OUTDOOR WALKING ACCESS

REPORT TO THE MINISTER FOR RURAL AFFAIRS

WALKING ACCESS
CONSULTATION PANEL

Requests for printed copies should be directed to:

Policy Publications
Ministry of Agriculture and Forestry
PO Box 2526
Wellington
New Zealand

Tel: +64 4 894 0252

Email: policy.publications@maf.govt.nz

This publication can be downloaded from www.walkingaccess.org.nz

ISBN: 978-0-478-29876-5 (Print)

ISBN: 978-0-478-29877-2 (Online)

Foreword

This the second time I have chaired a committee of committed and talented people to bring to the Government a report on how New Zealanders might have walking access to the great outdoors that is free, certain, enduring and practical. I want to thank the Hon Damien O'Connor and his Government for having the faith in us to tackle this issue again.

The first report, *Walking Access in the New Zealand Outdoors*, laid the groundwork for this report. The Walking Access Consultation Panel seeks to build on the traditional goodwill of the past. We believe this report reflects a consensus that common-sense solutions based on voluntary negotiation are needed. This report is not about a right to roam or about taking rights over private land. Rather, it is about finding where the access is now, where people need access and then ensuring access is in the right place and that all parties agree to the outcome.

The Panel promotes local solutions and community engagement. It recommends that an organisation be established to provide leadership at the national level and encourages people to work with it to "get some runs on the board". I am aware personally of situations where I believe people have been unreasonable about giving access. There will be times when process proposed in this report won't succeed, but there is still plenty to do over the next 10 years. You will appreciate that when you read our report.

Access to the great outdoors is part of New Zealand's culture and national identity. Having listened to people throughout the country at our meetings and having read close to 1400 submissions, I hear people saying that they want and expect fair and reasonable access to rivers, the coastline, lakes and public land. This report endeavours to reflect those sentiments. I, on behalf of the Panel, want to thank all those who went to the meetings and made written submissions.

The Panel also thanks Mark Neeson, Hunter Donaldson, Misty Skinner and Sheryl Harding for the dedicated effort they have given to this report. The Panel also expresses its appreciation and gratitude to Brian Hayes for his extremely thorough research on access matters relating to water margins and unformed legal roads. Brian's research has made a significant contribution to our understanding of some very complex legal issues.

The other members of the Panel acknowledge the reasons for the alternative views held by one Panel member, Bryce Johnson. They do not, however, agree that his alternative recommendations are necessary to make progress, and note that he supports the majority of the report.

It is my sincere belief that this report will help to achieve the aim of providing free, certain, enduring and practical access for everyone who lives in this wonderful country.

John Acland
Chair of the Walking Access Consultation Panel
Mount Peel Station, Peel Forest
February 2007

Contents

Summary

This report responds to a request from the Government for the Walking Access Consultation Panel (the Panel) to seek a consensus from stakeholders on concerns about walking access to the outdoors and measures that might be taken to deal with the concerns. The Panel consulted widely.

The Panel recognises that there are divergent views on walking access, however it believes that it has established consensus on a way forward. The matters on which the Panel believes it has found consensus are:

- New Zealanders should have fair and reasonable access on foot to and along the coastline and rivers, around lakes and to public land.
- The public generally have the right to be on public land.
- Landholders generally have the right to manage their land and who may enter on to it.
- The public has rights to public resources.
- There is a need for leadership, guidance and policy making at a national level in respect of walking access, and this will require the establishment of a new access organisation.
- There is a need for improved information about public access rights and this will require the provision of appropriate mapping and signposting.
- Unformed legal roads provide an important network of public access rights, both along water margins and elsewhere.
- There is a need for measures to enforce the public right of access to unformed legal roads, but these measures should be accompanied by powers to regulate the inappropriate use of these roads.
- There is scope to use existing access rights that are not in a useful location as a basis for negotiating more practical access.
- Where fixed water margin access has been affected by erosion it is desirable that it should be reattached to the relevant water margin.
- There are uncertainties around existing public access along water margins, and these need to be addressed.
- Where new access over private land is needed, it should be by negotiation and agreement with the landowner, and with appropriate compensation where necessary.
- The New Zealand Walkways Act 1990 is a valuable existing statutory mechanism for the provision of walking access, and there is merit in transferring the management of this Act to the proposed access organisation.

- The proposed access organisation (Te Ara o Papatuanuku) should work in harmony and cooperation with existing access initiatives and with local government.
- There is a need for a widely accepted voluntary code of responsible conduct to protect the environment and the interests of landholders.
- Landholders' concerns about liability in respect of walker safety and any fire risk attributable to walkers need to be managed.
- Rural crime and personal security is a concern to many, and requires on-going attention by the Police and stakeholders together.
- Biosecurity is an important issue for landholders, and while there are adequate existing regulatory controls, there is scope to recognise biosecurity concerns when negotiating access.
- While the focus of the proposed access organisation's work will be on walking access, there is scope in the negotiation of walking access on private land for agreement by landholders to access with vehicles, guns and dogs.

One member of the Panel, Mr Bryce Johnson, believes that the Panel's recommendations, if adopted, will not be sufficient to achieve the objective of completing the Queen's Chain and will not deal effectively with the issue of "exclusive capture". Mr Johnson's alternative view and recommendations are included as section 21 of this report.

The majority of the Panel does not consider that there is a consensus amongst stakeholders on the measures recommended by Mr Johnson, and, therefore, does not support them.

