritively summarised by Sir John Salmond then Solicitor-General in his *Notes on the History of Native Title 1909* (Vol 6 The Public Acts of New Zealand 1908-1931 at p87) reproduced as Appendix 14.

All of the statutes to which Sir John refers have been perused; there is no statutory provision which would require or authorise a marginal strip along water boundaries. That is not to say that on occasion reserves may have been made for public access. Rather, the statutes simply do not provide for margins along water. Cooke J in his judgement in *re the Bed of the Wanganui River* (1955) NZLR 419 at 437 in

[22] Many riparian titles (no riverside or coastal reservation) came into the hands of settlers through direct sales from Maori.

commenting on the effect of the legislation summarised by Sir John Salmond (supra) says:

> At every stage of the legislation, there was, however, provision for the issue of some instrument that either itself was, or that had the effect of, a Crown grant; and it is clear, I think, that, whatever be the precise form of the instrument of grant that represented the culmination of the proceedings for investigation of title to any of the riparian lands between 1862 and 1903, the grantor, and the only grantor, in the transactions was the Crown. The instrument was always, in effect or in terms, a grant by the Crown: and it is to such a grant and to the circumstances surrounding it that resort must be had …

In the event of there being a doubt in the final analysis it is the grant and the supporting survey plan which will determine the issue.

Many years were to pass before the Crown would attempt to establish public ownership of water margins on lands for which it had granted title but had not made appropriate provision at the time of the Crown grant. The Land Subdivision in Counties Act 1946 was the first of a line of statutes which provided for a compulsory reserve for public purposes along water boundaries when land was subdivided by the owner. Section 11 – Reserves along seashore and banks of lakes and rivers etc – included a proviso to subsection (1) –

> Provided also that nothing in this subsection shall apply with respect to the subdivision of any land which is **[**Maori**]** land within the meaning of **[**the Maori Affairs Act 1953**]**.

Traditional values were preserved in the legislation.

This approach was to change. Section 432 of the Maori Affairs Act 1953 required partitions (subdivisions) of Maori Land in cities and boroughs to comply with the provisions of the Municipal Corporations Act as to subdivision. Under s432 the vesting of a reserve was effected by an order of the Maori Land Court. Section 23 of the Maori Affairs Amendment Act 1967 inserted a new s432A in the Principal Act to place land in counties in the same situation as land in cities and boroughs. Esplanade reserves could be required by councils and confirmed by order of the Maori Land Court.

When the Local Government Act 1974 replaced the Municipal Corporation Act and the Counties Amendment Act (in 1979) the same procedure were followed. When Te

Ture Whenua Maori Maori Land Act was enacted in 1993 there was a substantial upgrade of procedures. The main provisions relating to Maori partitions are set out in *Environmental Law & Resource Management* (2n Ed 1997 DAR Williams) at p139. Section 303(2) of Te Ture Whenua as originally enacted was specific in relation to the vesting of esplanade reserves. [23] Sub paragraph (b) says:

> Make such orders as may be necessary to
>
> (i) Vest in the territorial authority an esplanade reserve required to be set aside under section 230 of the Resource Management Act 1991; and
>
> (ii) Vest in the Crown any land to which section 235 of the Resource management Act 1991 applies, - and sections 229 to 237 of the Resource Management Act 1991 shall apply with all necessary modifications.

However, by s47 of Te Ture Whenua Maori Amendment Act 2002[24] this provision was repealed and new procedures substituted. Land no longer vests in the territorial

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[23] The main differences between an ordinary subdivision and a partition to which the RMA applies are:
1. Any condition requiring a contribution of land for reserves or in lieu of reserves can only be set aside out of part of the land to be alienated (Section 302(1), Te Ture Whenua Maori Act 1993, Maori Land Act 1993) ;
2. A reserve contribution cannot be made in respect of any part of the land which the Maori Land Court has certified to be of special historical significance or emotional association to the Maori people (Section 302(2). Te Ture Whenua Maori Act 1993, Maori Land Act 1993)
3. No survey plan relating to the partition need to be deposited with the District and Registrar, but a plan must still be approved by the Maori Land Court; (Section 300, Te Ture Whenua Maori Act 1993, Maori Land Act 1993)
4. Any outstanding subdivision consent conditions may still have to be complied with at the time of making the partition order (Section 303(2) and (3), Te Ture Whenua Maori Act 1993, Maori Land Act 1993);
5. The Maori Land Court has special powers to deal with subsequent alienation of land outside the hapu where there has previously been an exempt partition of the land (Section 304, Te Ture Whenua Maori Act 1993, Maori Land Act 1993) and;
6. Any requirement for reserves or roading may be waived if the territorial authority is satisfied that the partition is not for the purposes of sale and no person other than the present owner will acquire an interest in the land. (Section 305, Te Ture Whenua Maori Act 1993, Maori Land Act 1993; the Court may impose a condition that, in the event of sale, the territorial authority's reserves and roading requirements be met in full.)

[24] S47 Te Ture Whenua Maori Amendment Act 2002 states in subsections (2) (3) (4) and (5) the following:

> "(2) The Court must –
> "(a) make such orders as it considers necessary, having regard to Part X of the Resource Management Act 1991, to ensure that, in respect of any conditions of the subdivision consent that have not been complied with, adequate provision is made for such compliance; and
> "(b) have regard to sections 229 to 237H of the Resource Management Act 1991 in respect of every partition of land to which section 301 applies.

authority as esplanade reserve along water but is set apart as a Maori reservation for the common use and benefit of the people of New Zealand.

"(3) Any land that would be required to be set apart, reserved, or vested in another person, because of subsection (2), must be set apart as a Maori reservation for the common use and benefit of the people of New Zealand, despite anything in the Resource Management Act 1991.

"(4) Land to which subsection (3) applies must be treated –
"(a) as if it were land set apart under section 338(1) and section 340(1); and
"(b) as if the procedural requirements of those subsections has been satisfied.

"(5) The Court may declare that any land set apart under subsection (3) be dedicated for the construction of roads, if the Court considers that to be necessary to satisfy a condition or requirement of a subdivision consent."

CHAPTER 2: CURRENT STATUS OF PUBLICLY OWNED MARGINS

Introduction

It is now possible to distill out of the historical account a classification of the current status of the publicly owned water margins. In broad terms, publicly owned water margins can have been either vested in the Crown upon alienation or regained in subdivision. Within these two broad categories there are various legal forms of publicly owned water margins.

In terms of land that was vested upon Crown alienation, publicly owned water margins can be:

- "Roads" and "Road Reserves" (the legal issues relating to waterside roads will be fully addressed in Part B Chapter 2);
- "Marginal Strips";
- "Ambulatory Marginal Strips";
- "Public Reserves"

Publicly owned margins that have been regained in subdivisions can be further classified into:

- "Public Reserves";
- "Recreation Reserves";
- "Public (Esplanade) Reserves";
- "Maori Reservation"

The following tables outline the alienation period, title to margin and the public rights that relate to each class of publicly owned margin.

Margins vested in the Crown upon 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.* **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 in appendix 21*	1840 – 1892	**Original Title[25]:** 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	**Current Title[26]:** 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	Full Rights as on Public Highways

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

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

Class	Alienation Period	Title to Margin	Public Rights
		then County Councils.	
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.	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.
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	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

Conservation Act 1987 as amended by Conservation Law Reform Act 1990; new part IVA		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	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 15 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

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. 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 15 Section (2) of the Reserves Act 1977 should be referred to for a full definition of "Reserve".	**[**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)

Margins regained in 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.[27]	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. (i) Section 335 Municipal Corporations Act 1920; (ii) Section 332 Municipal Corporations Act 1933; (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.	 1.4.1921–1.4.1934 1.4.1934-1.4.1955 1.4.1955-1.4.1979	**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.
Public Purpose Reserve under s29 Counties Amendment Act 1961 subject (now) to Reserves Act 1977 which in s23(2) acknowledges Esplanade status.[28]	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.
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.[29]	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	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

[27] Reserves along water **required to be taken** under the provisions of the statute
[28] Ibid.
[29] Ibid.

Local Government Amendment Act 1978 subject to Reserves Act 1977 which in s23(2) acknowledges Esplanade status.[30]			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.[31]	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.[32]	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 transferred 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[33]	7.10.93 to present time	Land remains vested in Owner. Instrument creating the strip is in favour of Territorial Authority	Do

[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] 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.[34]			
(i) Section 432 Maori Affairs Act 1953 – deems partition to be subdivision for purposes Municipal Corporations Act 1933 and later the Act of 1954.	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.	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.	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.	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. Section 303 vested esplanade strips in the Territorial Authority in the conventional way. This was soon to change in 2002 with	1.7.1993-1.7.2002	**Original Title:** Territorial Authority **Current Title:** Territorial Authority	"

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

Maori retaining title but dedicating a reservation to public usage.			
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.[35]	1.7.2002 to present time	A reservation under s338 and 340 Te Ture Whenua Maori Maori Land Act 1993	General right of access.

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

PART B: ROADING LAW AS IT APPLES TO UNFORMED ROADS

CHAPTER 1: THE ORIGIN AND DEVELOPMENT OF THE UNFORMED ROADING NETWORK

Introduction

In New Zealand in the time of settlement almost all roads when first legally constituted were unformed. This was inevitable in a pioneering society where the settlers' demand for services, surveying, and access, and title to land outstripped the capacity of both central government and the provincial governments to provide for these needs.

When New Zealand became a separate colony in 1840, the law of the United Kingdom became – so far as it would apply – the law of New Zealand (The English Laws Act 1858). No reference to an imperial statute relating to roads passed after 18 January 1840 has any effect in New Zealand. However, the Highways Act 1835, 5 and 6, William IV, Chapter 50, the statutory law in England in 1840, according to *Short's Roads and Bridges* was held never to have been in force in New Zealand.[36] As a result, the law in New Zealand is based on that part of the English law applicable to the circumstances of the colony in 1840, as altered by the law of New Zealand since 1840.

The English concept of a "highway" – a public way that everyone has the right to use – is central to our law on roads, and applies to all roads, whether across land or along water boundaries; whether formed or not; and whether physically usable or not. (Some roads that have been legally constituted but not formed, are not suitable for passage,[37] the theory of the law prevailing over practicality).

The terms "road" and "highway" date from the earliest recording of English law. As used in New Zealand, the terms generally refer to formed passageways in public use maintained by the Crown or local authorities. However, a road or highway need not necessarily be formed or maintained. Indeed, when the roading network was progressively established from the middle of the nineteenth century as the settlers

[36] W S Short, *Short's Roads and Bridges*, "A Treatise Upon the law of Roads, Bridges, and Streets in New Zealand" by, Timaru Post Newspaper Co Limited, 1907 at p4.

[37] Some paper roads (i.e. roads drawn on plans but not surveyed on the ground) are intersected by cliffs and other natural obstructions. These obstacles do not detract from the legal character of the road so that the ordinary law as is explained, so far as it may be applicable in the circumstances of the case, continues to apply. A cliff may intersect a road but the land above and that extending at the foot thereof is legally a road.

took up title hardly any legally constituted roads were formed or made when the land was granted by the Crown.[38] However, the essential law relating to roads and highways does not differentiate, and never has differentiated, between formed and unformed roads.

This commentary is generally predicated on the laying out of unformed rural roads, for most of these roads are in rural areas. Unformed roads may, however, be laid out in former boroughs and cities. Although municipalities have had title to streets since 1876, before that date the Crown held title to all highways in municipalities, which were then and subsequently called "streets", and unformed streets could be laid out. All highways in former cities and boroughs are now legally roads so the same principles apply to former unformed streets in cities or boroughs as apply to unformed roads.

The general principles outlined in this chapter apply to all unformed roads whether traversing land or abutting rivers, lakes or the coast. There are, however, additional attributes which apply to roads alongside water as are indicated in Chapter 2.

Key Elements

The network of unformed roads primarily was established under the early statutes of the General Assembly and the ordinances of the Provincial Councils. General powers to lay off roads on Crown land (whether over land or abutting water), in the provincial and post provincial era, were universally applied in the legislation which authorised sales. Regional differences in the relevant ordinances and the implementation of policy in provincial times in particular are reflected in the physical inconsistencies of the unformed roading network as it exists today.[39] Gaps in the road lines along water, and on occasion a complete failure to reserve waterside roads when such might reasonably have been expected, apply to some extent in all of the former provinces. However, the only matter of significance today is the factual position. "Once a road, always a road" is the historic aphorism. No matter how a road became a legal road the current statute law on roads applies. Most of the law

[38] In nearly every case (in the nineteenth century) where land is Crown granted, and described as bounded by a road, the road at the time when the land was granted was not made: per Williams J in *Mueller v Taupiri Coal Mines Ltd* (1900) 20 NZLR 89 (part in brackets added by the author).

[39] The office of surveyor – general was vacant from 1857 to 1876 so there was no nationally-based administration of surveying law and practice in the time of provincial government.

which was in force when any unformed road was laid out may be discarded in favour of the law now in force.

Section 315 of the Local Government Act 1974 and s43 of Transit New Zealand Act 1989 provide the focus of current law applying to roads, formed and unformed.

In *Fuller v MacLeod* (1981) 1 NZLR 390 CA at p395 Richardson J, when dealing with common-law rights of access to the highway, preferred to concentrate on the provisions of the consolidating statute in force at the relevant time, rather than tracing the history of the various sections and the cases decided under them. In support of this observation he quoted Lord Wilberforce, who said in *Farrell v Alexander* (1977) AC 59, 73; (1976) 2 All ER 721, 726:

> …self-contained statutes, whether consolidating previous law, or so doing with amendments, should be interpreted, if reasonably possible, without recourse to antecedents, and … recourse should only be had when there is a real and substantial difficulty or ambiguity which classical methods of construction cannot resolve.

A vast sweep of historic law applying generally to roads becomes largely irrelevant to present-day unformed roads if the observations of Richardson J and Lord Wilberforce are applied. Appendix 16 provides an illustration of relevant statute law in force at a given point in time. The appendix sets out, not exhaustively but nearly so, the statute law relating to roads and streets in force in 1905, when the unformed roading network had largely been established. With the exception of s3 of the Public Works Amendment Act 1905, which deals with the petitions of frontagers to have unformed roads formed by the local authority the list includes no statutory provisions relating exclusively to unformed roads. None of the provisions differentiate between formed and unformed roads or streets. Section 245 of the Counties Act 1886 is the only other provision which refers to unformed roads:

> 245. The County Council shall have the care and management of all county roads within the meaning of "The Public Works Act, 1882."
>
> The said Council shall and may exercise such control over all the said roads, although the same may not have been formed or made.

All the statutes listed in Appendix 16 are either repealed or subsumed into later legislation and so need not be considered.

However, the theory the judges expound may not be completely applied, for the two principal roading statutes now in force are not self-contained, and to some extent are common-law dependent. In this latter respect some current roading law has an historical origin, and cases decided on the early statutes provide an explanation of the law as it is today.

In New Zealand as in England, "… the crucial distinction is that a public highway is a public right of way… Though the highway is sometimes described as the Queen's Highway, this refers to the right of all subjects to pass over it and not to any rights of ownership in the Crown".[40] Although from early settlement in New Zealand the Crown was the proprietor of all public roads in counties whether formed or unformed,[41] in 1972 title in county roads was divested in favour of the then territorial local authorities. The rights of citizens were not affected by the change of ownership.

The concept of a "Queen's Highway" is in law more far-reaching than may be generally thought. As the term is the origin of the right of free passage, a brief reference to antiquity may provide an understanding not imparted by any statute old or new, by any modern text, or for that matter by the decisions of the New Zealand courts.

> The term "highway" is of a very ancient date, and the references in the "Book of Numbers" to the road through which the children of Israel are reported to have desired to pass through the land of Edom is translated in our version of the Bible as "The King's Highway". A road was originally called in England "The King's Highway"; for the first roads made in England, of which we have any record, bore that title. The term appears to have arisen in the time of Molincius, a King of the Ancient Britons, who decreed that there should be roads or ways of succour by which persons who had committed some trespass could flee in safety to a temple or other place of security, and such ways were provided accordingly. Those ways were, however, not sufficiently defined, and strife arose in consequence, so that when his son Belinus became King, he defined four great roads, the longest of which was from Cornwall to Caithness; and these roads were called "King's Highways." The term "Highway" was afterwards applied in law to

[40] Colin Sara, *Boundaries and Easements*, Sweet & Maxwell, London 1991 at p111.
[41] There was an early period when ownership was not clear but the matter is now beyond doubt; s80 Public Works Act 1876 and later legislation.

> any public road that was of sufficient size to warrant the title, and even now a road is often spoken of in popular language as "The King's Highway". The term "Public Highway" generally meant a public way for carriages and other kinds of traffic; but it did not necessarily have so wide a meaning; and it sometimes meant a bridle road or way for horse traffic only … In English law a road is usually referred to either a "highway", a "turnpike road", a "main road", or a "street", but the term "highway" was the common term applicable to and comprehending all public ways, and it included a way over or through both private or common lands which the public had a right to use, by prescription, dedication, or Act of Parliament. In New Zealand law the term "road" has practically the same meaning as "highway" in English law.[42]

In New Zealand until recently there were two main divisions of public ways: roads and streets. The term "roads" was generally used comprehensively to refer to all roads, streets, thoroughfares, highways, carriageways, bridle paths, footpaths, tracks, and other public rights-of-way outside the limits of cities or boroughs. "Streets" referred to all similar things within the limits of a city or borough. These two terms have generally been used in this way in New Zealand law (see *Borough of Onslow v City of Wellington*, 22 NZLR, p926)

The Local Government Act 1974 as enacted by the local Government Amendment Act 1978 preferred the universal term "road" and discarded "street". At statute law there are now no "streets" except that in an historical sense streets continue to exist as urban highways, and are popularly known as streets in towns and cities. At law all highways are now "roads".

Section 315 of the Local Government Act says:

> Road means… land which immediately before the commencement of this Act was a road or street or public highway…

The Local Government Act does not explain the terms "road", "street", and "public highway" further. Section 43 of the Transit New Zealand Act 1989 offers some guidance:

> Road means a public highway, whether carriageway, bridle path, or footpath; and includes the soil of —

[42] *Short's Road and Bridges*, 1907 at p4.

> (a) Crown land over which a road is laid out and marked on the record maps …
>
> (b) Land over which a right of way has in any manner been granted or dedicated to the public by any person entitled to make such grant or dedication:…

A consideration of the terms “public highway”, “carriageway”, “bridle path” and “footpath”, and for completeness a comment on “streets”, form the basis of an understanding of New Zealand law on roads.

In English law a “public highway” is the common term applicable to all public ways. A road is a public highway providing a right of free passage for the public. The courts have always provided rigorous protection for the right of passage. Recently, in delivering the judgment of the Court of Appeal in *Man O’War Station v Auckland City Council* (2000) 2 NZLR 267 at 272 Blanchard J said:

> Until 1 January 1973 all land becoming road was vested in the Crown (s111 of the Public Works Act 1928). From that date, with certain exceptions of no present relevance, roads were vested in fee simple in the local authority under s191A of the Counties Act 1955 and, from 1 April 1979, under s316 of the Local Government Act 1974. Despite the vesting in the local authority the right of passage over a road is one possessed by the public, not the local authority, which holds its title and exercises its powers in relation to a road as upon a trust for a public purpose (*Fuller v MacLeod* [1981] 1 NZLR 390 at p414 quoting from the judgment of Somers J in the Court of Appeal).

The terms “carriageway”, “bridle path” and “footpath” appear as alternative components of “public highway” in s79 of the Public Works Act 1876. This statute was the first having national application to roads, and s79 is the forerunner to s43 of Transit New Zealand Act 1989.

The term “carriageway”, which has its origin in English common law, refers to that part of a public highway intended for vehicular traffic.

Bridle paths and footpaths also have a place in English common law. In *Boundaries and Easements*, Colin Sara at p123 notes that “in most cases footpaths and bridleways are ancient…”. At common law, the owner of private land may dedicate footpaths and bridle paths to public use by allowing public access.

Footpaths and bridle paths have never been established in New Zealand by ancient practice. In its opening words defining the term "road", s79 of the Public Works Act 1876 is virtually identical to s43 of the Transit New Zealand Act 1989. The definition has remained materially unabridged in its passage through seven statutes: s78 of the Public Works Act 1882, s100 of the Public Works Act 1894, s101 of the Public Works Act 1905, s101 of the Public Works Act 1908, s110 of the Public Works Act 1928, s121 of the Public Works Act 1981, and thence to s43 of Transit New Zealand Act.

Section 79 of the 1876 Act begins: "The word 'road' means a public highway, whether carriage way, bridle path or footpath, and includes the soil of…"

On the basis of the statutory definition, the term "road" has been interpreted to mean:

> a public highway, whether used as a carriage way, bridle path, or footpath, or intended to be used as such, and it includes the soil thereof…[43]

In the nineteenth century the Crown, as the original subdivider of land, invariably laid off roads at a width suitable for carriageways, that is, one chain.

> The Government is not bound by any law in sub-dividing Crown lands for sale or lease to make the roads or streets giving access to such lands of any specified width, and the section of the Public Works Act referring to the matter cannot therefore be enforced against the Crown. As a matter of practice, however, the roads giving access to Crown Lands are usually laid off one chain wide, except in special cases, such as in townships, where the main street may be wider. In a few cases also of the subdivision of land under the Lands for Settlement Act, owing to special circumstances, the roads are less than one chain wide. The Crown also is not bound to form or metal the roads or streets so laid out; and, although the Crown frequently does form such roads, and sometimes metals them, or makes grants of money for such purposes, the local authority cannot compel the Government to do so, or, in fact, to form or metal a road or street in any specified way whatever.[44]

Towards the end of that century, private developers were able to subdivide land without formally dedicating roads as legal highways, and began laying off narrow roads. The Public Works Amendment Act 1900 required private subdividers to provide legal roads to any allotment intended for sale. Any road fronting new

[43] *Short's Roads and Bridges*, 1907 at p8.
[44] *Short's Roads and Bridges*, 1907 at p196.

allotments had to be one chain wide. The policy of the Government at that time was to prevent the private establishment of narrow roads: New Zealand was to be a land of broad highways. That policy was subsequently modified to allow narrower roads to be laid off in urban areas.

The terms "bridle path" and "footpath" as used in New Zealand statutes are most likely included in the statute law as a codification of the components which make up a highway at English common law. In the provinces there are examples of specific statutory provisions for bridle paths and footpaths.[45] Such roads in New Zealand if laid off over Crown land would be specifically laid off and noted as such on the Crown grant record plans.

However, roads laid off over Crown land, whether across land, alongside rivers, around lakes, or along the coast, are almost always of the carriageway width of one chain. Unless a road is positively documented as a bridle path or a footpath, a full right of passage with or without vehicles may be assumed. No other solution appears workable, given that notations on the original Crown grant record plans for bridle paths or footpaths rarely exist.

In the context of unformed roads, a somewhat unusual provision referring to "roads or tracks" over Crown land or Māori land should be noted. Section 245 of the Counties Act 1886 provides that:

> …all lines of roads or tracks passing through or over any Crown lands or native lands, and generally used without obstruction as roads, shall, for the purposes of that section be deemed to be public roads under the control of the County Council in whose district they may be situated, notwithstanding that such lines of roads have not been surveyed, laid off, or dedicated in any special manner to public use.

This is a peculiar enactment. No other Act contains a provision whereby such roads are "deemed to be public roads". And as they are not apparently public roads within

[45] Section 28 of the Westland Waste Lands Act says:

> 28 Reserves for public highways bridle-paths and foot-paths shall be made by the Waste Lands Board and shall be set forth on the authenticated maps in the Land Office of the County.

See also Section XVII Southland Waste Lands Act; and The Bridle Road Protection Act 1860, Nelson Province.

the meaning of the Public Works Act (now s43 Transit New Zealand Act 1989), they are public roads in a restricted sense only.

This provision was brought forward as s153(3) of the Counties Act 1908, s155(3) of the Counties Act 1920, and s191(3) of the Counties Act 1956, but it expired when the Local Government Amendment Act 1978 repealed s191 of the Counties Act 1956. Any such road created prior to the enactment of the Local Government Amendment Act 1978 would continue to exist as a deemed public road.

Some reference should be made to the physical nature of "unformed roads". There is no statutory definition, but s2 of the Local Government Act 1974 provides a definition of formation:

> Formation, in relation to any road, has the same meaning as the construction of the road, and includes gravelling, metalling, sealing, or permanently surfacing the road; and form has a corresponding meaning:

So an unformed road is one which neither the Crown nor the council has formed in accordance with the definition. There may be some formation, as of a track, say, running alongside a river, but if no work of the kind indicated in the definition has been undertaken, the road is "unformed".[46]

In the primary sense of roads reserved from Crown land, unformed roads originate from one of two practices of land definition established in the early period of provincial government. The early intention of the General Assembly was that land should not be offered for sale until it was properly surveyed and streets and roads should have been marked off on the ground and distinguished on the map.

It is a matter of some importance to note the slow progress in making land available for settlement in the early days of the colony for ultimately it was pent-up pressure for title which gave impetus us to the mapping procedures which expanded the unformed roading pattern. There was no large-scale Crown granting of rural land in the early colonial period 1840–1853. There clearly would have been some roading

[46] There are some cases which provide limited assistance in establishing the meaning of "formation": *Mayor of Palmerston North v Casey* (1925) NZLR 879 (CA), and *Jones v Lower Hutt City Council* (1966) NZLR 879.

laid out and formed in a rudimentary sense in the period 1840–1853 on Crown land and on land administered by the New Zealand Company.

Alienation of Crown land on a large scale began early in the period of provincial government subject to the statutory oversight of the General Assembly.

Each of the provinces administered either provincial ordinances or statute law provided by central government to apply in a specified province for the sale of Crown land.[47] These regulations and statutes were not wholly consistent. In addition, the provinces could enact regulations for the conduct of surveys, and through the chief surveyor for the province could control survey practice. The statutes of the province of Auckland provide a representative example.

In 1858 the Provincial Council of Auckland passed the Auckland Waste Lands Act 1858. This Act was validated by the General Assembly in the Waste Lands Act 1858. The Provincial Act (ss 8–10) provides that:

> (8) No land shall be offered for sale or disposed of by auction or otherwise until it shall have been properly surveyed and marked off on the ground, and a map thereof deposited as a record in the office (hereinafter called 'the Land Office') of the Commissioner.
>
> (9) Every allotment of country land shall have a frontage to a road, and the Commissioner shall use all due diligence in causing to be selected the most suitable lines for roads with reference to their practical utility as means of communication, and not as mere boundary-lines of allotments: he shall also as far as practicable lay off the allotments in such manner as to give to each in proportion to its extent equal advantages as nearly as may be in respect to practicable roads and to wood and water.
>
> (10) All reserves, streets, roads sections, allotments, and other divisions of the land shall be so marked off on the ground and distinguished on the map thereof by numbers or otherwise as to be easily identified.

[47] Prior to the introduction of provincial government the Governor promulgated the Waste Land Regulations 1853 which established comprehensive rules for the sale of Crown Land. These regulations were an interim measure to apply pending each of the provinces passing legislation to specifically apply in the province.

The law was clear. Before land was offered for sale by the provincial government it must be surveyed and marked off on the ground; every allotment of country land should have a frontage to a road; roads should be selected "with reference to their practical utility as a means of communication"; and all roads should be marked on the ground and distinguished on the map.

After this legislation came into force, the demand for land soon outstripped the capacity of the provincial council to survey the land before sale. To avoid retarding settlement, the General Assembly passed the Auckland Waste Lands Act 1866 to provide a system of sale before survey. The general regulations as to surveys and record maps contained in ss 8–10 of the Provincial Act of 1858 were left unrepealed. Roads were to continue to be shown on record maps but no longer needed be marked out on the ground. The era of the paper road had arrived.

The Auckland Waste Lands Act 1858 and the Auckland Waste Lands Act 1866 were repealed by the Auckland Waste Lands Act 1867, but the provisions of ss 4–25 of the 1866 Act were repeated in the same words in ss 31–52 of the 1867 Act. The only difference, as far as survey practice is concerned, is that the statutory provisions as to survey contained in ss 8–12 of The Auckland Waste Lands Act 1858 ceased to have effect as statutory provisions. Edwards J in *The King v Joyce* (1900) 25 NZLR 78 at p107 noted that:

> These provisions are, however, merely of the nature of departmental regulations, and they have been acted upon as such ever since. It was evidently considered that such matters might properly be left to departmental control, and that statutory provisions upon the subject were unnecessary. That there was no intention to alter the practice is shown by the provisions of section 23 of the Act of 1866, reproduced in the Act of 1867 as section 50, which are designed to insure prompt and accurate surveys, and by the fact that that practice has never been altered.

An ancillary effect of placing survey and related matters under departmental control was that officials dealing with the sale of Crown land in the land office of the provincial land commissioner by drawing roads on the record plans could create roads shown only on paper.

The introduction of the system of sale without survey enabled the provinces to rapidly place settlers on the land so that by 1890 almost all of the accessible land available

for sale was alienated. The settlers took up the land on the basis of receipt for purchase money. Subsequently, over many years, the parcels of land sold were surveyed and a formal Crown grant of title made. Important paper roads were also surveyed and demarcated on the ground along with the boundaries of the adjoining land; many paper roads continued to exist however by virtue of the "paper" status originally allocated.

In barely more than twenty five years a vast roading network across land and along water boundaries had been created in part on the basis of surveys marked on the ground and in large part by depiction "on paper" on official plans.

Authoritative decisions by the courts on the state of the roading law enacted by statute in the nineteenth century were not delivered until the first part of the twentieth. The time taken to explain the law may be seen in retrospect to be of advantage, for when the opportunity arose the courts provided emphatic rulings on status.

The leading judgment in the Court of Appeal of Ostler J *in Wellington City Corporation v McRea* (1936) NZLR 921 at 932 places s79 of the Public Works Act 1876 in perspective as requiring that a road be laid out on the ground to be a legal road. The judgment also shows that laying down a road on the surveyor's map alone may also, if authorised by statute or provincial ordinance, be sufficient to make the road legal.

> Section 79 of the Public Works Act 1876, provided that the word "road" "means a public highway, whether carriage way, bridle path, or footpath, and includes the soil of … waste lands of the Crown over which a road is laid out and marked in the survey maps," &c. Section 80 provided that all roads should be vested in the Crown. That definition of "road" and the provision that all roads should be vested in the Crown have been repeated with immaterial variations in every subsequent Public Works Act, and are now to be found in ss110 and 111 of the Public Works Act 1928. The law had been the same ever since 1876. A perusal of the whole of s79 of the Act of 1876, a part only of which I have quoted, will show that it is retrospective in operation, and it has always been so treated by the Courts: see the decision of the Court of Appeal in *Kaikoura County v Snushall.* In that case there was a difference of opinion as to the meaning of the words laid out and marked on the survey maps," or "on the record "maps" as the words appear in later statutes. *Stout, C J,* held that the words "laid out" as there used meant "laid out on a record map,", and that it was unnecessary that there should be a laying-out on the ground in order to constitute a legal road. The

> other members of the Court, without expressly deciding that "laid out" meant "laid out on the ground," declined to adopt the opinion of *Stout, C J*. The case went to the Privy Council and Lord *Haldane,* in delivering the judgment of the Court, made it plain that in the opinion of the Privy Council "laid out" means "laid out on the ground": see *Snushall v Kaikoura County Council*, where he said, "It is clear that under the Nelson Land Regulations the vital matter is only the laying down on the surveyor's map, as distinguished from the land itself, the reserves for roads. There is no provision in the Regulations, analogous to that in s101(a) of the Public Works Act of 1908, pointing to the necessity of the road being laid out on the land itself". In view of this clearly expressed opinion of the Privy Council, I think this Court must hold that "laid out" in s79 of the Act of 1876, and in the subsequent Public Works Acts, means "laid out on the ground".

The fountainhead of case law on paper roads is *Snushall v Kaikoura County* (1923) AC 459 (1840-1932) New Zealand Privy Council Cases 670, (1920) NZLR 783 (CA).

The judgment of the Privy Council noted at p671 (1840-1932) NZPCC said:

> The roads in question are strips of land, about a chain in width, which either form the boundaries of or intersect land now belonging to the appellant. The land was formerly the property of the Crown, and was granted to a predecessor in title of the appellant. The particular strips of land have never been in fact fenced off or made up, or actually used as roads by the general public. Strips of this kind are not uncommon in the Dominion, and are commonly referred to as "paper roads" or as subdivisonal roads. The strips in controversy contain an area of about 70 acres, and there is said to be a total acreage in the County of Kaikoura of about 2,000 of such acres.

The headnote to the case at p670 states the decision of the Council:

> The requirements of regulations which had statutory authority, for the sale and disposal of waste lands of the Crown within the Province of Nelson, the vital matter in which was the laying-down on the surveyor's map as distinguished from on the land itself, the reserves for the roads, were carried out…
>
> …
>
> That what had taken place was equivalent in point of law to a dedication under s101(b) of the Public Works Act 1908.[48]

[48] The current equivalent to s101(b) is the definition of "road" set out as paragraph (b), s43 Transit New Zealand Act 1989.

The *Snushall* decision removed any doubts concerning the status of roads that were shown on plans of Crown subdivision but were not pegged on the ground. It confirmed that if an ordinance or statute authorised the laying out of a road on the surveyor's plan, such a road is a legal road.

The Privy Council in that decision also made it plain that the provisions of the Public Works Act requiring a road to be laid out meant "laid out on the ground", ie generally pegged by the surveyors. The decision of the Court of Appeal in *Wellington City Corporation v McRea* was therefore to confirm the advice of the Privy Council in *Snushall* concerning the meaning of the words "Crown land over which a road is laid out and marked on the record maps".

A legal road established over Crown land, whether formed or unformed, may therefore be constituted by being:

- authorised by a statute or provincial ordinance to be shown only on a surveyor's plan;
- laid out on the ground and shown on the record plan, ie the plan prepared for the Crown grant.

From early times all public roads whether formed or not were shown as burnt sienna (brown) on the Crown grant record sheets, providing instant confirmation of their legal status. When a road has once been made or has become a public road, the right of the public to use it as a public road continues forever unless it has been legally stopped by process of law, for "once a highway, always a highway".[49] (See *Mackay v Lynch* 3 NZLR, SC, 425; and also *Cherry v Snook* 12 NZLR, 54; *Martin v Cameron* 12 NZLR 769; *Hughes v Boakes and another* 17 NZLR, 113; *Borough of Onslow v Rhodes and another* 23 NZLR 653; 6, Gaz. L.R., 336; and *Borough of Lower Hutt v Yerex* 24 NZLR 697.)

An unformed road is a highway and as good as any other road. Any doubt that unformed roads were in some way inferior to formed roads has long been dispelled by the decision the Privy Council in *Snushall v Kaikoura County* confirming the

[49] This historic aphorism which cites a fundamental principle of roading law – the perpetual nature of highways – was most recently referred to in the judgment of the Court of Appeal in *Man O'War Station v Auckland City Council* (above) delivered by Blanchard J at p272 of the report.

decisions previously made by the then Supreme Court (now the High Court) and the Court of Appeal.

Ownership of Roads

Notwithstanding the period 1840–1876 when the statute law was silent, roads in New Zealand have belonged to the Crown from the beginning of colonial times. No roads laid out before 1876 are owned by adjoining owners to the centre line as provided by English common law.

A pioneering society puts a great deal of attention and effort into providing roads. Whilst the statutes of the General Assembly, and in the provincial period (1854–1876) the ordinances of the provinces, extensively authorised roads, the issue of ownership did not receive early statutory attention.

Aspects of management of highways as streets in towns were first dealt with by statute in 1867, and aspects of ownership in 1876.[50] Roads in counties were similarly dealt with in 1876.[51] Streets in towns were vested in the council and managed by the council. Roads in counties were vested in the Crown and managed by the county council or roads board.

On the face of it, the common law of England, under which the adjoining landowner was assumed to own the road to the centre line, applied in New Zealand from 1840 until 1876. There appears to be no early case law which might have clarified the matter.

In 1895 in *Clemison v Mayor of West Harbour* (1895) 13 NZLR 695 at p699 Williams J ruled on the application of the common law. Williams J decided on the peculiar facts of the case that the common law doctrine whereby ownership in a highway passes by a conveyance of adjacent lands was applicable to Crown grants and conveyances in New Zealand that were made before highways were vested in the Crown or local authorities (i.e. prior to 1876). Where, in such a case, a road was closed and the rights of the public over it were extinguished, the ownership of the closed road vested in the adjoining owners.

[50] Municipal Corporations Act 1867, s266; Municipal Corporations Act 1876, s185
[51] Public Works Act 1876, s79; s80.

The opening passage of Williams J's judgment so clearly sets out the colonial application of the common law as he then saw it applying to roads and rivers that it is instructive to repeat it here in full.

> The Crown grant… must be construed according to the doctrine of the common law, subject to any statutes of the colony modifying the common-law doctrines. The Crown grant was dated on the 2nd of March, 1863. At that time, so far as I am aware, there were no colonial statutes in force declaring that public highways were to be or to remain vested in the Crown or in local bodies. The common-law doctrines as to when the property in a highway passes by a conveyance of the adjoining lands are set forth in the case of *Lord v The Commissioners for the City of Sydney* (12 Moo PCC473) and *Micklethwait v The Newlay Bridge Company* (33 Ch D133). The latter case was decided in 1886 in the Court of Appeal by Cotton, Lindley, and Lopes, L J. The result of the authorities is stated by Lopes, L J, (at p155) to be as follows: "If land adjoining a highway or a river is granted, the half of the road or the half of the river is presumed to pass, unless there is something either in the language of the deed, or in the nature of the subject-matter of the grant, or in the surrounding circumstances sufficient to rebut that presumption; and this though the measurement of the property which is granted can be satisfied without including half of the road or half of the bed of the river, and although the land is described as bounded by a river or a road, and notwithstanding that the map which is referred to in the grant does not include the half of the river or the road." What circumstances are sufficient to rebut the presumption are discussed in the judgments in the case. The earlier case of *Lord v The Commissioners for the City of Sydney* decides that the doctrine is applicable to grants from the Crown as well as from private persons, and to grants from the Crown in a colony. The case of *The Plumstead Board of Works v The British Land Company* (LR 10 QB 16), decided by the Court of Queen's Bench in 1874, was cited in argument in the case of *Micklethwait v The Newlay Bridge Company*, but was not referred to in the judgment in the latter case, and seems to some extent inconsistent with it. It was not, however, expressly overruled; and if it be law it would follow that the ordinary form of the Crown grant of a section abutting on a road would not convey the half of the road. This was also decided in Victoria in the case of *The Garibaldi Mining &c, Company v The Craven's New Chum Company* (10 VLR (L) 233), and, apart from any statute, would probably be held to be law in this colony.

Williams J in the concluding sentences quoted above pressed, more faintly than he clearly would have preferred, the view that the usual form of Crown grant in New Zealand would not convey half of the adjoining road.

Five years later, when next he had the opportunity, Williams J robustly stated a more considered opinion in his judgment in the decision of the Court of Appeal in *Mueller v Taupiri Coal-mines Ltd* (1900) 20 NZLR 89 at p110.

> I had occasion, in the case of *Clemison v Mayor of West Harbour* (13 NZLR 695), to consider the question of a grant abutting on a highway, and I expressed a doubt (at p699) whether, taking the ordinary form of Crown grant of land, when the land was described as bounded by a road, the road would pass ad medium filum to the grantee. I am now entirely satisfied that it would not. In nearly every case where land is Crown-granted, and described as bounded by a road the road at the time the land was granted was not made. It might be necessary, in order to construct and maintain the road, to alter the level of it and interfere with the soil in all kinds of ways. It would therefore be necessary and desirable that the Crown – that is, the public authority – should retain the road in its hands.

Williams J, supported by Mr Justice Edwards in a characteristically vigorous judgment in *Mueller*, goes on to say that legislation in New Zealand has always proceeded on the assumption that the Crown has not given up the ownership of the soil of roads or highways, although it might have given up the land adjacent to them.

Some years later, in 1936, Ostler J in the leading Court of Appeal decision in *Wellington City Corporation v McRea* confirmed the retrospective nature of Crown ownership of roads. The durability of the observation of Williams J in *Mueller*, noted above, is emphasised by the adoption of this quote in 1950 by Mr Justice Hay in the *King v Morison* (1950) NZLR 247 at p259.

Until 1 January 1973 when roads in counties, with certain exceptions of no relevance here, were transferred to the then county councils, the Crown was the proprietor of roads. This was in spite of the fact that district roads boards and then county councils controlled and managed roads outside of cities and boroughs. Section 191 A(1) of the Counties Amendment Act 1972 effected the change of ownership by adopting as a precedent the section which from 1900 governed the vesting of streets in cities and boroughs in the council.[52] So it was the law relating to streets which formed the basis

[52] At the relevant time in 1972, s170(1) of the Municipal Corporations Act 1954 was in force. This is identical to s212 (1) of the Municipal Corporations Act 1900 and each of these sections is otherwise identical to s191 A(1) of the Counties Amendment Act 1972 and s316 of the Local Government Act 1974 if the word "street" in the Municipal Corporations Act is read as "road" in the Counties Amendment and the Local Government Act.

of the new law relating to roads, even though the law on streets had developed in a different and more specialised way from the law on roads, as is illustrated in a quote from Somers J below.

The original vesting of roads in the Crown is stated in s80 of the Public Works Act 1876:

> 80. All roads are hereby declared to be and are hereby vested in Her Majesty.

This principle was maintained in each of the Public Works Acts subsequently enacted.

Section 111 of the Public Works Act 1928 was the vesting in force immediately before the enactment of s316 of the Local Government Act 1974. It reads:

> 111. Roads vested in the Crown and the soil thereof are hereby declared to be and are hereby vested in the Crown, together with all materials and things of which such roads are composed, or which are capable of being used for the purposes thereof, and are placed or laid upon any such roads.