Some stakeholders raised concerns about recreational access to land with vehicles, especially with four-wheel-drive vehicles. This is outside the scope of walking access, but, given the existing right to use motor vehicles on unformed legal roads, this issue should be considered alongside the recommended measures to deal with the use of unformed legal roads for walking access.

The Panel has recommended a plan of action that would see the forming of an establishment board for an access organisation as soon as possible, and the commencement of work on the mapping of existing access rights under the supervision of the board. The plan of action also recommends that work commence on the legislative measures that would be needed to give effect to some of the Panel's recommendations.

PART 1

INTRODUCTION

1 Background

New Zealanders value access to the great outdoors for recreation, and landholders in New Zealand have traditionally granted access to and across their land for recreational use. The great deal of goodwill this has generated forms an excellent basis for an enduring system of access for New Zealand.

Many community groups are working with local landholders, councils and communities to promote better access for recreation (this report contains examples of some of these initiatives). Unfortunately, landholders and outdoor enthusiasts sometimes disagree about what land is open to the public and who should control access to it.

In response to a 2003 report by the Land Access Ministerial Reference Group and the subsequent announcement of legislative proposals in December 2004, landholders expressed strong opinions on the protection of private property rights. They regarded the proposals as a taking of an interest in land without compensation, although the Government later announced (in mid-2005) that it would provide compensation in exceptional circumstances. These sentiments were largely a response to the concept of a deemed access right along water margins over private land. In mid-2005, the Government abandoned the legislation that it had proposed to give effect to this concept.

However, the issues still remain. The Walking Access Consultation Panel (the Panel) was appointed in 2005 to seek a consensus about solutions for formal access for recreational purposes.

During consultation in 2006, the Panel heard strongly expressed concerns, especially from those interested in fishing and hunting, about the protection of the public's interests in relation to wildlife, freshwater fisheries and water. Although the ownership of these resources does not generally attach to land title under New Zealand law, there is no legal right to cross private land to access them. These submitters expressed a strong desire for clear public access rights to these resources (including sports fish, game and other wildlife).

While acknowledging the importance of protecting private property rights, the Panel is concerned that the rights of the public (for example, access to public land, including unformed legal roads and marginal strips) are not impeded, and that the public has practical access to public resources, including sports fish and game.

The Panel has taken a long-term view. Their concern is not just today's identified problems, but emerging trends in land ownership and use, and landowner and community attitudes, that threaten what the previous Land Access Ministerial Reference Group and the current Panel, following consultation, regard as a fundamental New Zealand

value, that is, the opportunity to walk freely along our coastline and rivers, around lakes and to other public land.

The Panel proposes practical and cost-effective solutions, for which it believes there is widespread support, while recognising that implementing some elements may take time. Realistically, some access issues can only be resolved over the long term.

The Panel was also asked to advise on areas of disagreement and recommend possible solutions. The alternative view of one member of the Panel has been recorded. The Panel does not agree with those comments and does not believe there is widespread support for them.

2 Structure of report

In this report, the Panel informs the Minister for Rural Affairs on the issues that arose during the consultation process and makes recommendations. These recommendations reflect, as far as possible, a consensus on how to address the access concerns identified. Recommendations are also made on matters where there is no clear consensus.

The consultations indicated that most people did not want a major departure from the status quo. Some access advocates have reservations about this approach, which depends to a large extent on the traditional goodwill between landholders and recreational users being retained and built upon.

The basis of this report is the Panel's agreement that there is a public interest in recreational walking access in the outdoors, and that this interest must be reconciled with the right of private landowners to control who may access their land. Current tensions between these concepts are linked to a trend away from the tradition of rural landholders allowing free recreational walking access to their land and to the absence of a recognised and accepted public policy framework for walking access. The Panel believes that this report can form the basis of such a framework.

This report begins with a discussion on the aim and principles that the Panel agrees should be used to guide the issue of walking access in the future (Part 2). It is followed by a detailed consideration of, and recommendations on, the key issues raised during consultation (Part 3).

The report concludes with a summary of the recommendations, the alternative view of one Panel member and a proposed plan of action (Part 4).

This report emphasises water margin access because public land along water margins has been reserved since the earliest days of organised European settlement in New Zealand. The Panel recognises the importance of access "across country" to water margins and access to other public land, and these matters are also covered.

This report is accompanied by three companion reports:

- *Outdoor Walking Access: Analysis of Written Submissions* (Walking Access Consultation Panel 2007);
- *Roading Law as it Applies to Unformed Roads* (Hayes 2007a);
- *Elements of the Law on Movable Water Boundaries* (Hayes 2007b).

Summaries of the latter two reports form Appendix I and Appendix J of this report.

This report, the three companion reports and notes from the consultation meetings are available on the walking access website (www.walkingaccess.org.nz).

3 Identified access issues

Consultation by the Panel in 2006, and by the Land Access Ministerial Reference Group in 2003, identified the following problems with existing access arrangements.

- Existing water margin reservations consist of various different legal forms, with differing rights of access.
- Existing water margin reservations are incomplete, so that a significant proportion (possibly half) of the water margin is private land.
- Much of the water margin reservation has been affected by erosion and accretion so that either it does not now provide water margin access or the original reservation has become separated from the water margin.
- There is a lack of authoritative and readily available information about the location of public access.
- Voluntary access arrangements can lack endurance and certainty.

In an attempt to overcome these problems the Government proposed, in 2004, to provide for a deemed right of access over a five-metre strip of land adjoining water margins. The Panel recognises that this proposal failed to take sufficient account of the property rights of potentially affected landholders. Nevertheless, access problems remain, and the Panel has looked at how they might be addressed.

Many landholders said that there is already ample public land for recreational access (although some said that adequate information about its location needed to be provided). Many other submissions identified areas where access to or along water margins, to areas of public land or public resources such as sports fish and game, was not available, or only available at the discretion of the landholder. Consultation showed that access over private land was generally freely granted in the past, but there are claims that there is a growing tendency to deny access, often when there is a change of ownership of the property. Submitters claimed that legal access can be blocked by an adjoining landholder (for example, along unformed legal roads), and that the Department of Conservation (DOC) sometimes blocks access to land that it administers. There were also claims that, where practical access to sports fish and game was available only by crossing private land, exclusive commercial access arrangements were sometimes preventing the negotiation of reasonable non-commercial access arrangements.

Consultation showed that many people are unclear about the law applying to unformed legal roads (paper roads). This issue has been

clarified by Hayes (2007a) in a paper commissioned by the Ministry of Agriculture and Forestry (MAF). Hayes' paper provides a robust examination of the law, and the Panel has used it to help form its advice and proposals in this report.

The Panel's terms of reference focus on walking access. Consultation showed concerns about access by vehicles (including motor vehicles and bicycles) and with firearms and dogs. Some reference was also made to access with horses. The Panel acknowledges that it is difficult to deal with walking access in isolation, but, in this report, "walking access" means access on foot and without firearms, dogs or horses, except where specifically referred to (note "walking access" includes access with disability-assist dogs and access with mobility devices).

Issues raised in the 2006 consultation

The key issues raised during the consultation process include:

- public interest in access to land;
- protection of private property;
- possible functions and form of a proposed access organisation;
- different types of access currently available to the public;
- management of unformed legal roads (paper roads);
- provision of information about existing access;
- lack of differentiation on maps between private and public roads;
- restoration and realignment of access that has been lost due to erosion or accretion;
- methods to establish new access;
- Māori land and Māori issues;
- possible content and status of a code of responsible conduct for access;
- extent of landholders' liability to the public and suggestions for possible further limitations;
- risk of fires and liability for the costs imposed by fires;
- rural crime and security concerns;
- biosecurity risks to plants, animals and people;
- "exclusive capture" of access to sports fish and game and other public resources;
- access with motor vehicles, horses, bicycles and dogs;
- access for hunting;
- difficulty in contacting landholders to ask permission for access.

4 About the Walking Access Consultation Panel

4.1 Appointment of the Panel

In August 2005, the Government appointed the Walking Access Consultation Panel to carry out thorough consultation with interest groups and the public. The Panel started with the views expressed at consultation meetings with stakeholder representatives, Māori and the public, and in the many written submissions received in response to the Land Access Ministerial Reference Group's 2003 report *Walking Access in the New Zealand Outdoors*. Details of the members of the Panel are included in Appendix D.

The Ministry of Agriculture and Forestry (MAF) provided policy, research and support services for the Panel.

4.2 Terms of reference

The Panel reports to the Minister for Rural Affairs. The full terms of reference are provided in Appendix E.

To summarise, the Panel was asked to attempt to establish more clearly the concerns of interest groups and the extent to which agreement could be reached on measures to:

- clarify existing public access rights along water margins (that is, the location of the Queen's Chain) (section 8 of this report);
- establish the location of "gaps" in the Queen's Chain, their significance and how they might be remedied (section 9);
- signpost access rights to water margin land so that the public will be better informed on where they may walk (section 9);
- establish a code of responsible conduct applying to persons walking on private land or on land adjacent to private land (section 13);
- protect the security of landholders where this is seen to be an issue (section 16);
- deal with issues that may arise regarding walking access from a Māori perspective (section 12);
- provide access along rivers and lakes that may have no Queen's Chain at all (section 11);
- negotiate access across private land to the Queen's Chain or to public land where there is no other reasonable or convenient means to access this land (section 11);

- explore with interest groups and organisations how suitable unformed legal roads might be better used to provide walking access to the Queen's Chain or to public land (section 8).

The Panel was also directed to explore the nature of a proposed access commission, and how a commission might provide the necessary leadership on access-related issues (section 7).

The Panel was also invited to report on any other matters related to access policy that appear to require the Minister's consideration (section 18).

4.3 Summary of consultation process

During May, June and July 2006, the Panel held 43 consultation meetings throughout the country. The meetings were an opportunity for the public and stakeholder organisations to talk to the Panel about the issues and solutions discussed in the Panel's consultation document *Outdoor Walking Access*, which was published in April 2006. This feedback was considered by the Panel in formulating its recommendations and conclusions.

The Panel also established a website (www.walkingaccess.org.nz), called for submissions from the public, and met with interested organisations to have more in-depth discussions about the access issues affecting the membership of those groups.

The Panel received approximately 1400 written submissions. An analysis of the submissions is available as a companion document to this report (Walking Access Consultation Panel, 2007).

The Panel was impressed by the very large number of individuals and organisations who took the time to attend meetings and make written submissions, and gratified at the goodwill shown. It seems to the Panel that the public and landholders are keen to see the access debate resolved amicably, and there were many positive suggestions as to how public access could be improved while protecting the interests of landholders.