Section 316 of the Local Government Act 1974, replacing s111 of the Public Works Act 1928, introduced the current law in 1978:

> **316. Property in roads** – (1) Subject to section 318 of this Act, all roads and the soil thereof, and all materials of which they are composed, shall by force of this section vest in fee simple[53] in the council of the district in which they are situated. There shall also vest in the council all materials placed or laid on any road in order to be used for the purposes thereof.

In other words, the council owns the fee simple of roads, the materials they are made of, and any new materials that may be added to them.

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[53] Fee simple: An estate in fee simple is the largest estate known to the law. It confers upon its owner the fullest powers of alienation, and the right to exercise, in respect of the land, the most extensive rights of use and enjoyment permitted by our legal system. The historical fee simple estates are: (1) fee simple; (2) fee simple conditional; (3) fee simple determinable; and (4) fee simple subject to a condition subsequent.

Only the term fee simple is generally used in New Zealand today. The fee simple determinable may, however, be demonstrated to apply to unformed roads given the power of the Crown to require a council to return unformed road to the Crown (s323 Local Government Act 1974).

Somers J, in his judgment in the decision of the Court of Appeal in *Fuller v MacLeod* in 1981 in discussing this form of vesting states at p411 of the report:

> The common law and statutory history sheds some light on the reasons for enactment in this form. At common law the owners of land fronting a highway owned such highway, as in the case of rivers, ad medium filum… Section 266 of the first Municipal Corporations Act 1867 provided that the management of streets and the pavements and materials "shall belong to" the Council. That did not vest the fee simple in the Council: *Mayor etc of Christchurch v Attorney-General ex rel Gould* [1931] NZLR 137, 149… In *Mayor of Tunbridge Wells v Baird* [1896] AC 434 a similar statute was held not to vest the subsoil. And in *Municipal Council of Sydney v Young* [1898] AC 457 a statute which provided that "All public ways in the city of Sydney now or hereafter formed shall be vested in the Council, who shall have full power…" did not vest any property in the Council beyond the surface of the streets and such portion as was necessarily incidental to proper repair and management. The Council was not the owner of the land… Meanwhile in New Zealand s185 of the consolidating and amending Municipal Corporations Act 1876 provided that all streets "with the soil and materials thereof …" should be vested in the corporation. In *Plimmer v Loughrey* (1886) NZLR 4 CA 73 the reference to the vesting of the soil, and the powers of sale given the Corporation in the event of a closure of a street, suggested to the Court, although it did not decide the point, that the vesting was in fee… When therefore in s212 of the Municipal Corporations Act 1900 Parliament adopted provisions identical with those of s170(1) of the Municipal Corporations Act 1954 [and with s316 above[54]] it is clear that it intended to confer the full estate in the Council with correspondingly greater rights than resulted from statutes such as those considered in *Mayor of Tunbridge Wells v Baird* [1896] AC 434: … But it is not clear that the legislature intended to do more than vest in the Council the fee simple of the part of the land described as street and soil thereof and materials of which it is composed. It may be arguable that the Council's estate is in the nature of a stratum estate only, perhaps variable as levels may be altered… The need to confer power to alter levels may support that.

He goes on to discuss several authorities which describe the interest of the council as a determinable fee, that is, a fee simple which may cease in certain circumstances. He went on to say at p412:

[54] Parenthesis added.

> It may also be noticed that in *Tithe Redemption Commission v Runcorn Urban District Council* [1954] Ch 383; [1954] 1 All ER 653 (in which *Municipal Council of Sydney v Young* [1898] AC 457 was referred to in argument but not mentioned in the reasons for judgment) the Council's interest was held to be of the nature ascribed to it in *Rolls v Vestry of St George the Martyr, Southwark* (1880) 14 Ch D 785 and in quality a determinable fee.

Sir Edward Somers is regarded as the leading equity lawyer of his generation and so his opinion deserves great respect. When the Court of Appeal next considered the legal nature of a highway, some 20 years later in *Man O'War Station Ltd v Auckland City Council* (2000) 2 NZLR 267, it was to the opinion of Somers J that the Court looked for authority. *Man O'War* at p272 referred to *Fuller* at p414 where Somers J said:

> I conclude that the vesting of streets in a corporation is in their character as highways and that the general powers conferred, as in s170(4)[55] are for the purpose of enabling the corporation in the interests of citizens to facilitate that passage which the word highway itself imports. And it is because that is the Council's primary function, and the purpose of the vesting and the conferring of general powers, that it was necessary to give particular power to permit what might otherwise be obstructions on the highway. The primary purpose of a street is passage. The Council holds the land and its general powers as upon a trust for a public purpose.

Some of Somers J's observations on the nature of the vesting in the council may be given as asides[56], but he clearly bases the conclusion set out immediately above on his observations at p410–414. His view is that the legislature may allow the council ownership of only as much land as is required for a street or road, as well as its soil (in practice the surface)[57], and the materials it is made of.

The materials which make an unformed road are generally provided by nature, or, when the road is occupied by a farmer, by the pasture (or crop) that the farmer has cultivated. To that extent, an unformed road is physically very different from a formed road.

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[55] Now s319 Local Government Act 1974.
[56] Technically, "obiter" – i.e. an opinion that is not necessary for the decision of the case; a remark of the court that does not directly bear on the issue before it and therefore is not binding as precedent.
[57] Parenthesis added.

In addition, the legislature has laid four major inhibitions on unformed roads.

1. Unformed roads are subject to return to the Crown, when the land returned becomes subject to the Land Act 1948, i.e. available for sale.
2. Roads along rivers and the coast, if stopped, become esplanade reserves vested in the council.
3. Roads in rural areas cannot be stopped without the consent of the Minister of Lands.
4. Unformed roads intersecting or adjoining Crown land may be closed.

1. Under s323 of the Local Government Act 1974, unformed roads are subject to return to the Crown, on the request of the Crown, when the land returned will become Crown land subject to the Land Act 1948, i.e. available for sale.

> **323. Unformed roads in the district—** (1) Where the land comprising any unformed road existing at the commencement of this Part of this Act was immediately before the commencement of this Part of this Act vested in the Corporation of the district by section 191A (1) of the Counties Act 1956, the Minister of Lands may, by notice in writing to the council given at any time while the land, or, as the case may be, the part of thereof specified in the notice, continues to be an unformed road, require the council to transfer that land or that specified part thereof to the Crown without consideration, and that council shall transfer it to the Crown accordingly.
>
> (2) On the publication in the Gazette of a notice by the Minister of Lands declaring that any land or part thereof referred to in subsection (1) of this section has been transferred to the Crown pursuant to this section, the land transferred shall cease to be a road and shall be deemed to be Crown land.

2. If unformed roads along rivers and the coast are stopped, the land becomes esplanade reserve vested in the council. (Note, however, the provisions of s77 of the Resource Management Act 1991)

> 345 (3). Where any road or any part of a road along the mark of mean high water springs of the sea, or along the bank of any river with an average width of 3 metres or more, or the margin of any lake with an area of 8 hectares or more is stopped, there shall become vested in the council as an esplanade reserve (as

defined in section 2 (1) of the Resource Management Act 1991) for the purposes specified in section 229 of the Resource Management Act 1991—

In respect of roads located in the public foreshore and seabed, s345 (1A) as inserted by s103(1) of the Foreshore and Seabed Act 2004 states that s345 does not apply to the public foreshore and seabed. Section 15(4) of the Foreshore and Seabed Act stops unformed roads in the public foreshore and seabed which are vested in the Crown.

3. Roads in rural areas cannot be stopped without the consent of the Minister of Lands.

342 (1). The council may, in the manner provided in the Tenth Schedule to this Act, —

(a) Stop any road or part thereof in the district:

Provided that the council (not being a borough council) shall not proceed to stop any road or part thereof in a rural area unless the prior consent of the Minister of Lands has been obtained; or

(b) The full width of the land which ceases to be road—

whichever is the lesser.

"Rural area" is defined in s2 as "an area zoned rural in proposed or an operative district plan".

4. Unformed roads intersecting or adjoining Crown land may be closed under the Land Act 1948.

43 (1). In any case where any unformed and unused road intersects or is adjacent to any private land or interest in Crown land purchased under this Part of this Act and is not suitable to the subdivision of the land, the Governor-General may, by notification in the Gazette, close such road or portion thereof and declare the land comprised therein to be Crown land subject to this Act.

(2) No road or portion thereof adjacent to any land purchased under this Part of this Act shall be closed under the last preceding subsection without the prior

> consent in writing of the owners of all lands having a frontage to the portion of the road intended to be closed.

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

The law, however, is very clear. There is no possibility of the occupier acquiring any rights of ownership or possession through occupancy, use, or care of any unformed road.

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

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

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

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

The statute law further protects the legality of roads which may have been included in a certificate of title through error, misunderstanding, or otherwise without authority

when the title document was issued by the Registrar-General of Land. Section 77 of the Land Transfer Act 1952 provides:

> **77. No right to public road or reserve where unauthorised registration—** No right to any public or reserve shall be acquired, or be deemed to have been acquired, by the unauthorised inclusion thereof in any certificate of title or by the registration of any instrument purporting to deal therewith otherwise than as authorised by law.

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

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

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

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

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

Recently in *Abbott v Police, High Court, Christchurch*, 27 May 2008 Fogarty J had to deal with the question of trespass on a road. He held that the Council as owner of the road was not by reason of statute an occupier with exclusive rights of possession in the sense of having the ability to exclude anyone else from using the road. In reaching that conclusion he choose to follow the decision of the House of Lords in *Jones V DPP* (1999) 2 AC 240 which is now the leading authority on the subject.

Fogarty J noted that the ancient right of passing and re-passing on the highway is a critical right which is central to our constitutional history.

The physical occupancy of unformed roads by the adjoining owner is acknowledged by the Privy Council in the leading case of *Snushall v Kaikoura County* (above). "The particular strips of land have never been in fact fenced off or made up, or actually

used as roads by the public".[58] Neither the Council as statutory owner of the road nor the adjoining owner as a de facto occupier may exclude anyone else from using the road. There are, however, some occupiers who may be authorised. This occupancy cannot be in the nature of exclusive occupation as the common law right to pass and re-pass on the road remains unaffected.

Adjoining owners have been permitted for the past 117 years, on statutory terms, to use gates to enclose roads[59]. The first provision to authorise swing gates was s12 of the Public Works Amendment Act 1889 and since then a variety of legislation has permitted roads to be gated and enclosed. Section 344 of the Local Government Act 1974 (now in force) authorises gates and cattle stops across roads on fairly prescriptive conditions. Section 8 of the Trespass Act 1980 fortifies s344 to ensure the safe farming of domestic animals.

> 8. Gates – Every person commits an offence against this Act who-
> (a) …
> (b) With intent to cause loss, annoyance, or inconvenience to any other person,-
> (i) Opens and leaves open a shut gate; or
> (ii) Unfastens and leaves unfastened a fastened gate; or
> (iii) Shuts and leaves shut an open gate-
> on or leading to any land used for the farming of domestic animals or of any other animals held under lawful authority.

Section 8 is designed to ensure that farming operations are not hindered by inappropriate behaviour concerning a gate on or leading to any road, whether formed or unformed, leading to farmland.

While unformed roads are undoubtedly highways, being public ways that everyone has the right to use, roads which are unformed do not carry exactly the same attributes of formed roads. The four statutory inhibitions are significant limitations; the absence in an unformed road, of the materials which make up formation, may be a factor in establishing the breadth of the fee simple interest of the territorial authority

[58] A long line of authorities acknowledge that roads maybe "occupied" within the ordinary and natural meaning of the term *Rhodes v Beckett* (1909) 29 NZLR 361 Loughnan and the *Cambridge Road Board v Morgan* (1912) 31 NZLR 697 (CA) *Hutt County v Whiteman Bros* (1923) NZLR 751.
[59] "Enclose" in this context means to enclose land intersected or bordered by an unformed legal road for stock control purposes where the legal road is not fenced off longitudinally from the adjoining private land.

in the road. In this respect the observations of *Somers J Fuller v Macleod* noted above are directly relevant. Although the Crown has vested title to unformed roads in the territorial authorities and historically has encumbered the authorities with management of these roads, the residual rights and directory powers of the Crown are significant and extensive. This well exemplified by s15(4) of the Foreshore and Seabed Act 2004 which stopped certain unformed roads along the Coast, removing these roads from the title of the territorial authorities, and effecting a vesting in the Crown.

Unformed Roads Created on Private Subdivision

Prior to 1900 land owners could subdivide land and lay out new roads on plans deposited either in the office of the Registrar of Deeds and after 1870 in the office of the District Land Registrar. There was no statutory requirement to dedicate these roads for the use of the public and as a result a great many privately owned roads and streets were entered in the public records. The subdividing owners showed an intention to dedicate for public use which may be completed by the acceptance of the land as a public road or street by the territorial authority.

If land shown as road on these early plans of subdivision was not accepted as road by the territorial authority, the land never became a legal road but remained in the paper title of the subdividing owner. These were never legal roads and so are not "unformed roads". Many of these "roads" have been adversely occupied by the owner of the adjoining land and have been the subject of an application for title under s3 of the Land Transfer Amendment Act 1963, in the process losing the character of a 'road" by being incorporated in the adjoining land holding.

After 1900, if new legal access was required whenever land was privately subdivided, a road had to be dedicated, and formed to statutory standards at first in accordance with s20 of the Public Works Amendment Act 1900. Therefore no question of unformed roading on private subdivision arises after 1900. None of the subdivisional law variously applying to private subdivision after 1900 has any bearing on unformed roads.

Repair and Maintenance of Roads

The territorial local authority has full power under s319 of the Local Government Act 1974 to do whatever is needed to construct and to maintain in good repair any road under its control. In interpreting these powers, the question arises whether a territorial local authority may be compelled to repair a road vested in it. Two secondary questions also arise:

- What responsibility has a territorial authority for an unformed road?
- What responsibility continues for a legal road that was once used as a highway but which has been largely allowed to revert to secondary status or a state of semi-nature?

The cases which have been decided in New Zealand show that a territorial or other roading authority is only liable for misfeasance in repairing or constructing a road but not for nonfeasance. ("Misfeasance" means doing something in an improper or negligent manner causing damage; "nonfeasance" means doing nothing.) In spite of the breadth of powers to execute works on roads, there is no statutory obligation to do so.

The cases show that to impose by statute an arbitrary general duty on roading authorities to construct and repair roads would be an impermissible intrusion by central government into the sphere of local body discretion and policy. The general rule of the common law is that a roading authority with control of a road is not liable for damage to it arising out of ordinary disrepair. If a roading authority does nothing in relation to a road, no liability arises for the authority.

Before examining the development of the law on misfeasance and nonfeasance in New Zealand, it is timely to point out that from early times, the courts in New Zealand have distinguished unformed roads from formed roads in this respect, in effect extending the common law rule of nonfeasance.

A territorial local authority is not bound to keep in repair roads which have never been formed and remain in a state of nature, and is not liable for injuries caused by defects in such roads to people who may use them: *Inhabitants of Kowai Road Board v Ashby* (1891) 9 NZLR 658; *Tuapeka County Council v Johns* (1913) 32 NZLR 618.

Kowai also decides that the Road Board doing some work on part of a long line of unformed road by filling up some holes, formed under special circumstances, is not sufficient to throw upon the Board the duty of repairing the whole line of road. Nor does it alter the board's liability in respect to the unformed part of the road that it has not interfered with.

The management of roads and streets has been locally based[60] ever since the Public Works Act 1876 vested statutory title to roads in the Crown, and the Municipal Corporations Act 1867 provided for management of streets in municipalities.

Part XX1 of the Local Government Act 1974 as enacted by the Local Government Amendment Act 1978 provides the territorial local authority with powers in relation to roads. No distinction is made between formed and unformed roads in s319 of the Local Government Act 1974 in the exercise of the general powers of the council.

Formation, Alteration, Stopping, and Closing of Roads

General powers of councils in respect of roads –

319. The council shall have power in respect of roads to do the following things:

(a) To construct, upgrade, and repair all roads with such materials and in such manner as the council thinks fit:

(b) Repealed by s39(1) of the Local Government Amendment Act 1985.

(c) To lay out new roads:

(d) To divert or alter the course of any road:

(e) To increase or diminish the width of any road subject to and in accordance with the provisions of the district plan , if any, and to this Act and any other Act:

[60] The term "road" as described in s316 Local Government Act 1974 and s44 Transit New Zealand Act 1989 does not for the purposes of this discussion include –

a. Any government road:
b. Any State highway outside urban areas:
c. Any roads in respect of which the Minister of Local Government is deemed to be the council:
d. Any regional road: s316 Local Government Act 1974 and s44 Transit New Zealand Act 1989.

(f) To determine what part of a road shall be a carriageway, and what part a footpath or cycle track only:

(g) To alter the level of any road or any part of any road:

(h) To stop or close any road or part thereof in the manner and upon the conditions set out in section 342 and the Tenth Schedule to this Act:

(i) To make and use a temporary road upon any unoccupied land while any road adjacent thereto is being constructed or repaired:

(j) To name and to alter the name of any road and to place on any building or erection on or abutting on my road a plate bearing the name of the road:

(k) To sell the surplus spoil of roads:

(l) For the purpose of providing access from one road to another, or from one part of a road to another part of the same road, to construct on any road, or on land adjacent to any road, elevators, moving platforms, machinery, and overhead bridges for passengers or other traffic, and such subways, tunnels, shafts, and approaches as are required in connection therewith.

The Act also provides special powers for the council with the consent of adjoining owners to carry out work on Māori roadways.

324A Power to carry out works on Māori roadway.

The council may from time to time—

(a) Maintain, repair, or improve any roadway laid out in the district in accordance with [Part XIV of the Māori Land Act 1993]; or

(b) Contribute towards the cost of maintaining, repairing, widening, or improving any roadway of the kind described in paragraph (a) of this subsection.

The general powers in s319 have an origin in the early Public Works Acts of the nineteenth century (s87 of the Public Works Act 1876) and have variously been included in the Counties Acts and Municipal Corporations Acts of the twentieth century and so have been well tested. While in a procedural sense, say in stopping

or closing an unformed road, the council must follow the same statutory practices and procedures as for a formed road, the courts have limited the accountability of the council for unformed roads.

Although there were some earlier cases, the true beginning of indigenous case law in New Zealand was the decision in 1894 of the Court of Appeal in *Tarry v the Taranaki County Council* (1894) 12 NZLR 467. The court held that the County Council was not liable for repairing the hole in a road which had caused injury to the plaintiff. The Council was not liable for mere nonfeasance such as the non-repair of roads.

Denniston J in delivering the principal judgment in the Court of Appeal at p471 said:

> Before any special legislation on the subject of highways, whatever roads were made and kept must have been so made and repaired by the colony – that is, the public. When power as to roads and highways was given by statute to public bodies, it was simply a transfer to some particular section of the public in counties, road districts, or boroughs, as the case might be, of the common-law powers and duties already existing. The words of the provisions in the statutes on which it is sought in the present case to fix the defendants with responsibility are in the usual form. They cannot be said to show "a direct intention" to create greater liabilities than previously existed.

In *The Municipality of Pictou v Geldert*, (1893) AC524 the Privy Council affirmed the principle held by the House of Lords in 1892 in *Cowley v The Newmarket Local Board* (1892) AC345 as applicable to a colony, and held at p527:

> … it must now be taken as settled law that a transfer to a public Corporation of the obligation to repair does not of itself render such Corporation liable to an action in respect of mere non-feasance. In order to establish such liability it must be shown that the Legislature has used language indicating an intention that this liability shall be imposed.

Denniston J went on to say at p472 of *Tarry* that the judgment of the Privy Council in Pictou, according to the headnote, does not overrule but distinguishes that judgment of the Privy Council in the earlier case of *Borough of Bathurst v Macpherson* (1879) 4 App. Cas 256.

In *Bathurst* a barrel drain was constructed on a road by the appellant corporation:

> The judgment of their Lordships was as follows: "Their Lordships are of opinion that, under these circumstances, the duty was cast upon them of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway which but for such artificial construction, would not have existed, or at the least of protecting the public against the danger when it arose, either by filling up the hole or fencing it".

Broadly, the Privy Council in *Pictou* (1893) decided that the transfer by statute of the duty to manage a road to a council does not of itself create a liability if the council does not carry out repairs. Liability arises only if a statute requires that repairs be undertaken. In *Bathurst* (1879), the Privy Council had previously ruled that if a council undertook "an artificial work" that work fell into disrepair, the council must protect the public against risk either by filling up a hole or fencing off a danger. This case generated great controversy. What is an artificial work? Is a culvert part of a road, or an artificial work underneath the surface? – and so on.

Williams J and Denniston J in *Tarry* could not reconcile *Bathurst* and *Pictou*, and preferred *Pictou*. The other judges in the Court of Appeal preferred not to consider the conflict. The headnote to *Tarry* states:

> Per Williams and Denniston JJ (Prendergast CJ and Richmond J preferring not to express an opinion): Since the decision in *The Municipality of Pictou v Geldert*, the case of the *The Borough of Bathurst v Macpherson* must be taken to be no longer law.

Denniston J in his judgment in *Tarry* at p472 indicated that many previous decisions of the courts in New Zealand made on the authority of Bathurst had made councils liable for non-repairs on roads. These decisions appear to have been made by lower courts, for they are not reported. The law was, however, clearly stated in *Tarry* in 1894: councils were not liable for a failure to repair.

But shortly after the decision in *Tarry's case* came the decision of the Privy Council in *Municipal Council of Sydney v Bourke* (1895) AC433. That case concerned potholes formed in the road through non-repair, and the Privy Council had no difficulty in following the principle laid down in *Municipality of Pictou v Geldert*, and in holding that it was a case of mere nonfeasance. However, the judgment of the Privy Council proceeded to declare that the *Bathurst* case was good law. By this decision the Privy Council seems to have completely eliminated the doubt cast on the *Bathurst* case.

Ostler J in *Hokianga County v Parlane Brothers* (1940) NZLR 315 at p320 observed on Bathurst:

> Indeed, so long as the principle of that case is good law, it would seem that a local authority is liable for injury caused by it allowing any artificial structure which it has made on its roads, including a bridge, to become dangerous by falling into disrepair, although this seems to be absolutely contrary to the principle clearly laid down in Municipality of Pictou v Geldert.

Nearly 70 years after *Tarry*, the then Supreme (now the High) Court dealt with a question of misfeasance on a public road in *Hocking v Attorney-General* (1962) NZLR 118. Neither counsel nor Barrowclough CJ referred to the decision of the New Zealand Court of Appeal in *Tarry v Taranaki County Council*. The Chief Justice considered *Borough of Bathurst v Macpherson* to state the law. He acknowledged that it may be "a controversial decision" at p123 and went on to say: "Its authority however is undoubted and I am clearly bound by it."

He nevertheless distinguished *Bathurst* from the facts he was dealing with, so that he did not need to follow it and despite being overruled in the Court of Appeal, arrived at what appeared to be an eminently sound decision set out in the headnote at p118:

> If in the course of the repair of a road already built a roading authority installs a culvert which is of insufficient capacity to prevent flooding and the erosion of the road, that act is not such an act of misfeasance as will give rise to a claim for damages by a person injured as the result of a sudden washout if the injuries are caused before the roading authority has had an opportunity of taking steps to repair the road or give warning of the danger.

Hocking in the then Supreme Court establishes a limitation on misfeasance as a determinant of liability as when the roading authority has not at the material time (say, that of an accident) had an opportunity of taking steps to repair the road or give warning of the danger. Under this view of the law, for the roading authority to have liability it must be aware of the danger generated by work on a road which has deteriorated, and have done nothing about it within a reasonable time.

Clearly, the rule which the Chief Justice sought to have established would have applied equally and conveniently to formed roads, unformed roads (particularly

unformed roads leading to rivers, lakes and the sea where some rough work may facilitate access), and former highways now in occasional use, on which work may have been undertaken when in use as fully formed roads. This ruling did not, however, survive an appeal in the New Zealand Court of Appeal. Although one of the judges of the Appeal Court (Gresson P) would have dismissed the appeal, the majority (North J and Turner J) considered the reasoning of the Chief Justice to be in error, and his judgment was overturned ((1963) NZLR 513).

The doctrine that a roading authority is not liable for mere nonfeasance (as where an authority does nothing or where work may be executed competently but not sufficiently to avoid danger) has its critics. Gresson P in the Court of Appeal in *Hocking* at p519 said:

> The immunity which Highway Authorities have long enjoyed for passive non-repair is of historical origin, but its genesis is irrelevant; the question is whether in the present case it operates to exonerate the two Boards from liability. The rule has been condemned as an archaic and anomalous survival into modern times without any sound reason to justify it (by Salmon J. in Attorney-General v St, Ives Rural District Council [1960] 1 Q.B. 312, 323; [1959] 3 All ER 371, 376), and in Northern Ireland Lord Macdermott, when compelled to apply the non-feasance rule in Quinn v Ministry of Commerce [1954] N.I. 131, 136 did so regretfully with the comment that it was "behind the times", as conferring an unduly wide immunity in respect of negligent omission, having regard to the gravity of the dangers which such omissions might cause; and further that such measure of relief as had arisen from established exceptions had been obtained at the price of fine distinctions and consequent uncertainty.

In the court below in *Hocking*, Barrowclough CJ at p129 provided an anticipatory answer, to the points raised above by Gresson P, given New Zealand conditions:

> But whatever may be the ground of the doctrine it seems to me that in a new country like New Zealand, suffering as it still does from the effects of forest denudation and excessive flooding, bridges and culverts which could cope with all foreseeable intensities of rainfall would be very costly luxuries and well beyond the financial and other resources of most roading authorities. Many culverts of inadequate capacity and likely to result in washed out and therefore dangerous roads will often be better than no culverts at all. It may well be that we should accept that there may be unexpected hazards on our roads and that the retention of the doctrine of no liability for mere nonfeasance is really in the public interest.

The question of liability for accident damage on defective roads is a vexed one ranging from the difficulties of interpretation indicated in the Privy Council cases, the fine distinctions that Gresson P speaks of, and the common sense expressed above by Barrowclough CJ. Many a roading engineer for a territorial authority in New Zealand with responsibility of hundreds of kilometres of road might give a wry smile at the deliberations of the court in Northern Ireland in *Quinn v Ministry of Commerce* noted above: "To a further issue asking whether the accident was due to the failure of the defendants to take reasonable care in the manner in which they temporarily repaired the pothole the answer was 'yes'. We consider that the pothole should have been observed more carefully and filled more often."

It is not the purpose of this discussion to delve too deeply into the historic complexities of liability for roadway management. The main concern here is the liability (if any) for unformed roads and roads previously maintained by councils but now used mainly but not necessarily exclusively for recreational purposes (for example, the old "ferry" roads which continue to lead to rivers). However, the general question of liability on formed legal roads needs to be placed in perspective before the liability for "recreational" legal roads may be addressed.

Undoubtedly, the decision of the majority in the Court of Appeal in *Hocking* is the foundation of our modern law of roading accountability, despite the overturn of the convenient rule which Barrowclough CJ proposed in the court below. The decision of the majority was heavily influenced by Australian and English decisions. Of the three appellate justices, only North J referred to *Tarry v Taranaki County Council* (above), a prior decision of our Court of Appeal and the leading New Zealand authority. Put simply, the decision in *Hocking* changed the law.

North J pointed out at p532 that there were exceptions in respect of roading authority liability, such as when statute imposes a duty on the council from which a private right of action might accrue. Then, too, the essence of the rule he advocated was that the disrepair causing the injury must be on the road itself and not on some artificial structure placed on the road. He went on to say (also at p532):

> But, subject to these exceptions, while a road authority is immune from liability to users of the highway who are injured as the result of the unsafe or dangerous state of the highway so long as it adopts a merely passive role, once it decides to reconstruct

> or repair a road, then it is obliged, like anyone else, to exercise reasonable care in the performance of its self-imposed task.

This duty to exercise reasonable care also formed the basis of the extensive judgment of Turner J, who at p543 summarised his view:

> If the accident was caused as a foreseeable consequence of what was previously positively and negligently done by the Road Authority, then the Road Authority is liable.

While the ratio of *Hocking* clearly establishes liability for an inadequate culvert, for that was the subject of the action, the language used by North J and Turner J suggests a wider duty of care and narrows the scope of immunity for omissions in undertaking construction or repair work on a road.

The scope of the principle established in *Hocking* may be explained by reference to an earlier decision of the English Court of Appeal in *Newsome v Darton Urban District Council* (1938) 3 All ER 93. Although the case was not cited in *Hocking*, on its facts *Newsome* reinforces the wider principle indicated in *Hocking*.

Newsome was a case where the respondents were not only the local highway authority, but the local sanitary authority. In the latter capacity they had dug a hole in one of their streets to lay a drain. The hole had been filled in and the surface covered with metal, which was sprayed with tar and rolled level by a steam roller. A year later a depression had formed. The jury trying the case found as a fact that this depression was dangerous. It also found that although the original work of rolling the excavation was done without negligence, the local authority was negligent in not discovering and remedying the dangerous condition into which it subsequently declined. It was held by the Court of Appeal that the local authority was guilty of misfeasance, and liable accordingly.

Ostler J in *Hokianga County* at p322 observed that in *Newsome*:

> MacKinnon L J lays down a broader rule – viz that where a local authority even in its capacity as highway authority does something to the surface of the highway and that which it does is, in addition to natural causes and traffic, the origin of the defect, and

> the local authority does not remedy the defect, then the local authority is guilty of misfeasance.

In summary, the common law now imposes a duty of care on a roading authority in executing works, with a requirement of reasonable observation of works after completion. Ordinary wear and tear on a road does not create a liability for the roading authority at common law.

The immunity for "the friction of traffic and the operation of natural causes" was abolished in England by the Highways (Miscellaneous Provisions) Act 1961 (UK) which created an obligation to maintain highways. In New Zealand, immunity for nonfeasance (doing nothing) continues as the law.

Immunity does not, however, extend to the creation of a "public nuisance" on a road which the authority knows about and allows to continue[61]. The general rule is that a local authority is not itself entitled to create a public nuisance in executing public works or any other activity unless authorised by statute. In this respect s191 of the Local Government Act 2002 provides a code:

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

In addition, councils must take reasonable precautions for the general safety of the public and workers when carrying out work on or near a road: s353(a) Local Government Act 1974.

> Under s353 (b) the council must:

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[61] *Mayor of Invercargill v Hazlemore* (1905) 25 NZLR 194 at 204; *Gilchrist v Mayor of Oamaru* (1913) 32 NZLR 902 (drain subsidence); *Invercargill Borough v McKnight* [1923] NZLR 1044 (tramlines); *Ogier v Christchurch City Corp* [1938] NZLR 760 (pole).

> (b) Require the owner or occupier of any land upon which there is any hole, well, excavation, or other place dangerous to persons passing along any road forthwith to fill in, cover, or enclose the same:
>
> And under subsection (c) of that section the council may:
>
> (c) Whenever the public safety or convenience renders it expedient, require the owner or occupier of any land not separated from a road by a sufficient fence to enclose the same by a fence to the satisfaction of the council.

All legal roads, whether formed or unformed, carry the general status of roads under common law and statute law until formally closed or stopped. The responsibilities of councils in relation to unformed roads are drawn from the general law relating to roads. The general principles can be summarised as follows.

- The council has no obligation to form or maintain an unformed road.[62]
- If the council carries out no work, there is no liability.[63]
- The council's immunity from liability on unformed roads has been held to extend to the filling of holes on part of a long line of unformed road, but there is no duty to repair the whole road.[64]
- The council is immune from liability for the operation of natural causes.[65]
- If the council undertakes any artificial work such as a culvert or bridge on a road which is generally unformed it has a duty of reasonable care in construction, and also a duty of ongoing reasonable observation of that work to ensure that any dangerous change in condition is discovered and remedied. [66]
- The council may require the occupier of any land that contains a hole or other place dangerous to people passing along it to fill in, cover, or enclose the danger. [67],[68]

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[62] *Inhabitants of Kowai Road Board v Ashby* (1891) 9 NZLR 658; *Tuapeka County Council v Johns* (1913) 32 NZLR 618.
[63] *Hocking v Attorney-General* (1963) NZLR 513 (CA).
[64] *Inhabitants of Kowai Road Board v Ashby* (1891) 9 NZLR 658; *Tuapeka County Council v Johns* (1913) 32 NZLR 618.
[65] *Tarry v the Taranaki County Council* (1894) 12 NZLR 487 (CA); *Hokianga County v Parlane Brothers* (1940) NZLR 315; *Newsome v Darton Urban District Council* (1938) 3 All ER 9; *Hocking v Attorney-General* (1963) NZLR 513 (CA).
[66] *Hocking v Attorney-General* (1963) NZLR 513 (CA).
[67] Section 353 (b) Local Government Act 1974.
[68] Although early legislation appears not to have provided territorial local authorities with powers to direct occupiers of unformed roads to observe safety requirements for the benefit of the general public, since 1954 in municipalities (Municipal Corporations Act 1954: ss 201, 202), and since 1956 in

- Whenever the safety or convenience of the public applies, the council may require the owner or occupier of any land not separated from a road by a sufficient fence to enclose the land with a fence that complies with council requirements.[69]

The principles applying to secondary-use roads, such as the old "ferry roads" leading to a river, which were originally formed and maintained by the Council, may be summarised as follows.

- The council is immune from liability for the friction of traffic and the operation of natural causes.[70]
- If any work on the surface or artificial construction along the line of the road is executed by the council, either before or after the road reverted to secondary use, there is a duty of reasonable care in construction, and a duty of ongoing reasonable observation of that work to ensure that any dangerous condition is discovered and remedied. [71]
- The council should put up adequate signage relating to the state of the surface, blind ends, and so on.[72]
- The council may require the occupier of any adjoining land that contains a hole or other place dangerous to people passing along the land to fill in, cover, or enclose the danger.[73]
- Whenever the safety or convenience of the public applies, the council may require the owner or occupier of any land not separated from a road by a sufficient fence to enclose the land with a fence that complies with council requirements.[74]

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counties (Counties Act 1956: ss 208, 209) the councils have had authority to deal with dangers on unformed roads and in addition may require the adjoining owner to fence the boundary. Clearly, councils have exercised the powers with discretion. Sections 353 pf the Local Government Act 1974 states the powers now in force.

[69] Section 353 (c) Local Government Act 1974.

[70] *Tarry v the Taranaki County Council* (1894) 12 NZLR 487 (CA); *Hokianga County v Parlane Brothers* (1940) NZLR 315; *Newsome v Darton Urban District Council* (1938) 3 All ER 9; *Hocking v Attorney-General* (1963) NZLR 513 (CA).

[71] *Hocking v Attorney-General* (1963) NZLR 513 (CA); *Newsome v Darton Urban District Council* (1938) 3 All ER 93.

[72] *Oamaru Borough v McLeod* (1967) NZLR 940 (a sign at the end of a blind road); *Meurs v Taieri County* (1954) NZLR 1081. (Facts of each case critical.)

[73] Section 353 (b) Local Government Act 1974.

[74] Section 353 (c) Local Government Act 1974.

Stopping of Roads

A power to stop roads (including unformed roads) is contained in s116 of the Public Works Act 1981. This Act empowers the Minister of Lands, by notice in the Gazette, to declare any road or part of any road to be stopped. If the road is under the control of a regional council or a territorial authority, the consent of that council or authority has to have been previously obtained. If a road as defined in s315 of the Local Government Act 1974 has been stopped under the Public Works Act, the territorial authority may deal with it as though it had been stopped under the Local Government Act 1974.[75] There are residual powers of disposition which may be exercised by the Crown with the consent of the territorial authority: s117 Public Works Act 1981.

The powers of the Minister, which may be exercised on the election of the Minister, but not on that of the territorial authority, are indicative of an administrative role which places the public interest as an overriding consideration.

As an alternative to stopping, unformed roads continue to be subject to return to the Crown on the request of the Minister of Lands under s323 of the Local Government Act 1974.

The Public Works Act 1981 discontinued a long line of authority, starting with s93 of the Public Works Act 1876, dealing with the procedures to be followed by territorial authorities in stopping roads.

Section 93 was later re-enacted as s94 of the Public Works Act 1882, then subsequently as s130 of the Public Works Act 1905, s131 of the Public Works Act 1908, and finally s148 of the Public Works Act 1928.

These sections established the basis on which territorial authorities could stop roads. Roading authorities were required to prepare a plan for public inspection of the road to be stopped and provide a conspicuous physical notice on the section of the road affected. The roads board was required to call a public meeting of ratepayers, which would decide by a majority whether the road should be stopped, and then a meeting of the council would either confirm or reverse that decision.

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[75] Section 117(1) Public Works Act 1981.

The omission of s148 of the Public Works Act 1928 from the Public Works Act 1981 is explained by the enactment in the Local Government Amendment Act 1978 of s342 of the Local Government Act 1974. Together with the tenth schedule of the latter Act, s342 establishes procedures for stopping roads. Although Schedule 10 provides for updated procedures, the requirements stated there clearly originate in the line of statutory authority encompassed in the Public Works Acts as set out above.

Under s342(l)(a) of the Local Government Act 1974, a territorial authority may not stop a road in a rural area without the consent of the Minister of Lands.

Section 342 of the Local Government Act 1974 and Schedule 10 of that Act set out the current powers of councils to stop roads whether formed or unformed.

Section 319 says:

[319. General powers of councils in respect of roads—

The council shall have power in respect of roads to do the following things:

…

(h) To stop or close any road or part thereof in the manner and upon the conditions set out in section 342 and the Tenth Schedule to this Act:

Section 342 says:

342. Stopping and closing of roads

(1) The council may, in the manner provided in the Tenth Schedule to this Act, —

(a) Stop any road or part thereof in the district:

Provided that the council (not being a borough council) shall not proceed to stop any road or part thereof in a rural area unless the prior consent of the Minister of Lands has been obtained; or

[[(b) Close any road to traffic or any specified type of traffic (including pedestrian traffic) on a temporary basis in accordance with that Schedule and impose or permit the imposition of charges as provided for in that Schedule.]]

Schedule 10 is set out as Appendix 17.

The separation of territorial powers from ministerial powers may seem to imply two wholly concurrent jurisdictions to stop roads – one on conditions of public notice and public participation, and the other by an administrative process that does not require public notification. However, the legislative history of the separate processes shows that they were intended for use in different circumstances.

The separation of powers to stop roads into those of the Crown and those of territorial local authorities was established relatively early (though not immediately) in the post-provincial era.

In 1876 the first Public Works Act provided for the stopping of roads by territorial local authorities on very prescriptive criteria[76] but made no provision for stopping by ministerial notice or by proclamation of the Governor. The Land Act 1877 provided for the alteration of the course of a road[77] by agreement with the owner of the adjoining land and the Crown, and enabled the Governor to execute appropriate grants or conveyances to adjust title. Under the Land Act 1877 the Governor had power to proclaim roads over rural[78] or urban lands[79] but neither the Minister of Lands nor the Governor had the power to stop roads. The Land Act 1885[80] did not in this respect materially differ from the Land Act 1877 that it replaced.

However, the next re-enactment of the Land Act in 1892 provided the Governor with wider powers. In addition to the power to proclaim roads and streets, the Governor could now by proclamation, with the consent of the territorial local authority, close roads and grant that land in exchange for the land taken for the proclaimed road[81].

The powers of the Crown to stop roads or streets, now expressed in s116 of the Public Works Act 1981, date from the Land Act 1892. These powers, which were to

[76] Section 93 Public Works Act 1876.
[77] Section 162 Land Act 1877.
[78] Section 160 Land Act 1877.
[79] Section 161 Land Act 1877.
[80] Sections 13, 14, 15 Land Act 1885.
[81] Section 13 Land Act 1892.

be exercised with the consent of the territorial local authority, were maintained in the Land Act 1908[82] and enacted in a different form (with similar effect) in s12 of the Land Act 1924. Section 12(7) empowered the Governor-General by proclamation, subject to the consent of the territorial local authority, to close any road or street.

Section 12 remained in force until repealed by s29(18) of the Public Works Amendment Act 1948. Under s29(3) of the 1948 Act, a proclamation by the Governor-General was required. However, s7(1) of the Public Works Act 1965 substituted the Minister for the Governor-General, the Minister having power to close roads by notice published in the Gazette. The Minister in this context was the Minister of Works.

When the Public Works Act 1981 replaced the Public Works Act 1928 and amendments, s116 of the new Act, still in force today, provided for the stopping of roads by the Minister by notice in the Gazette with the consent of the territorial local authority. Either adequate access has to be provided for adjoining owners, or their consent in writing obtained.

Section 30 of the Public Works Amendment Act 1988 enacts a new s113 of the Public Works Act 1981. “Minister” in relation to roads now means the Minister of Lands rather than the Minister of Works.

The power of stopping of roads under s116 of the Public Works Act, which originated under the lands administration of early post-provincial government, has now returned to the custody of the Minister of Lands. This legislation, in force for over a century, has not required that public notice be given. The early inclusion in the statutes of powers to exchange land for roads is strongly suggestive of road closures where the Crown and the adjoining owner have the primary interest. The re-alignment of a public road, when the position of the road as shown on the Crown grant record plan was found in practice to be wrongly placed, was therefore permitted without public notice. The wider interest of the public, when councils stopped roads, was originally catered for in successive Public Works Acts dating from 1876, and latterly in the Local Government Act 1974, by quite aggressive requirements for public notice.

[82] Section 11 Land Act 1908.

The separate powers of the territorial local authorities to stop roads were set out in s94 of the Public Works Act 1882 (replacing the Act of 1874), next as s122 of the Public Works Act 1894, and then as s130 of the Public Works Act 1905. Section 133(a) of the 1905 Act introduced a new power of supervision by the Governor over all territorial local authorities. Thereafter councils could not stop county or district roads until the consent of the Governor by order in council was gazetted. Section 130 of the Public Works Act 1905 was replaced by s131 of the Public Works Act 1908 which in turn was superceded by s148 of the Public Works Act 1928. In 1970 the Minister of Works replaced the Governor-General as the consenting authority.[83]

When the Counties Amendment Act 1972 vested roads in counties in the corporation of the council[84], s148 of the Public Works Act was repealed[85] and new procedures vesting stopping powers in the council[86] were set out in a new eighth schedule to the Counties Act 1956. Schedule 8 providing for notice of intention to stop, objections and appeals, has its origin in s93 of the Public Works Act 1876 and each of the succeeding provisions providing for stopping of roads. In 1972 the councils were freed of any general requirement of Crown approval for road stopping, but were still required to obtain the consent of the Minister of Lands for any road stopping in rural areas.