PART 2

AIM AND PRINCIPLES FOR WALKING ACCESS

5 Aim

The Panel considers that a high-level, overarching statement is needed to guide future access policy. After consultation, the Panel concludes that the aim for walking access is that:

> **New Zealanders have fair and reasonable access on foot to and along the coastline and rivers, around lakes and to public land.**

The Panel found consensus on this "aim".

The Panel recognises the difficulty in defining the term "reasonable". The Panel considers that the phrase "fair and reasonable" reflects a balance between different interests. This report endeavours to give some context to the term without defining it. What is "reasonable" will need to be determined on a case-by-case basis.

The aim is consistent with section 6 of the Resource Management Act 1991, which states that "the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers" is a matter of national importance.

The Panel decided not to specify that the aim includes visitors to New Zealand because the objective is for a strategy that focuses on the aspirations of New Zealanders. Its effects would, in practice, apply to visitors to New Zealand.

6 Principles

The Panel believes that solutions for walking access should be guided by a set of principles that are applicable generally and reflect the aspirations and values of both landholders and the public.

The Panel has heard the clearly expressed concern during consultation about "property rights". Reflecting that concern, the Panel recognises that:

- the public generally have the right to be on public land;[1]
- landholders generally have the right to manage their land and who may enter on to it;[2]
- the public has rights to public resources.

These references to "rights" should not be taken as detracting from the benefits of and support for traditional access over private land by either explicit or implicit agreement. Arrangements of this kind are still widely practised and supported. The Panel would not wish to see any action to clarify or extend rights of access undermine the goodwill that exists between the public and landholders. For this reason, this report does not refer to "rights", whether public or private, unless the context requires otherwise.

The Panel believes that there is consensus on the following five principles. It acknowledges the different views about each statement but feels that together they fairly reflect the consultation. Many of the caveats and comments received on the principles are covered in this section.

Principle 1: Quality of access

Walking access should be free, certain, enduring and practical.

- **Free** – The public should be able to access, without charge, land that is open for public use. The terms of access over private land are a matter for negotiation.
- **Certain** – Both the public and landholders expect legal certainty over the ability of the public to access public land, and the right of landholders to exclude the public from privately owned land.
- **Enduring** – The legal right of access should be enduring over time.
- **Practical** – New access should be usable in terms of location and topography.

[1] For a detailed analysis of the right of the public to be on public land, see Hayes (2007b).

[2] The exceptions are statutory rights of entry to private land by the Police and various government and local authority officials.

Principle 2: Private property

- Landholders have the right to decline permission for access to or across private property unless some form of enduring legal access has been established.
- Landholders have the right to charge for any facilities or services[3] that they provide on their property in association with the provision of access. They also have the right to recover any costs incurred in providing access.
- New access should be established by negotiation in ways that are fair to all parties.
- Mandatory access across private land should not be imposed on landholders.
- Private property and activity must be respected.

Landholders felt strongly that any taking of land or any interest in land should be subject to compensation. They referred frequently to the possible use of the Public Works Act 1981 and the provisions for compensation in that Act. These concerns about compensation appear to have arisen from a misunderstanding by landholders that the Panel (or the Government) would propose some form of mandatory legislated access over private land. Some even used words like "this proposal" or "this legislation". The Panel wishes to record that the Government has made it clear that it will not be pursuing the five-metre access strip proposal that it set aside in 2005.

Principle 3: Public interest

- Landholders do not have the right to refuse access over adjoining public land. This includes unformed legal roads (paper roads) that intersect private land. These roads do not form part of the title to the adjoining land, and are thus not subject to the rights attached to that land.
- Wildlife, freshwater fisheries and natural water are natural resources and do not usually attach to the land title.
- Landholders should not unreasonably deny access to public natural resources and public lands.
- Access restrictions to public land are a matter for the administering authority, and any statutory power they may have to regulate access.

Public land includes esplanade and other reserves administered by local authorities, Crown land in respect of which the Crown has no reason to exclude the public, marginal strips and unformed legal roads.

[3] Services do not include the granting of access permission but could include the building of bridges or stiles, road maintenance or the provision of accommodation.

Again, the Panel notes the many concerns about access to wildlife and freshwater fisheries. These resources are regulated under the Wildlife Act 1953 and the Conservation Act 1987. This is discussed in more detail in section 18.1.

Principle 4: Respect for the environment

Public access, like any land use, carries a responsibility to care for the environment.

The potential for damage to habitats and environmental degradation is a concern in some areas. Particularly, care must be taken to avoid:

- damage to flora and fauna;
- the illegal removal of flora and fauna;
- pollution and contamination of water and/or land – this is particularly an issue in water catchments that supply drinking water for human consumption (access to community water catchments may be limited for this reason);
- erosion of stream banks;
- the transfer of weeds or pests from one location to another (see section 17 for further discussion);
- damage by fires (see section 15 for further discussion);
- wāhi tapu and other places of cultural sensitivity (see section 12 for further discussion);
- the leaving of rubbish and litter;
- damage to the ground surface, particularly by vehicles.

Environmental concerns should be covered in the proposed code of responsible conduct to raise public awareness of environmental issues (section 13).

Principle 5: Respect for people

Everyone should:

- respect the interests and privacy of both landholders and access users;
- not interfere with the lawful activities of landholders, their employees, contractors or visitors;
- not endanger, disturb or annoy other people.