Subsequently, when the Local Government Amendment Act 1978 repealed the provisions of the Counties Act dealing with roads and inserted part XXI in the Local Government Act 1974, s342 of the principal Act (i.e. the Act of 1974) provided for a new tenth schedule along the lines of the former eighth schedule of the Counties Act. Section 342 and the tenth schedule to the Local Government Act 1974 set out the law now in force. Of particular relevance to unformed roads is the continuing requirement of the consent of the Minister of Lands before a rural road is stopped.

Section 116 of the Public Works Act 1981 is now administered in Land Information New Zealand. The provision for stopping roads without public notice is appropriately seen by the department as one of very conservative application. Only in very clear cases will the section be applied. This is not to say that it may never be applied to unformed roads, but rather that in almost all road stoppings, s342 of the Local

[83] Section 2(1) Public Works Amendment Act 1970.11
[84] Section 2 Counties Amendment Act 1972 inserting s191 A (1) in the principal act.
[85] Section 8(1) Counties Amendment Act 1972.
[86] Section 191A(5)(h) Counties Amendment Act 1972.

Government Act 1974 and the procedures in the tenth schedule to the Act which incorporate requirements for public notification will more correctly apply.

An unformed road may be included in a walkway with the prior consent of the territorial local authority in which the road is vested: s6 New Zealand Walkways Act 1990. Before giving consent, the territorial local authority has to consult with every owner who has a frontage on or access to the unformed road. Those owners retain the right to use as a road the unformed legal road after it is incorporated in a walkway. However, the public are restricted to using the road as a walkway. The Minister of Conservation may specify any other conditions of use in the notice designating the unformed legal road as a walkway.

Section 6 is a curious provision which is inconsistent with the common law, the statutory law protecting the status of roads, and the rigorous protection the New Zealand courts have provided for the interests of the public.

The Management of Unformed Roads

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

All rights the public may have either at common law, or by virtue of statute law, are unaffected by the occupancy of any road by the owner of the adjoining land, whether by licence from the Council, or merely as an occupier. These occupiers are not legal custodians, yet it is largely through work undertaken on the land by the occupier, say, pasture maintenance, or suppression of noxious weeds, that the public may enjoy their rights of passage. If the surface of the road is allowed to degenerate then a road will often become impassable. Many and varied are the practices which confer physical passage over unformed roads; the right of free passage (in practical terms useless if it is not physically available) is never, or hardly ever, provided at public expense. The "interest" of the occupier in the road may not be a legal interest, but it is nevertheless real, for if there is any expenditure on such a road, it is likely to be the money of the occupier which is applied to provide a surface which is usable by the occupier and the recreational user.

Statutory management of unformed roads intended to remain in a state of nature has hitherto had a low priority. The statute law relating to bylaws on roads is framed to exist for the benefit of formed roads. There appears to be no case law to test the validity of bylaws made under general authority to regulate the use of roads which remain in a state of nature.

Section 72 of the Transport Act 1962, which extensively authorises roading bylaws, seems largely inapt for passing bylaws affecting unformed roads. Sub clauses (a) to (l) of subsection (1) are very specific and authorise bylaws which clearly are intend to apply to formed roads. Sub paragraph (i) which authorises the prohibition or restriction of specified classes of traffic may arguably have an application to unformed roads. However, the breadth of bylaws authorised is not conducive to effective and fair management by the territorial authorities.

Section 146(b) of the Local Government Act 2002 provides for general bylaws including bylaws for the purpose of managing, regulating against, or protecting from, damage, misuse, or loss, or for preventing use of, the land, structures, or infrastructure associated with reserves, recreation grounds, or other land under the control of the territorial authority. Neither s72 nor s146(b) are well suited to the management of an unformed roading network.[87]

In recent years in the United Kingdom, in England and in Scotland attention has been given to the use of bylaws to provide standards to apply to the right of passage in the field. The Countryside and Rights of Way Act 2000 (England) and the Land Reform (Scotland) Act 2003, preserve rights of passage over various forms of public access, and provide for specific bylaws to balance rights and duties. The English Act is based on the application for more than 50 years of legislation providing public access in the countryside.[88]

Section 17 of the Countryside and Rights of Way Act 2000 (England) and section 12 of the Land Reform (Scotland) Act 2003 are set out in Appendix 20.

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[87] The provisions of s684 of the Local Government Act 1974 which remain in force, applying to roading bylaws, are highly prescriptive and generally are unsuited to unformed roads.

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

In summary, each statute provides for bylaws which if adjusted to apply in the context of unformed roads would:

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

Any such bylaws may relate to all unformed roads in the district or any particular such roads and should not interfere with:

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

Many years of experience in England and in Scotland in providing good balanced practice in the exercise of public access in the countryside are encapsulated in the suggestion for specific bylaws in New Zealand. The existing provisions relating to bylaws on roads have to be forced into a shape which may accommodate unformed roads. The result in neither good practice nor good law.

CHAPTER 2: A CLOSER LOOK AT WATERSIDE ROADS

Introduction

Waterside law and practice, designed to free New Zealand from the rules of English law and provide public access to water, was optimistically put in place in the 19th century by the colony's administrators, legislators and judges. They employed the most durable means then known: roads along water. Roads which the legislators declared could never be legally stopped if along rivers; roads which when placed on either side of a river preserved a right of passage and public access to the bed and recreational waters. Chapter 1 of this part summarises the legal attributes applying to all unformed roads including roads along water. This chapter indicates the principles which apply in addition to riparian roads.

Up until the enactment of the Land Act 1892, general waterside reservations were shown as roads on the plans prepared for the sale of Crown land. From 11 October 1892 the Land Act[89] provided for a strip of Crown land to be reserved along water on the sale of land by the Crown. Public reserves of various kinds were also established along rivers and the coast in the early days, but roads form by far the bulk of early public land.

However, the practice of showing reservations as road continued inconsistently until 1913 (in some provinces the depiction of a road was thought to be a compliance with the Land Act 1892). In 1914 the practice of setting aside a margin of Crown land, rather than a road, along water was introduced on a national basis.[90] Much of the public land along major rivers and the coast is legal road.[91]

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[89] s110 Land Act 1892

[90] From 1888 to 1906 roads along rivers were considered to be ambulatory under a decision of the then Supreme Court and this may have influenced the Chief Surveyors of the land districts (the former provinces) to continue to use roads rather than fixed strips of Crown land along water. Also, roads along rivers could not be stopped after 1882 - s93 Public Works Act 1882.

[91] The author has read the relevant instructions from the Colonial Office to the New Zealand Governors, the land-related ordinances and statutes of the central government and the 10 provincial governments prior to the abolition of provincial government in 1875, and all relevant statutes of the central government up until the enactment of the Land Act 1892, and cannot find any specific or general references to "roads as a requirement along water". Legislation in Canada most closely approximates to waterside legislation in New Zealand extending to colonial times, and commentators there have faced the same problem. Professor David W Lambden, Emeritus Professor of Surveying, University of Toronto and Izaak de Rijcke of the Canadian Bar in Legal Aspects of Surveying Water Boundaries (Carswell, 1996) say at p45 of their text:

The use of roads as a reservation along water was designed to ensure:

(1) a stable common law right of access;
(2) the preservation of ownership of the bed for the Crown as adjoining proprietor of the road; and
(3) continuing recreational and other rights over the bed for the public.

The unformed roading pattern along rivers had been well established when s93 of the Public Works Act 1882 was enacted to read:

> 93. No road shall be stopped unless and until a way to the lands adjacent as convenient as that theretofore afforded by the said road is left or provided, unless the owners of such lands give consent in writing to such stoppage, **and no road along the bank of a river shall be stopped either with or without consent.** *[Emphasis added.]*

Section 93 was a unique legislative provision providing roads along rivers with quasi-constitutional protection; that is to say, an Act of parliament or the authority of an Act would be necessary before a riverside road could be stopped. The intention of the legislature in enacting s93 appears to have been to provide riverside roads with a perpetual life.

The water boundary of an unformed road as a riparian boundary is subject to the legal rules on accretion and a modified rule on erosion. Curiously, the early cases which were to come before the Courts concerning eroded roads along river boundaries did not consider s93.

Documentation has not been found in the authors' research giving the official reason for placing a road allowance along the shores of navigable lakes and the banks of navigable rivers in the surveys, after 1851, of the 1000-acre sectional system in the forest lands of the Shield area of Southern Ontario. It is suggested that for the Crown to keep a reserve and dedicate it as a road was a logical practice to adopt, not that it would become a physically passable road but that it gave freedom of enterprise for the logging operations that were the prime industry of Ontario at that time. In driving the logs down the rivers, the lumber men would not be trespassing on private lands if a space was maintained along the shore. Since navigable waters are a highway, a road (a very valid term of somewhat older times for the clear main channels leading to harbours), a shore reserve for the same purpose, would appropriately be called a "road allowance".

The use of roads as waterside reservations in New Zealand may well owe something to earlier settlement in Canada.

The problem of riparian roads erosion

The first case on erosion of a riverine road decided in the Supreme Court[92], *Pipi Te Ngahuru v The Mercer Road Board* (1888) 6 NZLR 19, decided that when a road along the bank of a river is washed away, the public are automatically entitled to a road over a corresponding part of the adjoining land. The judgment of Ward J is short and to the point, but does not discuss in detail the English authorities on roads along water, although some are mentioned by counsel. Ward J does not refer to the statutory prohibition on stopping riverside roads introduced by s93 of the Public Works Act 1882 but his judgment is consistent with s93.

Whether s93 was a truly effective legislative means of providing a perpetual road along the bank of a river when at the time of the Crown grant a road was reserved may be debated. The section does not specifically deal with ambulatory boundaries, or gaps in the physical roadway caused by erosion. However, in placing the interpretation that he did on waterside roads, Ward J included the concept of perpetual public access in the spirit of s93 within the scope of his decision. Given the comparatively small volume of New Zealand statute law in force in 1888 it seems inconceivable that he would not be aware of s93. He had the vision to see what was required in New Zealand, and provides an early example of a judge reasoning a solution rather than rigidly applying common law when common law does not fit.[93] His judgment is surely in keeping with the objectives of the early surveyors who laid out the first publicly owned water margins using roads as the best of the mapping tools available to them.

This interpretation of the law stood until 1906 when in *Attorney-General and Southland County Council v Miller* (1906) 26 NZLR 348 on similar facts the Supreme Court[94] held that where a public road runs along the edge of a river, the owner of land abutting on such road is under no obligation, if the land on which the road is

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[92] The former Supreme Court, now the High Court.

[93] Many year later in an unreported decision, *MacDougalls Transport Ltd v Southland Catchment Board,* Somers J alluded to the problem:

> Undoubtedly the common law rules about watercourses form part of our law. But they are rules which developed in a different physical climate, which were formulated centuries ago and whose object was to regulate the lives of men settled along the banks of rivers and streams. And such rules cannot automatically be applied to some of the circumstances of New Zealand which are wholly different. Rivers such as the great South Island watersheds had no part in the formulation of the common law rules. The Courts have recognised that in cases such as *Piripi te Maari v Matthews* (1893) 12 NZLR 13, 22 and *Kingdon v Hutt River Board* (1905) 25 NZLR 145, 157-158.

[94] The former Supreme Court, now the High Court

constructed is destroyed or washed away, to give up to public use any part of his or her land to take the place of that road. If there is a public need for a replacement road and it cannot be obtained without encroaching on private property, then the new line of road must be taken under the Public Works Acts, and the owner of the land compensated.

This decision was based on an extensive discussion of the common law of England (rather than any consideration of conditions in New Zealand). It establishes in general the concept of a fixed position for roads, negating any right of road along the altered course of the river. However, the decision makes no attempt to reconcile the common law with s129 of the Public Works Act 1905 replacing the original s93, which was designed to preserve in perpetuity the legal existence of roads along the banks of rivers.

Whether this case was rightly decided obviously may be argued. However, even though the decision grievously damaged the concept of continuous water margin access, the principle that it established has stuck. Erosion of a water margin road may create a physical gap in the road. The case also established by implication a second principle that the inner limit of the road is not ambulatory. When there is a road alongside, no matter where the river may change its course the boundaries of the Crown-granted land will always remain the same. The longitudinal waterside and inner boundaries of a road which is eroded do not change with the movement of the water.

This sounds simple enough and reflects the very human desire exemplified in the profession of survey draughting to “fix” things including parcel boundaries in a land title system. However, in many cases where pegging is incomplete the location of the inner limit i.e. the landward side of the road, is dependent on the natural boundary at a particular moment in time – the time of the Crown grant. Often the task for the surveyor is a very difficult one: to locate that original natural boundary, where the grant may have been given over 100 years ago. The natural boundary may have been subject to flooding or erosion, or other effects of the ravages of time. These surveys may be extremely expensive. Along water, where a public land is reserved, it may sometimes be difficult for even the expert professional to readily know if they are standing on publicly owned land, or on the land of the adjoining owner, or in the former riverbed, or possibly on the foreshore.

Pipi te Ngahuru v The Mercer Road Board showed how the common law when read with relevant innovative statute law can, in case of need, keep pace with the nature of the society it controls, particularly in a new country. Equally, *Attorney-General and Southland County v Miller* shows how the common law can arrest the advance, or (to vary the metaphor) put back the clock. There is very little written commentary on either of the cases. When comparing the two cases in The Land Transfer Act 2nd Edition (1971), E C Adams says at page 608 that *Pipi te Ngahuru* "according to general professional opinion was wrongly decided", but he provides no reasons, nor does he discuss or mention s129 of the Public Works Act.

The only other text to address these cases, *Short's Roads and Bridges* (1907) at p31, says with unaccustomed reticence:

> It has until recently been held, under the authority of *Pipi Te Ngaharu v The Mercer Road Board*, 6, NZLR 19, that if a river washes away the bank and destroys the road thereon, the public are entitled to a road over a corresponding portion of the adjoining land, and the local body having control over the road has a right to remove any fences that obstruct such road; but by the recent case of *Attorney-General and Southland County Council v Miller* (9 GLR, 145), it appears that the public has no such right.

It is possible to distinguish the *Mercer Road Board* decision and *Miller's case*, for *Miller* was decided on authorities relating to roads which were formed and in use; *Mercer* was broadly decided to encompass roads which were in a state of nature. Although roads were extensively laid out along water from the time of the early surveys (i.e. shown as roads on the Crown grant survey plans), the least logical place to build a country road is usually immediately beside a river, a lake or the foreshore, as such sites are inherently hazardous being subject to erosion and flooding. *Mercer* recognised that much of New Zealand in 1888 was still in a state of nature including its roading, and that a considerable proportion of the roads along water would remain so.

However, since 1906, *Attorney-General and Southland County Council v Miller* has been applied both to roads which are formed and used, and to roads which remain in (or have reverted to) a state of nature, or perhaps are in pasture, or in some cases are uncared for and may be in noxious weeds. Formed roads and roads in a state of nature largely have a common legal background. In fact, however, there are some

distinctions. A territorial local authority is not bound to keep in repair roads which have never been formed and is not liable for injuries caused by defects in such roads to people who may use them: *Inhabitants of Kowai Road Board v Ashby* (1891) 9 NZLR 658; *Tuapeka County Council v Johns* (1913) 32 NZLR 618. While The Public Works Act 1981 may be the appropriate instrument to make good a gap in a formed and maintained road which is used by the public, statutory action to fill an eroded gap in a riverine road which is in a state of nature does not appear to be specifically authorised or in any event likely to be undertaken. Riparian access over unformed roads has become vulnerable to erosion, administrative inadequacy, and neglect.

The desire to fix the boundary in survey records, even when as a result of natural change the boundary no longer reflected the physical attributes of the land, must be seen in the light of the mood and temper of the time. In 1906 the Torrens system providing state-guaranteed land title in New Zealand was barely 35 years old. The new government guarantee of title extended in the minds of many people to guaranteed boundaries (although in fact it never has at any time[95]) Edwards J in *The King v Joyce* 25 NZLR (1905) 78 at 102 provides what is probably the most succinct description ever made of the New Zealand survey system:

> It must be borne in mind that in New Zealand a survey of land is not a mere measurement of land within certain boundaries, known by name or otherwise. It is a complete ascertainment of the geographical position of each allotment, starting from a fixed point, and defining each allotment by bearings, as well as by measurements and by area, so as to render the exact position of the land a matter of mathematical certainty. In addition to this, the exact boundaries are defined upon the land by pegs, so that every one who purchases land from the Crown may see with his own eyes

[95] S Rowton Simpson, *Land Law and Registration*, Cambridge University Press, 1976 – an international study – notes, at page 137:

> **The so-called "guaranteed boundary" –**
>
> Owing to the way in which boundaries are set out on the ground and surveyed under the Torrens system, they can be regarded as being of the fixed boundary category. None of the Torrens statutes, however, expressly guarantees boundaries, though the belief is widespread that the "guaranteed boundary" is an outstanding merit of the Torrens system in contrast to the loose "general boundary" of the English system. Ruoff (sometime Chief Land Registrar, London) writes: "Incidentally when, as a younger man, I was in New Zealand, I was constantly reminded, both by lawyers and by surveyors in that country, that in England HM Land Registry did not guarantee a man's boundaries. These statements startled me for the plain truth is, that of all the numerous Torrens statutes, covering many countries, which I have ever read, I have yet to find one which makes any express provision for the guaranteeing of boundaries. In particular, none of the New Zealand Acts does so, or has ever done so.

> what he is purchasing, and so he knows that he is purchasing neither more nor less than the survey indicates upon the record map and the pegs indicate upon the ground.

As good as it is, this statement is not complete. The principle that parcels are defined by fixed boundaries ("mathematical certainty") does not fully mean what it implies. Under the Torrens system, parcels by fixed boundaries mean that the geometric land boundaries have been actually surveyed and demarcated (generally pegged) on the ground. If pegs or other monuments of title are disturbed or lost, the position lost may be reinstated in accordance with the Survey Regulations. However, natural boundaries are not demarcated, but are identified on the plan to indicate a moveable position.

However appealing as the notion of guaranteed boundaries for guaranteed parcels of guaranteed title may have been to the early administrators, the truth is that the facts and description in the land titles register and the plan which supports the title do not control the parcel on the ground where the rules of evidence of the things there observed (i.e. the position of the water boundary) control the actual extent of the parcel. This principle applies to Crown-owned riverbeds where private title abuts the bed, and to privately owned riverbeds to the centre line. The principle statutorily applies to accretion to waterside roads, and at common law to other waterside public reservations, but does not apply to erosion of the water boundary of a road.[96] Perhaps it is not surprising that since *Miller* the doctrine of moveable boundaries has applied inconsistently to roads. A practice established by the Department of Lands and Survey in 1926 – that an accretion to a road was Crown land, not road – was overturned in 1965. Since 1965 should there be an accretion to a road, the road having a natural boundary will widen to the extent of the accretion, the accretion taking the same status as the road to which it attaches. The principle that an accretion takes on the legal character of the parent land is supported by common law authorities.[97] On the other hand, should the road be eroded by water, the status of

[96] "Once a road, always a road" is the maxim. A road may expand in width by accretion but if eroded, the part covered by water remains road.

[97] *Mercer v Denne* (1904) 2 Ch 534 affirmed (1905) 2 Ch 538, CA
Monashee Enterprise v British Columbia, Minister of Recreation and Conservation (1981) 28 BCLR 260; 23 LCR19 (CA)
White v Rosseau (1995) 24 OR (3d) 826, the Ontario Divisional Court held that land accreted to a municipal road allowance took on the character of a road allowance, and did not become municipal land. The court cited *Monashee Enterprises Ltd v British Columbia (Minister of Recreation & Conservation),* above with approval.

the land lost to the water will remain road: the road stays in a fixed position in accordance with the Crown grant survey of the adjoining land.

Since 1978 accretion and erosion of roads has been covered by statute, with the Local Government Amendment Act 1978 inserting a new s315 in the principal Act.[98]

Subsections (4) and (5) of s315 say:

> (4) Every accretion to any road along the bank of a river or stream or along the mean high-water mark of the sea or along the margin of any lake caused by the action of the river or stream or of the sea or lake shall form part of the road.
>
> (5) Where any road along the bank of a river or stream or along the mean high-water mark of the sea or along the margin of any lake is eroded by the action of the river or stream or of the sea or lake, the portion of road so eroded shall continue to be a road.

The new subsections may have been intended to serve administrative record-keeping in preference to a true reform of the law.[99] Historically, since *Miller* there are many inconsistencies, two long periods of different practice,[100] and the amendment to the law in 1978 may not apply retrospectively to accretions where decisions may

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[98] *The Surveyor and the Law*, 1981, The New Zealand Institute of Surveyors, at para 5.11.5A:

> The position has now been resolved in reference to the differing treatments of (1) terminal and (2) lateral accretion to a road. Previously, a laterial accretion to the soil of a highway (road or street) vested in the Crown or the appropriate municipal corporation, but did not become a public highway. But if a road or street ended at the sea shore or riverbank, any accretion to it formed part of the highway as to the normal width of that highway. For many years (since a Crown Law opinion of 1926) the Department of Lands and Survey had followed the policy of treating laterial accretions to a public road as having the status of Crown land, due to a precedent having been established. The opinion of 25.8.1926 from the Solicitor-General stated that the question seemed barren of authority, but the unreported judgment of Salmond J in Mayor, etc of Eastbourne v. O'Sullivan (Supreme Court, Wellington, 10 June 1924, No. 1923/85) was apparently not considered. A further Crown Law opinion obtained in May 1965 took the contrary view that such accretion had the status of public road. The question has now been resolved by statute.

[99] S315 (4) and (5) merely re-state in an imperfect way indicated in the text above the principle that is set out in Miller's case in respect of erosion. Although, as indicated, subsection (4) would not appear to apply to all prior accretions, this is not of much account because the common law which applied previously is to the same effect as the new subsection.

[100] For many years accretion to road was treated administratively as Crown land (curiously access along water would not then be as of right) and latterly, post 1965, accretion was treated as road thus preserving public rights.

have been made in conflict with the statute law as now amended i.e., the accreted land may have been treated as Crown Land and not as road. Nor is the amendment worded to include erosion which took place before 1978. The words "…is eroded by the action of the river etc…" are not qualified to include previous erosion. For comparison, note s172(1) of the Land Act 1948 which concludes in a clear expression: "whether such use commenced before or after the coming into force of this Act".

Roads laid out on river banks which have been wholly or partly eroded away have, in effect, been stopped by nature. Yet the law in force (s129 Public Works Act 1905) at the time of the decision in *Miller* (1906) says that no road along the banks of a river may be stopped. The legal process of stopping that this refers to is not to be confused with stopping by nature. The truth is that before *Miller*, nature and the law were in harmony. However, it is not suggested that settled principles of survey definition and riparian road practice as have been observed after *Miller* should be altered, even if the premises upon which they are founded may be questioned. Rather, this summary of the history of the law means to show why there are problems in relation to eroded roads along water.

It is a pity that Cooper J sought to find solace in the common law of England, for had he looked for consistency with s129 of the Public Works Act and further developed an indigenous solution, legislation to deal comprehensively with identified difficulties would surely have followed. Our law could have developed from a settled base. Six years earlier the Court of Appeal in *Mueller v Tapurii Coal Mines* developed an indigenous solution for Crown ownership of a specially identified navigable riverbed, and legislation to deal generally with navigable riverbeds was enacted.[101] An opportunity for future riverside certainty was lost in the decision of *Miller*.

There is in fact an historic four-way tension between (a) the legislature which in 1882 fledgingly provided in s93 of the Public Works Act for perpetual roads along rivers; (b) the court, which in 1906 failed to acknowledge that legislation and clearly did not take into account the special attributes of roads which are in a state of nature when eroded; (c) the administrators of the survey and title systems following that case who strove for certainty in title boundaries in matters which of their very nature are uncertain; and (d) the territorial local authorities in which title to these roads is now

[101] s14 Coal Mines Amendment Act 1903.

somewhat unhappily vested. Erosion is the most subtle of all boundary adjustments, for the law gradually and imperceptibly takes title away. Neither the landowner nor the recreational user should be exposed to civil or criminal contention as a result of erosion. Trespass as a result of erosion may readily be addressed, but it is part of a wider issue.

Stopping of Roads along water

The general law on stopped roads as set out in Chapter 1 of this part applies to the stopping of roads along water. However, stopped road along water is generally preserved for public access and in this respect different rules apply to waterside roads. At first, roads along rivers could not be stopped.

The statutory prohibition preventing the stopping of roads along rivers introduced by s93 of the Public Works act 1882 was to remain the law for the next 70 years.

Section 93 was re-enacted four times (in each case without amendment): first as s121 of the Public Works Act 1894, then successively as s129 of the Public Works Act 1905, s130 of the Public Works Act 1908, and s147 of the Public Works Act 1928.

The death knell for this controlling provision concerning roads was sounded by the Public Works Amendment Act 1952. Section 12 states:

> 12(1) Section one hundred and forty-seven of the principal Act is hereby amended by omitting the words “and no road along the bank of a river shall be stopped either with or without consent”.

Roads along rivers in counties which lost protected status in 1952 continued to be owned by the Crown until vested in the county councils by the Counties Amendment Act 1972. Crown ownership may have been thought to be sufficient protection for public access. Section 191F(3) of the Counties Act 1956, which was inserted by the amending the Act 1972, applying to roads vested in councils provided that where any road (or part of a road) along water is stopped or reduced, the land which was no longer road would become a public reserve for esplanade purposes vested in the Council subject to the provisions of the Reserves and Domains Act 1953.

Section 2 of the Counties Amendment Act 1977 repealed s191 F(3) of the Counties Act 1956 and substituted a new subsection (3). Under the new Subsection (3) a stopped road became a recreation reserve (rather than an esplanade reserve). With the consent of the Minister of Lands the council could waive the requirement for a recreation reserve and sell or lease the former road.

In cities and boroughs the power of the council to stop any **street** that runs along the bank of a river, or along the margin of the sea was curtailed by the Municipal Corporations Act 1900 (s212 subs 4(h)) which reads "provided that no street along the bank of a river or the margin of the sea shall be stopped". The restriction was re-enacted in s172(4)(h) of the Municipal Corporations Act 1920, then in s175(h) of the Municipal Corporations Act 1933.

The restricting subsection was omitted from the corresponding s170 of the Municipal Corporations Act 1954. However, immediate protection for public access was assured by s190(3) of the Municipal Corporations Act 1954 which provided that if a street along the bank of a river or along the margin of any lake or the sea were stopped it would become a public reserve vested in the council. It could not be used for any other purpose of public convenience or utility or disposed of without the consent of the Minister of Lands. Section 190 of the Municipal Corporations Act 1954 was to apply to waterside street stoppings until replaced by s345 of the Local Government Act 1974.

The Local Government Amendment Act 1978 which inserted a new part XX1 in the Local Government Act 1974 introduced a common standard for roads and streets each of which thereafter became "roads".

A stopped road along water under s345(3) of the Local Government Act 1974 as inserted by s2 of the Local Government Amendment Act 1978 was to be held by the council as a public reserve vested in the council. The purpose of such a reserve under the Reserves Act 1977 was to provide access to the water and to protect the environment. However, the Minister of Lands could waive this requirement and the council could then sell or lease the stopped road.

Section 345(3) of the Local Government Act 1974 was amended by s362 of the Resource Management Act 1991 and again by s226(6) of the Resource Management Amendment Act 1993 to become the current law:

345(3) Where any road or any part of a road along the mark of mean high water springs of the sea, or along the bank of any river with an average width of 3 metres or more, or the margin of any lake with an area of 8 hectares or more is stopped, there shall become vested in the council as an esplanade reserve (as defined in section 2(1) of the Resource Management Act 1991) for the purposes specified in section 229 of the Resource Management Act 1991 –

(a) A strip of land forming part of the land that ceases to be road not less than 20 metres wide along the mark of mean high water springs of the sea, or along the bank of any river or the margin of any lake (as the case may be); or

(b) The full width of the land which ceases to be road – whichever is the lesser…

(4) The obligation under subsection (3) of this section to set aside a strip of land not less than 20 metres in width as an esplanade reserve is subject to any rule included in a district plan under section 77 of the Resource Management Act 1991.

The provisions set out above relate to the stopping of a waterside road by the territorial authority in accordance with the enabling provisions described in Chapter 1 of this part.[102] Chapter 1 also refers to the powers of the Minister of Lands to stop roads under s116 of the public Works Act 1981. Section 118 of the Public Works Act 1981 as inserted by s362 of the Resource Management Act 1991 applies to stoppings of waterside roads made by the Minister and says:

118. Application of other Acts to stopped roads –

(1) Notwithstanding section 117 of this Act, where any road or any portion of a road along the mark of mean high water springs of the sea, or along the bank of any river, or the margin of any lake (as the case may be) is stopped under section 116 of this Act –

(a) Section 345 (3) of the Local Government Act 1974 comprising the road or portion of the road so stopped if that land was formerly a road vested in a local authority (including a state highway vested in a local authority):

(b) Part IVA of the Conservation Act 1987 (relating to marginal strips) shall apply to the land comprising the road or portion of the road so

[102] s342 and Schedule 10 Local Government Act 1974.

> stopped if that land was formerly a Government road or a state highway or other road vested in the Crown.
>
> (2) For the purpose of subsection (1) of this section, 'lake' and 'river' have the same meaning as in section 2 (1) of the Resource Management Act 1991."

In terms of this section if the stopped road was formerly vested in a local authority it automatically becomes an esplanade reserve (s1(a)) and if the stopped road was formerly vested in the Crown (s1(b)) it becomes a marginal strip subject to part IVA Conservation Act 1987. Access for the public is retained notwithstanding the stopping.

In respect of roads located in the public foreshore and seabed, s345(1A) as inserted by s103(1) of the Foreshore and Seabed Act 2004 states that s345 does not apply to the public foreshore and seabed. Section 15(4) of the Foreshore and Seabed Act stops unformed roads in the public foreshore and seabed which are vested in the Crown.

Section 77(3) of the Resource Management Act 1991 says:

> (3) A territorial authority may include in its district plan a rule which provides –
> (a) That esplanade reserves, required to be set aside under section 345(3) of the Local Government Act 1974, shall be of a width greater of less than 20 metres:
> (b) That section 345(3) of the Local Government Act 1974 shall not apply.

Now, the stopping of a road along water may be governed by s77 of the Resource Management Act 1991 which empowers a territorial authority in its district plan to provide that s345(3) of the Local Government Act 1974 will not apply. In that event, public access to the water may be lost when a waterside road is stopped.

The consequences of stopping a road along water differs from the stopping of an ordinary road, for the vesting of a stopped waterside road in a form suitable for public access, with the exception allowed by s77 of the Resource Management Act 1991, is made mandatory by statute.

PART C: CROWN OWNERSHIP OF RIVERBEDS

CHAPTER 1: THE INCONSISTENCIES OF THE PAST

Introduction

In 1903 the Coal-mines Amendment Act vested the beds of navigable rivers in the Crown, so that riverbeds not previously retained by the Crown should return to public ownership. Now, more than 100 years later, there is still judicial contention over the scope of that legislation. However, this legislation may be demonstrated as indicated hereafter, to be of more plain and extensive effect than judicial opinion in the past may have indicated.

Inconsistent judicial practices and a failure to maintain cohesive policy development in the 20th century have resulted in uncertain law and practice. In particular, crucial issues of riverine ownership are addressed in Part B to show how:

- ownership of riverbeds where there is no road or reserve alongside may be uncertain;
- ownership of riverbeds when roads are alongside requires clarification;
- owners of adjoining land may consider that they own to the centre line of the river, while the riverbed may in fact be owned by the Crown under the Coal Mines Act;
- the fact that the Coal Mines Act should contain provisions relating to Crown ownership of riverbeds may be explained;
- links with Canadian law and practice show that our early law was not developed in isolation;
- a minor amendment to the Trespass Act 1980 may alleviate public access problems created by erosion and uncertain ownership of riverbeds in New Zealand.

This commentary on riverbed ownership is a summary of statute law and decided case law, which is indicative of a past too often shaped by judicial and administrative interpretations based on the circumstances of the day, rather than the cohesive approach intended by the statute law. This summary reflects on the law as it is today and to shows how public access to riverbeds is compromised by law made uncertain by inconsistent interpretation.

The inconsistencies of the past are easily illustrated and show how the law is, at present, open to a more certain explanation of the statutory provisions first enacted in

1903. The time may have arrived, with the benefit of a broadly based reflection on the origin of the statute law and the vagaries of inconsistent interpretation, to consider again the literal meaning of s14 of the Coal-mines Amendment Act 1903, noting the words of Hay J in *The King v Morrison* "The language … is to my mind, plain and unambiguous …". Hay J in these words represents one end of the interpretative continuum. Most of the other case law provides various levels of complexity in interpretation. At the other end of the continuum some of the judges prefer a meaning so restricted as to make the section virtually meaningless.

Section 14 and succeeding sections in the various Coal Mines Acts form the basis of the following discussion. It will become clear that the legislators had in mind a powerful expression of Crown ownership of navigable rivers, based on an extended definition of "navigable", to encompass all navigable rivers great and small regardless of width, to ensure that the beds of all such rivers were nationalised for the benefit of the nation.

As will be illustrated, the nationalisation of water for the generation of electricity took place at the same time; the Coal-mines Amendment Act 1903 and The Water-power Act 1903 were to come into force on the same day. The vesting of navigable riverbeds in the Crown although achieved in general terms rather than for any specific purpose, when viewed in the context in which the legislation was enacted, clearly was not intended to be an inchoate vesting. The Water-power Act specifically identified its subject matter; on the other hand section 14 of the Coal-mines Amendment Act provided the certainty of Crown ownership of riverbeds for a broad range of purposes. However, a dominant objective of s14, ascertained by a reading of the Water-power Act and an understanding of the context in which that Act was enacted, is for sites for hydro-electric power stations. While it is relatively easy to point to the interpretative difficulties which have afflicted s14 for much of its statutory life, on a literal view, the scope of the section may now be seen to be quite plain. Section 14 was enacted to confirm Crown ownership of navigable riverbeds when title to the bed had never been alienated by the Crown. Also, it was intended to achieve an unambiguous return to the Crown of navigable riverbed alongside alienated lands, when that riverbed had not previously been included by area and measurement in a Crown grant (i.e. had not been purchased by the adjoining grantee by a payment to the Crown).

In effect s14 may have:

(a) confirmed by declaration the ownership by the Crown of riverbeds:

i) when riverbed formed part of the demesne lands of the Crown;[103] and

ii) when ownership had previously been preserved for the Crown by the laying out of road or marginal strips reserved from sale along river boundaries;

(b) had the effect of returning navigable riverbed to the Crown in circumstances where at common law prior to 23 November 1903[104] the adjoining owner may previously have claimed ownership to the centre line;[105] and

(c) confirmed Crown ownership in special circumstances, where as in respect of the Waikato River, the river is a highway retained by the Crown.

The bed of a navigable river, except where it has been granted by the Crown, remains, and is deemed to have always been, vested in the Crown by statutory declaration under various Coal Mines Acts. Whilst the theory may be easily stated, applying the concept to waterways is another and vastly more difficult matter. The adjoining landowner may consider that they own to the centre line whereas under the statute law, dating from 1903, the bed may have vested in the Crown; the recreational user may not be sure if they are on privately owned land or Crown land.[106] A short journey through the legal jungle will prove the point.

Decisions by the Courts

A decision by the New Zealand Court of Appeal in 1900[107] indicated an indigenous approach to major waterways in New Zealand. The court held that the bed of the Waikato River remained in the public ownership of the Crown, being a public though non-tidal river subject to a right of passage. The Crown retained ownership of all

[103] Land which had never been alienated by the Crown.
[104] The coming into force of s14 of the Coal-mines Amendment Act 1903.
[105] Note the reference immediately above to an absence of payment for adjoining riverbed. Edwards J in the *King v Joyce* (1905) 25 NZLR 78 CA at p95 points out the practice of there being no payment by the grantee for adjoining riverbed.
[106] JAB O'Keefe, in the only modern text on Crown land in New Zealand, *The Law and Practice Relating to Crown Land in New Zealand*, 1967, Butterworths, Wellington, says pointedly at p266, "The law in New Zealand as to ownership of riverbeds is indeterminate".
[107] *Mueller v Taupiri Coal Mines Ltd* (1900) 20 NZLR 89.

minerals under the bed. The headnote to *Mueller v The Taupiri Coal Mines Limited* summarises the decision:

> The presumption that a grant of land described as bounded by a river passes the bed of the river ad medium filum aquae is rebutted in the case of a grant from the Crown by the fact that the river is a public navigable (though non-tidal) river, subject to a public right of passage, the Crown, as trustee for the public having an interest in the bed remaining public property, and the presumed intention to pass the bed being therefore negatived. The fact that the grant is a military grant, made under an Act passed for the purpose of confiscating Native land and making military settlements thereon, and that the river is the only practicable highway for military and other purposes, indicates that the Legislature, and therefore the Crown, in making the grant, had no intention that the bed of the river should be granted. So held by Williams, Edwards, Conolly, and Martin, JJ. (Stout, CJ, dissentiente).

Hay J in *The King v Morison* (1950) NZLR 247, 258-260 in discussing the effect of Mueller on navigable rivers pointed out that although the Waikato River was a public highway it does not follow that all navigable rivers are public highways.

The legislature decided by enacting s14 of the Coal-mines Amendment Act 1903 to codify and extend the effect of *Mueller* to apply generally to all navigable rivers. Section 14 stated:

> 14 (1) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown, and without limiting in any way the rights of the Crown thereto, all minerals, including coal, within such bed shall be the absolute property of the Crown.
>
> (2) For the purpose of this section –
>
> "Bed" means the space of land which the waters of the river cover at its fullest flow without overflowing its banks.
>
> "Navigable river" means a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public for the purpose of navigation by boats, barges, punts, or rafts; but nothing herein shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers.

The later enactments were the Coal-mines Act 1905, s3; the Coal-mines Act 1908 s3; the Coal-mines Act 1925, s206; and the Coal Mines Act 1979, s261, which was repealed by the Crown Minerals Act 1991 (s120(1) and First Schedule). But the repeal does not affect the Crown's title to land (that is, to the beds of navigable rivers affected) under s261, which continues by s354(1) of the Resource Management Act 1991. Under s261(1) of the Coal Mines Act 1979 "bed" means the space of land which the waters of the river cover at its fullest flow without overflowing its banks, and to be "navigable" the river must be of sufficient width and depth (whether at all times or not) to be used for the purposes of navigation by boats, barges, punts or rafts. (The definition of "navigable" differed somewhat from that in the Acts of 1903, 1905, and 1908; but the difference has been said to be immaterial: *Attorney-General ex rel Hutt River Board v Leighton* [1955] NZLR 750 (SC and CA) at 788 per FB Adams J).

Adams J said:

> This enactment first appeared as s14 of the Coal-mines Act Amendment Act 1903, re-enacted unchanged in s3 of the Coal-mines Act 1905, and in s3 of the Coal-mines Act 1908. In those three statutes the wording was as above, except for the definition of "navigable river," which appeared therein in the following form:
>
> "Navigable river" means a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public for the purpose of navigation by boats, barges, punts or rafts.
>
> It will be seen that "continuously or periodically" has now become "whether at all times so or not" and the reference to use by "residents … on its banks," as well as by "the public", has disappeared. But, in regard to user, the words that remain are perfectly general, and on their face, would apply to residents on the banks and to all other persons whomsoever. It is difficult to see any practical difference between the two formulae, and it is unlikely that, in a section of this kind, a change of meaning was intended. I suspect that the draftsman of the Coal-mines Act 1925, was merely saving words and aiming at simplification without change of meaning, and intended neither to narrow nor to enlarge the scope of the section. To narrow it might be abandonment pro tanto of lands theretofore vested in the Crown, while to enlarge it might be an encroachment upon titles previously vested in subjects. An alteration of wording does not necessarily imply a change of meaning: Maxwell on Interpretation of Statutes, 9th Ed, 326, and Craies on Statute Law, 5th Ed, 135."

Section 261 of the Coal Mines Act 1979, the latest re-enactment of s14 reads:

> 261. Right of Crown to bed of navigable river – (1) For the purpose of this section –
>
> "Bed" means the space of land which the waters of the river cover at its fullest flow without overflowing its banks:
>
> "Navigable river" means a river of sufficient width and depth (whether at all times so or not) to be used for the purpose of navigation by boats, barges, punts, or rafts.
>
> (2) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown; and, without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown.
>
> (3) Nothing in this section shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers.

In 1901 a case on navigability on non-tidal rivers was reported in England (*Attorney-General v Simpson* (1901) 2Ch 671) and there seems no doubt that the draftsman of s14 (as first enacted) drew on the English case as well as *Mueller's* case. The relevant issues decided by the English case are:

- proof of a public right of navigation in a non-tidal river depends on proof of historical use;
- it is not enough to show that it is a large river which could have been used for navigation.

Both of these elements of the common law are overturned by s14. In New Zealand after the enactment of s14 a non-tidal river to be navigable merely had to be susceptible; that is:

- of sufficient width and depth to be of actual or future use; and
- not necessarily always available for the use of craft when flow is diminished.
- The specified craft (boats, barges, punts or rafts) cover all craft available in 1903 – in other words, any craft which then floated – and arguably may cover any craft which is capable of navigation today.

The three principles set out above may be directly extracted from the statute and clearly stand apart when considered in the light of *Attorney-General v Simpson*. *AG v Simpson* decided that at common law whether a non-tidal river is navigable or not depends, not on the question of the possibility of navigation, but on the fact of navigation. However, with the exception of FB Adams J who gives extensive but not complete support, and Hay J, the judges have not accepted the simplicity of the tripartite proposition. Instead they have preferred to be guided by the complexity of English common law, omitting, however, reference to *Attorney-General v Simpson* which is demonstrably the key to s14.[108]

Section 14 is an amalgam and extension of the principles enunciated in *Mueller's* case and a robust overturning of the common law as set out in *Attorney-General v Simpson*. Whilst in matters of judicial interpretation the section has been treated as not being free from doubt, when viewed from the perspective here suggested, s14 may in fact be clearer in intent and greatly wider in scope, affecting many more rivers than judicial opinion so far may have indicated. *Mueller's* case created New Zealand common law – judge-made law. *Mueller's* case recognises in New Zealand that the presumption that a Crown grant of land bounded by a river passes the bed of the river "ad medium filum aquae" (to the centre line of the water) may be rebutted (in the circumstances of the case) by the fact that a river is a public navigable (though non-tidal) river.

That is not the case in England, where the common law admits that any non-tidal river owned to the centre line may through historic use bear a right of navigation for the public. Since *Mueller* the New Zealand courts have acknowledged that at any time after the Crown grant the court may consider evidence of whether the presumption may be rebutted. After the decision in *Mueller*, every Crown grant incorporating a riparian boundary is conditional to the extent that the presumption may be rebutted by legal process. An express grant of the bed of a river by the Crown is, however, an unconditional grant. Section 14 is the expression of the legislature entrenching, extending and clarifying the decision in *Mueller's* case. Section 14 clearly intended to remove the narrowness of English common law which was so dependent on historical practice, an element unsuited to a new country. It is not, however, a panacea. Unless a decision of the High Court clarifies its operation in respect of an individual waterway its application is uncertain.

[108] Note, however, the exception made by Hutchison J referred to below.

Whilst the relative isolation of New Zealand around 1900 may superficially indicate a certain uniqueness in developing Crown ownership of riverbeds, Canadian experience about the same time shows that is not so. A brief reference first to the western provinces (a radical solution) and then to Ontario (a solution similar to ours) will demonstrate the manner in which the problem was addressed in four of the Canadian provinces at about the same time as in New Zealand. Survey Law in Canada (Canadian Council of Land Surveyors) 1989, Carswell states at page 230:

> In Alberta the question of ownership of the bed is effectually resolved by the Public Lands Act 1980, navigability of the waters is not a criterion.
>
> 3. (1) Subject to subsection (2), the title to the beds and shores of all rivers, streams, watercourses, lakes and other bodies of water is hereby declared to be vested in the Crown in right of Alberta and no grant or certificate of title made or issued before or after the commencement of this Act shall be construed to convey title to those beds or shores. [Subjection 2 provides for certain exceptions.]
>
> These statutory provisions, with the date of June 18, 1931 for Alberta and July 15, 1930 and April 1, 1931, for the similar provisions for Manitoba and Saskatchewan respectively, provide continuity with the earlier federal enactment, the North-west Irrigation Act, originally passed in 1894; where the Act applied the bed of the waters would not pass with the grant.
>
> The prairie provinces laws are statutory and generally exclude the continued operation of the common law principle of entitlement to the land under any water, except where a judicial interpretation of a grant might rule otherwise. In Ontario the law on this matter remains the common law except for the statutory provision that waterways that are navigable, in fact, are excluded from the title.

Litigation is not required in the western provinces to establish Crown ownership – simplicity is achieved by radical expropriation despite Canadian property law being very similar to that of New Zealand, at least in essential elements. Ontario in 1911 enacted legislation weighted towards a navigability test. To make the statute workable, six substantive amendments and a number of re-enactments were required over the next 50 years. The Ontario legislation is set out as Appendix 18.

The Canadian solutions are given to illustrate how difficult it is technically and politically to achieve a title-based solution. Either the legislature has to follow the Shakespearian prescript and be "bold, brave and resolute" as in the western provinces, or if a softer solution is preferred, be prepared to grapple with the matter in ongoing legislation. In New Zealand, our solution did not exclude the judiciary like the western provinces, or rely upon an active legislature like Ontario. Although s14 as re-enacted in subsequent legislation is in some immaterial respects rephrased, there are no substantive amendments to it since 1903.

In New Zealand the judges have held varying interpretations of s14 and succeeding sections so that uncertainty of the effect of the section proceeds from two perspectives:

- rivers may not be authoritatively identified as having Crown-owned riverbeds except by action in the High or superior courts (this inherent in s14);
- the outcome of court action is uncertain.

One judge has said that the meaning of the section is plain and unambiguous.[109]

Two judges have said that the relevant navigability should be based on commercial activity, thereby limiting the scope of Crown ownership to very large rivers.[110]

One judge has said that navigability and use as a highway go together.[111]

Two judges have said that the emphasis ought not to be on "navigation" but on the craft which the section mentions so that if those craft may negotiate a river then that is navigation by these craft.[112]

One judge has said that the grant of a riverbed must be express or by necessary implication to avoid the statutory declaration of Crown ownership;[113] two judges have disagreed.[114]

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[109] Hay J in the *King v Morison* (SC)
[110] Hutchison J in *Leighton's Case* (SC); Fair J in *Leighton's Case*
[111] Hay J in the *King v Morison* (SC)
[112] F B Adams J in *Leighton's Case* (CA); Stanton J in *Leighton's Case* (CA)
[113] Fair J in *Leighton's Case* (CA)
[114] F B Adams J in *Leighton's Case* (CA); Savage J in *Tait-Jamieson's Case* (HC)

One judge has said that a confiscation is effected by the section.[115]

Two judges have said that s261 is not a statutory rebuttal of the common law rule of a presumption of ownership to the middle line making the section of nugatory effect.[116]

Other judges disagree; and so on. A closer consideration of judicial opinion is instructive.

Given the steady reference in New Zealand to the common law as a fountainhead of riverine authority, it is curious that there is only one reference to *Attorney-General v Simpson* in the New Zealand cases on navigability and Crown ownership of riverbeds. This is by Hutchison J in the court of first instance in *Attorney-General ex relatione Hutt River Board v Leighton* (1955) NZLR 750 at page 754:

> The English authorities dealing with navigation or navigable rivers do not, in general, assist in interpreting the phrase "for the purpose of navigation" in the section, because of the common-law definition of navigable rivers, which restricts those to tidal rivers. A right of navigation in a non-tidal river may, however, be obtained by user. In *Attorney-General v Simpson* ([1901] 2 Ch 671), where it was sought to establish a public right of navigation on a non-tidal river, Farwell, J, at first instance, said: "The first issue which I have to determine is, whether the river is and has been from the earliest times, or, at any rate, a time anterior to the grant of the patent rights, a public navigable river. Now, the question whether a non-tidal river is navigable or not depends, not on the question of possibility of navigation, but on the proof of the fact of navigation. If the fact be proved, then the channel of river is the King's highway, and as such is open to the free passage of all the subjects of the Crown:". While the judgement of Farwell, J, was varied on appeal, it was, so far as this issue was concerned, upheld.

Hutchison J does not however draw attention to greatly extended definition of navigability introduced by s14 in contrast to *Simpson* and rather prefers a narrow meaning. After an examination of English and American authorities Hutchison J stated at page 755:

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[115] Fair J in *Leighton's Case*
[116] F B Adams J in *Leighton's Case* (CA); Savage J in *Tait-Jamieson's Case* (HC)

> My opinion is that the words "for the purpose of navigation" in the definition in s206 of the Coal-mines Act 1925, mean for economic purposes, such as the transport of goods for the purposes of commerce, agriculture, and the like. As a matter of interest, this meaning is, I think, consistent with the use of the phrase in the original section (s14 (2)) of the Coal-mines Act Amendment Act 1903: "Susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public."
>
> If the right of navigation contemplated by the definition in s206 is a public one, it is, in my view, for such purposes as a public highway is normally used for on land, which would include the transport of goods for the purposes mentioned. If, on the other hand, the right so contemplated is confined to the riparian residents and is, consequently, a right of way (*Orr Ewing v Colquhoun*, (1877) 2 App Cas 839), it is still, in my view, a right of way for the like purposes. I think that this view receives some support from the choice that the definition makes of craft by which navigability is to be tested. Boats are of various kinds, and for various purposes, but barges and punts are primarily goods-carrying vessels, while rafts, if not rafts of logs being floated to a mill, seem to me also to be goods-carriers.

When Leighton's case moved to the Court of Appeal further differences in interpretation were to feature.

F B Adams J did not agree with Hutchison J, the trial Judge's interpretation of s206. At page 788, Adams J said:

> To my mind, the emphasis rests not so much on the word "navigation" as on the words "by boats, barges, punts or rafts." The envisaged purpose is "navigation by boats, barges punts or rafts" and, wherever such craft are used for their proper purposes, there is I think, "navigation" by boats, barges, punts or rafts. There may be a problem in determining what are "boats", "barges", "punts" and "rafts" respectively; but when that problem is solved all that remains in this particular connection, is the question whether such means of passage or conveyance can be used with normal and reasonable facility. In regard to the meaning of "boats", I prefer to reserve my opinion, but, as at present advised, would not be disposed to limit the word to boats used commercially, or to depart in any other way from whatever may be the natural and ordinary meaning of the word.

Fair J said at page 768: "The evidence as to the use of the river when s14 of the Coal-mines Act Amendment Act 1903, was passed is very scanty and I agree that the Court should not decide whether this river falls within the scope of the section

unless it is essential to do so". Later on in his judgement, however, at page 770 Fair J expresses a firm view which appears to be substantially in accord with that of the judge of first instance:

> The principle of construction, which requires the limitation of general words to a scope which is amply sufficient to effect the object and the purpose of the provision, requires, in my view, a restriction of the section to rivers likely to be of real use for commercial, or economic or general purposes of transport. As I have said, it is, clearly, highly improbable that it was intended to include a shallow stream not likely in the year 1903, to be of substantial use for these purposes.

Stanton J dealt very briefly with this point, but it is reasonable to infer that he would give the section a wider construction. At page 778, he said:

> For myself, I would only say that I find the test suggested by the learned trial Judge – namely, that "for the purpose of navigation" [below page 766,1. 4] means for economic purposes such as the transport of goods – does not afford much assistance in determining whether any particular stream has the requisite width and depth, to bring it within the section. What would seem to be envisaged is such a width and depth as would be sufficient to allow the boats or other craft mentioned to pass over a sufficiently continuous length of water as to justify one in saying that the stream, or a substantial and continuous portion of it, was available for the passage of any of the craft mentioned.

A further dimension had previously been added in 1950. Hay J in *The King v Morison* (1950) NZLR 247 at 267 said:

> The language of s206 is, to my mind, plain and unambiguous as expressing an intention on the part of the Legislature that the beds of all navigable rivers are to be deemed always to have been vested beneficially in the Crown, excepting in cases where such beds have been expressly granted by the Crown. Unless that interpretation is adopted, it is difficult to see what purpose as to be served by passing the legislation at all.

However, at p259 Hay J made it clear that in his view the meaning of the phrase "for the purposes of navigation" is that the cases indicate that navigability of a river and its use as a highway are matters that go closely together. He decided that:

> The bed of the Wanganui River for such of its length as is capable of being used for navigation is vested in the Crown by virtue of s206 of Coal-mines Act 1925; excepting in those cases where such bed has been expressly granted by the Crown.

In another aspect of the interpretation of s206 of the Coal Mines Act 1925 there is a marked divergence of opinion between Fair J and F B Adams J (Leighton's case). The wording of subs (1) would suggest a retrospective effect of the section; in particular the words "and shall be deemed to have always been vested in the Crown". At page 792 F B Adams J, however, said: "This is the sort of thing one expects in a declaratory enactment; and in my opinion, the wording tells strongly against the theory that any divesting of private rights already acquired was intended."

Fair J expresses an opinion in sharp conflict to this. He was certain that the effect of the section was confiscatory (at p768, 769). At page 770, he said:

> But F B Adams J, in his judgment, gives the widest possible meaning to the exception in the opening words of subs (1) of s206 of the Coal-mines Act 1925. The effect of this is so to limit the operation of the enacting words of subs (1) as to render it (as indeed the learned Judge frankly recognises) practically nugatory.

And at page 772 Fair J continued:

> In my view, the only way in which the attainment of the object of the section according to "its true intent, meaning and spirit" (Acts Interpretation Act 1924, s5(j)) can be achieved is by construing the word "granted" in the opening words as meaning "expressly or by necessary implication granted", and by construing the general words of the section as including within its terms, the ownership of beds of navigable rivers which are vested in the owner by implication as the result of a general rule of law applicable to the grants of land shown as bordering on a river.

Stanton J does not express an opinion on this point but Hay J in *The King v Morison* [1950] NZLR 247, 267, expresses an opinion similar to that of Fair J.

In the most recent case, *Tait-Jamieson v G C Smith Metal Contractors Ltd* (1984) 2 NZLR 513, Savage J preferred to follow the dissenting view of FB Adams J in *Leighton's* case and the headnote for *Tait-Jamieson* summarises his decision concerning the Manawatu River:

> When land bounded by a non-tidal river is granted by the Crown the presumption that the boundary of the land extends to the middle line of the river applies unless rebutted either by the terms of the grant or by the circumstances of the particular case. Section 261 is not a statutory rebuttal of the presumption ad medium filum. In this case the presumption had not been rebutted. Further, it has not been shown that the river was navigable. Consequently, the presumption applied and the plaintiffs were the owners of the bed of the river ad medium filum.

Savage J referred to the conflicting views expressed in *Attorney-General ex rel Hutt River Board v Leighton*. In the Court of Appeal, Fair J had interpreted "granted" as meaning "expressly or by necessary implication granted". The consequence of this was to bring within Crown ownership the beds of all navigable rivers that would otherwise have passed to grantees under the presumption of ownership to the centre line. F B Adams J disagreed and concluded that:

> wherever there is a Crown grant to which the presumption applies, the portion of the bed ad medium filum has, in the words of [the section], been "granted by the Crown"; and it has been so granted as fully and truly as the other lands comprised in the grant; any alternative construction would … produce an unjust and almost cynically arbitrary result.

Uncertainty concerning the ownership of riverbeds continues to be formally expressed in legal commentaries. In *The Laws of New Zealand* (Vol 30, Butterworths, 1997) at p74[117] the effect of s261 is considered:

> For a grant of the bed to come within the exception to the statutory vesting, it is uncertain whether the grant must be made expressly or by necessary implication, or whether in a grant of riparian land the middle line presumption applies so that half of the bed is included. The former interpretation is thought be correct.

An express grant of a riverbed or part riverbed would describe the bed in some way by reference to a plan of survey so that title could be issued for it. A grant by "necessary implication" poses some descriptive difficulty[118] but could perhaps extend

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[117] *The Laws of New Zealand* is a commentary (30 plus volumes) which when completed should cover all branches of New Zealand law. It is being compiled under the supervision of distinguished judges and former judges of the Court of Appeal, and High Court, and distinguished academic lawyers. The quote above is from Professor F M Brookfield.

[118] This is a "judicial" phase which does not fit particularly well with our system of land titles in which title cannot issue for an undefined interest: s65(2) Land Transfer Act 1952.

to a Crown grant of land bounded by a river where the grant included by description the portion of riverbed alongside. At best, the phrase is not particularly helpful.

On the view of F B Adams J (*Leighton*) and Savage J (*Tait-Jamieson*), despite s261 of the Coal Mines Act 1979 which is said to vest the bed of navigable rivers in the Crown, a Crown grant of land adjoining a navigable river will carry with it a common law title to half of the adjoining bed, or the whole of the bed if the river intersects the land.

On the alternative view expounded by Fair J in particular, s261 modifies the common law so that in the absence of an express grant of the bed (or a grant by necessary implication) as outlined above, the bed of any such navigable river is vested in the Crown. *The Laws of New Zealand* suggests that the alternative view is correct. If the alternative is not accepted s261 becomes virtually meaningless.

The layman must surely be puzzled as to why laws dealing with the ownership of riverbeds should be so complex. A decision of the High Court is required to authoritatively determine whether a riverbed is Crown-owned or privately owned. The Canadian experience at the turn of the 19th century is better documented than that of New Zealand. *The Legal Aspects of Surveying Water Boundaries* at p174 puts the issues which underpin legislation in Ontario and New Zealand in sharp focus:

> It might have been better if "navigable" had never been used for the [Ontario Act]; the capability for navigation is merely a test for what the Crown really wanted, which was control of many waterways for clear title needed for the siting and construction of hydro-electric power dams.

Public access except for navigation on large rivers apparently was not a critical issue when legislation to vest riverbeds in Crown was enacted in Ontario. Nor was public access the prime factor when the Coal-mines Amendment Act 1903 was enacted in New Zealand. Navigation, in the context of s14 primarily is a test for Crown ownership of the bed. The capacity for navigation takes greater prominence than the fact of navigation.[119] The legislation gave the Crown the capacity to establish ownership of a riverbed by an action in the court on grounds which would not be available at common law.

[119] This is a reversal of English common law.

CHAPTER 2: THE CANADIAN - NEW ZEALAND APPROACH

The Canadian precedent

In the latter years of the 19th century a series of actions was fought in the courts of Canada over matters similar to those which came before the New Zealand Court of Appeal in Mueller's case in 1900. In Canada, however, unlike New Zealand, there was a more open disclosure of new social and economic goals. A brief summary of the turmoil in Canada, followed by a description of the legislative response in securing the position in New Zealand, may surprise the layman and lawyer alike.[120]

Not only does the Canadian experience mirror some of the reasoning which was applied by the Court of Appeal in Mueller's case, but it also places Crown ownership of riverbeds in perspective in the early part of the 20th century. At the time that legislation confirming Crown ownership of riverbeds was enacted, the driving force was the energy that rivers were soon to provide. The age of hydro-electric power had arrived.

In 1878 the Province of Ontario had enacted An Act Respecting Water Powers. The following account by Jamie Benidickson is informative.[121]

> The application of the Water Powers Act to certain Ontario rivers depended upon the nature of the presumption regarding ownership of the beds of navigable rivers where

[120] Although no documentation of the Canadian–New Zealand connection at the end of the 19th century has been discovered, there are very strong indications of a cross fertilisation of ideas. For example s110 of the Land Act 1892 (NZ) providing for Crown-owned strips along rivers was preceded by similar legislation in Canada. –

In New Brunswick, An Act to provide for the Survey, Reservation and Protection of Lumber Lands 1884 was made applicable to grants of lands adjacent to lakes as well as non-tidal rivers. Section 4 stated:

> In all Grants hereafter to be made of Crown Lands adjacent to the following Rivers and Streams [here followed a list of many of the rivers of the Province] and all such other rivers, lakes and streams as the Governor in Council may hereafter declare by Proclamation published in the Royal Gazette, – there shall be reserved to the Crown a strip or portion of land, four rods in width from the banks of the streams, or lakes on each side thereof, and the riparian ownership of the said stream shall remain wholly vested in the Crown provided always, that the owner or occupier of any lot abutting upon said strip of land shall have a right of way across the same to and from the said river or stream.

[121] J Benidickson, "Private Rights and Public Purposes in the Lakes, Rivers, and Streams of Ontario 1870-1930" in D H Flaherty, ed., *Essays in the History of Canadian Law*, vol. 2, Toronto: Osgoode Society, 1983 at p390-393.

> shoreline property had been granted by the Crown. Control of a number of major hydro-electric power sites in the north depended upon determining whether the Crown was presumed to have granted or retained ownership of the stream beds when granting shoreline properties. In Keewatin Power Company and Hudson's Bay Company v Town of Kenora (1906), the issue was tested in a dispute involving the Winnipeg River.

From the time of the decision in *Dixson v Snetsinger* in 1872, to 1908, a number of decisions were made in Ontario about title to land under water, navigability, and ownership of riverbeds. These were considered by Justice Anglin in the court of first instance in *Keewatin Power Company v Kenora (Town*); *Hudson's Bay Co. v Kenora (Town)* (1906).[122] Justice Anglin referred to the opinion of Sir Henry Strong, Chief Justice of Canada, in Provincial Fisheries, Re (1895):[123]

> Assuming that the Upper Canada cases … of Parker v Elliott, 1 CP 470; *The Queen v Meyers*, CP 305; *The Queen v Sharp*, 5 PR 140, and *Dixson v Snetsinger*, 23 CP 235, were well decided, as I hold they were, the soil of all non-tidal navigable rivers, so far as it has not been expressly granted by the Crown, was, at the date of confederation, vested in the provinces.

Anglin J, in Kenora, elaborated with the following points:

> Finally, in Re Provincial Fisheries …at page 528, Strong CJ, says: "It is said that the common law of England applies to new settled colonies only so far as it is adapted to the circumstances and requirements of the colonists. I cannot bring myself to think, this being the condition on which the law of England applies in settled colonies, that we are required, in the case of ceded colonies which have adopted the law as the rule of decision, to apply it in a manner which would be entirely unsuitable to the circumstances and conditions of the people."
>
> Assuming that doctrines of the English common law wholly unsuited to our conditions should be altogether rejected and other doctrines of the same law applied only so far as they appear to be reasonably adapted to those conditions, in determining to what non-tidal navigable waters in Ontario the English ad medium rule is not reasonably applicable, our courts would encounter many difficult problems for

[122] (1906) 13 OLR 237 (HC) varied (1908) 16 OLR 184 (CA)
[123] (1895) 26 SCR 444

> the solution of which it would seem scarcely possible to prescribe an immutable standard.

Earlier, Anglin J stated:

> The weight of judicial opinion of authority in this Province distinctly supports the view that the soil of our rivers navigable in fact is presumed to remain in the Crown unless expressly granted.

The opinion of Anglin J would equate with the opinion of the majority (4/1) of our Court of Appeal in *Mueller's* case.

However, Anglin J's decision was appealed in 1908 and the judges of the Court of Appeal held that the 1792 enactment of the legislature of Upper Canada adopted the laws of England and that the common law of England must control the decision. Chief Justice Moss said:

> In my opinion, the rule of the common law as to the presumption of title in the beds of the streams, whether navigable or non-navigable, still prevails in this Province, and is to be applied in the first instance. Whether there exist circumstances or conditions sufficient to repel the presumption is a question to be dealt with in the particular case.[124]

Meredith JA expressed his view on the real issue that was being tested:

> But it is said that the natural conditions of this country are such as to render the rule quite inapplicable to navigable non-tidal waters here. That I quite deny.
>
> This contest is not in the interests of navigation, but is really wholly for private purposes and in private interests; that is to say, it is, in truth, but to ascertain who is entitled to the price of the bed of the river which the defendants are acquiring for the purposes of a private dam, a dam which will most effectually stop any such navigation as there might in a state of nature have been where it is to be, and would be a public nuisance if the place were naturally navigable.

[124] This is substantially the view taken by Stout CJ in *Mueller's case*, his being the dissenting opinion.

There were no further appeals, but three years later in 1911, with important power developments on the St Lawrence River in contemplation, the legislature reversed the result of the *Kenora* case (see Bed of Navigable Waters Act SO 1911, Appendix 18) enacting provisions comparable to s14 of the Coal-mines Amendment Act.

The real issue was whether the beds of larger rivers should be publicly owned to protect navigation if that were appropriate for large rivers, or publicly owned for the purposes of hydro-electric schemes to generate publicly owned electricity. The essential issue was energy.

The New Zealand solution

In New Zealand, the first river harnessed for the generation of electricity for municipal supply to a major city (Dunedin) was the Waipori River. Work on the power scheme began in 1900.[125] The issue of Crown versus private ownership of riverbeds had reason to be alive in New Zealand as it was in Canada. The Coal-mines Amendment Act as described below embodies the principle decided in *Mueller*, indicating an intention on the part of the legislature to put in place a broadly-based statute dealing with the ownership of river beds. Ownership of the beds of rivers was one part of the equation – the use of water for the generation of electricity was addressed by parliament in a Water-power Bill which was before the House at the same time.

When the Coal-mines Amendment Act received its second reading on 12 November 1903, Mr McGowan, Minister for Mines moved that a new clause be inserted:

> It is hereby declared that all coal and lignite under any river exceeding 33 feet in width is vested in the Crown.

Mr Massey moved to insert the words “subject to existing rights” after “that”. At that point a very conservative approach to Mueller’s case appeared intended. Crown ownership of coal under river beds was not provided for in the Bill as originally introduced.

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[125] A water right was granted to the Waipori Falls Electric Power Company Limited on 7 May 1900 to divert water out of the Waipori River. Eight further licences were granted for additional water and the erection of a power house between 22 July 1901 and 27 April 1903. In 1904 The Waipori Falls Electrical Power Act provided for the reticulation of electricity in the City of Dunedin and surrounding boroughs and counties. The Act also directed that the entire undertaking of the company should forthwith be assigned to the Dunedin City Council.

On 17 November, some five days later, the Premier, Mr Seddon, moved a new clause 14 to replace Mr McGowan's clause. Mr Seddon's new clause 14 was accepted without discussion. The Bill received its third reading and clause 14 became s14 of the Act to read:

> 14 (1) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown, and without limiting in any way the rights of the Crown thereto, all minerals, including coal, within such bed shall be the absolute property of the Crown.
>
> (2) For the purpose of this section –
>
> "Bed" means the space of land which the waters of the river cover at its fullest flow without overflowing its banks.
>
> "Navigable river" means a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public for the purpose of navigation by boats, barges, punts, or rafts; but nothing herein shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers.

In the view of this commentator s14, despite judicial reluctance to give it full effect, is in many respects astutely drafted if considered in the light of the common law it was designed to alter and overcome. It is almost unthinkable that so complex a piece of law so carefully drawn would have been drafted in less than five days after the first proposed amendment. The Department of Mines dealing with coal mining at that time would have been the general agency for energy. Placing a provision which (among other matters) would preserve for the Crown, the sites of power stations and incidental ownership rights for the future generation of hydro-electric power, a new national energy resource, in the prime statute dealing with coal, then the main form of energy in New Zealand, has a certain, if strained, logic about it.

The link between Crown ownership of riverbeds and the generation of hydro-electric power is made more explicit by the enactment at the same time of the Water-power Act 1903. This Act reserved to the Crown exclusive rights to generate electricity by water power. The Water-power Act is set out as Appendix 19. The Water-power Act and the Coal-mines Amendment Act came into force on 23 November 1903 to apply

simultaneously to water and to riverbeds. The Water-power Bill was controversial and generated a great deal of discussion in the House. Clause 14 of the Coal-mines Amendment Bill, which was more far-reaching, slipped through virtually unnoticed.

Earlier experience in Canada supplies an explanation of the connection between the Water-power Act and s14 of the Coal-mines amendment Act. Benidickson's account of the legislation in Ontario is reiterated:

> The application of the Water-powers Act to certain Ontario rivers depended upon the nature of the presumption regarding ownership of the beds of navigable rivers where shoreline property had been granted by the Crown. Control of a number of major hydro-electric power sites in the north depended upon determining whether the Crown was presumed to have granted or retained ownership of the stream beds when granting shoreline properties.

On that analysis (which undoubtedly is correct) each of the New Zealand Acts is ineffective for the purposes of providing for state-controlled hydro-electric power generation without the existence of the other statute. While s14 may stand alone, because it vests riverbeds in the Crown and a broad meaning may be attributed, the Water-power Act for practical purposes would be a nullity without s14 as a companion. In fact, the purpose of the twin enactments in nationalising resources may not be achieved if the vesting of the water and the vesting intended by s14 is not in each case, an absolute vesting in the Crown, extinguishing every interest in the bed, and, for the purposes of hydro-electric generation, every interest in the water.[126]

The riverbeds which the original s14 was primarily intended to return to the Crown would have been the subject of Crown grants of land alongside made prior to the enactment of s110 of the Land Act 1892. Also affected would be rivers intersecting land granted by the Crown prior to the enactment of s110 if not included in the grant. In either case for s14 to be operative in 1903, there would have been no roads or marginal strips reserved alongside. Roads or marginal strips along the banks would have preserved ownership of the bed for the Crown.

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[126] The intention to vest the means of generating electricity absolutely in the State had earlier been the subject of legislation. The Electrical Motive-power Act 1896 prohibited any right to generate or use electricity without the previous consent of the Governor by gazetted Order in Council. In a letter dated 26 February 1906 to S Saunders, Editor, Lyttelton Times, Premier Seddon confirmed that he had promoted the 1896 measure to provide exclusive rights for the State in all streams, rivers and lakes.

After s110 came into effect, on the sale or alienation of Crown land, marginal strips alongside would have preserved Crown ownership of the beds of all rivers having a width of 33 feet or more, i.e. 10 metres. In this respect the choice of navigability as a test in s14 rather than a specified width is noteworthy. In the first attempt to amend the Coal-mines Amendment Act (indicated above), to provide for Crown ownership of coal under rivers, width was the criterion selected. The same width as employed in s110 of the Land Act 1892 was proposed, i.e. 33 feet. On the other hand, there is a clear implication in s14 that riverbeds of less than 33 feet (10 metres), if navigable, and not the subject of a Crown grant, should return to the Crown. In 1948, 66 years after s110 was enacted, the width of rivers and streams alongside of which marginal strips were reserved on the sale of Crown land was reduced to 10 feet (3 metres).[127] Many rivers between 3 and 10 metres are navigable by boats and rafts, providing s14 and the sections which succeeded it with a wide potential application. In this respect, the provisions of s2(1) of the Water-Power Act 1903 are noteworthy:

> Subject to any rights lawfully held, the sole right to use water in lakes, falls, rivers, or streams for the purpose of generating or storing electricity or other power shall vest in His Majesty.

The section includes streams as well as rivers indicating, as suggested above, that s14 of the Coal-mines Amendment Act should apply to small navigable watercourses.

Riverbed status by Crown declaration

In the past, the Department of Lands and Survey and its successor department, the Department of Survey and Land Information, have made status declarations establishing land to be the land of the Crown.[128] In 1986 when the Department of Survey and Land Information was established, the Survey Act 1986 provided in s11 for the functions of the Surveyor-General to include by subsection:

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[127] Section 58 Land Act 1948.

[128] In respect of notations on the status of riverbeds made by the Department or Lands and Survey prior to the enactment of Survey Act 1986 JAB O'Keefe sounds a caution.

> Although this might appear to be a question of fact, it may well be open to some conjecture whether a given river may be characterised "navigable" within the meaning of s206 of the Coal Mines Act 1924. As a matter of practice, the Crown (i.e. the Survey Office) plans may or may not contain notations such as "navigable river" or "Crown land" similar to the "road to be closed" kind of notation. This cannot be anything more than a surveyor's opinion, and thus descriptive or explanatory matter, and not substantive of the legal status of the land concerned.

> (l) To investigate the status of the title to lands of the Crown as required to enable disposal, reservation, revesting, or allocation for government purposes.
>
> And by subsection:
>
> (o) To receive requests, investigate status of land, and co-ordinate proposals for relevant legislation.

These status declarations were applied in establishing the identity of the demesne lands of the Crown (i.e. land which had never been alienated by the Crown) and were extensively used by catchment authorities in respect of riverbeds.

The Cadastral Survey Act 2002 replaced the Survey Act 1986. Section 7, which prescribes the functions and duties of the Surveyor-General, no longer includes equivalent provisions to subsections (l) and (o) of the former s11. The Surveyor-General now does not certify status.

After 10 April 1990, s24F of the Conservation Act 1987 as inserted by s15 of the Conservation Law Reform Act 1990, provides that when the Crown disposes of land adjoining a non-navigable river or stream the relevant part of the bed of that river or stream shall remain owned by the Crown. Section 24 of the Conservation Act reserves marginal strips when Crown land is sold alongside any river or stream over three metres in width and so preserves Crown ownership of the bed for all larger streams or rivers whether navigable or not.

Statutory navigability

Statutorily defined navigability is at the heart of Crown ownership of riverbeds. Section 261 of the Coal Mines Act 1979 is the latest re-enactment of s14.

> **261. Right of Crown to bed of navigable river –**
>
> (1) For the purpose of this section – "Bed" means the space of land which the waters of the river cover at its fullest flow without overflowing its banks:
>
> "Navigable river" means a river of sufficient width and depth (whether at all times so or not) to be used for the purpose of navigation by boats, barges, punts, or rafts.

> (2) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown; and, without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown.
>
> (3) Nothing in this section shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers.

Section 120 of the Crown Minerals Act 1991 repealed s261, but s354 of the Resource Management Act 1991 preserved Crown title to riverbed previously vested.

> **354. Crown's existing rights to resources to continue –**
>
> (1) Without limiting the Acts Interpretation Act 1924 but subject to subsection (2), it is hereby declared that the repeal by this Act or the Crown Minerals Act 1991 of any enactment, including in particular –
>
> (a) …
>
> (b) …
>
> (c) Section 261 of the Coal Mines Act 1979,
>
> – shall not affect any right, interest, or title, to any land or water acquired, accrued, established by, or vested in, the Crown before the date on which this Act comes into force, and every such right, interest, and title shall continue after that date as if those enactments had not been repealed.

While any vesting is protected by s354, the right of the Crown to the bed is not made plain until the High Court has declared the bed to be the property of the Crown. To evidence the vesting in the Crown of the bed notwithstanding the repeal of s261, the court must have regard to the definition of "bed" and "navigable river" in s261(1). At the time of vesting, which may date to 1903 when the section was first enacted, Crown ownership of the bed is wholly dependent on "navigation" as defined in s261(1) in terms of a "navigable river". Without navigation or the capacity for navigation there is no Crown ownership in terms of s261. If there is an existing right of navigation the repeal of s261 may not affect the continued existence of that right for in terms of s354(1)(c) the right of navigation is a right established by the Crown as

the factor to determine whether the Crown has an interest of title in the bed of a river. Section 20(e) of the Acts Interpretation Act 1924 in force at the time of the repeal says:

> (e) The repeal of an Act … at any time shall not affect –
>
> (i) …
>
> (ii) …
>
> (iii) Any right, interest or title already acquired, accrued or established.

Section 17(1)(b) of the Interpretation Act 1999 (now in force) says:

> 17(1) The repeal of an enactment does not affect –
>
> (a) …
>
> (b) An existing right, interest, title, immunity or duty; …

The vesting of the bed and navigation over it are inextricably bound together and whilst the issue has not been decided by the courts, given the relevance of the interpretation acts, the better opinion would appear to be that existing rights of navigation over a vested bed would continue notwithstanding the repeal of s261.

Riverbeds bounded on both sides by road

Before Part I of the Counties Amendment Act 1972 came into force on 1 January 1973, the ownership of roads (as opposed to the control of operations on them) within counties was vested in the Crown under the Public Works Act 1928. The effect of the relevant provisions of Part I (which became ss191 and 191 A-H of the Counties Act 1956) is expressed in s191A(1) in this way:

> All roads (whether created before or after the commencement of this section) and the soil thereof and all material of which they are composed, shall by force of this section vest in fee simple in the Corporation. There shall also vest in the Corporation all materials placed or laid in any road in order to be used for the purposes there of.

The vesting included all roads whether formed and in use or in a state of nature, and all roads along rivers and streams, around lakes, or along the foreshore.

The purpose of the Amendment Act was part of a continuing process of expanding the powers of county councils to bring their powers largely into line with those long since exercised by borough and city councils under the various Municipal Corporations Acts. The Act was concerned with roads and their ownership and control, and has nothing whatever to say about waterways. A similar comment may be made in relation to Part XXI of the Local Government Act 1974 which now deals with roads under local government control.

Before 1972 there were never any doubts concerning Crown ownership of riverbeds bounded by roads. The Crown owned the riverbed because (among other reasons) it owned the roads alongside. Transferring the bounding roads to the territorial local authorities raised the question of whether the Crown had transferred ownership of the bed.

Neither the Counties Act 1956 nor Part XXI of the Local Government Act 1974 is expressed to bind the Crown, though plainly some portions of it do affect, and were intended to affect, the rights and interests of the Crown.

Nevertheless, the general provision contained in s5(k) of the Acts Interpretation Act 1924 (in force when the Counties Amendment Act 1972 was enacted) applies to this situation. It states:

> No provision or enactment in any Act shall in any manner affect the rights of Her Majesty, her heirs or successors unless it is expressly stated therein that Her Majesty should be bound thereby …

This provision runs counter to the vesting by implication of portions of Crown land (i.e. Crown-owned riverbed) in territorial local authorities by virtue of statutory ownership of adjoining roads. A sensible construction is to leave s191A(1) to the topic which it deals with expressly – that is, the vesting of roads, not riverbed. While it is a pity the legislature did not expressly deal with the ownership of these riverbeds the Crown appears to have authority as is expressed above to claim ownership and in practice does so.

Trespass (applied to riverbeds and waterside margins)

A direct entry on land in the possession of another person may be a trespass and create a right of action at common law without proof of actual damage. The right of action in the High Court which the occupier may bring in his or her name is therefore not wholly based on actual harm for the law is intended to ensure that the possession of land should be free from interference by other persons. The law provides a private way of punishing wrongful entry on land and acts as a deterrent.

The common law action for trespass is a separate civil remedy to be distinguished from Criminal Trespass under the Trespass Act 1980. Common law actions are now rarely undertaken.

A criminal offence may be committed by entering without permission on any place and, after being told to leave by the occupier, by failing or refusing to leave the property. If an occupier warns any person to stay off, that person commits a criminal offence if they wilfully return to that place within two years of the warning. The occupier can call the police to arrest, remove, and prosecute the trespasser.

A warning under the Trespass Act 1980 may be given orally or by written notice delivered to the person named or sent by post to that person's usual address. A warning to leave (under s3) need not specify the consequences of non-compliance. However, a warning to stay off (under s4) must specify the consequences of not staying off the property.

A person who enters with permission, as a licensee, may become a trespasser if they breach the terms of the licence (i.e. any conditions that the occupier might impose, for example, not to enter with dogs). An offence is then committed should there be a failure to comply with a request to leave. The alternative is to revoke the licence (i.e. advise the person of the defect in behaviour, and terminate the right to be on the land) so that the person becomes a trespasser, and then provide a warning to leave in terms of s3 of the Trespass Act. The Act provides a limited defence of necessity.

In relation to public access, prosecutrion under the Trespass Act 1980 is a far more significant issue than civil proceedings trespass at common law.[129]

[129] Professor John Smillie makes a detailed analysis on the law of trespass on land at p360 *The Law of Torts in New Zealand* (4th Ed, 2005, Brooker's)

If nothing else, it is often hard to know who owns the gravel in the old riverbed. The sources of potential uncertainty on private land may be summarised as follows:

- the effect of erosion and accretion– gaps and alterations created by nature – on reserved land along water boundaries;
- the difficulty of applying either the presumption of title to the centre line of the water, or Crown ownership of the bed;
- the administrative uncertainty of the effects of erosion, which maps and official records may not show;.
- the intense statutory protection from trespass given the Crown contrasting with uncertain rights applying to natural boundaries on private land.

Trespass along water boundaries may take place where there is no reserved land along the water boundary; where there is a gap in a reservation; when the bed of a river or stream is privately owned to the legal centre line of the water; or where a person indiscriminately accesses private land in the vicinity of or away from water. Trespass may either be at common law, where unauthorized entry is the critical element, or within the scope of the Trespass Act 1980.

Trespass over Crown land may take place in terms of s176 of the Land Act 1948 (p3 above). Although trespass extends to any lands of the Crown[130] and so includes Crown-owned riverbeds, the Commissioners of Crown Lands have always been generous in allowing access over Crown land.

In one sense natural boundaries along water are the most certain of all boundaries, for they are always observed on the ground in the position seen on the day of the observation. Uncertainty exists where there is erosion of public land along water; and also in the ever-present conflict between the presumption of ownership to the centre of the water, and Crown ownership of the bed under the Coal Mines Act.

An interesting ancillary aspect of access dealt with by Cooper J in *Attorney General v Miller* but not actually decided by him, is discussed by Short at page 45 of his 1907 text:

[130] "Lands of the Crown" as specified in s176 2(a) of the Land Act 1948 is a more comprehensive term than "Crown land" as defined in s2 of the Land Act.

> It used to be the law in England that where the road was out of repair the traveller could deviate on to the adjoining land, doing as little damage and returning as soon as possible to the road, but this is not the law now where the land is fenced off from the road; consequently any one who deviates from the road in such a case is a trespasser, and is liable to the owner of the land for damages. It is doubtful if any person has the legal right in New Zealand to go even temporarily upon private land adjoining a highway in order to pass a temporary obstruction (see *Attorney-General and Southland County Council v Miller*, 9 GLR p145).

There is early support for the contention of trespass in *Bayliss v Caroll* (1908) 27 NZLR 638. Chapman J at 642 said:

> It has sometimes been asserted that when a road becomes founderous the public may freely pass over the adjacent fields. This notion is based on a misunderstanding arising, no doubt, out of the misinterpretation of actual grants of rights of way. That no such general rule of law exists is made clear by Mr. Justice Cooper *in Attorney-General v Miller*, of the result and reasoning of which I entirely approve.

On this explanation of the law, a trespass at common law or within the scope of the Trespass Act 1980 takes place whenever an eroded gap in a waterside road is traversed without permission.

SUMMATION

In little more than 160 years an extensive body of statute law has been developed relating to a driving force at the beginning of colonial settlement – the principle that the old English law protecting landed privileges should not apply in New Zealand. The implementation of a policy of open access, was doubtless seen as a bold strategy in 1840. The problem is that while the strategy was sufficiently applied to create an outdoor ethos for New Zealand, it was not wholly applied at the time of settlement, leaving a host of residual deficiencies in access.

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 not statutorily based either in the legislation of central government, nor in the ordinances and legislation applying in specific provinces, it is not surprising that practices varied. Although the custom of providing roads along water boundaries was extensively put to good use, the practice was inconsistently applied within individual provinces, and generally across the provinces. There may be inconsistencies on the same waterway with gaps great and small in the reserved margin. There may be a road on one side of a river but not on the other. Some curious anomalies are on a large scale. For example, as early as 1860 land on the very large Wairarapa coastline was alienated without coastal roads, whereas in the 1870s roads were reserved along sloping cliff-tops on Banks Peninsula. The first example would have produced practical access if reserved land had been taken, whereas in the second, access has been reserved notwithstanding that in practice, in many places, it cannot be used.