PART 3

EVALUATION OF THE ISSUES

7 Leadership

7.1 Background

The Panel considers that there is a need for leadership, guidance and policy making at a national level, especially if central government funding is made available. This view is supported by the consultation, which found a consensus for the formation of an access organisation.

The lack of national leadership on access, and a perceived lack of interest in access issues on the part of agencies with existing responsibilities, attracted a great deal of comment and proposals for action. People interested in this matter felt that the public interest in recreational access is not dealt with well because of the ad hoc management of access by responsible agencies, including DOC, Land Information New Zealand (LINZ) and local authorities.

This lack of clear leadership results in poor availability of information and a sense of frustration for some members of the public, who find it difficult to obtain help and advice about access. There is a belief that access (particularly to unformed legal roads) is being lost.

The principles for walking access proposed by the Panel (discussed in section 6) will not be realised without strongly focused leadership at all levels. This is especially so in the absence of specific access legislation, as options will depend for their effectiveness on leadership, co-operation and persuasion.

Support was received for an access organisation, perhaps in the form of a "trust" (for example, the Queen Elizabeth the Second National Trust or the New Zealand Landcare Trust), on which the various access stakeholders could be represented. There is wide support for implementation resting at a local or regional level. The Panel notes an antipathy to "another central bureaucracy". A small number of landholders, iwi groups, local government and industry organisations did not see a need for any institutional change. Local authorities and landholders strongly opposed the funding of any new access functions from local authority rates.

The Panel discussed this proposal at length. The Panel concludes firmly that there is a need for leadership on access and this will not be achieved through any existing organisation or structure. An access organisation may not prove to be the complete answer, but it is the linchpin of the package of proposals in this report.

Before it could decide on the merits of the proposal for an access organisation, the Panel considered the functions such an organisation might carry out. The next section summarises the possible functions of

a new access organisation and the roles of existing institutions. It then considers the organisational and institutional options for a new access organisation.

7.2 Options for a new access organisation

7.2.1 Functions

The Panel identified nine core functions of a new access organisation. The term "organisation" is used because it is the Panel's view, supported by many submissions, that existing agencies will not be effective in carrying out the functions seen as being essential to address the walking access issues identified by the Panel.

The following functions are explained in more detail in, and supported by, subsequent sections of this report.

- **Leadership** – There is a need for strong national leadership to direct and co-ordinate access arrangements nationwide. It is essential for the organisation to have sufficient authority, mana and resources to accomplish its goals. The organisation needs to provide local leadership on access issues, by encouraging, supporting and co-ordinating the work of local groups or organisations concerned with access.
- **Negotiation and acquisition of new access** – These negotiations may be carried out by the access organisation or by local government or community groups. The organisation would co-ordinate local initiatives to achieve a consistent approach across the country and promote best practice. No matter how the negotiations are carried out, consideration will have to be given to the completion of legal processes to secure enduring access and to the holding of the negotiated rights.
- **Co-ordination and provision of information about access** – The access organisation should be responsible for ensuring that access information is available to the public in a useful form.
- **New Zealand Walkways Act 1990 (the Walkways Act)** – The Panel considers that this legislation could be used more actively, especially if funding is available to help negotiate access. An organisation could assume responsibility for the legislation and for establishing walkways under this Act. This would require some changes to the legislation. DOC currently administers the Walkways Act. The organisation could potentially contract with DOC to continue the operational management of walkways, especially those that include public conservation land. Firearms and dogs could be allowed on walkways where specifically provided for.

- **Administration of a contestable fund** – The negotiation of new access rights will often require funding. In some cases, it may be appropriate to make a financial contribution to providers of access. Funding could be provided directly by the organisation or through contractual arrangements with local government or community groups. Funding would be needed for signage and track improvement. An appropriate organisational structure and sound legal, administrative and accountability systems will be needed to manage a contestable fund. The organisation should also be able to seek private funding and sponsorship.
- **Conflict resolution** – The organisation could undertake mediation (primarily to make parties aware of the legal basis under which they are operating). Where appropriate, issues would be referred to a responsible agency (such as a territorial authority in the case of roads) for resolution. The organisation would seek to encourage resolution consistent with the principles outlined in section 6.
- **The holding of interests in land** – Negotiated interests (such as easements or leases for access over private land) may be held on behalf of the Crown by the organisation, by a trust or by local government. If the organisation were established as a body corporate, it will have the capacity to hold assets in its own name. This may not happen very often, but the power to do so is essential.
- **Monitoring of and reporting on the activities of central and local government organisations that have an access-related role** – The activities and policies of local government regarding esplanade reserves and strips and the administration of unformed legal roads, and the related policies of such departments as DOC, the Ministry for the Environment, LINZ and the Department of Internal Affairs, are important for walking access. These activities and policies need to be monitored from an access perspective, with findings reported annually to Parliament via an appropriate Minister.
- **Provision of advice on access** – Whatever form the organisation takes, it will need to provide specialist advice to the Government on access. It could also provide advice to local government and other interested parties, using guidelines and best practice information.

7.2.2 Assessment of existing institutions

The Panel considered whether any or all of the existing institutions could manage the identified issues in an effective and timely way. The various roles of existing institutions are described in Appendix F. The

Panel found a consensus that the existing institutional arrangements are not satisfactory, for example:

- LINZ does not currently consider that it has a role in providing the public with recreational maps or providing readily accessible information to the public about the location of publicly accessible land;
- some local authorities do not keep unformed legal roads free of obstructions to access even when complaints are received;
- the very strongly held view of access advocates that DOC is not an appropriate agency to promote access (the Panel notes that this view remains unchanged from 2003);
- access is not seen as a core function of MAF.