As is explained in chapter 1 part A, Maori land (whether in freehold or as customary land) does not bear roads or other general reservations along rivers, around lakes or along the coast. That is not to say, however, that on occasions there may be exceptions to this rule.

The omissions of the provincial period continue to have an impact today, as for example, for there may be no or limited rights of access along some large rivers. Access margins over land which was freeholded without waterside reservations, are taken back when the adjoining land is subdivided, giving rise to a complex historical mix of reserves affecting rivers and streams, some lakes and the coast.

Waterside margins comprise eight general categories. Roads (1840-1892) Marginal Strips (1892 to present time)[131], Ambulatory Marginal Strips (1990 to present time), Public Reserves (including road reserves) along water (1840 to present time) make up the marginal strips which were retained by the Crown when land was alienated. Esplanade and Public Reserves (of various types) date from 1912 to the present time; Recreation Reserves (1977-79), Esplanade Strips (1991 to present time) and Maori Reservations (2002 to present time) together make up the land which is reserved as public land when land with a water boundary is subdivided. It is possible for all or more than one of these reservations to apply along part of the length of one riparian boundary, thereby creating a mix of access rights.

There is no right of passage superior to that provided by a road. The reservations set aside either by the Crown on the alienation of Crown land after 1892, or taken back by the Councils on approval of a subdivision, may provide access for the public, but not with the security of passage provided on roads by the common law.

An illustration may be provided of the capture for other purposes of land originally set aside for public access. Section 24 of the Conservation Act 1987 replaced the then existing marginal strips, including strips reserved for public access under the Land Acts, since 1892 with new conservation (ecological) values. The Conservation Law Reform Act 1990 modified this stance and provided for six conservation purposes one of which was for firm rights of public access. These purposes are stated conjunctively so that all six apply concurrently. The Resource Management Act which in 1993 was amended to provide for a more flexible means of regaining waterside margins on private land. Six conservation values are to apply to esplanade reserves. Provision for public access is included, and generally the values equate with the Conservation Act values, but are stated disjunctively, so that an esplanade reserve may be created for all, several or one of them i.e. there need be no public access.

[131] The term "marginal strips" encompasses all strips of Crown land reserved from 1892 onwards. JAB O'Keefe, then of the Law Faculty, University of Auckland and formerly an office solicitor for the Department of Lands and Survey, in "the Law and Practice Relating to Crown land in New Zealand" Butterworths, 1967 discusses Crown land reserved on sale, referring extensively to that land as "Marginal Strips". The statutory term "Marginal Strip" was introduced by the Conservation Act 1987.

Over the last 100 years or so the simple goal of providing access over reserved margins along water has become obscured in the complexity of law which is designed:

(a) to make good the deficiencies which exist when margins were not reserved when the land was first alienated by the Crown; and
(b) to introduce ecological considerations on Crown land adjoining water.

In a broad sense the general categories of waterside reservations split into three classes.

1. Unformed roads vested in the territorial local authorities.
2. Marginal strips vested in the Crown and administered by the Department of Conservation.
3. Local reserves whether vested in the Crown, the territorial local authorities or some public authority.

Unformed roads and marginal strips together make up the greater part of public reservations along water. Most of the best land was alienated by the Crown prior to 1892 when provision was first made for marginal strips. Notwithstanding the new provisions permitting a strip of Crown land to be reserved, in a number of the provinces roads continued to be reserved along water boundaries until 1913 when the Surveyor–General excluded the practice. Roads are a dominant aspect of waterside access.

Local reserves, principally esplanade reserves gained on subdivision and vested in the territorial local authorities are a class of reservation which continue to expand as land is subdivided. Reserves for many classes of public purpose may also provide public access along water.

The Crown continues to have a direct role as manager of marginal strips. There is a further role for the Crown as proprietor of river beds if the bed has never been alienated or has returned to the Crown under s14 of the Coal Mines Amendment Act 1903. In addition the Crown continues to be the guardian of unformed roads.

When title to unformed roads was transferred from the Crown to the then county councils in 1972 the vesting was stated to be in fee simple. In practice, however, the Crown retained controls which heavily qualify the title of the council. For example:

- unformed road may be resumed as Crown land;[132]
- if roads along water are stopped, the former road becomes an esplanade reserve;[133]
- roads in rural areas cannot be stopped without the consent of the Minister of Lands;[134]
- an unformed road intersecting or adjoining Crown land may be closed[135].

Section 316 of the Local Government Act 1974 is the statutory authority which currently vests roads in the council:

> **316. Property in roads** – (1) Subject to section 318 of this Act, all roads and the soil thereof, and all materials of which they are composed, shall by force of this section vest in fee simple in the council of the district in which they are situated. There shall also vest in the council all materials place or laid on any road in order to be used for the purposes thereof.

Somers J in the Court of Appeal in *Fuller v MacLeod* (1981) 1 NZLR 390, 411 points out that it is not clear that the legislature in enacting s316 and earlier equivalent provisions intended to do more than vest the fee simple of the part of the land described as road, including its soil and the materials the road is made of. He said: "It may be arguable that the Councils estate is in the nature of a stratum estate only, perhaps variable, as levels may be altered. The need to confer power to alter levels may support that."

Recently, the Privy Council expressed a view similar to that of Somers J[136]:

> There has been no argument before Their Lordships as to whether s316 effects a complete divesting of the landowner's title to the land over which the public road

[132] Section 323 Local Government Act 1974
[133] Section 345(3) Local Government Act 1974
[134] Section 342(1) Local Government Act 1974
[135] Section 43(1)(2) Land Act 1948
[136] *Man O'War Station v Auckland City Council* (Judgement No2) 2002 3NZLR 584 at P602.

> passes or whether there is only divested so much of the subsoil as is necessary to support and maintain the road. Griffith CJ in *Narracan*[137] referred to a complete divesting. [*The Chief Justice was dealing with land in Victoria and with a statute, the Local Government Act 1874, containing a similar vesting provision to that in s316*.] Their Lordships are not sure that that is right but do not find it necessary to reach a final decision on the issue. [*Part in brackets added by the author*.]

Clearly, the view of Somers J and the guarded opinion of the Privy Council are deserving of respect and consideration. The fee simple of the surface of a road still in a state of nature, or perhaps in pasture established by the occupying farmer, may not indicate a very substantial legal interest in the land which it comprises.

Although the territorial local authorities may have a limited fee simple interest in unformed roads it is clear that under the general law relating to roads that local management is the responsibility of the Council. The Crown has not specifically equipped the councils for this role and if a council wishes to enact by laws reliance must be made on statutory authority which clearly is intended to apply to formed roads. Suggestions for authority to enact bylaws tailored to unformed roads, based on precedents existing in the United Kingdom, are made in chapter 1 part B.

The early surveyors in selecting roads along water instead of mere strips of Crown land, preferred a right of passage which is as old as the common law itself. Fogarty J in *Abbott v Police* (noted in the introduction) said that the right of passage "is central to our constitutional history". Rural roading is the historical foundation of rights of access to the outdoors in New Zealand and appropriately the Crown has always been its guardian.

The Crown has in more recent times adopted the role of co-ordinator in respect of public access to the outdoors (the very thing that was absent in provincial times when most of the problems that exist today originated). It retains some extensive control (marginal strips and rural roading policy), but the regaining of access along rivers, streams and around lakes and along the coast on the subdivision of the adjoining land is placed in the hands of the territorial local authorities. The Crown now looks, however, to expand the acquisition of walking access by negotiation. Clause 11 of the Walking Access Bill states that in negotiating walking access over private land the commission may give priority to obtaining walking access:

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[137] *Shire of Narracan v Levistion* (1906) 3CLR 846 at p861.

(a) over land on the coast where there is not already walking access over the foreshore or the land adjoining the foreshore on its landward side:

(b) over land adjoining rivers or lakes where there is not already walking access over the land:

(c) to parts of the coast, rivers, or lakes to which there is not already walking access:

(d) to replace walking access that has become obstructed (for example, by being submerged beneath a body of water):

(e) over any other land that the Minister notifies to the Commission.

In the final analysis, the selection of priorities in planning a new approach to solve some of the problems which exist because of the deficiencies of the past, may matter less than the practical wisdom with which the process is adapted to local needs and the competence with which it is administered.

APPENDICIES

APPENDIX 1

Extract from Queens' Instructions of 5 December 1840

37. And whereas by the said recited charter, we have given and granted to the governor of our said colony of New Zealand for the time being, full power and authority, with the advice and consent of the Executive Council of our said colony (but subject nevertheless to such provisions as should be in that respect contained in any instructions which might from time to time be addressed to him in that behalf), by any proclamation or proclamations, to divide our said colony into districts, counties, hundreds, towns, townships, and parishes, and to appoint the limits thereof respectively, and to make and execute in our name, and on our behalf, under the public seal of our said colony, grants of waste land to us belonging within the same, to private persons for their own use and benefit, or to any persons, bodies, politic or corporate, in trust for the public. uses of our subjects there resident, or any of them; provided nevertheless, that nothing in the said charter contained shall affect or be construed to affect the rights of any aboriginal natives of the said colony to the actual - occupation or enjoyment in their own persons, or in the persons of their descendants, of any lands in the said colony then actually occupied or enjoyed by such natives. Now we do hereby authorize and require you to cause a survey to be made, in manner hereinafter mentioned, of all the lands within our said colony; and you are for this purpose from time to time to issue instructions to the surveyor-general for the time being of our said colony, and to divide and apportion the whole of the said colony into counties, each of which shall contain, as nearly as may be, 40 miles square, and to apportion each county into hundreds, of which each hundred sha1l, as nearly as may be, comprise an area of one 100 square miles, and again to sub-divide each hundred into parishes, of which each parish shall, as nearly as may be, comprize an area of 25 square miles; and you are to instruct the said surveyor-general that in making the division aforesaid of our said colony into counties, hundreds and parishes, he do have regard to all such natural divisions thereof as may be formed by rivers, streams, highlands, or otherwise; and that whenever in order to obtain a clear and well-defined natural boundary of any county, hundred, or parish, it shall be lawful and necessary to include therein a greater or a smaller quantity of land than is hereinbefore mentioned, he the said surveyor-general do make such deviations from the prescribed, dimensions of such county, hundred, or parish as may be necessary for obtaining such natural boundary, provided that no such county, hundred, or parish, shall in any case exceed or fall short of the dimensions before prescribed to the extent of more than one third part of such dimensions.

38. You are further to require the said surveyor-general from time to time to make to you reports, setting forth the progress which he has made in the before-mentioned survey of our said colony, specifying therein. the limits of each county, hundred, and parish which he has surveyed and apportioned;

and you are to require him to annex to such his written reports charts or maps of every such county, hundred, and parish.

39. And it is our pleasure that when any such report of the surveyor-general as aforesaid shall be finally approved by you, with the advice of our said Executive Council, the same shall be deposited among the public records of the said colony, and that an exact transcript thereof shall be deposited in the office of the surveyor-general of our said colony, and that another transcript thereof shall be transmitted to us through one of our Principal Secretaries of State.

40. And for the better guidance of the said surveyor-general in the execution of the duty so to be committed to him, you will, with the advice of the said Executive Council, issue to him such instructions as may from time to time become necessary.

41. And it is our further will and pleasure, and we do hereby specially authorize and empower you in our name from time to time to issue, under the public seal of our said colony, letters patent for erecting into counties, hundreds, and parishes such districts as may m manner aforesaid be selected for that purpose by the said surveyor-general, in and by any reports so to be; made by him and approved by you; and all such letters patent so to be issued by you in our name shall be enro1led among the public records of the said colony, and shall be of record; and the issuing of any such letters patent shall by you be made known to all our loving subjects within our said colony by proclamations, to be by you from time to time published for that purpose in the most usual and public manner.

42. And we do further authorize and require you, in and by any such letters patent as aforesaid, in our name and on our behalf, to grant to our loving subjects resident within any such county, hundred, or parish all such franchises, immunities, rights, and privileges whatever as, consistently with the circumstances, situation, laws, and usages of our colony of New Zealand, may be properly granted to such our loving subjects in that behalf; provided that such franchises, immunities, rights, and privileges shall, as far as the circumstances of the said colony may admit, be such as are and of right may be claimed, held, enjoyed, and exercised by our subjects inhabiting and residing in any county, hundred, or parish in that part of our United Kingdom of Great Britain and Ireland called England, and not otherwise.

43. And it is our pleasure, and we do further direct you to require and authorize the said surveyor-general further to report to you what particular lands it may be proper to reserve in each county, hundred, and parish, so to be surveyed by him as aforesaid, for public roads and other internal communications, whether by land or water, or as the sites of towns, villages churches, school-houses, or parsonage-houses, or as places for the interment of the dead, or as places for the future extension of any existing towns or villages, or as places fit to be set apart for the recreation and amusement of the inhabitants of any town or village, or for promoting the health of such inhabitants, or as the sites of quays or landing-places which it 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 convenience, utility, health, or enjoyment; and you are specially to require the sand surveyor-general to specify in his reports, and to distinguish in the charts or maps to be subjoined to those reports, such tracts, pieces, or parcels of land in each county, hundred, and parish within our said colony as may appear to him best adapted to answer ad promote the several public purposes before mentioned; 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 reserved as aforesaid, nor permit or suffer any such lands to be occupied by any private person for any private purposes.

44. And it is our will and pleasure that all the waste and uncleared lands within our said colony, belonging to and vested in us, which shall remain after making such reservations as before mentioned for the public service of our said colony of New Zealand shall hereafter be sold and disposed of at one uniform price per acre, which price it is our pleasure shall from time to time be fixed and determined by such instructions as we shall from time to time convey to you through one of our Principal Secretaries of State.

45. And we do further direct that the survey of lands in our said colony shall be carried forward with all practicable expedition, and that the land shall be divided into lots, consisting of not more than one square mile each, which said lots may be further divided into such smaller lots, being equal parts of square miles, as may hereafter be directed by us through one of our Principal Secretaries of State; provided nevertheless, and we do hereby require, that the amount of the expense, to be incurred from year to year in effecting such surveys be included in the estimate of the public expenditure of the said colony, to be annually laid before the legislature thereof, and that such expenses be a charge upon the land revenue of the current year, and be not in any year greater than one-fifth part of the estimated amount of such land revenue, and that such estimate be never exceeded in the actual expenditure for the service aforesaid during the year.

46. And we do direct that charts of all the lands surveyed as aforesaid shall be kept for public inspection in the office of our surveyor-general or deputy surveyor-general for the said colony.

47. And we do further direct that there shall be kept at the office of our said surveyor- general registers of all lands hereafter to be appropriated in the said colony, and that registers shall also be prepared at the same office, as far as may be practicable, of all lands which may have been appropriated within the said colony.

48. And it is our pleasure that such charts and registers shall be kept in such form and manner as to exhibit to all persons applying for the same full and authentic information of all appropriations of land, and all surveyed lands not appropriated.

49. And we do direct, that any person within our said colony of New Zealand, who shall pay to the treasurer or deputy-treasurer of our said colony any sum or sums of money for the purchase of lands situated in the said colony, shall be entitled to receive from such treasurer or deputy-treasurer a certificate of such payment; and on production of such certificate at the office of the surveyor-general in the said colony, every such person shall be entitled to have appropriated and granted to him or her such unappropriated land within the said colony as may be selected by him or her, the number of acres to be granted to him or her corresponding with the amount of the payment so appearing to have been made by him or her divided by the said uniform price per acre.

50. And we do direct, that no person within our said colony shall be entitled to purchase land therein except by payment made as aforesaid to the treasurer or deputy-treasurer of our said colony.

51. And we do further declare our pleasure to be, that and person within our United Kingdom, who shall pay to the agent for our said colony of New Zealand resident in London any sum or sums of money, in such amount as may from time to time be fixed by us for that purpose, for the purchase of land situate in the said colony shall be entitled to receive from such agent a certificate of such payments; and on production of such certificate to our Commissioners of Colonial Land and Emigration in this our United Kingdom, every such person shall be entitled to receive from the said Commissioners a certificate that he or she hath become the purchaser of such a number of acres within the said colony as may be selected by him or her for that purpose, the number of acres to be appropriated to every such purchaser corresponding with the amount of the payments so appearing to have been made by him or her, divided by the said uniform price of land per acre.

52. And we do further declare our pleasure to be, that on the production by any such purchasers as 1ast aforesaid of any such certificate as last aforesaid from the said Commissioners of Colonial Land and Emigration, at the office of our said surveyor of Crown lands in the said colony New Zealand, the said purchaser shall be entitled to have appropriated and granted to him or her such unappropriated lands as may be selected by him or her under the same regulations as aforesaid.

53. Provided nevertheless, and it is our will and pleasure, that all such purchases so to be made as aforesaid, whether by payments in our colony of New Zealand or in this our United Kingdom, shall be made in lots, consisting of such number of acres as shall from time to time be fixed for that purpose by us or under our authority.

54. And we do further direct that grants of all lands, so to be appropriated as aforesaid, shall with all practicable speed after the appropriation thereof, be issued under the public seal of our said colony to the purchaser thereof, and that for ensuring method and punctuality in that respect a sufficient number of such grants, with blanks for the names of the purchasers, and for the

description of the lands so to be purchased, shall be kept at the office of the surveyor-general of our said colony, all lands so to be granted as aforesaid being described in such grants with exact references to the charts and registers as
aforesaid.

55. And we do further declare our pleasure to be, that any persons by whom such purchase of land as aforesaid shall have been made within this our United Kingdom, shall be entitled either to the free conveyance to the said colony of any emigrants who may be named by them to our Commissioners of Colonial Land and Emigration for the purpose, provided such emigrants shall fall within the rules to be approved and established on our behalf by one of our Principal Secretaries of State, and that the number of such emigrants shall not exceed such proportion to the amount paid for land, as may be fixed and determined on our behalf by one of our Principal Secretaries of State, or else shall be entitled to the payment of a bounty on the introduction of such emigrants as aforesaid into our said colony, according as the one course or the other may be provided by any rules and regulations hereafter to be established in that behalf by one of our Principal Secretaries of State.

56. And we do further declare our pleasure to be that, anything hereinbefore contained to the contrary notwithstanding, no land shall be sold in any part of the said colony of New Zealand, which the said surveyor-general may report to you as proper to be reserved for any of the several public uses hereinbefore mentioned.

APPENDIX 2

Extracted from Reed and Methuen, *The New Zealand Book of Events* at p275

June 15, 1839 Letters patent were issued to expand the territory of NSW to include the area encompassing NZ, from latitude 34º South to 47º 10' South, and from longitude 166º 5' East to 179º East. Gov Gipps of NSW was appointed Governor over "any territory which is or may be acquired in sovereignty by Her Majesty … within that group of islands in the pacific Ocean commonly called New Zealand". This was the first clear expression of intent to annex NZ.

Aug 15 Capt Hobson was appointed Consul to NZ and was authorised to negotiate with the Maoris for the recognition of the Crown's authority "over the whole or parts of those islands which they may be willing to place under Her Majesty's dominion". He was also appointed Lt-Gov (subordinate to Gov Gipps) over "that part of our Territory which is or may be acquired in Sovereignty in New Zealand". Although anticipatory, this shows a clear decision to incorporate all or parts of NZ in the Empire.

Jan 14, 1840 Gov Gipps proclaimed the Letters Patent of June 15, 1839, and announced the swearing-in of Capt Hobson, who had arrived in Sydney as Lt-Gov with his appointments and instructions. This is the date chosen by NZ legislators, in the English Laws Act of 1858, as the date English law became effective in NZ. The same date was acknowledged in the Supreme Court Act 1882.

Jan 29 Capt Hobson arrived in the Bay of Islands. Hobson was now drawing full pay for both his offices (Lt-Gov and Consul).

Jan 30 Hobson landed at Kororareka where he promulgated the Letters Patent of June 15, 1839. This was the first, undeniable, exercise of Crown authority in NZ.

Feb 6 The initial signing of the Treaty of Waitangi was on this day. NZ's entry into the Empire hinged on this document as an effective legal instrument, the date of Feb 6 can only relate to those parts of Northland whose chiefs signed on that day. Some 450 other signatures – which did not cover all of NZ – were obtained over the next few months.

May 21 Possibly to forestall constitution making by the New Zealand Co at Wellington, Hobson proclaimed British sovereignty over the North Island by cession (the Treaty of Waitangi) and the South Island by discovery. (Hobson was unaware that one of his subordinates was collecting signatures to the Treaty in the South Island). This proclamation may have been beyond Hobson's authority but Britain was empowered to ratify it retrospectively.

Jun 16 Before news on Hobson's proclamation had reached Sydney, the legislative Council of NSW passed an Act to extend the laws of NSW to "Her Majesty's Dominions in the Islands of New Zealand".

Aug 7 The British Parliament passed the New South Wales Continuance Act, authorising the Crown to make into a separate colony or colonies the islands of NZ which "now are or which hereafter may be" dependencies of NSW. As London had, as yet, received no word from Hobson, this statute reveals that the Letters Patent were never more than temporary expedient; NZ had always been seen as a separate

colony. The fact that a statute was deemed necessary may indicate that the Colonial Office believed NZ to be a settled colony, not a colony acquired by a treaty.

Oct 2 Hobson's dispatches, containing his proclamations on May 21, arrived in London on Sept 28. They were approved or ratified, by their official appearance in the Gazette on Oct 2. The Crown, and the Government, recognised NZ as a British territory.

Nov 16 Acting under powers granted in the New South Wales Continuance Act of Aug 7, 1840, the Queen made the islands of NZ a separate colony. This charter effectively promoted Hobson from Lt-Gov to Gov, authorised the appointment of a Legislative Council and an Executive Council and empowered the Governor to appoint judges. These Letters patent create or "erect" NZ as a colony, separate from NSW, and inaugurate NZ as a Constitutional entity.

APPENDIX 3

New South Wales Act, 4 Vict., No. 7, Repealed

NEW SOUTH WALES ACT, 4 VICT., NO. 7, REPEALED.

No. II.

ORDINANCE to repeal within the said Colony of New Zealand a certain Act of the Governor and legislative Council of New South Wales made and passed in the fourth year of the reign of Her present Majesty and adopted under an Ordinance of the Governor and legislative Council of New Zealand for extending the Laws of New South Wales to the said Colony of New Zealand and which said Act of the Governor and Council of New South Wales is instituted *"An Act to empower the Governor of New South Wales to appoint Commissioners with certain powers to examine and report on Claims to Grants of Land in New Zealand, and also to terminate any Commission issued under the same, and to authorise the Governor of the Colony of New Zealand to appoint Commissioners with certain powers to examine and report on Claims to Grants of Land therein, and to declare all other titles except those allowed by the Crown null and void"*.

1. Be it therefore enacted and ordained by His Excellency the Governor in and over the said Colony of New Zealand with the advice and consent of the Legislative Council of the same Colony, That from and immediately after the passing of this Ordinance the said Act of the Governor and Council of New South Wales so adopted as aforesaid intituled *"An Act to empower the Governor of New South Wales to appoint Commissioners with certain powers to examine and report on Claims to Grants of Land in New Zealand,"* be and the same is hereby repealed and of no effect within the said Colony of New Zealand; and the said commission so issued by the said Governor of New South Wales under and by virtue of the powers for that purpose contained in the said Act is hereby determined and declared to be null and void, anything in the said Act in the contrary thereof notwithstanding.

2. And whereas it is expedient to remove certain doubts which have arisen in respect of titles of land in New Zealand, be it therefore declared enacted and ordained, That all unappropriated lands within the said Colony of New Zealand, subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said Colony, are and remain Crown or Domain Lands of Her Majesty, her heirs and successors, and that the sole and absolute right of pre-emption from the said aboriginal inhabitants vests in and can only be exercised by Her said Majesty, her heirs and successors, and that all titles to land

in the said Colony of New Zealand which are held or claimed by virtue of purchases or pretended purchases gifts or pretended gifts conveyances or pretended conveyances leases or pretended leases agreements or other titles, either mediately or immediately from the chiefs or other individuals or individual of the aboriginal tribes inhabiting the said Colony, and which are not or may not hereafter be allowed by Her Majesty, her heirs and successors, are and the same shall be absolutely null and void: Provided and it is hereby declared that nothing in this Ordinance contained is intended to or shall affect the title to any land in New Zealand already purchased from Her Majesty's Government or which is now held under Her Majesty.

APPENDIX 4

Despatch from Lord John Russell to Governor Hobson

No. 24.
Lord J. Russell to Govenor Hobson, 16 April 1841.

No. 24

Extract of a DESPATCH from Lord *John Russell* to Governor *Hobson*, dated Downing-street, 16 April 1841

Para 56.

I HAVE laid before the Queen the Act of the Governor of New South Wales, passed with the advice and consent of the legislative council of that colony, in the fourth year of Her Majesty's reign,. intituled, "An Act to empower the Governor of New South Wales to appoint Commissioners with certain Powers to examine and report on Claims to Grants of Land in New Zealand."

Her Majesty has been graciously pleased to approve the general provisions of that Act as well as the more particular details which it comprises. But circumstances to which it, was impossible that the legislature of New South Wales should have adverted will probably 1ender the execution of it difficult if not impossible. The separation of New Zealand from New South Wales will render obsolete and impracticable those enactments, which require the interposition of the governor of the older colony. The arrangements which I have made with the New Zealand Company will forbid the application of the Act,. in its present form, to the case of the lands to be granted to them.

To these considerations is to be added the remark, that I propose to commit these inquiries to the single commissioner appointed by Her Majesty for that purpose, and not to three joint commissioners as the Act has provided.

For these reasons it appears necessary that a new law on the subject should be proposed to the local legislature of New Zealand, to meet the various exigencies which I have pointed out, and any others which your experience may have brought to light. Subject to such variations, the Act of New South Wales may be followed as a safe and proper guide.

Her Majesty has therefore been pleased to disallow the Act passed by the governor of New South Wales with the advice of the legislative council of that colony. But as difficulties may possibly arise in obtaining from the legislature of New Zealand the necessary enactment in substitution for it, or as the immediate disallowance of the New South Wales Act may be productive of other inconveniences which at this distance it is impossible to anticipate, the Queen has been further pleased to authorize me to signify to you Her Majesty's pleasure that you do postpone the notification of Her Majesty's disallowance of the Act in question, if you should be of opinion that the disallowance of it would, on the whole, be injurious to the public service. In that case you will report to me the grounds of that opinion, and until you are in receipt of further instructions, the New South Wales Act will continue in force in New Zealand, so far as it may be capable of execution, although subject of course to any amendments which may in the interval have been made by yourself with the advice of the legislative council of New Zealand.

I have, &c.
(signed) .J. *Russell.*

Despatch from Lord John Russell to Governor Sir George Gipps.

No. *25.*
Lord J. Russell to Sir George Gipps.
16 April 1841.

No. 25

(No. 241.)
Copy of a DESPATCH from Lord *John Russell* to Governor Sir *George Gipps.*

Sir, Downing-street 16 April 1841.

I TRANSMIT to you the copy of a despatch which I have this day addressed to the governor of New Zealand, signifying to that officer Her Majesty's decision on the Act passed by yourself, with the advice and consent of the Legislative Council of New South Wales, on the 4th of August 1840, entitled," An Act to empower the Governor of New South Wales to appoint Commissioners with certain Powers to examine and report on Claims to Grants of Land in New Zealand." Until you shall be apprised by Governor Hobson of the actual notification by him at New Zealand of Her Majesty's disallowance of the Act in question you will abstain from notifying within your government that it has been so disallowed.

You will clearly understand that the advice which has been tendered to Her Majesty on this occasion has not been suggested by any disapprobation of the enactment in question, in which, indeed, you strictly followed the instructions under which you were acting. You have every claim to the acknowledgments of Her Majesty's Government for the able and zealous exertions which you made in order to promote the success of that measure, but the altered circumstances of the case, consequent on the erection of New Zealand into a distinct government, and on the other occurrences mentioned in my despatch to Governor Hobson, have dictated and appear to require some deviation from the form though not from the spirit of the measures actually pursued. .I have, however, as you will perceive, adverted to the possible misconceptions to which, from this distance from the scene of action, the confidential advisers of the Crown are unavoidably liable, and have taken what I trust may be an effectual security against the injurious consequences to which any such misconceptions might otherwise have given rise. '

I have, &c.
(signed) .J. *Russell.*

APPENDIX 5

Grant 2 Bishop Pompallier

1827.
29 December

Bay of Islands District

KORORAREKA.
John Johnston.
Boundaries.

Deeds – No. 79

Kororareka Beach (South End), Bay of Islands District

Memorandum of an assignment made and entered into this 29th day of December in the year of our Lord 1827 Witnesseth that Kivie Kivie a Chief on Kororadika in New Zealand fir a consideration already received doth make over and confirm to John Johnston now residing at Kororadika his heirs and assigns for ever a certain portion of land situated at Kororadika as aforesaid and bounded in manner following that is to say in length along the Beach at low water mark in a north and south direction (as measured by a line) of one hundred and sixty eight feet in length and drawn from a certain Jager post and passing the end of a certain saw pit to the low water mark for a distance of one hundred and eighty (180) feet: and the said land is also bounded in an east and west direction by a line drawn at right angles from the said low water mark and extending up the hill for a distance of six hundred feet: and the said land is further Bounded by the lands on the South side Mai Anga commonly called King Charley, and on this North by the lands of Wareumu commonly called King George; And the consideration, mentioned above as having been received by the said Kivie Kivie and for which he grants the above mentioned land is noted on the other side at the foot of this Agreement. In Witness whereof the sad Kivie Kivie has set his hand at Kororadika the day and year first above written.

Receipt.

Witness - (Signed) KIVIE KIVIE his x mark.

(Signed) John McLean.
John Matthew.

The above is a true copy of the deed of sale from Kivie Kivie to John Johnston.

Witness – JOHN ROBERTON.
Joseph Meyrick.
Daniel Fitzpatrick.

The price paid for the above mentioned land is 2 muskets

1842.
26 November.

Extract from Commissioner's Report

Commissioner's report.

Transfer from Turner to R. C. Mission.

The purchase of this land from the Natives and its resale and transfer by the original purchaser John Johnston to Gilbert Mair, and again from the said Gilbert Mair to Benjamin Evans Turner, having been proved in Claim No. 232;
And the said Benjamin Evans Turner having admitted and sworn to his resale and transfer of this land to the Claimant (Bishop Pompallier):
The Commissioner therefore respectfully recommends that a Grant for the above-described land should be issued to the Right Rev. the Bishop Pompallier for the Catholic Mission, his heirs and assigns for ever. Excepting 100 feet from high-water mark. EDWARD L. GODFREY,

No. 391B.

O.L.C.

Kororoika, 26th November, 1842.
Commissioner.

A True Transcript of Certified Copy of Original Deed and Extract from Commissioner's Report. H. HANSON TURTON.

Wellington, 18th December, 1879.

APPENDIX 6

Title of Ordinances and Statutes

(1841-1853)

No.		Page	Amendments, &c.	Repealed, &c.	Gazette of Confirmation by Her Majesty
1 …	Session 1, 1841 4 VICTORIA				
2	To repeal within the said Colony of New Zealand a certain Act of the Governor and Legislative Council of New South Wales made and passed in the fourth year of the reign of Her present Majesty, and adopted under an Ordinance of the Governor and legislative Council of New Zealand for extending the Laws of New South Wales to the said Colony of New Zealand, and which said Act of the Governor and Council of New South Wales is intituled "an Act to empower the "Governor of New South Wales to appoint Commissioners with certain powers to examine and report on Claims to Grants of Land in New Zealand," and also to terminate any Commission issued under the same, and to authorize the Governor of the Colony of New Zealand to appoint Commissioners with certain powers to examine and report on Claims to Grants of Land therein, and to declare all other titles except those allowed by the Crown null and void.	4	…	Repealed, so far as repugnant to No. 32, 1856	5 Sept., 1842.

No.		Page	Amendments, &c.	Repealed, &c.	Gazette of Confirmation by Her Majesty
1-13	Session 2, 1841-2. 5 VICTORIA				
14	To amend an Ordinance enacted by the Governor of New Zealand, with the advice and consent of the legislative Council thereof, Session I, No. 2.	12	…	…	Disallowed, 6 Sept., 1843.

No.		Page	Amendments, &c.	Repealed, &c.	Gazette of Confirmation by Her Majesty
1-2	Session 3, 1841-2. 7 VICTORIA				
3	To amend Ordinance Session I, No. 2.	123	…	…	

APPENDIX 7

Land Act 1877

Reserves

144. The Governor may from time to time, either by a general or particular description, and whether the same had been surveyed or not, reserve from sale temporarily, notwithstanding that the same may be then held under pastoral license, any Crown lands which in his opinion are required for any of the following purposes – viz., for docks, quays, improvement of harbours, landing places, tramways, railways, railway stations, roads, bridges, ferries, canals, or other internal communications whether by land or by water, reservoirs, aqueducts, watercourses, water-races, drains, improvement and protection of rivers, irrigation and works connected therewith, embankments, quarries, gravel-pits, sites of markets, abattoirs, public pounds, baths, washhouses, mechanics' institutes, libraries, museums, or other institutions of instruction, county or municipal buildings, court-houses, gaols, prisons, or other public buildings, sites and grounds for schools, colleges, reformatories, hospitals, asylums, and charitable institutions, or for the purposes of any agricultural or pastoral associations, or for the growth and preservation of timber, gardens, parks or domains, places for the interment of the dead, or for the health, recreation, convenience, or amusement of the people, or for the use, support, or education of aboriginal natives of the colony, or for any purpose of public defence, safety, utility, advantage, or enjoyment; or as endowments for education.

145. When any land has been temporarily reserved, notice of such reservation shall be published in the *Gazette*.

At the expiration of one month, but not later than six months, after the publication of such notice, the lands described therein (not being reserves for endowments) may be permanently reserved, and notice of such permanent reservation shall be published in the *Gazette*, and failing such permanent reservation any such temporary reservation shall be void.

Regulations

169. The Governor shall have power from time to time to make rules, regulations, and orders for the purposes hereinbefore mentioned, to alter or rescind such rules, regulations, and orders to provide for the mode by which any land or allotment shall be surveyed and boundaries adjusted, for prescribing the form of and the conditions and mode of applying for licences and leases to be issued under this Act, and the conditions upon which the same shall be issued, for imposing any reasonable charge for surveys or fee for any document issued under the authority of this Act, for providing for all proceedings, forms of leases, licences, and other instruments, and for the execution of all other matters and things arising under and consistent with this Act and not herein expressly provided for, and for the more fully carrying out the objects and purposes and guarding against evasions and violations of this Act; and all such regulations shall be signed by the Minister, and upon being published in the Gazette shall be valid in law, as if the same were enacted in this Act, and shall be judicially

noticed; and all such rules, regulations, and orders shall be laid before both Houses of the Assembly within fourteen days after the making thereof, if Parliament be then sitting and, if Parliament be not then sitting, within fourteen days after the commencement of the next sitting of Parliament.

Land Act 1885

Regulations

4. The Governor shall have power from time to time to make rules, regulations and orders for the purposes of this Act, to alter or rescind such rules, regulations, and orders –

Providing for the mode by which any land or allotment shall be surveyed and boundaries adjusted;

For prescribing the form of and the conditions and mode of applying for licenses and leases to be issued under this Act, and the conditions upon which the same shall be issued;

For imposing any reasonable charge for surveys or fees for any document issued under the authority of this Act;

For providing for all proceedings, forms of leases, licenses, and other instruments, and for the execution of all other matters and things arising under and consistent with this Act and not herein expressly provided for;

And for the more fully carrying out the objects and purposes and guarding against evasions and violations of this Act.

All such regulations shall be signed by the Minister, and upon being published in the *Gazette* shall be valid in law, as if the same were enacted in this Act, and shall be judicially noticed; and all such rules, regulations, and orders shall be laid before both Houses of the Assembly within fourteen days after the making thereof, if Parliament be then sitting, and, if Parliament be not then sitting, within fourteen days after the commencement of the next sitting of Parliament.

Reserves

227. The Governor may from time to time either by a general or particular description, and whether the same has been surveyed or not, reserve from sale temporarily, notwithstanding that the same may been then held under pastoral license, any Crown lands which in his opinion are required for any of the following purposes – namely, for docks, quays, improvement of harbours, landing-places, tramways, railways, railway-stations, roads, bridges, ferries, canals, or other internal communications whether by land or by water, reservoirs, aqueducts, watercourses, water-races, drains, improvement and protection of rivers, irrigation and works connected therewith, embankments, quarries, gravel-pits, sites of markets, abattoirs, public pounds, baths, washhouses, mechanics' institutes, libraries, museums, or other institutions of instruction, county or municipal buildings, court-houses, gaols, prisons, or other public buildings, sites and grounds for schools, colleges, reformatories, hospitals, asylums, and charitable institutions, or for the purposes of any

agricultural or pastoral associations, or for the growth and preservation of timber, gardens, parks or domains, places for the interment of the dead, or for the health, recreation, convenience, or amusement of the people, or for the use, support, or education of aboriginal natives of the colony, or for any purpose of public defence, safety, utility, advantage, or enjoyment; or as endowments for education; and also any land containing mineral or other springs which he may think should be so reserved for the public health, or any land wherein or whereon natural curiosities may exist of a character to be of national interest.

228. When any land has been temporarily reserved, notice of such reservation shall be published in the *Gazette*.

At the expiration of one month, but not later than six months, after the publication of such notice, the lands described therein (not being reserves for endowments) may be permanently reserved, and notice of such permanent reservation shall be published in the *Gazette*, and failing such permanent reservation any such temporary reservation shall be void.

229. Upon such notices being duly published as aforesaid the lands described in such notices respectively shall become and be dedicated to the purposes for which they were reserved respectively, and may at any time thereafter be granted for such purposes in fee-simple, or disposed of in such other manner as for the public interest may seem best, subject to the condition that they shall be held in trust for the purposes for which they were reserved, unless such …

APPENDIX 8

Land Act 1908

13. Notwithstanding any sale or other disposal of any unsurveyed rural or pastoral lands for cash, or on deferred payment, or for occupation with right of purchase, or perpetual lease, or lease in perpetuity, or renewable lease, or in any manner whatsoever, and at any time previous to the approval of the plan of the survey of the same by the Chief Surveyor of the district, the Governor shall have the right to exclude from such sale or other disposal any road-lines which may be required through or over any such lands, and to reserve any of the said lands which are situate on the seashore, the margin of lakes, or on river-banks, or which are required for any of the purposes mentioned in section three hundred and twenty-one hereof, without paying compensation for any land so excluded or reserved.

122. There shall be reserved from sale or other disposition a strip of land not less than sixty-six feet in width along all high-water lines of the sea, and of its bays, inlets, or creeks, and along the margins of all lakes exceeding fifty acres in area, and along the banks of all rivers and streams of an average width of not less than thirty-three feet, and, in the discretion of the Commissioner, along the bank of any river or stream of less width than thirty-three feet.

Land Act 1924

14. **Lands on seashore &c., excluded from sale**. – Notwithstanding any sale or other disposal of any unsurveyed rural or pastoral lands in any manner whatsoever, at any time previous to the approval of the plan of the survey of the same by the Chief Surveyor of the district, the Governor-General shall have the right, without liability to pay compensation, to exclude from such sale or other disposal any road-lines which may be required through or over any such lands, and to reserve any of the said lands which are situate on the seashore, or on the margin of any lake, or on any river-bank, or which are required for any of the purposes mentioned in section three hundred and fifty-nine hereof.

This section replaces s13 of the Land Act 1908.

129. **Reserves along seashore and banks of lakes, rivers, &c. –** There shall be reserved from sale or other disposition a strip of land not less than sixty-six feet in width along all high-water lines of the sea, and of its bays, inlets or creeks, and along the margins of all lakes exceeding fifty acres in area, and along the banks of all rivers and streams of an average width of not less than thirty-three feet, and, in the discretion of the Commissioner, along the bank of any river or stream of less width than thirty-three feet.

This section replaces s122 of the Land Act 1908.

It does not apply to settlement land (Land Settlements Act 1925, s66); nor to land comprised in closed roads (Land laws Amendment Act 1929, s20).

APPENDIX 9

Conservation Act 1987, Part 4A – Marginal Strips

[24 Marginal strips reserved

(1) There shall be deemed to be reserved from the sale or other disposition of any land by the Crown a strip of land 20 metres wide extending along and abutting the landward margin of—

(a) Any foreshore; or

(b) The normal level of the bed of any lake not subject to control by artificial means; or

(d) The bed of any river or any stream [(not being a canal under the control of a State enterprise within the meaning of section 2 of the State-Owned Enterprises Act 1986 and used by the State enterprise for, or as part of any scheme for, the generation of electricity)], being a bed that has an average width of 3 metres or more.

(2) There shall be deemed to be reserved from the sale or other disposition by the Crown of any land extending along and abutting the landward margin of any lake controlled by artificial means a strip of land that—

(a) Is 20 metres wide; or

(b) Has a width extending from the maximum operating water level to the maximum flood level of the lake,—

whichever is the greater.

[(2A) Where the Crown proposes to sell or otherwise dispose of any land, the responsible department of State or agency shall notify the Director-General of the proposal; and the sale or other disposition shall have no effect unless and until that requirement is complied with.**]**

(1) 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.

(2) Nothing in this section shall affect any right, title, or interest any person may have in respect of any assets or improvements lawfully existing on any marginal strip at the commencement of this section.

[(5) Nothing in this section shall limit or affect section 230 of the Resource Management Act 1991.**]**

(6) Every disposition of any land by the Crown to a State enterprise pursuant to the State-Owned Enterprises Act 1986, on or after the

commencement of this section (whether the agreement to dispose of that land was entered into before that date or is entered into after that date), shall be deemed to be a disposition of land for the purposes of this section.

(7) Notwithstanding subsection (6) of this section, where the freehold of any land subject to a lease or licence under the Land Act 1948 is transferred by the Crown to [Landcorp Farming Limited], the reservation of any marginal strip on any part of the land to which the lease or licence relates shall not have effect until either the lease or licence is renewed or the freehold of the area to which the lease or licence relates is transferred to the lessee or licensee, whichever first occurs.

[(7A) Every disposition of land by the Crown to a Crown Research Institute pursuant to the Crown Research Institutes Act 1992 shall be deemed to be a disposition of land for the purposes of this section.**]**

[(7B) Nothing in this section applies to the vesting or proposed vesting of any reserve under section 26 of the Reserves Act 1977.**]**

(8) Except as otherwise expressly provided, this section shall apply to the disposition of any land by the Crown under the provisions of any enactment.

[(9) For the purposes of this section, a disposition by the Crown in relation to any land, includes—

(a) The grant of a Crown forestry licence under the Crown Forest Assets Act 1989:
(b) The grant or renewal of a lease or licence under the Land Act 1948:
(c) The vesting, pursuant to the New Zealand Railways Corporation Restructuring Act 1990, of any land held by the Crown or the New Zealand Railways Corporation in a Crown transferee company within the meaning of section 2 of that Act:
(d) The grant or renewal of a lease or licence of any land pursuant to section 12 of the New Zealand Railways Corporation Restructuring Act 1990:
(e) The sale or other disposition of land held by the New Zealand Railways Corporation to a Crown transferee company within the meaning of section 2 of the New Zealand Railways Corporation Restructuring Act 1990 or to any other person.]]

Status Compendium

Hist. s24(1)(c): Words “(not being a . . . generation of electricity)” substituted for omitted words “(not being a canal under the control of the Electricity Corporation of New Zealand Limited used by the Corporation for, or as part of any scheme for, the generation of electricity)” on 14 May 1999 by 1998 No 88, s100 & SR 1999/115/2.

Hist. s24(2A): Inserted on 13 March 1996 by 1996 No 1, s9(1).

Hist. s24(5): Repealed and substituted on 1 October 1991 by 1991 No 69, s362. The repealed s24(5) is listed below for reference.

"(5) Nothing in this section shall limit or affect section 289 of the Local Government Act 1974."

Hist. s24(7): Words "Landcorp Farming Limited" substituted for omitted words "Land Corporation [] Limited" on 12 April 2001 by SR 2001/23/4.

Hist. s24(7): Words "of New Zealand" omitted after word "Corporation" on 13 March 1996 by 1996 No 1, s9(2).

Hist. s24(7A): Inserted on 1 July 1992 by 1992 No 47, s46(1) and (3).

Hist. s24(7B): Inserted on 13 March 1996 by 1996 No 1, s9(3).

Hist. s24(9): Repealed and substituted on 28 August 1990 by 1990 No 106, s2. The repealed s24(9) is listed below for reference.

"(9) For the purposes of this section, a 'disposition', in relation to any land, includes the grant of a Crown forestry licence under the Crown Forest Assets Act 1989, and also includes the grant or renewal of a lease or licence under the Land Act 1948."

Hist. s24: Repealed and Part 4A (comprising s24 to s24J) inserted on 10 April 1990 by 1990 No 31, s15. The repealed s24 is listed below for reference.

"24. MARGINAL STRIPS—

"(1) Subject to the provisions of this section, no interest in a marginal strip shall be granted or disposed of.

"(2) Every marginal strip shall be held for conservation purposes, and, subject to sections 18 to 23 of this Act, shall be managed—

"(a) For the conservation of its natural and historic resources and those of the adjacent water; and

"(b) Subject to the conservation of those resources, so as to enable public access to the adjacent water.

"(3) Subject to subsection (5) of this section, if satisfied that the retention in public ownership of any part (not being a part less than 3 metres from the tide mark, level, or bank concerned) of any marginal strip is neither necessary to ensure reasonable and practical public access to the adjacent water nor desirable for conservation purposes, the Minister may, by notice in the Gazette describing the part, declare it not to be required as marginal strip.

"(4) Subject to subsection (5) of this section, if satisfied that all or part of a marginal strip—

"(a) Was, immediately before the commencement of this Act, occupied by—

"(i) Any aqueduct, bridge, boom anchor, canal, control gate, dam, flume, headrace, penstock, power station, screen, spillway, switching gear, surge chamber, tailrace, transmission tower, tunnel, or weir, used by

Electricity Corporation of New Zealand Limited for or in connection with the generation, transmission, or supply of electricity; or
"(ii) Any similar structure or device so used,—
"whether or not its construction was then completed; or
"(b) Will necessarily be used in connection with any such structure or device; or
"(c) Should not be open to the public because of the dangers of any such structure or device,—
the Minister may, by notice in the Gazette, describing the strip or part, declare it be required in connection with electricity works; and may thereafter dispose of it to the corporation without complying with section 26 of this Act.

"(5) Before publishing a notice under subsection (3) or subsection (4) of this section, the Minister shall give public notice of intention to do so; and section 49 of this Act shall apply accordingly.

"(6) Subject to subsection (2) of this section, the Minister may, if it is in accordance with the management plan of a marginal strip,—
"(a) Enter into an agreement with the owner of any adjacent land for the owner to use or develop all or any part of the strip; and
"(b) In accordance with any such agreement, close all or any part of the strip under section 13(1)(a) of this Act:
"(c) Authorise the Director-General to do any work on the strip

"(7) If satisfied that it is in the public interest to do so, the Minister may refuse to renew any lease of or permit issued in respect of any conservation area, unless the lessee or permit-holder surrenders the lease or permit in respect of—
"(a) All marginal strips forming part of the area; or
"(b) Such of those strips, and such parts of any of those strips, as the Minister specifies.

"(8) Where any Crown land or State forest land is, on or after the commencement of this Act, vested in or transferred to a State enterprise under the State-Owned Enterprises Act 1986, so much of the land as would, if it were all a conservation area, be a marginal strip shall thereupon become a marginal strip."

[24A Power to reduce width of marginal strip

(1) Notwithstanding section 24 of this Act, in the case of a marginal strip extending along and abutting the landward margin of the sea or a lake, the Minister may**[**, at any time before the disposition by the Crown of the land adjoining the marginal strip,**]** approve the reduction of the width of the strip to not less than 3 metres if he or she is satisfied that its value in terms of the purposes specified in section 24C of this Act will not be diminished.**]**

[(2) Notwithstanding section 24 of this Act, in the case of land extending along and abutting the bed of a river or stream where—

(a) The bed is not less than 3 metres in width; and

(b) The land (including the marginal strip) contains not more than 2 hectares,—

the Minister may, at any time before the disposition by the Crown of the land, approve the reduction of the width of the strip to not less than 3 metres if he or she is satisfied that its value in terms of the purposes specified in section 24C of this Act will not be diminished.**]**

Status Compendium

Hist. s24A(1) inserted words ", at any time before the disposition by the Crown of the land adjoining the marginal strip," on 13 March 1996 by 1996 No 1, s10(1).

Hist. s24A(2) inserted on 13 March 1996 by 1996 No 1, s10(2).

Hist. Part 4A (comprising s24 to s24J) inserted on 10 April 1990 by 1990 No 31, s15.

[24AA Power to increase width of marginal strip

(1) Where the Crown proposes to sell or otherwise dispose of any land, the proposal shall be subject to the succeeding provisions of this section.

(2) During the period of 20 working days commencing on the day after the date of the receipt of a notification under section 24(2A) of this Act in respect of the proposal,—

(a) The sale or other disposition shall not proceed; and

(a) The Director-General shall notify the responsible department or agency whether or not he or she intends to investigate the proposal to ascertain whether or not it is appropriate to increase the width of any marginal strip that would be reserved from the sale or other disposition.

(3) If the Director-General fails to notify the responsible department or agency in accordance with subsection (2)(b) of this section, the department or agency may proceed with the sale or other disposition after the expiration of the period specified in that subsection and section 24 of this Act shall apply accordingly.

(4) If the Director-General notifies the responsible department or agency in accordance with subsection (2)(b) of this section that he or she intends to investigate the proposal,—

(a) The prohibition contained in subsection (2)(a) of this section shall be deemed to be extended by a further 20 working days; and

(b) During that further period of 20 working days, the Minister shall advise the responsible department or agency whether or not he or she requires the reservation of a marginal strip having a width exceeding 20 metres, and, where the Minister requires the

reservation of such a marginal strip, he or she shall also specify the width of the marginal strip to be reserved.

(5) In considering whether to require the reservation of any marginal strip having a width exceeding 20 metres, the Minister shall have regard to whether increasing the width of the marginal strip is necessary—
(a) To provide effective access along the strip; and
(b) To maintain the value of the strip in terms of the purposes specified in section 24C of this Act.

(6) Where the reservation of any marginal strip under section 24(1) of this Act creates a residual area of land that is of such size or shape that it has little or no potential use either alone or in conjunction with the remainder of the land being sold or disposed of, that residual area of land may be added to the marginal strip by agreement between the responsible department or agency, and the Minister.

(7) Where the disposition takes the form of the renewal of a lease or licence under the Land Act 1948 that is referred to in section 24(7) of this Act, the lessee or licensee is entitled to a reduction in rent or fees or royalties for any injurious affection to the lessee or licensee caused by any reservation of a marginal strip having a width exceeding 20 metres.

(8) Any reduction in rent or fees or royalties payable under this section shall be assessed by the Minister responsible for the administration of the land.

(9) A lessee or licensee shall not be entitled to a reduction in rent or fees or royalties by reason only of any increase in the width of any marginal strip.

(10) The costs of and incidental to the investigation and assessment of increasing the width of any marginal strip shall be paid by the Director-General.

(11) The Minister may require that the whole or any part of a marginal strip be of a width exceeding 20 metres.**]**
{ Editorial Note: For reservation of Purakaunui marginal strip see 1998 No 97, s425(4). }

Hist. s24AA inserted on 13 March 1996 by 1996 No 1, s11.

[24B Power to declare certain dispositions to be exempt from section 24

(1) Subject to subsection (2) of this section, the Minister may at any time before the disposition by the Crown of any land extending along and abutting the bed of any river or stream (being a bed of not less than 3 metres in width), by notice in the Gazette, declare that section 24 of this Act shall not apply to the proposed disposition.

(2) The Minister may make a declaration under subsection (1) of this section only if satisfied—
  (a) That the land has little or no value in terms of the purposes specified in section 24C of this Act; or
  (b) That any value the land has in those terms can be protected effectively by another means.

(2) Notwithstanding subsection (2) of this section, where the Minister proposes to grant an exemption under this section in respect of the renewal of a lease or licence under the Land Act 1948 but is precluded from doing so by that subsection, the Minister may grant the exemption if satisfied that the proposal is equitable and in the public interest.

(4) The Minister may, by notice in the Gazette, declare that section 24 of this Act shall not apply to any proposed disposition of—
  (a) Land that is part of the core assets of [a State enterprise within the meaning of section 2 of the State-Owned Enterprises Act 1986 that is a generator of electricity]; or
  (b) Land that is required in connection with electricity works.

(5) A notice under subsection (4)(a) of this section shall have effect only so long as the core assets concerned remain assets of the [State enterprise].

(6) For the purposes of subsection (4)(a) of this section, the term "core assets" means—
  (a) Any aqueduct, bridge, boom anchor, canal, control gate, dam, flume, headrace, penstock, power station, screen, spillway, switching gear, surge chamber, tailrace, transmission tower, tunnel, or weir, [used by a State enterprise within the meaning of the State-Owned Enterprises Act 1986 for or in connection with the generation, transmission, or supply of electricity]; or
  (b) Any similar structure or device so used.

(7) Nothing in section 24 of this Act shall apply to any disposition in respect of which a notice is given under this section.**]**

Status Compendium

Hist. s24B(4)(a): Words "a State enterprise . . . generator of electricity" substituted for omitted words "the Electricity Corporation of New Zealand Limited" on 14 May 1999 by 1998 No 88, s100 & SR 1999/115/2.

Hist. s24B(5): Words "State enterprise" substituted for omitted word "Corporation" on 14 May 1999 by 1998 No 88, s100 & SR 1999/115/2.

Hist. s24B(6)(a): Words "used by a . . . supply of electricity" substituted for omitted words "used by the Electricity Corporation of New Zealand Limited for or in connection with the generation, transmission, or supply of electricity" on 14 May 1999 by 1998 No 88, s100 & SR 1999/115/2.

Hist. Part 4A (comprising s24 to s24J) inserted on 10 April 1990 by 1990 No 31, s15.

[24BA Notification of intention to reduce marginal strip or to grant exemption

(1) Where the Minister receives an application under section 24A (which relates to the reduction of the width of marginal strips) or section 24B (which relates to exemptions) of this Act, the Minister shall consult the relevant Conservation Board and Fish and Game Council.

(2) On being satisfied that it is reasonable in the circumstances to do so, the relevant Conservation Board or Fish and Game Council may request the Minister to publicly notify the proposal.

(3) On receipt of a request under subsection (2) of this section that the Minister considers reasonable in the circumstances, the Minister may publicly notify the proposal and section 49(1) of this Act shall apply accordingly; but the Minister is not obliged to publicly notify the proposal.

(4) In considering whether or not it is reasonable in the circumstances to publicly notify an application, the Conservation Board or Fish and Game Council or the Minister, as the case may be, shall have regard to—

(a) The purposes specified in section 24C of this Act; and
(b) The interests of the public in marginal strips; and
(c) The potential costs of notification (including the costs of public notification) that are likely to be incurred by the seller and the purchaser of the land.

(5) The responsible department or agency disposing of the land shall pay to the Minister all the costs of and incidental to the public notification of the proposal in accordance with section 49 of this Act.]

Hist. s24BA inserted on 13 March 1996 by 1996 No 1, s12.

[24C 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.**]**

Status Compendium
Hist. Part 4A (comprising s24 to s24J) inserted on 10 April 1990 by 1990 No 31, s15.

[24D Reservation of marginal strips to be recorded

(1) Upon the registration of any disposition by the Crown of any land under the Land Transfer Act 1952, the District Land Registrar of the land registration district affected shall, without fee, record on the certificate of title for that land a statement to the effect that the land to which the certificate of title relates is subject to this Part of this Act.

[(1A) Upon being notified of any reduction in the width of any marginal strip under section 24A or any increase in the width of any marginal strip under section 24AA or any exemption under section 24B of this Act, where there is a certificate of title for the land under the Land Transfer Act 1952, the District Land Registrar shall, without fee, record the reduction or increase or exemption on the certificate of title.**]**

(2) Upon being notified of any disposition by the Crown of any land not registered under the Land Transfer Act 1952, the Chief Surveyor shall, without fee, record on the proper plans and records of the land registration district affected a statement to the effect that the land so transferred is subject to this Part of this Act.

[(2A) Upon being notified of any reduction in the width of any marginal strip under section 24A or any increase in the width of any marginal strip under section 24AA or any exemption under section 24B of this Act, where the land is not registered under the Land Transfer Act 1952, the Chief Surveyor shall, without fee, record the reduction or increase or exemption on the proper plans and records.**]**

(3) The Chief Surveyor shall, without fee, in the manner the Chief Surveyor considers most appropriate, cause the proper plans of every land registration district to show the marginal strips [(including details of the reduction in the width of any marginal strip under section 24A or the increase in the width of any marginal strip under section 24AA of this Act)] within that district.

(4) All land that is subject to this Part of this Act shall remain subject to this Part and the statements specified in subsections (1) and (2) of this section shall continue to be recorded on the certificates of title for that land and on all subsequent certificates of title for that land and on all the proper plans and records of the land registration district affected, as the case may be, notwithstanding—

(a) Any subsequent subdivision of that land; or

(b) Any subsequent transfer by sale or otherwise of that land.

(5) Every statement recorded on a certificate of title in compliance with subsection (1) of this section shall be deemed to sufficiently protect any reservation made by this Part of this Act in respect of any portion of the land comprised in that certificate of title, and no certificate of title shall be impeached on the ground of uncertainty or otherwise on account of any such reservation.

(6) The land comprised in any certificate of title that bears a statement recorded in compliance with subsection (1) of this section—
(a) Shall be deemed to be all the land described in that certificate of title, with the exception of any portion that is deemed to be reserved as marginal strip under this Part of this Act; and
(b) May be defined for the purposes of the issue of a certificate of title as if this Part of this Act had not been passed.

(7) Notwithstanding anything in the Land Transfer Act 1952, land reserved as marginal strip under section 24 of this Act shall not be required to be surveyed for the purposes of that Act.]

Status Compendium

Hist. s24D(1A) inserted on 13 March 1996 by 1996 No 1, s13(1).
Hist. s24D(2A) inserted on 13 March 1996 by 1996 No 1, s13(2).
Hist. s24D(3) inserted words "(including details of . . . of this Act)" on 13 March 1996 by 1996 No 1, s13(3).
Hist. Part 4A (comprising s24 to s24J) inserted on 10 April 1990 by 1990 No 31, s15.

[24E Exchange of marginal strips

(1) The Minister may, by notice in the Gazette, authorise the exchange of any marginal strip for another strip of land.

(2) The Minister shall not authorise the exchange of any marginal strip unless the Minister is satisfied that the exchange will better achieve the purposes specified in section 24C of this Act.

(3) The land taken by the Crown in exchange for any marginal strip shall be deemed to be reserved as marginal strip.

(4) The Minister may authorise the payment or receipt by the Crown of money by way of equality of exchange in any case under this section; and all money so received shall be paid into the Department of Conservation Grants and Gifts Trust Account, and shall be applied, without further appropriation than this section, for the purposes of this Act.

(5) The Minister or the Director-General may, on behalf of the Crown, do all such things as may be necessary to effect any exchange authorised under this section.

(6) District Land Registrars are hereby authorised and directed to make such entries in registers and do all such other things as may be necessary to give effect to exchanges authorised under this section.]

Status Compendium

Hist. Part 4A (comprising s24 to s24J) inserted on 10 April 1990 by 1990 No 31, s15.

[24F Right of Crown to half of bed of river adjoining former land of the Crown

Notwithstanding any other enactment or rule of law, where the Crown owns part of the bed of a non-navigable river or stream adjoining any land (being a bed of not less than 3 metres in width) and disposes of that land, that part of the bed of that river or stream shall remain owned by the Crown.**]**

Hist. Part 4A (comprising s24 to s24J) inserted on 10 April 1990 by 1990 No 31, s15.

[24G 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.

(3) With respect to any foreshore, to any lake or reservoir and to any bay or inlet of any lake or reservoir, and to any river or stream, a marginal strip shall be reserved by subsection (1) or subsection (2) of this section on all land of the Crown, and on all land the title to which is subject to this Part of this Act, and on no other land.

(4) Every marginal strip reserved by subsection (1) or subsection (2) of this section shall be of such dimensions and be situated as if the marginal strip had been reserved under section 24 of this Act, and shall extinguish either in whole or in part, as the case may require, the existing reservation of the existing marginal strip which would have continued but for the alterations referred to in those subsections.

(5) Nothing in this section shall affect any right, title, or interest any person may have in respect of any assets or improvements existing on any

marginal strip at the time such marginal strip is reserved by subsection (1) or subsection (2) of this section.

(6) Subject to this section, the provisions of this Act shall apply to every marginal strip reserved by subsection (1) or subsection (2) of this section as if such marginal strip had been reserved by section 24 of this Act.

(7) Nothing in this section shall apply to any marginal strip reserved by section 24(3) of this Act.**]**

Status Compendium

Hist. Part 4A (comprising s24 to s24J) inserted on 10 April 1990 by 1990 No 31, s15.

[24H Management of marginal strips

(1) The Minister may from time to time appoint suitable persons to be managers of marginal strips.

(2) Subject to subsection (6)(c) of this section, the Minister may appoint one of the following persons to be the manager of any marginal strip:
- (a) The owner for the time being of the land adjoining that strip:
- (b) Some other suitable person, if the Minister considers that person to be more suitable than the adjoining owner.

{ Editorial Note: Prior written consent of Minister of Conservation required before preliminary proposal to holder of reviewable lease (or instrument) by the Commissioner may designate
- (a) Marginal strips in Conservation area as remaining conservation area:
- (b) Land to be restored to, or retained by, the Crown as conservation area:

subject to appointment of a manager under this subsection. See section 41(1)(d). }

(3) The Crown shall manage all marginal strips around controlled lakes and reservoirs; but any costs relating to any such strip that are costs arising out of electricity generation in the area of the strip shall be payable by the person or body responsible for that electricity generation.

(4) Subject to this section, 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.

(5) Subject to this section, the manager of a marginal strip may make improvements to the strip, and the improvements may include such planting or harvesting of crops or trees as may be provided for in any

Crown forestry licence under the Crown Forest Assets Act 1989 affecting or relating to the strip or in any agreement between the manager and the Crown.

(6) In the case of the holder of a Crown forestry licence under the Crown Forest Assets Act 1989, the following provisions shall also apply:

(a) The licence holder may manage and harvest exotic plantation trees existing at the time of the grant of the licence on any marginal strip adjoining the land to which the licence relates:

(b) The licence holder may carry out one replanting of such trees on the strip:

(c) The Minister may appoint either the licence holder or the Director-General to be manager of the strip, but shall not appoint any other person to be the manager.

{ Editorial Note: For application re—

(a) Ngai Tahu claims settlement see 1998 No 97, s40:

(b) Pouakani claims settlement see 2000 No 90, s24. }

(7) The manager of a marginal strip may request the Minister to close temporarily the strip under section 13 of this Act where any operation proposed on the strip will significantly affect public safety or where fire hazard conditions exist.

(8) The manager of a marginal strip shall comply with any reasonable requirements or restrictions imposed in respect of the strip by the Minister by notice in writing to the manager; and the Minister shall impose such requirements or restrictions, or both, as the Minister considers reasonably necessary or expedient to protect the strip, having particular regard to the maintenance of riparian vegetation, wildlife, water quality, the health of aquatic life, and to maintain access to and the recreational use of the strip.

(9) The Minister shall not require the manager of any marginal strip to fence off any part of that strip, or to undertake any other works on or relating to that strip, unless the expenses associated with such fencing or other works are borne by the Crown.

(10) The Minister shall consult the appropriate manager where—

(a) An application for a licence to mine in a marginal strip is being considered; or

(b) Any complaint relating to a marginal strip is being investigated; or

(c) Any requirement or restriction under subsection (8) of this section is being proposed.

(11) The manager of a marginal strip shall obtain the written consent of the Minister before making any significant change to the management regime of the strip, and before making or erecting any significant improvements to or on the strip.

(12) Subject to subsection (9) of this section, any expense incurred by a manager under this section shall be borne by the manager.

(13) Every manager of a marginal strip commits an offence who—
(a) Knowingly damages the marginal strip or causes to be damaged the strip or any part of it; or
(b) Knowingly uses the marginal strip for any purpose contrary to any provision of or to any requirement imposed under this Part of this Act.]
Penalty

Hist. Part 4A (comprising s24 to s24J) inserted on 10 April 1990 by 1990 No 31, s15.

[24I Easements
Repealed

Hist. s24I repealed on 1 July 1996, by 1996 No 1, s15(1). The repealed s24I is listed below for reference.

"[24I. EASEMENTS—
"(1) The Minister may, after having due regard to section 24C of this Act and after giving notice in writing to the manager of the marginal strip concerned, grant an easement over the strip.

"(2) For the purposes of this section, the Minister shall be deemed to be the registered proprietor of marginal strips.]"

Hist. Part 4A (comprising s24 to s24J) inserted on 10 April 1990 by 1990 No 31, s15.

[24J Resumption of marginal strips by Crown
(1) On giving 90 days notice in writing to the manager of a marginal strip or such longer period not exceeding 6 months as may be provided for in any agreement between the manager and the Crown, the Minister, on behalf of the Crown, may resume the management of the strip.

(2) Subject to subsection (3) of this section, where the Crown resumes the management of a marginal strip, it shall be liable to pay to the manager of the strip—
(a) Compensation for any improvements made to the strip by the manager; and
(b) The manager's reasonable administration costs associated with the Crown's resumption of the strip.

(3) A manager shall have no right to be compensated for improvements made to or erected on the marginal strip without the prior consent of the Minister as required by section 24H(11) of this Act.

(4) If there is any dispute or difference between the manager of any marginal strip and the Crown as to any amount the Crown is liable to pay under subsection (2) of this section, the amount shall be fixed by arbitration in accordance with the [Arbitration Act 1996].

(5) For the purposes of any such arbitration, this section shall be deemed to be a submission to arbitration within the meaning of the [Arbitration Act 1996], and the reference shall be deemed to be to 2 arbitrators, one to be appointed by the Minister, and the other by the manager.

(6) Notwithstanding subsection (4) of this section, the parties may agree on the amount to be paid under subsection (2) of this section, either before or after the matter is submitted to arbitration, and, if the agreement is made after the date of any award of arbitration, the award shall be deemed to be cancelled.]

Hist. s24J(4) reference to "Arbitration Act 1996" substituted for reference to "Arbitration Act 1908" on 1 July 1997 by 1996 No 99, s18 & 1924 No 11, s21(1).
Hist. s24J(5) reference to "Arbitration Act 1996" substituted for reference to "Arbitration Act 1908" on 1 July 1997 by 1996 No 99, s18 & 1924 No 11, s21(1).
Hist. Part 4A (comprising s24 to s24J) inserted on 10 April 1990 by 1990 No 31, s15.

[24K Provisions applying in relation to land vested under New Zealand Railways Corporation Restructuring Act 1990

(1) In this section and in section 24L of this Act—

Crown transferee company has the same meaning as in section 2 of the New Zealand Railways Corporation Restructuring Act 1990:

Railway operator has the same meaning as in section 2 of the New Zealand Railways Corporation Restructuring Act 1990.

(2) The provisions of section 24D of this Act shall apply in relation to a disposition of land of the kind referred to in section 24(9)(c) of this Act with such modifications as shall be necessary and as if the reference in subsection (1) of that section to the registration of any disposition by the Crown were a reference to the registration of a Crown transferee company as the proprietor of the land in accordance with section 9(1)(a) of the New Zealand Railways Corporation Restructuring Act 1990.

(3) This Part of this Act (except section 24L) does not apply to—
(a) Land within an area of 25 metres of a line drawn midway between the rails of a railway line:

(b) Land approved by the Minister by notice in the Gazette as being required for the purpose of an alteration to the route of an existing railway line.

(4) The Minister shall give a notice under subsection (3)(b) of this section in any case where he or she is satisfied that—

(a) The land is reasonably required for the purposes of altering the route of the railway line; and

(b) The value in terms of the purposes specified in section 24C of this Act of the land adjacent to the railway line will not be diminished any more than is reasonably necessary for the purposes of the proposed alterations to the railway line.

(5) In giving an approval under subsection (3)(b) of this section the Minister may impose such conditions as he or she thinks fit in connection with the construction of the proposed alterations to the railway line.

(6) Where, in relation to land of the kind referred to in subsection (3)(b) of this section, a statement that the land is subject to this Part of this Act has, in accordance with section 24D of this Act, been recorded on the certificate of title to the land or on the proper plans and records of the land registration district affected, the District Land Registrar of the land registration district affected or the Chief Surveyor, as the case may be, shall make such alterations to any existing certificates of title for that land or to the plans and records of the land registration district, as the case may be, as shall be necessary for the purpose of recording the fact that the land is no longer subject to this Part of this Act.

(7) Where, in relation to any land of the kind referred to in subsection (3) of this section,—

(a) The railway line is removed permanently; or

(b) The railway line ceases to be operated by a railway operator; or

(c) In the case of land referred to in a notice in the Gazette published under subsection (3)(b) of this section, the Minister declares, by notice in the Gazette, that the land or any part of it is no longer required for the purposes of the alteration to the railway line—

as the case may be,—

the land shall immediately become subject to this Part of this Act and the provisions of section 24D of this Act shall apply with such modifications as shall be necessary and as if—

(d) The reference in subsection (1) of that section to the registration of any disposition by the Crown were a reference to land becoming subject to this Part of this Act by virtue of this subsection; and

(e) The reference in subsection (2) of that section to notification of any disposition by the Crown were a reference to notification of land becoming subject to this Part of this Act by virtue of this subsection.

(8) Nothing in this Part of this Act limits or affects the application of sections 30 and 31 of the New Zealand Railways Corporation Act 1981 or section 31 of the New Zealand Railways Corporation Restructuring Act 1990.**]**

Hist. s24K inserted on 28 August 1990 by 1990 No 106, s3.

[24L Public access rights

Every railway operator must allow members of the public to have access on foot over land that would, but for subsection (3) of section 24K of this Act, be reserved as a marginal strip, except land that is within 5 metres of a line drawn midway between the rails of a railway line, unless, in the opinion of the railway operator, such access would be likely to endanger the safety of persons or property.]

Hist. s24L inserted on 28 August 1990 by 1990 No 106, s3.

APPENDIX 10

Land Subdivision in Counties Act 1946

11.

(1) On every scheme plan submitted under the foregoing provisions of this Act there shall be set aside as reserved for public purposes a strip of land not less than sixty-six feet in width along the mean high-water mark of the sea and of its bays, inlets, or creeks, and along the margin of every lake with an area in excess of twenty acres, and, unless the Minister considers it unnecessary so to do, along the banks of all rivers and streams which have an average width of not less than ten feet, not being rivers or streams, or parts of rivers or streams, exempted from the provisions of this subsection pursuant to subsection four of this section:

Provided that the Minister may approve the reduction of the width of the strip of land to a width of not less than ten feet if in his opinion the reduced width will be sufficient to give members of the public reasonable access to the sea, lake, river, or stream:

Provided also that nothing in this subsection shall apply with respect to the subdivision of any land which is **[**Maori**]** land within the meaning of **[**the Maori Affairs Act 1953**]**.

(2) In any case where a strip of land is set aside by the last preceding subsection and any land below the mean high-water mark of the sea or of its bays, inlets, or creeks or, as the case may be, any part of the bed of the lake or river or stream is vested in the person in whom the land shown in the scheme plan is vested, the Minister may require as a condition of his approval of the scheme plan that the owner shall execute, or obtain the execution of, and register, a transfer to His Majesty of the whole or a specified part of the land below the mean high-water mark or, as the case may be, of the lake or river or stream which is vested as aforesaid.

(3) No land set aside as a reserve, or transferred to His Majesty, pursuant to this section shall be taken into account for the purposes of the next succeeding section **[**except to such extent (if any) as the Minister in his discretion allows. The Minister's decision under this subsection shall be final**]**.

(4) The Governor-General may from time to time by Order in Council declare that subsection one of this section shall not apply with respect to the banks, or any specified bank, of any specified river or stream, or part of any specified river or stream, of an average width of less than thirty-three feet.

In the second proviso to subs. (1) the term "Maori" was substituted for the term 'native" by s2(2) of the Maori Purposes Act 1947; and the Maori Affairs Act 1953, being the corresponding enactment in force at the date of this reprint, has been substituted for the repealed Maori Land Act 1931.

In subs. (3) the words in square brackets were added by s12 of the Land Subdivision in Counties Amendment Act 1953.

APPENDIX 11

Counties Amendment Act 1961

29. Reserves along seashore and banks of lakes, rivers, etc – (1) On every scheme plan submitted to the Council under the provisions of this Part of this Act there shall be set aside as reserved for public purposes a strip of land not less than 66 feet in width along the mean high-water mark of the sea and of its bays, inlets, or creeks, and along the margin of every lake with an area in excess of 20 acres, and, unless the Council, with the consent of the Minister of Lands, considers it unnecessary so to do, along the banks of all rivers and streams which have an average width of not less than 10 feet, not being rivers or streams, or parts of rivers or streams, exempted from the provisions of the subsection pursuant to subsection (4) of this section:

Provided that the Council, with the consent of the Minister of Lands, may approve the reduction of the width of the strip of land to a width of not less than 10 feet if in its opinion the reduced width will be sufficient to give members of the public reasonable access to the sea, lake, river, or stream:

Provided also that, in the case of commercial or industrial land where access to the sea is essential for the use of adjoining land or in the case of an artificial boat harbour, the Council, with the consent of the Minister of Lands, may dispense with the requirements of this subsection.

[(1A) The strip of land required to be reserved pursuant to subsection (1) of this section shall be so reserved only in respect of so much of the land in the scheme plan as abuts on the sea, lake, river, or stream as aforesaid and adjoins any allotment having an area of less than 10 acres.**]**

[(1B) Where –

(a) Pursuant to subsection (1) of this section or the provisions of any other enactment (whether passed before or after the commencement of this subsection, and whether or not in force at the commencement of this subsection), a strip of land less than 66 feet in width has been set aside as reserved for public purposes along the mean high-water mark of the sea or of any of its bays, inlets, or creeks, or along margin of any lake, or along any bank of any river or stream and

(b) A scheme plan of subdivision of land contiguous to that strip of land is subsequently submitted to the Council under the provisions of this part of this Act, -

then, notwithstanding the provisions of subsection (5) of this section, the Council may, as a condition of its approval of the scheme plan, require the owner to set aside as reserved for public purposes a strip of land contiguous to the strip of land previously set aside and of a width determined by the Council, being not more than the difference between the width of the strip of land previously set aside and 66 feet.

(1C) The strip of land required to be reserved pursuant to subsection (1B) of this section shall be so reserved only in respect of so much of the land in the scheme plan as abuts on the strip of land reserved, pursuant to subsection (1) of this section or the corresponding provisions of any other enactment on

the earlier subdivision and adjoins any allotment having an area of less than 10 acres.

(1D) Where in the opinion of the Council it is in the public interest that a road or part of a road be dedicated within the area required to be set aside as reserved for public purposes pursuant to subsection (1) or subsection (1B) of this section, then, with the consent of the Minister of Lands, the dedication of that road or part of that road which lies within the area set aside may be accepted in satisfaction of and in substitution for the area or part of the area, as the case may be, that would otherwise be required to set aside under this section.**]**

(2) In any case where a strip of land is set aside as required by subsection (1) of this section and any land below the mean high-water mark of the sea or of its bays, inlets, or creeks or, as the case may be, any part of the bed of the lake or river or stream is vested in the person in whom the land shown in the scheme plan is vested, the Council may require as a condition of its approval of the scheme plan that the owner shall execute, or obtain the execution of, and register, a transfer to Her Majesty of the whole or a specified part of the land below the mean high-wager mark or, as the case may be, of the bed of the lake or river or stream which is vested as aforesaid.
(3) No land set aside as a reserve, or transferred to Her Majesty, pursuant to this section shall be taken into account for the purposes of section 28 of this Act, except to such extent (if any) as the Council allows.
(4) The Minister of Lands may from time to time declare that section (1) of this section shall not apply with respect to the banks, or any specified bank, of any specified river or stream, or part of any specified river or stream, of an average width of less than 33 feet.
(5) Every decision of the Minister of Lands under this section shall be final.

Subs. (1A) was inserted by s. 22 of the Counties Amendment Act 1964.
Subs. (1B) – (1D) were inserted by s. 41 of the Counties Amendment Act 1968.

28. Reserves along seashore and banks of lakes, rivers, etc. –
(1) Section 29 of the Counties Amendment Act 1961 is hereby amended by repealing subsection (1A) (as inserted by section 22 of the Counties Amendment Act 1964), and substituting the following subsection:
"(1A) The strip of land required to be reserved pursuant to subsection (1) of this section along the bank of any river or stream shall, in any case where the river or stream has an average width of 3 metres or more but less than 5 metres, be so reserved only in respect of so much of the land in the scheme plan as abuts on the river or stream as aforesaid and adjoins any allotment having an area of less than 4 hectares."
(2) Section 29 of the Counties Amendment Act 1961 is hereby further amended by repealing subsection (1C) (as inserted by section 41 of the Counties Amendment Act 1968), and substituting the following subsection:
"(1C) The strip of land required to be reserved pursuant to subjection (1B) of this section shall, in any case where the river or stream has an average width of more than 3 metres but less than 5 metres, be so reserved only in respect of so much of the land in the scheme plan as abuts on the strip of land reserved, pursuant to subsection (1) of this section or the corresponding provisions of any other enactment, on the earlier subdivision and adjoins any allotment having an area of less than 4 hectares."
(3) The following enactments are hereby consequentially repealed:

(a) Section 22 of the Counties Amendment Act 1964:
(b) So much of the Third Schedule to the Counties Amendment Act 1972 as relates to subsections (1A) and (1C) of section 29 of the Counties Amendment Act 1961.

APPENDIX 12

Local Government Amendment Act 1978

(inserting new sections in the Local Government Act 1974)

289. Reserves along areas of water – (1) On every scheme plan submitted to the council under this part of this Act, unless the council, with the consent of the Minister of Lands (now Minister of Conservation), considers it unnecessary to do so, there shall be set aside as local purpose reserves for esplanade purposes under the Reserves Act 1977 for the purpose of providing access to the sea, lake, river, or stream, as the case may be, and to protect the environment, within the land proposed to be subdivided, a strip of land not less than 20 metres in width along the mean high-water mark of the sea and of its bays, inlets, or creeks, and along the margin of every lake with an area in excess of 8 hectares, and along the banks of all rivers and streams which have an average width of not less than 3 metres (not being rivers or streams or parts of rivers or streams exempted from this subsection pursuant to subsection (7) of this section):

Provided that the council, with the consent of the Minister of Lands (now Minister of Conservation), may approve the reduction of the width of the strip of land to a width of not less than 3 metres if in its opinion the reduced width will be sufficient to give members of the public reasonable access to the sea, lake, river, or stream.

(2) Where –

(a) A strip of land less than 20 metres in width along the mean high-water mark of the sea or of any of its bays, inlets, or creeks, or along the margin of any lake, or along any bank of any river or stream has either –

(i) Been reserved for the purpose of specified in subsection (1) of this section , or for public purposes pursuant to section 29 91) of the Counties Amendment Act 1961 (as in force before the commencement of this Part of this Act); or

(ii) Been set aside or served for recreation purposes pursuant to any other enactment (whether passed before or after the commencement of this Part of this Act and whether or not in force at the commencement of this part of this Act); or

(iii) Been reserved from sale pursuant to section 58 of the Land Act 1948 or the corresponding provisions of any former Act; and

(b) A scheme plan of subdivision of land contiguous to that strip of land is subsequently submitted to the council under this part of this Act, -

then, notwithstanding that under subsection (1) of this section or under any former enactment the Minister of Lands (now Minister of Conservation) had consented to the setting aside of the strip of land of less than 20 metres in width, the council may, as a condition of its approval of the scheme plan, require the owner to set aside as reserved for the purpose specified in subsection (1) of this section a strip of land contiguous to the strip of land previously set aside and of a width determined by the council, being not more than the difference between the width of the strip of land previously set aside and 20 metres.

(3) Nothing in subsection (1) or subsection (2) of this section shall require a strip of land to be set aside as reserved for the purposes specified in the said subsection (1) or subsection (2) as the case may be along the banks of any river or stream where that land adjoins any allotment having an area of 4 hectares or more and in the opinion of the council, that allotment is intended to be used, or will continue to be used, wholly or principally in a manner conforming with accepted farming or management practices, for agricultural or horticultural or silvicultural or pastoral purposes or the keeping of bees or poultry or other livestock.

(4) Where, in the opinion of the council, it is in the public interest that a road or part of a road be dedicated within the area required to be set aside as reserved for the purpose specified in subsection (1) of this section, then, with the consent of the Minister of Lands (now Minister of Conservation), the dedication of that road or part of that road which lies within the area set aside may be accepted in satisfaction of and in substitution for the area or part of the area, as the case may be, that would otherwise be required to be set aside under this section.

(5) Where a strip of land is set aside as required by subsection (1) or subsection (2) of this section, and any land below the mean high-water mark of the sea or of its bays, inlets, or creeks or, as the case may be, any part of the bed of the lake or river or stream is vested in the person in whom the land shown in the scheme plan is vested, the council may require, as a condition of its approval of the scheme plan, that the owner shall execute, or obtain the execution of, and register, a transfer to Her Majesty of the whole or a specified part of the land below the mean high-water mark or, as the case may be, of the bed of the lake, or river, or stream which is vested as aforesaid.

(6) No land set aside as a reserve or transferred to Her Majesty pursuant to this section shall be taken into account for the purposes of section 285 or section 286 of this Act, except to such extent (if any) as the council allows.

(7) The Minister of Lands (now Minister of Conservation)may from time to time on the application of the council declare that subsection (1) of this section shall not apply with respect to the banks, or any specified bank, of any specified river or stream or part of any specified river or stream, or may on the application of the council revoke any such declaration, in whole or in part. In making his decision under this section, the Minister of Lands (now Minister of Conservation)shall have regard to the provisions of any proposed or operative district scheme for the locality in which the river or stream is situated.

(8) Every decision of the Minister of Lands (now Minister of Conservation)under this section shall be final.

(9) In this section a reference to bays, inlets, or creeks of the sea includes those that are artificial as well as those that are natural.

CF. 1961, No. 131, s.29; 1977, No. 134, s.4

290. Compensation in respect of land along areas of water set aside as reserves – (1) Where –

(a) Pursuant to subsection (1) or subsection (2) of section 289 of this Act a strip of land that –

(i) Is situated along the mean high-water mark of the sea or of any of its bays, inlets, or creeks or along the margin of any lake; and

(ii) Adjoins any allotment having an area of 4 hectares or more which, in the opinion of the Minister of Lands (now the Minister of Conservation), is to be retained by the subdividing owner for a period of not less than 5 years from the date of deposit of the survey plan and, in the opinion of that Minister, is to be used for that period for any of the purposes specified in subsection (3) of that section, -

has been set aside as reserved for the purpose specified in subsection (1) of that section; and

(b) No part of that allotment is zoned for residential or commercial or industrial purposes under any operative or proposed district scheme at the date of deposit of the survey plan, -

There shall be paid, as compensation, to the subdividing owner, or, if he is deceased, to his personal representative, out of money appropriated by Parliament, an amount equal to the value, as at the date of deposit of the survey plan, of the land set aside, the amount to be determined by a valuation made by the Valuer-General.

(2) If the subdividing owner, or, as the cas may be, his personal representative, is dissatisfied with the amount of any valuation made for the purposes of subsection (1) of this section, he may, within 1 month after notice of the valuation has been given to him by the Valuer-General, object to that valuation by delivering or posting to the Valuer-General a written notice of objection stating shortly the grounds of his objection and the value at which he contends the land should be valued. Sections 20 to 23 of the Valuation of Land Act 1951, as far as they are applicable and with the necessary modifications, shall apply to the objection.