There is wide opposition to the organisation being established as part of the central government bureaucracy (this would tend to rule out the option of a branded agency within a department).

7.2.3 Criteria for, and possible forms of, the new organisation

Having decided on the functions of the access organisation, the Panel evaluated the most appropriate organisational form. Such an organisation must be able to demonstrate and/or hold:

- central leadership;
- independence;
- local implementation;
- stakeholder participation and "ownership";
- visibility;
- focus;
- accountability.

The Panel applied these criteria (and took public views into account) to some of the many possible forms of organisation identified in the consultation process, including: a form of "trust"; the Queen Elizabeth the Second National Trust; the New Zealand Landcare Trust; some form of local or regional administration; existing local authorities; the status quo, that is, existing central and local government agencies and their functions (for example, LINZ to take care of mapping, DOC to look after the public land it is responsible for, local authorities to deal with roads and subdivision, and so on); existing agencies augmented by a trust to promote new access over private land; a new statutory agency; a parliamentary commissioner; and some form of ombudsman.

The Panel determined that, while none of the organisational forms listed above fully meets the required characteristics, there are five realistic options (evaluated in Appendix G):

- a parliamentary commissioner;
- an access ombudsman;
- an access trust;
- the Queen Elizabeth the Second National Trust;
- a statutory authority.

Although submissions showed a high degree of support for a parliamentary commissioner or ombudsman, the Panel considers that this approach would not deliver the outcomes sought by submitters. For example, an ombudsman does not have the capacity to deliver services "on the ground". The Panel agrees that it is particularly important for the proposed organisation to be able to accept sponsorship and funding from private organisations. Some of these organisational forms will not be able to fulfil this requirement.

7.2.4 Structural and operational issues

Once a decision is made in principle to set up an access organisation, some detailed structural and operational matters will need to be determined. If the Government accepts the Panel's recommendations, these would best be considered in detail by an establishment board. These matters include:

- the composition of a national governance board, including the skills and experience appropriate to the board's functions;
- appropriate local and regional arrangements and functions, and how these relate to existing structures and organisations, including local government;
- the skill sets required to carry out the organisation's functions and how they might be provided;
- the scope for co-ordinating and sharing facilities with other organisations (for example, the Queen Elizabeth the Second National Trust, DOC, LINZ);
- the organisation's relationship with central government and existing government departments, and the administrative support it may require;
- the organisation's resource needs to support its administrative and operational functions, and a contestable fund; and
- appropriate governance and accountability arrangements, including reporting requirements to Ministers and Parliament (it is envisaged

that the organisation would be some form of Crown entity and subject to the governance and accountability provisions in the Crown Entities Act 2004).

The Panel considers that it is desirable that the access organisation have a distinctive name. A suggestion from the Panel is "Te Ara o Papatuanuku" (The Pathways of Mother Earth). This proposal would require further consideration and consultation before being formally adopted, but it is used throughout the rest of this report to illustrate the Panel's conviction of the need for such an organisation.

Recommendations on leadership

The Panel recommends that:

1 an access organisation be established that combines the characteristics of a statutory organisation with those of a trust (the Panel considers that this option is most likely to involve local landowners, users and enthusiastic volunteers);

2 the organisation be called Te Ara o Papatuanuku (the New Zealand Access Commission), to reflect the importance of rural New Zealand for all New Zealanders;

3 Te Ara o Papatuanuku be accountable to a Minister and be required to report to Parliament in accordance with the Crown Entities Act 2004.

The Panel recommends that Te Ara o Papatuanuku:

4 has a governance board appointed by the Minister responsible for the organisation, after consultation with key access stakeholders, with appointees having skills and experience relevant to the organisation's functions;

5 has a structure that reflects the need to work with, co-ordinate and promote the recreational access activities of local government and voluntary organisations;

6 be empowered to carry out the following functions:

- provision of national leadership, including a national strategy, and co-ordination of access among key stakeholders and relevant central and local government organisations;
- the provision of impartial and robust advice on access;
- local/regional leadership and co-ordination to help local groups with their access issues;
- mediation of disputes over walking access issues, including the ability to initiate negotiations;

- the reference of disputes about legal access to an appropriate authority;
- the creation and administration of walkways made under the Walkways Act 1990, with planning and supervision focused at a local level;
- the establishment and maintenance of a public access mapping database;
- administration of a contestable fund for the purpose of negotiating walking access either under the provisions of the Walkways Act 1990 or new or other existing legislation;
- creation of a trust structure able to hold land or interests in land for the purpose of providing walking access;
- the receipt and management of private funding contributions (including sponsorships) for the promotion of walking access;
- research, education and participation in external access-related topics and programmes;
- the development, promotion and maintenance of a code of responsible conduct.

8 Types of access

8.1 Background

There are many types of statutory access to and along water margins and other public land, and each type has different legal obligations and restrictions associated with it. The various forms of water margin access have been documented in Hayes (2003).