(3) Where –

(a) Any payment is made to the subdividing owner or his personal representative under subsection (1) of this section; and

(b) Within 5 years after the date of the deposit of the land survey plan the subdividing owner or, as the case may be, his personal representative or any successor in title of the subdividing owner subdivides the adjoining land or any part of it or transfers by way of sale or enters into an agreement to sell the adjoining land or any part of it, -

there shall be repayment to the Crown, by the subdividing owner or his personal representative or that successor in title, as the case may be, and charged against the land and recoverable as a debt, the amount of that payment to the extent that it has not already been repaid:

Provided that the Minister of Lands (now Minister of Conservation), whose decision shall be final, may, in his discretion, waive such a repayment or may direct that an amount less than the full amount shall be repaid.

(4) The right of the Crown to repayment under subsection (3) of this section shall be deemed to be an interest in the land for the purposes of section 137 of the Land Transfer Act 1952 (which relates to caveats against dealing with the land).

(5) Where pursuant to subsection (1) or subsection (2) of section 289 of this Act a strip of land has been set aside as reserved for the purpose

specified in section 289 (1) of this Act along the mean high-water mark of the sea or any of its bays, inlets, or creeks, or along the margin of any lake in excess of 8 hectares and adjoining any allotment having an area of 4 hectares or more, there shall be paid to the subdividing owner or, if he is deceased,, his personal representative, out of money appropriated by Parliament, an amount equal to any additional survey costs incurred by the subdividing owner in determining the land to be set aside (such costs to be determined in accordance with the scale of fees of the New Zealand Institute of Surveyors which are current at the date of deposit of the survey plan).

Cf. 1961, No. 131, s.29 (5) – (9); 1977, No. 131, s.4

Reserves Amendment Act 1979 - Consequently amended s289

(2) Section 289 of the Local Government Act 1974 (as enacted by section 2 of the Local Government Amendment Act 1978) is hereby amended –

(a) By inserting subsection (1), after the words “local purpose reserves”, the words “for esplanade purposes”:

By omitting from subsection (3) the words “for recreation purposes”, and substituting the words “for the purposes specified in the said subsection (1) or subsection (2), as the case may be,”.

APPENDIX 13

Resource Management Act 1991, Part 10 – Subdivision and reclamations

[229 Purposes of esplanade reserves and esplanade strips

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 public recreational use of the esplanade reserve or esplanade strip and adjacent sea, river, or lake, where the use is compatible with conservation values.**]**

Status Compendium

Hist. s229 - s237H: Substituted for repealed s229 - s237 on 7 July 1993 by 1993 No 65, s124. The repealed s229 is listed below for reference.

"229 Meaning and purposes of 'esplanade reserve'—

"(1) In this Act the term 'esplanade reserve' means a reserve within the meaning of the Reserves Act 1977, which shall be either—

"(a) A local purpose reserve within the meaning of section 23 of that Act, if vested in the territorial authority under section 239; or

"(b) A reserve vested in the Crown under section 236.

"(2) The purposes of an esplanade reserve are—

"(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

"(v) Mitigating natural hazards; and

"(b) To enable public access to or along the sea, a river, or a lake; and

"(c) To enable public recreational use of the esplanade reserve and adjacent sea, river, or lake, where that use is compatible with conservation values.

"(3) Nothing in this section or section 236 shall prevent the change of classification or purpose of an esplanade reserve in accordance with the Reserves Act 1977 or the exercise of any other power under that Act."

[230 Requirement for esplanade reserves or esplanade strips

(1) For the purposes of sections 77, 229 to 237H, 405A, and clause 5 of Part 2 of the Schedule 2, the size of any allotment shall be determined before any esplanade reserve or esplanade strip is set aside or created, as the case may be.

(2) The provisions of sections 229 to 237H shall only apply where section 11(1)(a) applies to the subdivision.

(3) Except as provided by any rule in a district plan made under section 77(1), or a resource consent which waives, or reduces the width of, the esplanade reserve, where any allotment of less than 4 hectares is created when land is subdivided, an esplanade reserve 20 metres in width shall be set aside from that allotment along the mark of mean high water springs of the sea, and along the bank of any river or along the margin of any lake, as the case may be, and shall vest in accordance with section 231.

(4) For the purposes of subsection (3), a river means a river whose bed has an average width of 3 metres or more where the river flows through or adjoins an allotment; and a lake means a lake whose bed has an area of 8 hectares or more.

(5) If any rule made under section 77(2) so requires, but subject to any resource consent which waives, or reduces the width of, the esplanade reserve or esplanade strip, where any allotment of 4 hectares or more is created when land is subdivided, an esplanade reserve or esplanade strip shall be set aside or created from that allotment along the mark of mean high water springs of the sea and along the bank of any river and along the margin of any lake, and shall vest in accordance with section 231 or be created in accordance with section 232, as the case may be.]

Status Compendium

Hist. s229 - s237H: Substituted for repealed s229 - s237 on 7 July 1993 by 1993 No 65, s124. The repealed s230 is listed below for reference.

"230 Esplanade reserves to vest on subdivision—
"(1) A strip of land not less than 20 metres in width along the mark of mean high water springs of the sea, and along the bank of any river, and along the margin of any lake, as the case may be,—
"(a) Shall be set aside from any land being subdivided as an esplanade reserve; and
"(b) Shall vest in and be administered by the territorial authority.

"(2) Every survey plan submitted to the territorial authority under section 223 shall show the area of land to be so set aside.

"(3) This section is subject to sections 231 and 232."

[231 Esplanade reserves to vest on subdivision

(1) An esplanade reserve required under section 230 or section 236—
  (a) Shall be set aside as a local purpose reserve for esplanade purposes under the Reserves Act 1977; and
  (b) Shall vest in and be administered by the territorial authority.

(2) Nothing in this Part shall prevent the change of classification or purpose of an esplanade reserve in accordance with the Reserves Act 1977 or the exercise of any other power under that Act.

(3) Every survey plan submitted to the territorial authority under section 223 shall show the area of land to be so set aside.**]**

Status Compendium

Hist. s229 - s237H: Substituted for repealed s229 - s237 on 7 July 1993 by 1993 No 65, s124. The repealed s231 is listed below for reference.

"231 Vesting where strip of land previously set aside or reserved—
"Where—
"(a) A strip of land along the mean high water mark or the mark of mean high water springs of the sea, or along the bank of any river, or along the margin of any lake, has either—
"(i) Been set aside as an esplanade reserve under this section or been reserved for the purpose specified in section 289 of the Local Government Act 1974, or for public purposes pursuant to section 29(1) of the Counties Amendment Act 1961 or section 11 of the Land Subdivision in Counties Act 1946; or
"(ii) Been set aside or reserved for recreation purposes pursuant to any other enactment (whether passed before or after the commencement of this Act and whether or not in force at the commencement of this Act); or
"(iii) Been reserved from sale or other disposition pursuant to section 24 of the Conservation Act 1987 or section 58 of the Land Act 1948 or the corresponding provisions of any former Act; and
"(b) A survey plan of land adjoining that strip of land is submitted to the territorial authority under section 223,—
then, notwithstanding that any strip of land of a kind referred to in paragraph (a) has been previously reserved or set aside, there shall be set aside on the survey plan as an esplanade reserve under section 230 a strip of land—
"(c) Adjoining the strip of land previously set aside; and
"(d) Of a width that is the difference between the width of the strip of land previously set aside and not less than 20 metres from the mark of

mean high water springs of the sea, and along the bank of any river, and along the margin of any lake, as the case may be."

[232 Creation of esplanade strips

(1) An esplanade strip of the width specified in a rule in a district plan made under section 77 may be created for any purpose specified in section 229 by the registration of an instrument between the territorial authority, and the subdividing owner, prepared in accordance with this section.

(2) Every such instrument shall—
- (a) Be in accordance with the Schedule 10; and
- (b) Be in the prescribed form; and
  { Editorial Note: Prescribed form is in SR 1991/170. }
- (c) Be created in favour of the territorial authority; and
- (d) Create an interest in land, and may be registered under the Land Transfer Act 1952; and
- (e) When registered with the District Land Registrar, run with and bind the land that is subject to the instrument; and
- (f) Bind every mortgagee or other person having an interest in the land, without that person's consent.

(3) Where an esplanade strip is created, that strip may be closed to public entry under section 237C.

(4) When deciding under section 220(1)(a) which matters shall be provided for in the instrument, the territorial authority shall consider—
- (a) Which provisions in clauses 2, 3, and 7 of the Schedule 10 (if any) to modify (including the imposition of conditions) or to exclude from the instrument; and
- (b) Any other matters that the territorial authority considers appropriate to include in the instrument.

(5) When deciding under subsection (4) which provisions (if any) to modify or exclude or what other matters to include, the territorial authority shall consider—
- (a) Any relevant rules in the district plan; and
- (b) The provisions and other matters included in any existing instrument for an esplanade strip, or easement for an access strip, in the vicinity; and
- (c) The purpose or purposes of the strip, including the needs of potential users of the strip; and
- (d) The use of the strip and adjoining land by the owner and occupier; and
- (e) The use of the river, lake, or coastal marine area within or adjacent to the strip; and
- (f) The management of any reserve in the vicinity.]

Hist. s229 - s237H: Substituted for repealed s229 - s237 on 7 July 1993 by 1993 No 65, s124. The repealed s232 is listed below for reference.

"232 Width of esplanade reserve subject to district plan
"(1) Any requirement under this Part to set aside a strip of land as an esplanade reserve is subject to any rule included in a district plan under section 77 (which enables rules to be made providing for esplanade reserves to be of a width greater or less than 20 metres), and sections 230 and 231 shall be read accordingly.

"(2) No resource consent shall be granted to do anything that would otherwise contravene a rule included in a district plan under section 77."

[233 Effect of change to boundary of esplanade strip

(1) Where, for any reason, the mark of any mean high water springs or the bank of any river or the margin of any lake alters, and the alteration affects an existing esplanade strip within an allotment, a new esplanade strip coinciding with such alteration shall be deemed to have been created simultaneously with each and every such alteration within the allotment.

(2) Any instrument creating any existing esplanade strip shall continue in existence and shall apply to a new esplanade strip created under subsection (1) without alteration, except as to location of the strip.

(3) Every esplanade strip created by subsection (1) shall be of such dimensions and be situated and subject to the same conditions as if it had been created by an instrument continued under subsection (2) and shall extinguish in whole or in part, as the case may require, the existing esplanade strip which would have continued but for the alterations referred to in subsection (1).

(4) Subject to this section, the provisions of this Act shall apply to every esplanade strip created by subsection (1).

(5) Any person having an interest in land affected by the new esplanade strip created under subsection (1) shall be bound by the instrument applying to that strip.]

Status Compendium

Hist. s229 - s237H: Substituted for repealed s229 - s237 on 7 July 1993 by 1993 No 65, s124. The repealed s233 is listed below for reference.

"233 Approval of survey plans where esplanade reserve required—
"(1) Subject to subsection (2), the territorial authority shall not approve a survey plan unless any esplanade reserve required under this Part is shown on the survey plan.

"(2) Where—
"(a) An esplanade reserve is required under this Part in respect of a subdivision which is to be effected by the grant of a cross lease or company lease or by the deposit of a unit plan; and
"(b) It is not practical to set aside the esplanade reserve on the survey plan submitted for approval under section 223 (in this section referred to as the 'primary survey plan'),—
the territorial authority shall not approve the primary survey plan until a separate survey plan showing the esplanade reserve to be set aside has been prepared and submitted to the territorial authority for approval under this section.

"(3) Where the territorial authority approves a separate survey plan under subsection (2),—
"(a) A memorandum to that effect shall be endorsed on the primary survey plan and the separate survey plan; and
"(b) A District Land Registrar or a Registrar of Deeds shall not deposit the primary survey plan and (in respect of a subdivision by the Crown) the District Land Registrar shall not issue a certificate of title for any separate allotment on the primary survey plan approved by the Chief Surveyor for the purposes of section 228, unless the separate survey plan on which the esplanade reserve is set aside is deposited prior to, or at the same time as, the primary survey plan.

"(4) Subject to this section, nothing in section 11 or this Part applies to a separate survey plan approved by a territorial authority under this section."

[234 Variation or cancellation of esplanade strips

(1) The registered proprietor of any land subject to an esplanade strip may apply to the territorial authority to vary or cancel the instrument creating the strip.

(2) The application shall include—
(a) A description of the strip and its location; and
(b) An assessment of the effects of varying or cancelling the strip.

(3) The territorial authority may at any time initiate a proposal to vary or cancel the instrument creating an esplanade strip by preparing a statement covering the matters specified in subsection (2); and references to an application in this section shall include a statement made under this subsection.

(4) Upon receipt of an application under subsection (1) by the territorial authority, or after the preparation of a statement by the territorial authority under subsection (3), the provisions of sections 127 to 132 shall apply as appropriate, with all necessary modifications.

(5) The territorial authority, when considering an application to vary or cancel any instrument creating an esplanade strip shall have regard to—

(a) Those matters set out in section 104(1), with all necessary modifications; and

(b) The purpose or purposes, as set out in section 229, for which the strip was created; and

(c) Any change in circumstances which has made the strip or any of the conditions in the instrument creating the strip inappropriate or unnecessary.

(6) After considering the application for variation or cancellation of an instrument creating an esplanade strip, the territorial authority—

(a) May grant the application, with or without modifications; or

(b) May decline the application.

(7) When all the appeals (if any) are finally determined, the territorial authority shall lodge for registration with the District Land Registrar a certificate, signed by the principal administrative officer or other authorised officer of the territorial authority, specifying the variations to the instrument or that the instrument is cancelled, as the case may be.

(8) The District Land Registrar shall make an appropriate entry in the register and on the instrument noting that the instrument has been varied or cancelled, and the instrument shall take effect as so varied or cease to have any effect, as the case may be.]

Status Compendium

Hist. s229 - s237H: Substituted for repealed s229 - s237 on 7 July 1993 by 1993 No 65, s124. The repealed s234 is listed below for reference.

"234 Relationship with conditions imposed under section 220—
"No land set aside as an esplanade reserve, or transferred to the Crown pursuant to section 235, shall be taken into account for the purposes of a condition imposed under section 220(1)(a)."

[235 Creation of esplanade strips by agreement

(1) An esplanade strip may at any time be created for any of the purposes specified in section 229 by agreement between the registered proprietor of any land and the local authority, and the provisions of sections 229[, 232, 234, 237(2), and 237C] shall apply, with all necessary modifications.

(2) No instrument for an esplanade strip by agreement may be registered with the District Land Registrar unless every person having a registered interest in the land has endorsed his or her consent on the instrument.]

Status Compendium

Hist. s235(1): Words ", 232, 234, 237(2), and 237C" substituted for omitted words "to 234 and sections 236 to 237D" on 17 December 1997 by 1997 No 104, s44.

Hist. s229 - s237H: Substituted for repealed s229 - s237 on 7 July 1993 by 1993 No 65, s124. The repealed s235 is listed below for reference.

"235 Vesting of ownership of land below mean high water springs or bed of lake or river in Crown—
"(1) Where—
"(a) A survey plan is submitted to a territorial authority in accordance with section 223; and
"(b) Any land below the mean high water springs of the sea, or any part of the bed of a river or lake, is vested in the owner of the land to which the survey plan relates; and
"(c) The Minister of Conservation does not waive the vesting under this section,—
the survey plan shall show as vesting in the Crown such part of the land as is below the mean high water springs of the sea, or as forms part of the bed of that river or lake, as the case may be.

"(2) The territorial authority concerned shall not approve a survey plan unless any part of the land required to vest in the Crown under subsection (1) is shown on the survey plan."

[236 Where land previously set aside or reserved

Where—

(a) Land along the mean high water mark or the mark of mean high water springs of the sea, or along the bank of any river, or along the margin of any lake, has—

(i) Been set aside as an esplanade reserve under this Part, or has been reserved for the purpose specified in section 289 of the Local Government Act 1974, or for public purposes pursuant to section 29(1) of the Counties Amendment Act 1961 or section 11 of the Land Subdivision in Counties Act 1946; or

(ii) Been set aside or reserved for public recreation purposes pursuant to any other enactment (whether passed before or after the commencement of this Act and whether or not in force at the commencement of this Act); or

(iii) Been reserved from sale or other disposition pursuant to section 24 of the Conservation Act 1987, or section 58 of the Land Act 1948, or the corresponding provisions of any former Act; and

(b) A survey plan of land adjoining that land previously set aside or reserved is submitted to the territorial authority under section 223—

then, notwithstanding that any land of the kind referred to in paragraph (a) has been previously reserved or set aside but subject to any rule in

a district plan or any resource consent, there may, as a condition of consent under section [220(1)(aa)], be set aside on the survey plan an esplanade reserve adjoining the land previously set aside or reserved, which shall—

(c) Be of a width that is the difference between the width of the land previously set aside or reserved and—

(i) The width required by a rule in a district plan under section 77 for an esplanade reserve, if any, where any allotment 4 hectares or more is created when land is subdivided; or

(ii) The width required by a rule in a district plan under section 77 for an esplanade reserve, if any, where any allotment less than 4 hectares is created when land is subdivided; or

(iii) Where any allotment less than 4 hectares is created when land is subdivided, and there is no rule in a district plan under section 77, then 20 metres as required under section 230.]

Status Compendium

Hist. s236: Expression "220(1)(aa)" substituted for omitted expression "220(1)(ab)" on 17 December 1997 by 1997 No 104, s45.

Hist. s229 - s237H: Substituted for repealed s229 - s237 on 7 July 1993 by 1993 No 65, s124. The repealed s236 is listed below for reference.

"236 Transfer of esplanade reserve to the Crown—

"Notwithstanding the provisions of the Reserves Act 1977, the Minister of Conservation may, with the prior written agreement of the territorial authority, declare by notice in the Gazette, that an esplanade reserve, or any part of an esplanade reserve,—

"(a) Shall cease to be vested in and administered by the territorial authority but instead shall vest in the Crown; and

"(b) Shall have such classification under the Reserves Act 1977 as may be specified in the Gazette notice, or shall be included in any existing reserve under that Act,—

and, subject to the provisions of the Reserves Act 1977, the reserve shall be administered by the Minister of Conservation in accordance with that classification."

[237 Approval of survey plans where esplanade reserve or esplanade strips required

(1) Subject to subsection (3), the territorial authority shall not approve a survey plan unless any esplanade reserve or esplanade strip required under this Part is shown on the survey plan.

(2) Notwithstanding anything in the Land Transfer Act 1952, an esplanade strip shall not be required to be surveyed, but where an esplanade strip is shown on the survey plan, it shall be clearly identified in such manner as the Chief Surveyor considers appropriate.

(3) Where—

(a) An esplanade reserve or esplanade strip is required under this Part in respect of a subdivision which is to be effected by the grant of a cross lease or company lease or by the deposit of a unit plan; and

(b) It is not practical to show the esplanade reserve or esplanade strip on the survey plan submitted for approval under section 223 (in this section referred to as the "primary survey plan")—

the territorial authority, after consultation with the District Land Registrar, shall not approve the primary survey plan until a separate survey plan showing the esplanade reserve or esplanade strip has been prepared and submitted to the territorial authority for approval under this section.

(4) Where the territorial authority approves a separate survey plan under subsection (3)—

(a) A memorandum to that effect shall be endorsed on the primary survey plan and the separate survey plan; and

(b) A District Land Registrar or a Registrar of Deeds shall not deposit the primary survey plan and (in respect of a subdivision by the Crown) the District Land Registrar shall not issue a certificate of title for any separate allotment on the primary survey plan approved by the Chief Surveyor for the purposes of section 228, unless the separate survey plan on which the esplanade reserve or esplanade strip is shown is deposited prior to, or at the same time as, the primary survey plan.

(5) Subject to this section, nothing in section 11 or this Part applies to a separate survey plan approved by a territorial authority under this section.]

Status Compendium

Hist. s229 - s237H: Substituted for repealed s229 - s237 on 7 July 1993 by 1993 No 65, s124. The repealed s237 is listed below for reference.

"237 Compensation for taking of esplanade reserve—

"(1) Subject to subsection (2), where an esplanade reserve of a width greater than 20 metres is required by a district plan to be set aside on a survey plan, the territorial authority shall pay compensation to the subdividing owner (or the owner's personal representative).

"(2) The amount of compensation payable under subsection (1) shall be equal to the value of the land described in paragraph (a) less the value, as at the date of deposit of the survey plan, of the land described in paragraph (b):

"(a) The total area of that part of the esplanade reserve required to be set aside on a survey plan which is more than 20 metres from the mark of mean high water springs of the sea, or along the bank of any river, or along the margin of any lake, as the case may be:

"(b) Any area of land within 20 metres from the mark of mean high water springs of the sea, or along the bank of any river, or along the margin of any lake, as the case may be, which is not required to be set aside as esplanade reserve on the survey plan by reason of a rule included in a district plan under section 77.

"(3) In the event that the territorial authority and the subdividing owner (or the owner's personal representative) cannot agree as to the amount of compensation payable under subsection (1), the amount shall be determined by the Valuer-General.

"(4) The Valuer-General shall give a copy of a valuation made under subsection (3) to the subdividing owner who may, if dissatisfied, within one month of receipt of the valuation from the Valuer-General, object to the valuation. Any such objection shall be in writing, shall be addressed to the Valuer-General, and shall state the grounds of objection.

"(5) Sections 20 and 22 of the Valuation of Land Act 1951 shall, so far as they are applicable and with the necessary modifications, apply to an objection made under subsection (4) as if that objection were an objection to an altered valuation under that Act."

[237A Vesting of ownership of land in coastal marine area or bed of lake or river in the Crown or territorial authority

(1) Where a survey plan is submitted to a territorial authority in accordance with section 223, and any part of the allotment being subdivided is the bed of a river or lake or is within the coastal marine area, the survey plan shall—

(a) Show as vesting in the territorial authority—

(i) Such part of the allotment as forms part of the bed of a river or lake and adjoins an esplanade reserve shown as vesting in the territorial authority; or

(ii) Such part of the allotment as forms part of the bed of a river or lake and is required to be so vested as a condition of a resource consent:

(b) Show as vesting in the Crown—

(i) Such part of the allotment in the coastal marine area as adjoins an esplanade { sic ? esplanade } reserve shown as vesting in the territorial authority; or

(ii) Such part of the allotment in the coastal marine area as is required to be so vested as a condition of a resource consent—

if such vesting of land in the Crown has the written agreement of the Minister of Conservation.

(2) Any requirement to vest the bed under subsection (1)(a)(i) or subsection (1)(b)(i) shall be subject to any rule in a district plan or any resource consent which provides otherwise.]

Status Compendium

Hist. s229 - s237H: Substituted for repealed s229 - s237 on 7 July 1993 by 1993 No 65, s124.

[237B Access strips

(1) A local authority may agree with the registered proprietor of any land to acquire an easement over the land, and may agree upon the conditions upon which such an easement may be enjoyed.

(2) Any such easement shall—
- (a) Be executed by the local authority and the registered proprietor; and
- (b) Be in the prescribed form; and
  { Editorial Note: Prescribed form is in SR 1991/170. }
- (c) Contain the relevant provisions in accordance with the Schedule 10.

(3) When deciding which matters shall be provided for in the easement, the parties shall consider—
- (a) Which provisions in clauses 2, 3, and 7 of the Schedule 10 (if any) to modify (including by the imposition of conditions) or to exclude from the easement; and
- (b) Any other matters that the local authority and registered proprietor consider appropriate to include in the easement.

(4) When deciding under subsection (3) which provisions (if any) to modify or exclude or what other matters to include, the parties shall consider—
- (a) Any relevant rules in the district plan; and
- (b) The provisions and other matters included in any existing instrument for an esplanade strip, or easement for an access strip, in the vicinity; and
- (c) The purpose of the strip, including the needs of potential users of the strip; and
- (d) The use of the strip and adjoining land by the owner and occupier; and
- (e) Where appropriate, the use of the river, lake, or coastal marine area within or adjacent to the access strip; and
- (f) The management of any reserve in the vicinity.

(5) Any such easement shall take effect when registered at the office of the District Land Registrar.

(6) An access strip may be closed to public entry under section 237C.

(7) No easement for an access strip may be registered with the District Land Registrar unless every person having a registered interest in the land has endorsed his or her consent on the easement.

(8) The registered proprietor and the local authority may, by agreement, vary or cancel the easement if the matters in subsection (4) and any change in circumstances have been taken into account; and in any such case the provisions of section 234(7) and (8) shall apply, with all necessary modifications.**]**

Status Compendium

Hist. s229 - s237H: Substituted for repealed s229 - s237 on 7 July 1993 by 1993 No 65, s124.

[237C Closure of strips to public

(1) An esplanade strip or access strip may be closed to the public for the times and periods specified in the instrument or easement under the Schedule 10, or by the local authority during periods of emergency or public risk likely to cause loss of life, injury, or serious damage to property.

(2) The local authority shall ensure, where practicable, that any closure specified in the instrument or easement, or any closure for safety or emergency reasons, is adequately notified (including notification that it is an offence to enter the strip during the period of closure) to the public by signs erected at all entry points to the strip, unless the instrument or easement provides that another person is responsible for such notification.]

Status Compendium

Hist. s229 - s237H: Substituted for repealed s229 - s237 on 7 July 1993 by 1993 No 65, s124.

[237D Transfers to the Crown or regional council

(1) Notwithstanding the provisions of the Reserves Act 1977, the Minister of Conservation or a regional council may, with the prior written agreement of the territorial authority, declare by notice in the Gazette that an esplanade reserve, or any part of an esplanade reserve,—

(a) Shall cease to be vested in and administered by the territorial authority but instead shall vest in the Crown or the regional council; and

(b) Shall have such classification under the Reserves Act 1977 as may be specified in the notice, or shall be included in any existing reserve under that Act,—

and, subject to the provisions of the Reserves Act 1977, the reserve shall be administered by the Minister of Conservation or the regional council, as the case may be, in accordance with that classification.

(2) The Minister of Conservation or a regional council may, with the prior written agreement of the territorial authority, declare by notice in the Gazette that the bed of any river or lake shall cease to be vested in the territorial

authority but instead shall vest in the Crown or the regional council, as the case may be.

(3) The notice shall be registered in the office of the District Land Registrar.]

Status Compendium

Hist. s229 - s237H: Substituted for repealed s229 - s237 on 7 July 1993 by 1993 No 65, s124.

[237E Compensation for taking of esplanade reserves or strips on allotments of less than 4 hectares

(1) Where an allotment of less than 4 hectares is created when land is subdivided, no compensation for esplanade reserves or esplanade strips shall be payable for any area of land within 20 metres from the mark of mean high water springs of the sea or from the bank of any river or from the margin of any lake, as the case may be.

(2) Where an esplanade reserve or esplanade strip of a width greater than 20 metres is required to be set aside on an allotment of less than 4 hectares created when land is subdivided, the territorial authority shall pay compensation for the area of the esplanade reserve or esplanade strip above 20 metres, to the registered proprietor of that allotment, unless the registered proprietor agrees otherwise.]

Status Compendium

Hist. s229 - s237H: Substituted for repealed s229 - s237 on 7 July 1993 by 1993 No 65, s124.

[237F Compensation for taking of esplanade reserves or strips on allotments of 4 hectares or more

Where any esplanade reserve or esplanade strip of any width is required to be set aside or created on an allotment of 4 hectares or more created when land is subdivided, the territorial authority shall pay to the registered proprietor of that allotment compensation for any esplanade reserve or any interest in land taken for any esplanade strip, unless the registered proprietor agrees otherwise.]

Status Compendium

Hist. s229 - s237H: Substituted for repealed s229 - s237 on 7 July 1993 by 1993 No 65, s124.

[237G Compensation for taking of land below mean high water springs or of bed of lake or river

Where—

(a) Land is vested in the Crown or a territorial authority in accordance with section 237A; and

(b) The land vested under section 237A adjoins, or would adjoin if it were not for an esplanade reserve, any allotment of 4 hectares or more created when land is subdivided,—

the Crown or territorial authority, as the case may be, shall pay compensation to the registered proprietor of that land, unless the registered proprietor agrees otherwise.]

Status Compendium

Hist. s229 - s237H: Substituted for repealed s229 - s237 on 7 July 1993 by 1993 No 65, s124.

[237H Valuation

(1) If the territorial authority or Crown, as the case may be, and the registered proprietor cannot agree as to the amount of compensation, including any additional survey costs, payable under section 237E, section 237F, or section 237G, the amount shall be determined by [a registered valuer agreed on by the parties (or, failing agreement, nominated by the President of the New Zealand Institute of Valuers)], who shall provide a copy of the determination to all parties.

[(2) The territorial authority or Crown, as the case may be, or the registered proprietor who is dissatisfied with the determination under subsection (1) may, within 20 working days after service of the determination, object to the determination to the registered valuer in writing, stating the grounds of objection.

(3) Sections 34, 35, 36, and 38 of the Rating Valuations Act 1998 (and any regulations made under that Act relating to reviews and objections), as far as they are applicable and with all necessary modifications, are to apply to the objection as if—

(a) The registered valuer had been appointed by a territorial authority to review the objection; and

(b) The review had been made under section 34 of that Act; and

(c) The references to a territorial authority in sections 34(4), 35, and 36 of that Act were references to the registered valuer.**]**

(4) For the purposes of this section and of sections 237E to 237G, the amount of compensation shall be equal to—

(a) In the case of an esplanade reserve, the value of the land set aside:

(b) In the case of an esplanade strip, the value of the interest in land created—

and any additional survey costs incurred by reason of the esplanade reserve or esplanade strip, as the case may be, as at the date of the deposit of the survey plan.**]**

Status Compendium

Hist. s237H(1): Words "a registered valuer . . . Institute of Valuers)" substituted for omitted words "the Valuer-General" on 1 July 1998 by 1998 No 69, s54(1).

Hist. s237H(2) & (3): Repealed and substituted on 1 July 1998 by 1998 No 69, s54(1). The repealed s237H(2) & (3) are listed below for reference.

"(2) The territorial authority or the registered proprietor may, if dissatisfied with the determination, within 20 working days of its receipt from the Valuer-General, object to the Valuer-General, in writing, stating the grounds of objection to the determination.

"(3) Sections 20 and 22 of the Valuation of Land Act 1951 shall, so far as they are applicable and with the necessary modifications, apply to an objection made under subsection (3) as if the objection were an objection to an altered valuation under that Act."

Hist. s229 - s237H: Substituted for repealed s229 - s237 on 7 July 1993 by 1993 No 65, s124.

238 Vesting of roads

(1) When a District Land Registrar or Registrar of Deeds deposits a survey plan, or a Chief Surveyor approves a survey plan to which section 228 applies, the land shown on the survey plan as road to be vested in a local authority or the Crown vests, free from [all interests in land including any] encumbrances (without the necessity of any instrument of release or discharge or otherwise),—

(a) In the case of a regional road, in the territorial authority or regional council, as the case may be:

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

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

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

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

Status Compendium

Hist. s238(1): Words "all interests in land including any" inserted on 7 July 1993 by 1993 No 65, s125.

239 Vesting of reserves or other land

(1) When a District Land Registrar or a Registrar of Deeds deposits a survey plan, or a Chief Surveyor approves a survey plan to which section 228 applies,—

(a) Any land shown on the survey plan as reserve to be vested in the territorial authority or the Crown, vests in the territorial authority or the Crown, as the case may be, free from [all interests in land, including any] encumbrances (without the

necessity of any instrument of release or discharge or otherwise) for the purposes shown on the survey plan, and subject to the Reserves Act 1977; and

(b) Any land shown on the survey plan as land to be vested in the territorial authority or in the Crown in lieu of reserves, shall vest in the territorial authority or in the Crown, as the case may be, free from [all interests in land, including any] encumbrances (without the necessity of an instrument of release or discharge or otherwise)[; and]

[(c) Any land in the coastal marine area or any part of the bed of a river or lake, shown on the survey plan as land to be vested in the territorial authority or the Crown, shall vest in the territorial authority or the Crown, as the case may be, free from all interests in land, including any encumbrances (without the necessity of an instrument of release or discharge or otherwise).**]**

[(2) Notwithstanding subsection (1), the land may be vested subject to any specified interest which the territorial authority has certified, on the survey plan, shall remain with the land.

[(3) Any land vested in the Crown shall, unless this Act provides otherwise,—

(a) In the case of land to which section 9A of the Foreshore and Seabed Endowment Revesting Act 1991 applies, be vested in the Crown subject to that section:

(b) In any other case, be vested under the Land Act 1948.]]

Status Compendium

Hist. s239(1)(a): Words “all interests in land, including any” inserted on 7 July 1993 by 1993 No 65, s126(1)(a).

Hist. s239(1)(b): Words “all interests in land, including any” inserted on 7 July 1993 by 1993 No 65, s126(1)(b).

Hist. s239(1)(b): Word “; and” added on 7 July 1993 by 1993 No 65, s126(1)(c).

Hist. s239(1)(c): Added on 7 July 1993 by 1993 No 65, s126(2).

Hist. s239(3): Repealed and substituted on 25 November 1994 by 1994 No 113, s4. The repealed s239(3) is listed below for reference.

“(3) Any land vested in the Crown shall, unless this Act provides otherwise, be vested under the Land Act 1948.]”

Hist. s239(2) & (3): Added on 7 July 1993 by 1993 No 65, s126(3).

[225 Creation of esplanade strips by agreement

(1) An esplanade strip may at any time be created for any of the purposes specified in section 229 by agreement between the registered proprietor of any land and the local authority, and the provisions of sections 229 **[**, 232, 234, 237(2), and 237C**]** shall apply, with all necessary modifications.

{ Editorial Note: s235(1): Expression "233," is to be inserted after expression "232," on 1 August 2003 by 2003 No 23, s74. }

(2) No instrument for an esplanade strip by agreement may be registered with the District Land Registrar unless every person having a registered interest in the land has endorsed his or her consent on the instrument.**]**

Status Compendium

Hist. s235(1): Words ", 232, 234, 237(2), and 237C" substituted for omitted words "to 234 and sections 236 to 237D" on 17 December 1997 by 1997 No 104(5), s44.

Hist. s229 -s237H: Substituted for repealed s229 -8237 on 7 July 1993 by 1993 No 65(6), s124. The repealed s235 is listed below for reference.

"235 Vesting of ownership of land below mean high water springs or bed of lake or river in Crown- "(1) Where-
"(a) A survey plan is submitted to a territorial authority in accordance with section 223; and
"(b) Any land below the mean high water springs of the sea, or any part of the bed of a river or lake, is vested in the owner of the land to which the survey plan relates; and "(c) The Minister of Conservation does not waive the vesting under this section,- the survey plan shall show as vesting in the Crown such part of the land as is below the mean high water springs of the sea, or as forms part of the bed of that river or lake, as the case may be.

"(2) The territorial authority concerned shall not approve a survey plan unless any part of the land required to vest in the Crown under subsection (1) is shown on the survey plan."

59 Application of Order in Council
Substituted s153(b)(i) & (ii) of principal Act.

74 Creation of esplanade strips by agreement
Inserted expression into s235(1) of principal Act

APPENDIX 14

Extract from Introduction to the Native Land Act, 1909, by Sir John Salmond

NOTES ON THE HISTORY OF NATIVE-LAND LEGISLATION

TRANSFORMATION OF CUSTOMARY INTO FREEHOLD LAND

The customary Native title to the land of New Zealand has now for the most part been extinguished, and this has been effected in two chief ways:-

(1) By the voluntary cession to the Crown of lands purchased from the Native customary owners. Such a cession extinguishes the Native title, and leaves the land vested absolutely in the Crown as ordinary Crown lands, free to be disposed of by lease or Crown grant in accordance with the Land Acts.

(2) By the operation of the Native Land Court in ascertaining the title to customary land, whereupon a Crown grant or a certificate of title under the Land Transfer Act is issued to the Native owners. The land so dealt with, though it continues to be owned by the Native proprietors, ceases to be held under the Native title, and becomes freehold land held under English tenure in fee-simple from the Crown.

The earlier Native Land Acts are devoted chiefly to this process of ascertaining Native customary title and transforming it into freehold title. The Native Land Court was established in 1862 by the Native Lands Act of that year. This Court was empowered to inquire into the title to the customary lands of Natives, and to issue to the tribe, community, or individuals found to be entitled a certificate of title, which was to be conclusive proof of ownership. If any such certificate of title is issued to not more than twenty persons, it may be sealed with the Public Seal of the Colony, and shall then operate as a Crown grant, so as to transform that customary land into freehold land and extinguish the Native title.
In 1865 this Act was repealed in favour of the Native Lands Act, 1865. By this Act certificates of title are not to be issued by the Native Land Court to more than ten persons, and on the issue of such a certificate the Governor may seal a Crown grant in favour of the Natives entitled.

By the Native Land Act, 1873, a "memorial of ownership" was substituted for a certificate of title, presumably to avoid a possible confusion with certificates of title under the Land Transfer Act, 1870. By the Native Land Court Act, 1880, however, the older term "certificate of title" was restored.

In 1886 the Native Equitable Owners Act was passed, to enable the Native Land Court to make inquiries as to whether the persons named as owners in former certificates of title and memorials of ownership were entitled

beneficially or were merely trustees for a larger number of Native owners, and to include in the title the persons so found to be entitled. The limitation imposed by the earlier Acts on the number of names that could be inserted in a certificate of title had led to the practice of inserting a small number of nominal owners on behalf of the rest, instead of the full number beneficially entitled. The jurisdiction conferred by this Act upon the Native Land Court in 1886 has not even yet been completely exercised.

By the Native Land Court Act, 1886, jt is provided that, instead of issuing a certificate of title or memorial of ownership, the Native Land Court shall simply make an order determining the title, and on this order being sent to the Minister of Lands a certificate of title under the Land Transfer Act should be issued to the Natives so declared to be entitled. The result of this change is to abolish the intermediate class of title which had existed under the earlier Acts -namely, a title which was no longer purely customary (because it had been ascertained by the Court and an instrument of title was held in respect of it) and, nevertheless, had not become freehold because no Crown grant had been issued in respect of it. Under this Act the title passed at once from customary to freehold by the immediate registration of the owners as proprietors under the Land Transfer Act.

By the Native Land Court Act, 1894, the same principle was maintained, and in addition it was provided that all land which at the passing of that Act was held under certificate of title or memorial of ownership issued by the Court should forthwith on the passing of that Act become subject to the Land Transfer .Act, and that the owners should acquire in consequence an estate in fee-simple. That is to say, in 1894 all customary land, the title to which had already been ascertained by the Court, was
transformed automatically into freehold land subject to the Land Transfer Act.

Since 1894 no material alteration has been made in the process of ascertaining customary title and transforming it into freehold, save that by the Maori Lands Administration Act, 1900, the powers of the Native Land Court in this behalf were vested concurrently in the Maori Land Boards.

ALIENATION OF NATIVE LANDS

In considering the history of the law as to the alienation of Native land it is necessary to distinguish between three classes of land-viz., (1) Customary land the title to which has not been ascertained by the
Native Land Court; (2) customary land the title to which has been so .ascertained; and (3) freehold land.

1. As to the first of these kinds, alienation is and always has been absolutely prohibited except in favour of the Crown. By the Treaty of Waitangi the exclusive right to purchase such lands was reserved to the Crown. By the Native Land Purchase Ordinance, 1846, it was made a criminal offence for a European to purchase such land or to be found in occupation of it. By section 73 of the Constitution Act, in 1852, the same prohibition was repeated; so also in section 75 of the Native Lands Act,

1865, section 87 of the Native Land Act, 1873, and section 117 of the Native Land Court Act, 1894.

2. As to the second class of Native lands-viz., customary land of which the title has 'been ascertained-special statutory powers of alienation have been from time to time conferred upon the Native owners. By the Native Lands Act, 1862, section 17, it was provided that any person holding a certificate of title issued by the Native Land Court could freely alienate the land by way of sale, lease, or exchange, and any such alienation was given effect to by the issue of a Crown grant or other instrument of title by the Crown. So also in the Native Lands Act, 1865, section 47, save that certain formalities of execution are required. So also in the Native Land Act, 1873, sections 48 and 49. The Native Land Act Amendment Act, 1878 (No.2), section 4, prohibited alienation by way of mortgage. By the Native Land Court Act, 1880, the Court, in issuing certificates of title, was empowered to impose such restrictions on alienation as were thought desirable. By the Native Land Laws Amendment Act, 1883, all negotiations for the alienation of Native land were prohibited for forty days after the ascertainment of title by the Native Land Court. By the Native Land Administration Act, 1886, all alienation was absolutely prohibited; but this Act. was repealed in 1888~ By the Native Land Court Act, 1894, this class of land was abolished by being brought automatically under the provisions of the Land Transfer Act, and so transformed into freehold.

3. Alienation of freehold land: Originally a Native holding land by freehold title had exactly the same powers of alienation as a European. By a long and very complicated course of legislation, however, this liberty has been restricted, the restrictions varying greatly in degree and nature at different times, and occasionally amounting to a general prohibition.

   By the Native Lands Act, 1862, the Governor was empowered, on the ascertainment of title, to impose restrictions on the alienation of any of the land so Crown-granted. By the Native Lands Act, 1865, the Court, in issuing a certificate of title, might recommend restrictions on alienation, and the restrictions so recommended were embodied in any Crown grant issued for that land. By the Native Lands Act, 1867, Native reserves were made inalienable by sale or mortgage, or by lease for more than twenty-one years, without the consent of the Governor.

   In 1870 the first Native Lands Frauds Prevention Act was passed. This invalidated all alienations of Native land if (a) contrary to equity and good conscience; or (b) made in consideration of the supply of liquor, arms, or ammunition; or (c) such that sufficient land was not left for the support of the Native. Trust Commissioners were appointed, and no instrument of alienation was to be valid unless endorsed by a Commissioner with a certificate that the alienation was in accordance with this Act.

   By the Native Land Act, 1873, Native reserves were to be set apart and to be inalienable without the consent of the Governor. By the same Act every

instrument of alienation had to be explained to the Native by an interpreter, and to have endorsed a statement of its contents in the Maori language.