Statutory access includes:

- **Marginal strips along rivers, lakes and the coast** – These take two forms: those with fixed boundaries established up to 1990, and those established since then and that move with the water margin (both forms are now administered by DOC and are generally open to the public but access could be restricted, for example, for conservation purposes).
- **Esplanade reserves, esplanade strips and access strips** – These are established under the Resource Management Act 1991 and are administered by local authorities. They are generally open to public access, but there may be restrictions.
- **Public reserves** – There are various kinds of public reserves, with various rights of access.
- **Other Crown land reserved from sale** – Such land is often subject to public access by implicit consent of the Crown, but this depends on the use of the land by the Crown.
- **Roads, including unformed legal roads** – These have the widest and most certain access rights, and include much of the land reserved along water margins.

Other types of public access derive from a private owner's consent or agreement, including:

- easements or leases over private land forming part of walkways established under the New Zealand Walkways Act 1990;
- other easements or rights of way providing for public access;
- informal arrangements allowing access over private land, either on a case-by-case basis or, more generally, by implicit consent;
- access to land provided for in Queen Elizabeth the Second National Trust covenants.

Hayes (2007b) has explored some of the issues that arise in the application of the statutory rights of access to water margins. He explores comprehensively the history and status of water margin boundaries, and documents the uncertainties that have arisen as a

result of inconsistent and, arguably, unsatisfactory interpretations of the law by the courts. These uncertainties have historically meant that there are practical issues about the application of the law of trespass around water margins. Hayes' paper makes a recommendation on how the application of water margin access rights and the law of trespass could be clarified. The recommendation and the Panel's views on it are discussed in section 9.5.

8.2 Marginal strips

Marginal strips were formerly created under section 58 of the Land Act 1948 (and preceding legislation) on the sale or disposal of Crown land. They are strips of land adjoining the coast, lakes of more than eight hectares in area and rivers wider than three metres. Under the Land Act 1948, marginal strips were formally surveyed before the land was disposed of and are fixed in position irrespective of the effects of erosion and accretion. Since 1990, they have been created under part 4A of the Conservation Act 1987, and are deemed to be created automatically on the disposal of Crown land. They do not need to be surveyed, and are deemed always to adjoin the relevant water margin, that is, they move with any movement in the water margin.

8.3 Esplanade reserves, esplanade strips and access strips

The current statutory mechanism for establishing new water margin access over private land is the creation of esplanade reserves, esplanade strips and access strips under the Resource Management Act 1991. This process is discussed in section 11.4.

8.4 Public reserves and Crown-owned land

There is a wide variety of public reserves. The extent to which they provide for public access depends on the purpose for which they were created. Improved mapping of public access will identify the reserves that are open to public access.

Crown-owned land is not necessarily open to public access. Land held by the Crown under the Land Act 1948 is subject to a trespass provision that is more restrictive than the Trespass Act 1980 (in respect of private land). Access is often allowed by implied permission, but this depends on the use of the land and any other statutory restrictions. For example, section 142 of the Corrections Act 2004 deals with trespass on any land that is part of a prison. A pilot mapping exercise undertaken by LINZ at the request of MAF (referred to in section 9.2) endeavoured to identify Crown land on which the Crown would be unlikely to oppose public access. This will need to be further refined as the mapping of public access proceeds.

Riverbeds can be a useful form of access where water margin access is not available or not practical. There is a common law presumption that the owner of the land adjoining a riverbed has ownership rights extending to the mid-point of the river (the ad medium filum aquae, or AMF, rule). In areas where there is no public reservation of land along the water margin (no "Queen's Chain"), it is often assumed that the adjoining landowner has AMF rights and that this reinforces the ability of the landowner to control access to the water margin.

Many riverbeds are publicly owned even when the land adjoining the river is privately owned. Crown ownership of riverbeds was clarified and extended by the Coal Mines Amendment Act 1903, which vested ownership of the beds of navigable rivers in the Crown. In this context, navigability is defined in statute in a way that appears to include far more rivers and streams than has generally been assumed. The scope and application of the provision in the Coal Mines Amendment Act 1903, which has been preserved by subsequent legislation, is discussed in Hayes (2007b).

8.5 Unformed legal roads ("paper roads")

The Panel is acutely aware that the nature, status and use of unformed legal roads are matters of intense public interest. Roads are a very important component of the public access network. For this reason, the Panel spent much time considering their legal nature. This part of the report deals with the topic in detail, as there is a great deal of misunderstanding about the legal status of unformed legal roads. Hayes (2007a) provides a very comprehensive analysis.

8.5.1 Background

Most of the road network in New Zealand was created when land was initially sold to settlers. In addition, land was reserved for public use around much of the coast and along major rivers. The water margin reserves generally took the form of legal roads. Not all the land set aside as road has been formed into recognisable surfaced roads, and the water margin land reserved as road was, for the most part, never intended to be formed. The water margin reservations were created as roads as this was the most convenient and secure legal form available at that time to ensure that this land was kept for public use. Some roads that were formed in the past are no longer maintained by the responsible territorial authority, and have, in effect, reverted to being unformed.

The amount of legal road in New Zealand is estimated to be nearly 156 000 kilometres, of which 56 000 kilometres is estimated to be unformed.[4] The proportion of unformed legal road varies considerably across local authorities, with a much greater proportion in rural areas. Appendix H contains a schedule of road length by district, showing the proportion estimated as unformed.

The Panel considers that it is clear that unformed legal roads (or "paper roads"[5]) are no different in law from formed roads (as established by case law). That is, the public have the right to pass and re-pass on foot, on horse or in vehicles without hindrance from the adjacent landholder or anyone else.[6] The general rules of the road apply, as well as the provisions in Part 21 of the Local Government Act 1974.