The Native Lands Frauds Prevention Act, 1881, repealed the Act of 1870, but re-enacted it with minor modifications. This Act remained in force until the passing of the Native Land Court Act, 1894.

By the short-lived Native Land Administration Act, 1886, the alienation of land by the Native owners was absolutely prohibited. Commissioners were appointed, who, with the consent of a committee of the Native owners, had power to dispose of the land under the provisions of the Land Act, 1885, in the same manner as if it was Crown land.

This Act was repealed by the Native Land Act, 1888, section 4 of which provided that "subject to the provisions of the Native Lands Frauds Prevention Act, 1881, and of the Native Lands Frauds Prevention Act 1881 Amendment Act, 1888, Natives may alienate and dispose of land or of any share or interest therein as they think fit." By the same Act the Governor in Council was empowered, on the application of a majority of the Native owners, to remove any restriction contained in any Crown grant or other instrument of title.

Until the passing of the Native Land Court Act, 1894, therefore, the law as to the alienation of freehold land held by Natives was as follows :-

(1) Certain specific lands were subject to restrictions imposed by the Crown grants under which they were held, but these restrictions could be removed by the Governor in Council on the application of the owners.
(2) Certain lands were set apart as Native reserves, subject to special restrictions on alienation.
(3) All other freehold land was freely alienable, subject only to the approval of the Trust Commissioners under the Native Lands Frauds Prevention Act, 1881.

By the Native Land Court Act, 1894, the following alterations were made :-

(1) Power to remove restrictions imposed since 30th August, 1888, was conferred upon the Court, while the Governor was empowered, on the recommendation of the Court, to remove restrictions imposed prior to that date, (Section 52).
(2) The power of confirming alienations was taken away from the Trust Commissioners under the Native Lands Frauds Prevention Act, 1881, and conferred upon the Native Land Court. The last-mentioned Act was repealed, but the provisions contained in it as to the conditions to be fulfilled before confirmation can be obtained are substantiallv re-enacted.
(3) By section 117 the alienation of land owned by Natives is absolutely prohibited except in the following cases:-
    (a) Land in the South Island may be alienated by way of lease.
    (b) Land may be alienated to the Crown.

(c) Land acquired by a Native "by way of purchase, gift, or testamentary disposition from any person other than the Crown, or by purchase from the Crown" is freely alienable.

(4) Instead of alienation by the individual Native owners, the Act provides for alienation by an incorporated body of owners, and also for alienation by the Land Board in the same manner as Crown lands, with the consent of a majority of the owners.

Within a year after the passing of the Native Land Court, Act, 1894, section 117 was amended by making further important exceptions to the prohibition of alienation. Sections 3 and 4 of the Native Land Laws Amendment Act, 1895, allow alienation (subject only to confirmation by the Court) in the following cases:-

(1) Land situated in a borough or town district:
(2) Blocks not exceeding 500 acres, the title to which was ascertained before the passing of this Act:
(3) Any land exempted from section 117 by the Governor.

By the same Act the principle was for the first time adopted that a purchaser or lessee of Native land must make a declaration that he does not already hold more than a certain area of land.

The Maori Lands Administration Act, 1900, established Maori Land Councils (now Maori Land Boards), and conferred upon them certain extensive powers in connection with the alienation and administration of Native lands. These Councils were in certain matters given the same jurisdiction that up to that time the Court alone has exercised, but it was not made clear what relation existed between the provisions of that Act and the different provisions in *pari materia* of the Native Land Court Act,
1894. Consequently the law contained two sets of different and inconsistent provisions dealing with the same matters, and also recognized two different bodies-namely, the Native Land Court and the Maori Land Board having concurrent and discordant powers and duties in respect of the same matters. Section 22 of this Act, as amended by section 4: of the Maori Lands Administration Act, 1901, makes the following provisions as to alienation :-

(1) Leases of land owned by more than two owners must be consented to by the Council.
(2) Sales of land owned by more than two owners must be consented to by the Governor in Council.
(3) Alienation of land owned by one or two Maoris remains subject to the same law as if this Act had not been passed-that is to say, such land remains subject to section 117 of the Native Land Court Act, 1894.

In 1905, by section 16 of the Maori Land Settlement Act, 1905, all restrictions on the leasing of Native land were abolished, whether those restrictions were imposed by the Crown grant or by any former statute. But no lease was to be valid unless the approval of the Maori Land Board was endorsed on it. The Board was not to approve a lease unless-

(a) The rent was adequate;
(b) The Native lessor had sufficient 1and or income for his support;
(c) The lease did not exceed fifty years;
(d) The lease took effect in possession and not in reversion.

By the Maori Land Laws Amendment Act, 1908, section 7, the Native Land Court is deprived (except as to the South Island) of the power of confirming alienations, and this power is transferred to the Maori Land Boards.

Trusts – From time to time more or less successful attempts have been made to deal with Native land by transferring the administration of it to trustees or other authorities on behalf of the Native owners. The chief instances of this are the following :-

1. Considerable areas of land are vested by statute in the Public Trustee as Native reserves in trust for the Native owners.
2. Under the Native Land Court Act, 1894, the owners of a block of Native land could be incorporated by an order of the Native Land Court, and the land could then be dealt with and alienated by an elected committee on the terms and in the manner prescribed by Order in Council. A similar provision for incorporation by order of a Maori Land Board was contained in the Maori Lands Administration Act, 1900.
3. Under various statutory provisions blocks of Native land became vested in Maori Land Boards on trust for the Native owners, with extensive powers of administration and alienation; e.g.,-

   (a) By section 28 of the Maori Lands Administration Act, 1900, as amended by section 6 of the amending Act of 1901, and by section 20 of the Maori Land Laws Amendment Act, 1903, the owners of Native land might, in pursuance of a resolution passed at a meeting or them, transfer their land to the Maori Land Board, and the Board had power to lease or mortgage the land so vested in it.

   (b) By section 8 of the Native and Maori Land Laws Amendment Act, 1902, the Governor might by Proclamation vest any Native land in the Maori Land Board as a site for a Native township, and the land was then to be held, administered, and disposed of accordingly in trust for the Native owners.
   (c) By section 8 of the Maori Land Settlement Act, 1905, the Governor in Council might vest in the Maori Land Board any Native land situated in certain districts if, in the opinion of the Native Minister, those lands were not suitable for Native occupation. Lands so vested in the Board could be leased or mortgaged by it on behalf of the Native owners. By section 3 of the Maori Land Settlement Act Amendment Act, 1906, these provisions were extended to any land which in the opinion of the Native Minister had not been properly cleared of noxious weeds.
   (d) By sections 8 and 9 of the Native Land Rating Act, 1904, it was provided that Native lands in respect of which judgment had been

obtained against the owners for unpaid rates might be similarly administered by the Board.

(e) Under Part I of the Native Land Settlement Act, 1907, the Governor in Council may vest in the Maori Land Board any area of Native land which has been reported as not required for Maori occupation by the Commission referred to in the Preamble to that Act. Every area so vested in a Board shall be disposed of on behalf of the Native owners-one-half by way of sale on deferred payments, and the other half by way of lease for any term not exceeding fifty years, with compensation to the lessee for improvements.

(f) Under Part II of the same Act of 1907 the Governor might by Order in Council transfer to a Maori Land Board the exclusive management and control of any area reserved for Maori use and occupation by the aforesaid Commission. Thereupon that area became wholly inalienable by the Native owners, and the Board must dispose of the land by way of lease to Maoris only.

SUCCESSION TO NATIVE LAND

The first Act dealing with the succession to the property of Natives is apparently the Intestate Natives Succession Act, 1861. This is limited to intestacy and to freehold land. In such cases the land is to descend according to Native custom, instead of in accordance with the English law of primogeniture, which was at that time still in force. The successor obtains the land by means of the issue of a new Crown grant or by means of a conveyance executed by the Colonial Secretary.

In 1865 these provisions were repealed by the Native Lands Act, 1865, and the Native Land Court was given power to issue "testamentary orders" determining the succession according to Native custom of a Native dying intestate possessed of freehold lands. Every such order had the same effect as a will devising the land to the successors.

In 1873 these provisions were extended by the Native Land Act, 1873, to include not merely freehold land, but also customary land of which the title had been ascertained by certificate of title or memorial of ownership issued by the Court.

In 1876 was passed the Intestate Native Succession Act, 1876. This dealt for the first time with succession to the personal estate of intestate Natives, and gave power to the Native Land Court to determine who were entitled to succeed to such property according to Native custom, and who
was best entitled to have the administration of the estate. The certificate so granted by the Native Land Court was made a sufficient authority to the Supreme Court to grant letters of administration of the estate in favour of the successors and administrators so nominated. Until the passing of this Act the succession of Natives to personal property was governed by the ordinary law.

In 1881this Act was repealed by the Native Succession Act, 1881. The power of the Native Land Court to appoint a successor to real or personal estate was

extended to cases where the deceased left a will, whether formal or informal. Customary land of which the title had been ascertained is to descend according to Native custom; freehold land is to descend according to English law, except that marriages according to Native custom are to be recognized as valid. In 1882, however, Native custom was again substituted for English law in the succession to freehold land.

The Act of 1881 was repealed by the Native Land Court Act, 1886, but its provisions were re-enacted without substantial alteration.

In 1889, by the Native Land Court Act Amendment Act, 1889, the Native Land Court was empowered for the first time to grant administration of the personal estate of a Native, if the estate did not exceed £200. Till this date administration was granted by the Supreme Court on the certificate of the Native Land Court as to the succession.

In 1890, by the Native Land Laws Amendment Act, 1890, this principle was extended, and the Native Land Court was given the same powers as the Supreme Court of granting probate of wills and letters of administration of the estates of Natives.

In 1894, by the Native Land Court Act, 1894, the following provisions were made as to succession:-

(1) All successions to be according to Native custom (if any), and if not, then according to English law.
(2) The jurisdiction of the Native Land Court to grant probate and letters of administration is made exclusive.
(3) Notwithstanding any will, the Court may award sufficient land to any person who would have been entitled on an intestacy.

.In 1895, by the Native Land Laws Amendment Act, 1895, it was provided that the land of a deceased Native is not to vest in his administrator – that is to say, it is to pass directly to his successor by virtue of a succession order. It was also provided that no probate could be granted more than two years after the death of the deceased. Unwritten wills were abolished.

In 1901, by the Maori Lands Administration Act, 1901, the Court was empowered to award to the widow of a deceased Native a life interest in the real or personal estate of the deceased. No adoption was to be recognized for the purposes of succession unless the adoption had been registered in the prescribed manner by the Native Land Court.

MAORI MARRIAGE LAW

By Maori custom the contract of marriage was created by consent merely, without any formality of celebration, and polygamous marriage was allowed. Such customary marriages were recognized by law as sufficient for the purposes of succession to the estates of Maoris and half-castes, whether the estate consisted of land or personal property, and whether the land was

customary or freehold. No such marriage, however, was valid for any other purpose.

On the other hand, marriages between Maoris were not subject to the requirements imposed by the Marriage Act, 1908. Maoris might, if they pleased, marry in accordance with that Act, but they were not obliged to do so. They were entitled, instead, to marry in accordance with the English common law, and by that law the only requirement is that the marriage must be celebrated before an episcopally ordained clergyman – that is to say, a clergyman of the English or Roman Catholic Church. By the Marriage Ordinance of 1842, indeed, it was provided that "all marriages solemnized by any minister of any Christian denomination who shall not have received episcopal ordination shall be as valid as if the said minister had received such ordination". This Ordinance, however, was repealed in 1891, apparently in forgetfulness of the fact that, though no longer required in respect of European marriages, it was still an operative enactment with respect to Maori marriages. Since 1891 Maoris must, in order to marry validly for any purpose other than succession to property, marry either in accordance with the full requirements of the Marriage Act or else in the presence of a clergyman of the English or Roman Catholic Church. It is doubtful whether a half-caste was not bound in all cases to marry in accordance with the Marriage Act: *Matiu v. Monika* (26 NZLR 642).

By the Native Land Act, 1909, all marriages between Natives are required to be celebrated either (1) in the same manner as a marriage between Europeans, or (2) in the presence of an Officiating Minister under the Marriage Act, but without the other conditions and formalities required by that Act. Marriages in accordance with Native custom, however, are still recognized as sufficient for the purposes of succession to Native land.

APPENDIX 15

Second Schedule Public Reserves and Domains Act 1908

(incorporating amendments by s4 Public Reserves and Domains Amendment Act 1914)

Classification of Reserves

Class I. Reserves for County, Local, and Municipal Purposes

ABATTOIRS.
Acclimatisation.
Agricultural and pastoral societies..
Aqueducts and watercourses.
Baths.
Bridges.
Canals.
Cattle-yards.

Cemeteries
Drains and water courses.
Embankments.
Ferries.
Gravel-pits.
Growth and preservation of timber.
Improvement and protection of rivers.
Internal communication by land or water.
Irrigation purposes.
Landing-places upon rivers and lakes.
Libraries.
Mechanics' Institutes and Athenaeums.
Plantations.
Provincial Government purposes.
Public buildings, and other objects for local governing bodies.
Public Halls

Public pounds
Quarries.
Reservoirs.
Sewage purposes.
Sites of markets.
Supply of water to towns.
Turnpikes.
Wash-houses.
Water-races and canals.

Class II. Reserves for Public Works and General Purposes

Commonages on goldfields and elsewhere.
Courthouses.
Drill-sheds and rifle ranges.
Fisheries.
Gaols or prisons.
Museums.

Police stations and purposes made.
Public buildings of the General Government
Quarantine grounds for stock and otherwise.
Railways and stations.
River-frontage reserves.
Shearing reserves, and for travelling stock.
Telegraphs.
Tramways.
Any other reserve not herein defined, and for any purpose of public safety, utility,advantage, or enjoyment.

Class III. Reserves for Harbours and Navigation, and Miscellaneous Purposes

Coal reserves.
Docks
Foreshore reserves.
Landing-laces.
Quays.
Reserves for improvement of harbours.
Reserves for military purposes and defence.
Signal-stations.

Lighthouses.

Reserves for Education, Charitable Purposes, and Recreation

Asylums.
Charitable institutions.
Colleges.
Endowments for education.
Endowments for universities.
Hospitals.
Parks and domains.
Public gardens.
Recreation reserves.
Reformatories.
Sites and grounds for schools.

Native Reserves

Reserves for the use, support, or education of aboriginal Natives.

APPENDIX 16

Statutory provisions in force in 1905

Coal Mines Act 1905, Section 16

Counties Act 1886, Sections 145, 245–248, 250, 251, 253–259, 272, 292, 304, 311, and 321

Counties Amendment Act 1904, Section 3

Crown Grants Act 1883, Sections 42, 43, 44, and 45

Defence Act 1886, Section 102

English Laws Act 1858

Fencing Act 1895, Section 26

Government Railways Act 1900, Sections 9, 11, 41, 44

Harbours Act 1878, Sections 142 and 150

Harbours Act 1878 Amendment Act 1904, Section 2

Harbours Act 1894, Section 8

Impounding Act, 1884, Section 2

Interpretation Act 1888, Section 12

Land Act 1892, Sections 13–18, 109, 110, 126, 128, 130, 131, 177, 198, 221, 235 and 249

Land Drainage Act 1904, Sections 17 and 20

Land for Settlement Consolidation Act 1900, Section 69

Land Transfer Act 1885, Sections 57, 171 and 173

Local Bodies Loans Act 1901

Local Bodies Loans Act 1901, Sections 73 and 77

Māori Land Laws Amendment Act 1903, Section 22

Mining Act 1905, Section 66, 200, 201, 204, 205, and 305

Municipal Corporation Act 1876, Sections 184, 185, 189, 190, and 211

Municipal Corporations Act 1886, Sections 231–264

Municipal Corporations Act 1900, Section 203, 209–256, 269, 282, 319, 335, 351, 374, 403–406, and 408

Municipal Corporations Act 1900, Schedule 7

Municipal Corporations Amendment Act 1902, Sections 23, 24, and 32

Municipal Corporations Amendment Act 1903, Section 16

Municipal Corporations Act 1906, Section 13

Native Land Act 1873, Section 106

Native Land Court Act 1894, Sections 69–72

Native and Māori Land Laws Amendment Act 1902

Native Township Act 1895

Native Township Local Government Act 1905, Section 11

Noxious Weeds Act 1900, Section 3

Police Offences Act 1884, Sections 3–6, and 15–17

Police Offences Act 1903, Sections 6 and 7

Public Works Act 1905, Sections 2, 10, 12, 16, 18, 19–21, 23, 24, 26–29, 33, 89, 90, 92–96, 100–119, 122–139, 141–153, 181, 184, 191–199, 222, 223, 239, 275–277, and 287

Public Works Act Amendment Act 1905, No. 10, Sections 2, 3

Rabbit Nuisance Act 1890, Section 5

Road Boards Act 1882, Section 126, 131, 138, 139, 144, and 145

Town Districts Act 1881, Section 3, 32, 33, 35, 36, and 53

Town Districts Act 1906, Section 3

Town Main Streets Act 1902, Section 2

Tramways Act 1894, Section 17, 19–20

APPENDIX 17

Schedule 10 Local Government Act 1974

Conditions as to stopping of roads and the temporary prohibition of traffic on roads

This schedule and the 11th to 13th schedules were inserted by s 3(1) of the Local Government Amendment Act 1978.

Stopping of Roads

1. The council shall prepare a plan of the road proposed to be stopped, together with an explanation as to [[why the road is to be stopped and]] the purpose of purposes to which the stopped road will be put, and a survey made and a plan prepared of any new road proposed to be made in lieu thereof, showing the lands through which it is proposed to pass, and the owners and occupiers of those lands so far as known, and shall lodge the plan in the office of the Chief Surveyor of the land district in which the road is situated. [[The plan shall separately show any area of esplanade reserve which will become vested in the council under section 345 (3) of this Act.]]

[The words in both sets of double square brackets were inserted by s.362 of the Resource Management Act 1991.]

2. On receipt of the Chief Surveyor's notice of approval and plan number the council shall open the plan of public inspection at the office of the council, and the council shall at least twice, at intervals of not less than 7 days, give public notice of the proposals and of the place where the plan may be inspected, and shall in the notice call upon persons objecting to the proposals to lodge their objections in writing at the office of the council on or before a date to be specified in the notice, being not earlier than 40 days after the date of the first publication thereof. The council shall also forthwith after that first publication serve a notice in the same form on the occupiers of all land adjoining the road proposed to be stopped or any new road proposed to be made in lieu thereof, and, in the case of any such land of which the occupier is not also the owner, on the owner of the land also, so far as they can be ascertained.

3. A notice of the proposed stoppage shall during the period between the first publication of the notice and the expiration of the last day for lodging objections as aforesaid be kept fixed in a conspicuous place at each end of the road proposed to be stopped:

Provided that the council shall not be deemed to have failed to comply with the provisions of this clause in any case where any such notice is removed without the authority of the council, but in any such case the council shall, as soon as conveniently may be after being informed of the unauthorised removal of the notice, cause a new notice complying with the provisions of this clause to be affixed in place of the notice so removed and provisions of this clause to be affixed in place of the notice so removed and to be kept so affixed for the period aforesaid.

4. If no objections are received within the time limited as aforesaid, the council may by public notice declare that the road is stopped; and the road shall, subject to the council's compliance with clause 9 of this Schedule, thereafter cease to be a road.

5. If objections are received as aforesaid, the council shall, after the expiration of the period within which an objection must be lodged, unless it decides to allow the objections, send the objections together with the plans aforesaid, and a full description of the proposed alterations to the [[Environment Court]].

[[6. The [Environment Court] shall consider the district plan, the plan of the road proposed to be stopped, the council's explanation under clause 1 of this Schedule, and any objection made thereto by any person, and confirm, modify, or reverse the decision of the council which shall be final and conclusive on all questions.]]

[This clause was substituted for the former clause 6 by s.362 of the Resource Management Act 1991.]

7. If the [[Environment Court]] reverses the decision of the council, no proceedings shall be entertained by the [[Environment Court]] for stopping the road for 2 years thereafter.

8. If the [[Environment Court]] confirms the decision of the council, the council may declare by public notice that the road is stopped; and the road shall, subject to the council's compliance with clause 9 of this Schedule, thereafter cease to be a road.

9. Two copies of that notice and of the plans hereinbefore referred to shall be transmitted by the council for record in the office of the Chief Surveyor of the land district in which the road is situated, and no notice of the stoppage of the road shall take effect until that record is made.

10. The Chief Surveyor shall allocate a new description of the land comprising the stopped road, and shall forward to the District Land Registrar or the Registrar of Deeds, as the case may require, a copy of that description and a copy of the notice and the plans transmitted to him by the council, and the Registrar shall amend his records accordingly.

[[11. The council may, subject to such conditions as it thinks fit (including the imposition of a reasonable bond), and after consultation with the Police and the Ministry of Transport, close any road or part of a road to all traffic or any specified type of traffic (including pedestrian traffic) –

(a) While the road, or any drain water race, pipe, or apparatus under, upon, or over the road is being constructed or repaired; or

(b) Where, in order to resolve problems associated with traffic operations on a road network, experimental diversions of traffic are required; or

(c) During a period when pubic disorder exists or is anticipated; or

(d) When for any reason it is considered desirable that traffic should be temporarily diverted to other roads; or

(e) For a period or periods not exceeding in the aggregate 31 days in any year for any exhibition, fair, show market, concert, film-making, race or other sporting event, or public function:

Provided that no road may be closed for any purpose specified in paragraph (e) of this clause if that closure would, in the opinion of the council, be likely to impede traffic unreasonably.

[[11A. The council shall give public notice of its intention to consider closing any road or part of a road under clause 11(e) of the Schedule: and shall give public notice of any decision to close any road or part of a road under that provision.

[[11B. Where any road or part of a road is closed under clause 11(e) of this Schedule, the council or, with the consent of the council, the promoter of any activity for the purpose of which the road has been closed may impose charges for the entry of persons and vehicles to the area of closed road, any structure erected on the road, or any structure or area under the control of the council or the promoter on adjoining land.

[[11C. Where any road or part of a road is closed under clause 11 (e) of this Schedule, the road or part of a road shall be deemed for the purposes of –

(a) The Transport Act 1962 and any bylaws made under section 72 of that Act:

(b) The Traffic Regulations 1976:

(c) The Transport (Drivers Licensing) Regulations 1985:

(d) The Transport (Vehicle and Driver Registration and Licensing) Act 1986:

(e) The Transport (Vehicle Registration and Licensing) Notice 1986:

[(ea) The Land Transport Act 1998:]

(f) Any enactment made in substitution for any enactment referred to in [paragraphs (a) to (ea)] of this clause—

not to be a road; but nothing in this clause shall affect the status of the road or part of a road as a public place for the purposes of this or any other enactment.]]

[Clauses 11, and 11A to 11C, were substituted for this former clause 11 (as enacted by s.3 (1) of the Local Government Amendment Act 1978) by s.14 (1) of the Local Government Amendment act (No.3) 1986.

[In clause 11C, para. (ea) was inserted from 1 March 1999 by s.215 (1) of the Land Transport Act 1998.

[In Clause 11C the words “paragraphs (a) to (ea)” were substituted for the words “paragraphs (a) to (e)” from 1 March 1999 by s.215 (1) of the Land Transport Act 1998.]

12. The powers conferred on the council by clause 11 (except paragraph (e)) may be exercised by the Chairman on behalf of the council or by any officer of the council authorised by the council in that behalf.

13. Where it appears to the council that owing to climatic conditions the use of any road in a rural area, other than a State highway or Government road, not being a road generally used by motor vehicles for business or commercial purposes or for the purpose of any public work, may cause damage to the road, the council may by resolution prohibit, either conditionally or absolutely, the use of that road by motor vehicles or by any specified class of motor vehicle for such period as the council considers necessary.

14. Where a road is closed under clause 13 of this Schedule, an appropriate notice shall be posted at every entry to the road affected, and shall also be published in a newspaper circulating in the district.

15. A copy of every resolution made under clause 13 of this Schedule shall, within 1 week after the making thereof, be sent to the Minister of Transport, who may at any time, by notice to the council, disallow the resolution, in whole or in part, and thereupon the resolution, to the extent that it has been disallowed, shall be deemed to have been revoked.

16. No person shall—

(a) Use a vehicle, or permit a vehicle to be used, on any road which is for the time being closed for such vehicles pursuant to clause 11 of this Schedule; or

[[(aa) Without the consent of the council or the promoter of any activity permitted by the council, enter or attempt to enter, or be present, on any road or part of a road that is for the time being closed to pedestrian traffic pursuant to clause 11 of this Schedule; or]]

(b) Use a motor vehicle, or permit a motor vehicle to be used, on any road where its use has for the time being been prohibited by a resolution under clause 13 of this Schedule.

[Para. (aa) was inserted by s.14 (2) of the Local Government Amendment Act (no.3) 1986.]

APPENDIX 18

The Bed of Navigable Waters Act 1911 (Ontario)

A consideration of the law of Ontario which is based on navigability (a term which is there left to the discretion of the court) indicates a refined approach based on experience. Since first enacted in 1911 with the objective of vesting all navigable riverbeds in the Crown with the exception of beds which had been expressly granted, the Bed of Navigable Waters Act has been amended six times and re-enacted a number of times.

Section 2 of the Act of 1911 reads:

2. Where land bordering on a navigable body of water or stream has been heretofore, or shall hereafter, be granted by the Crown, it shall be presumed, in the absence of an express grant of it, that the bed of such body of water or stream was not intended to pass to the grantee of the land, and the grant shall be construed accordingly and not in accordance with the rules of the English Common Law.

In 1940 the Act was amended by inserting definitions of “bed” and “high water mark” and providing for the physical boundary of navigable water. The Act was consolidated in 1950 but substantially amended in 1951 by the deletion of the statutory definitions of “bed” and “high water mark” making a return to the common law definitions. A new section 2 was inserted:

2. Where land that borders on a navigable body of water or stream, or on which the whole or a part of a navigable body of water or stream is situate or through which a navigable body of water or stream flows, has been heretofore or is hereafter granted by the Crown, it shall be deemed, in the absence of an express grant of it, that the bed of such body of water was not intended to pass and did not pass to the grantee.

Note that the operative section now includes water bodies intersecting land titles.

The Act was consolidated again in 1960 when s2 was re-enacted. For completeness of the illustration, the four key statutes are included in this appendix.
Previous legislation

S.O. 1911, c. 6

The Act as here follows continued unchanged through R.S.O. 1914, c. 31, R.S.O. 1927, c. 42 and R.S.O. 1937, c. 44, until February 24, 1940.

An Act for the Protection of the Public Interests in the Bed of Navigable Waters

Assented to 24th March, 1911.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:–

Short title

1. This Act may be cited as “The Bed of Navigable Waters Act.”

Grant to be presumed to be to water's edge

2. Where land bordering on a navigable body of water or stream has been heretofore, or shall hereafter, be granted by the Crown, it shall be presumed, in the absence of an express grant of it, that the bed of such body of water or stream was not intended to pass to the grantee of the land, and the grant shall be construed accordingly and not in accordance with the rules of the English Common Law.

Saving as to certain cases

3. Section 2 shall not affect the rights, if any, of a grantee from the Crown or of any person claiming under him, where such rights have heretofore been determined by a court of competent jurisdiction in accordance with the rules of the English Common Law, or of a grantee from the Crown, or any person claiming under him who establishes to the satisfaction of the Lieutenant-Governor that he or any person under whom he claims has previous to the passing of this Act developed a water power or powers under the bona fide belief that he had the legal right to do so, provided that he may be required by the Lieutenant-Governor in Council to develop the said power or powers to the fullest possible extent, and provided that the price charged for power derived from such water power or powers may from time to time be fixed by the Lieutenant-Governor in Council. And the Lieutenant-Governor in Council may direct that letters patent granting such right be issued to such grantee or person claiming under him, under and subject to such conditions and provisions as may be deemed proper for insuring the full development of such water power or powers, and the regulation of the price to be charged for power derived from them.

Act not to apply to a certain locality

4. This Act shall not apply to the bed of the river where it runs through Lot 8 in the 6th Concession of the Township of Merritt, in the District of Sudbury.

Lieutenant-Governor may deal with special cases

5. Notwithstanding anything herein contained the case of any person setting up on special grounds a claim to receive from the Crown a grant or lease of any part of the bed of a navigable body of water or stream shall be dealt with by the Lieutenant-Governor in Council as he may deem fair and just.

Proclamation of Act

6. This Act shall not come into force until a day to be named by the Lieutenant-Governor by his proclamation.

S.O. 1940, c28

The Statute Law Amendment Act, 1940.

Section 3 amended the 1911 enactment as given in
R.S.O. 1937, c. 44

Assented to February 24th. 1940.

Session Prorogued February 24th. 1940.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Rev. Stat., c. 44 amended

3. - (1) The Bed of Navigable Waters Act is amended by renumbering the present section 1 as section la and by adding thereto the following section:

Interpretation

1. In this Act, –

(a) “bed” used in relation to a navigable body of water shall include all land and land under water lying below the high water mark; and“

(b) “high water mark” shall mean the level at which the water in a navigable body of water has been held for a period sufficient to leave a watermark along the bank of such navigable body of water.Re

Rev. Stat., c. 44, s. la, amended

(2) Section la of The Bed of Navigable Waters Act, as renumbered by subsection 1 of this section, is amended by adding thereto the following subsections:

Where boundary body of navigable water

(2) Where in any patent, conveyance or deed from the Crown made either heretofore or hereafter, the boundary of any land is described as a navigable body of water or the edge, bank, beach, shore, shoreline or high water mark thereof or in any other manner with relation thereto, such boundary shall be deemed always to have been the high water mark of such navigable body of water.

Minister may fix high water mark

(3) The Minister of Lands and Forests may, upon the recommendation of the Surveyor-General for Ontario, fix the high water mark of any navigable body of water or any part thereof, and his decision shall be final and conclusive.

Rev. Stat., C. 44, s. 2, amended.

(3) Section 2 of The Bed of Navigable Waters Act is amended by striking out the word and figure “Section 1” in the first line and inserting in lieu thereof the word, figure and letter “Section 1a.”

R.S.O. 1950, c.34
The Bed of Navigable Waters Act

(The Act as here follows continued unchanged until April 5, 1951)

Interpretation

1. In this Act,

(a) “bed” used in relation to a navigable body of water includes all land and land under water lying below the high water mark;(b

(b) “high water mark” means the level at which the water in a navigable body of water has been held for a period sufficient to leave a watermark along the bank of such navigable body of water. 1940, c. 28, s. 3(1).Gr

Grant to be presumed to be to water’s edge

2. (1) Where land bordering on a navigable body of water or stream has been heretofore, or shall hereafter, be granted by the Crown, it shall be presumed, in the absence of an express grant of it, that the bed of such body of water or stream was not intended to pass to the grantee of the land, and the grant shall be construed accordingly and not in accordance with the rules of the English Common Law. R.S.0. 1937, c. 44, s. 1.

Where boundary body of navigable water

(2) Where in any patent, conveyance or deed from the Crown made either heretofore or hereafter, the boundary of any land is described as a navigable body of water or the edge, bank, beach, shore, shoreline or high water mark thereof or in any other manner with relation thereto, such boundary shall be deemed always to have been the high water mark of such navigable body of water.

Minister may fix high water mark

(3) The Minster of Lands and Forests may, upon the recommendation of the Surveyor-General for Ontario, fix the high water mark of any navigable body of water or any part thereof, and his decision shall be final and conclusive. 1940, c. 28, 2. 3(2).

Saving as to certain cases

3. Section 2 shall not affect the rights, if any, of a grantee from the Crown or of any person claiming under him, where such rights have heretofore been determined by a court of competent jurisdiction in accordance with the rules of the English Common Law, or of a grantee from the Crown, or any person claiming under him who establishes to the satisfaction of the Lieutenant-Governor that he or any person under whom he claims has previous to the 24th day of March, 1911, developed a water power or powers under the bona fide belief that he had the legal right to do so, provided that he may be required by the Lieutenant-Governor in Council to develop the said power or powers to the fullest possible extent and provided that the price charged for power derived from such water power or powers may from time to time be fixed by the Lieutenant-Governor in Council, and the Lieutenant-Governor in Council may direct that letters patent granting such right be issued to such grantee or person claiming under him, under and subject to such conditions and provisions as may be deemed proper for insuring the full development of such water power or powers, and the regulation of the price to be charged for power derived from them. R.S.O. 1937, c. 44,s.2.

Act not to apply to a certain locality

4. This Act shall not apply to the bed of the river where it runs through Lot 8 in the 6th Concession of the Township of Merritt in the District of Sudbury. R.S.O. 1937, c. 44, s. 3.

Lieutenant-Governor may deal with special cases

5. Notwithstanding anything herein contained the case of any person setting up on special grounds a claim to receive from the Crown a grant or lease of any part of the bed of a navigable body of water or stream shall be dealt with by the Lieutenant-Governor in Council as he may deem fair and just. R.S.O 1937, c. 44, s. 4.

S.0. 1951, c. 5

The Bed of Navigable Waters Amendment Act, 1951

Section 1 repealed the definitions and boundary determination section 1 of R.S.O. 1950, c. 34, enacted first by S.O. 1940, c. 28, s. 3; and extended the effect of the Act by repeal and re-enactment of section 2 to include the beds of navigable waters flowing through lands previously granted by the Crown and removed the presumption of the original statute.

An Act to Amend The Bed of Navigable Waters Act

Assented to April 5th, 1951.

Session Prorogued April 5th, 1951.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Rev. Stat., c. 34, s. 1, repealed

1. Section 1 of The Bed of Navigable Waters Act is repealed.

Rev. Stat., c. 34, s. 2, re-enacted

2. Section 2 of The Bed of Navigable Waters Act is repealed and therefor:

Grant to be deemed to exclude the bed

2. Where land that borders on a navigable body of water or stream, or on which the whole or a part of a navigable body of water or stream is situate or through which a navigable body of water or stream flows, has been heretofore or is hereafter granted by the Crown, it shall be deemed, in the absence of an express grant of it, that the bed of such body of water was not intended to pass and did not pass to the grantee.

Short title

3. This Act may be cited as The Bed of Navigable Waters Amendment Act, 1951.

R.S.O. 1960, c 32

The Bed of Navigable Waters Act

The Act as here follows continued unchanged through
R.S.O. 1970, c. 41, R.S.O. 1980, c. 40, and R.S.O. 1990,
c. B.4

Grant to be deemed to exclude the bed

1. Where land that borders on a navigable body of water or stream, or on which the whole or a part of a navigable body of water or stream is situate, or through which a navigable body of water or stream flows, has been heretofore or is hereafter granted by the Crown, it shall be deemed, in the absence of an express grant of it, that the bed of such body of water was not intended to pass and did not pass to the grantee. 1951, c. 5, s. 2.

Saving as to certain cases

2. Section 1 does not affect the rights, if any, of a grantee from the Crown or of a person claiming under him, where such rights were, previous to the 24th day of March, 1911, determined by a court of competent jurisdiction in accordance with the rules of the English Common Law, or of a grantee from the Crown, or a person claiming under him who establishes to the satisfaction of the Lieutenant Governor that he or any person under whom he claims has previous to the 24th day of March, 1911, developed a water power or powers under the bona fide belief that he had the legal right to do so, provide that he may be required by the Lieutenant Governor in Council to develop such power or powers to the fullest possible extent and provided that the price charged for power derived from such water power or powers may from time to time be fixed by Lieutenant Governor in Council, and the Lieutenant Governor in Council may direct that letters patent granting such rights to be issued to such grantee or person claiming under him under and subject to such conditions and provisions as are deemed proper for insuring the full development of such water power or powers and the regulation of the price to be charge for power derived from them. R.S.O. 1950, c. 34, s. 3, amended.

Act not to apply to a certain locality

3. This Act does not apply to the bed of the river in Lot 8 in the 6th Concession of the Township of Merritt in the District of Sudbury. R.S.O. 1950, c. 34, s. 4.

Lieutenant Governor may deal with special cases

4. Notwithstanding any other provision of this Act, the case of any person setting up on special grounds a claim to receive from the a grant or lease of any part of the bed of a navigable body of water or stream shall be dealt with by the Lieutenant Governor in Council as he deems fair and just. R.S.O. 1950, c. 34, s. 5.

Bed of Navigable Waters Act

(Current legislation)

Grant to be deemed to exclude the bed

1. Where land that borders on a navigable body of water or stream, or on which the whole or a part of a navigable body of water or stream is situate, or through which a navigable body of water or stream flows, has been or is granted by the Crown, it shall be deemed, in the absence of an express grant of it, that the bed of such body of water was not intended to pass and did not pass to the grantee. R.S.O. 1980, c. 40, s. 1. Saving as to certain cases

2. Section 1 does not affect the rights, if any, of a grantee from the Crown or of a person claiming under the grantee, where such rights were, before the 24th day of March, 1911, determined by a court of competent jurisdiction in accordance with the rules of the English Common Law, or of a grantee from the Crown, or a person

claiming under the grantee who establishes to the satisfaction of the Lieutenant Gover¬nor that he, she or it or any person under whom the person claims has, before the 24th day of March, 1911, developed a water power or powers under the reasonable belief that he, she or it had the legal right to do so, provided that the person may be required by the Lieutenant Governor in Council to develop such power or powers to the fullest possible extent and provided that the price charged for power derived from such water power or powers may from time to time be fixed by the Lieutenant Governor in Council, and the Lieutenant Governor in Council may direct that letters patent granting such rights be issued to the grantee or person claiming under the grantee under and subject to such conditions and provisions as are considered proper for insuring the full development of such water power or powers and the regulation of the price to be charged for power derived from them. R.S.O. 1980, c. 40, s. 2, revised.

Act not to apply to a certain locality

3. This Act does not apply to the bed of the river in Lot 8 in the 6th Concession of the Township of Merritt in the District of Sudbury. R.S.O. 1980, c. 40, s. 3.

Lieutenant Governor in Council may deal with special cases

4. Despite any other provision of this Act, the case of any person setting up on special grounds a claim to receive from the Crown a grant of lease of any part of the bed of a navigable body of water or stream shall be dealt with by the Lieutenant Governor in Council as the Lieutenant Governor in Council considers fair and just. R.S.O. 1980, c. 40, s. 4.

APPENDIX 19

The Water-power Act 1903 (New Zealand)

1903, No. 26.

An Act to provide for the Vesting in the Crown of Waters for Electrical Purposes and for the Utilising of such Waters for those Purposes.
[23rd November, 1903.]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:–

1. The Short Title of this Act is “The Water-power Act, 1903”; and it shall form part of and be read together with “The Public Works Act, 1894.”

2. (1) Subject to any rights lawfully held, the sole right to use water in lakes, falls, rivers, or streams for the purpose of generating or storing electricity or other power shall vest in His Majesty.

(2) The Governor may from time to time acquire as for a public work any existing rights or any lands necessary for utilising water for generation or storage of electrical power.

3. The Governor may from time to time, by Order in Council gazetted, delegate to any local authority, on such conditions as he thinks fit, the right to use water from any lake, fall, river, or stream for the purpose of generating electricity for lighting or motive power.

4. Notwithstanding anything in this Act, the Minister for Public Works, outside a mining district, may, subject to such conditions as he thinks fit, grant to any person or company the right to use water from any fall, river, or stream for the purpose of:-

(a.) Generating electricity for lighting, to be used only for the purpose of and in connection with the business of such person or company, and not for the purpose of sale to or use by any other person, company, or corporation; and

(b.) Driving any machinery used for any agricultural, industrial, or manufacturing purpose other than the generation or storage of electricity.

5. Nothing herein shall affect the right to the use of water for the irrigation of agricultural or pastoral lands, for the supply of water stock, or under “The Mining Act, 1898,” except the granting of water-rights for the generation of electric power for any other purpose save the applicant’s own use:

Provide that no application to a Warden for the use of more than forty heads of water shall be granted except with the consent in writing of the Minister of Mines.

6. Nothing in this Act contained shall be deemed to invalidate or restrict any rights or privileges conferred by any existing Act of the General Assembly.

APPENDIX 20

Countryside and Rights of Way Act 2000 England

Miscellaneous Provisions Relating to Right of Access

S17 Byelaws

(1) An access authority may, as respects access land in their area, make byelaws-
(a) for the preservation of order,
(b) for the prevention of damage to the land or anything on or in it, and
(c) for securing that persons exercising the right conferred by section 2(1) so behave themselves as to avoid undue interference with the enjoyment of the land by other persons.

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

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

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

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

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

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

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

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

Land Reform (Scotland) Act 2003

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

(1) The local authority may, in relation to land in respect of which access rights are excercisable, make byelaws-
(a) making provision further or supplementary to that made-
(i) by sections 2 and 9 and under section 4 above as to the responsible exercise of access rights; and
(ii) by section 3(2) and under section 4 above as to the responsible use, management and conduct of the ownership of the land;
(b) specifying land for the purposes of section 6(j) above;
(c) providing for-
(i) the preservation of public order and safety;
(ii) the prevention of damage;
(iii) the prevention of nuisance or danger;
(iv) the conservation or enhancement of natural or cultural heritage.

(2) Byelaws made under section (1)(c) above may, in particular-
(a) prohibit, restrict or regulate the exercise of access rights;
(b) facilitate their exercise;
(c) so as to protect and further the interests of people who are exercising or who might exercise access rights, prohibit or regulate-
(i) the use of vehicles or vessels;
(ii) the taking place of sporting and recreational activities;
(iii) the conduct of any trade or business;
(iv) the depositing or leaving of rubbish or litter; and
(v) the lighting of fires and the doing of anything likely to cause a fire, on the land.

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

(a) any public right of way or navigation; or
(b) the functions of a statutory undertaker.

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

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

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

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

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

APPENDIX 21

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 Colonization 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 Waste 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 Wast 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

Legislation by the General Assembly, 1877-1892

Land Act, 1877
Land Act Amendment Act, 1879
Land Act Amendment Act, 1882
Land Act Amendment Act, 1884

Agricultural leases
Land Act, 1885
Land Act Amendment Act, 1887
Land Act Amendment Act, 1888
Selectors' Land Revaluation Act, 1889
Land Act 1892