These provisions include the conditions under which an adjoining landowner may place a cattlestop or a swing gate across an unformed legal road. This is permissible only when the road is not fenced laterally, and is clearly aimed as a measure to enable the control of stock in these circumstances. Otherwise, it is not lawful to place a gate, fence or other obstruction across an unformed legal road. Moreover, swing gates may only be placed with the permission of the relevant territorial authority, may not be locked and must have a sign indicating that they are on a public road.

The Panel is concerned that these requirements do not seem to be widely observed or enforced. The Panel was given examples of unformed legal roads being blocked by locked gates or fences.

In practice, not all unformed legal roads will be useful for access. The Panel affirms the view that, because they are public land, they should be available for access without being unlawfully blocked. Many unformed legal roads have, in effect, been incorporated into the farms that they intersect, and are used for grazing livestock or other farm use. Many landholders commented that they were taking responsibility for weed control in exchange for grazing.

8.5.2 Use of roads for access

Unformed legal roads form the largest single component of existing public access along water margins. In principle, they can be mapped and, if necessary, signposted.

Consultation (including submissions from most recreational groups and many individuals) showed a keen interest in the nature and use of unformed legal roads for access. Most submitters considered

[4] Based on a MAF analysis of cadastral data held by LINZ.

[5] The term "paper road" was originally applied to roads that were drawn on survey plans, but not surveyed or pegged out on the ground.

[6] For a full analysis of the rights attaching to unformed legal roads, see Hayes (2007a).

them valuable for access, particularly because roads provide for the full range of access, including access with firearms, dogs, horses and vehicles, subject to existing legislation. These unformed legal roads may not, however, be available for practical use because of difficulties in establishing their precise location, the topography of where they are located or, in some instances, the use or obstruction of these roads by adjoining landholders.

As a reflection of the intense public interest in the future management of these roads, the Panel notes the recent formation of the Paper Road Society.[7] The Panel understands that the Society has been formed to raise awareness of unformed legal road issues and to oppose the stopping of unformed legal roads.

The Panel is aware that many recreational groups find it difficult to locate unformed legal roads on maps and there is generally no signage on the ground. They believe that identifying and publicising this network would greatly improve access opportunities.

The Panel notes that there are examples, especially in rural areas, where the formed public road does not fully align with the legal road boundary. In these circumstances, there may be an unformed legal road running more or less in parallel or partially overlapping with the formed road. These roads are not relevant for walking access purposes and the public is expected to use the formed road for practical reasons.

The Panel's analysis showed that the issues to be addressed are:

- separation from water margins caused by erosion;
- unlawful obstructions, such as fences or gates;
- adjacent landholders regarding themselves as having use rights;
- non-enforcement of public rights by territorial authorities;
- concerns by territorial authorities about damage to the surface of unformed legal roads, especially by vehicles;
- concerns by territorial authorities about their liabilities associated with unformed legal roads, especially in respect of abandoned structures, including bridges;
- management of weeds, pests and environmental damage;
- protection of water supply catchments;
- access to cultural and historic sites;
- the retention of unformed legal roads for possible future use, even if they have no apparent current use;

[7] The Paper Road Society's website is www.prs.org.nz.

- the continuation of the use of these roads for the grazing of stock (and weed control) and other productive uses where this does not interfere with their use as roads.

The Panel considers that some of these matters may be addressed by establishing some form of dialogue with the territorial authorities. A precondition for this is the establishment of an access organisation to undertake the necessary co-ordination and action. The Panel considers that some matters deserve more immediate consideration and discusses them below.

8.5.3 Exchanging roads for alternative access

The Panel considered the merits of a policy that would enable the "swapping" of unformed legal roads for access to and along water margins and to public land and tāonga. This topic is legally very complex and requires more analysis. The concept is that "swapping" or trading could form part of negotiations for access with landholders. Some groups – including four-wheel-drive and hunting enthusiasts – are suspicious of this suggestion. They fear that the road might be traded for access of lesser value, such as a walking path, to the detriment of vehicular access rights. The Panel believes that the opening position for negotiations should be an exchange for the same rights.

The stopping of unformed legal roads in exchange for more appropriate forms of access poses legal and procedural challenges. It is possible for these to be overcome in some circumstances if the interested parties co-operate. It is not, however, possible to create new "unformed legal roads".

The Local Government Act 1974 provides that, if there is any objection to a road being stopped, the matter must be referred to the Environment Court for determination. In order to protect the Court's hearing and determination process, it is not possible for a territorial authority to enter into a binding agreement with a landholder as to the disposal of a stopped road and any consideration for the stoppage, including alternative access, before the consideration of the issues by the Court. In effect, the stopping of a road for alternative access requires the Court to consider the views of any objectors before any binding arrangements can be put in place. This means that stopping a road in exchange for walking access may be difficult to achieve if there is an objection from someone seeking to maintain vehicle access.

The Panel concludes that the procedural requirement for objections to be heard and considered is important for the protection of the status and existence of unformed legal roads, which might otherwise be disposed of as a short-term expedient.

Consideration should be given to the use of the Crown's power to resume ownership of the land comprising unformed legal roads to facilitate an exchange for alternative access. This approach would involve the exercise by the Minister of Lands of the power in section 323 of the Local Government Act 1974 to return the land to the Crown. This power must, in the Panel's view, be the subject of a clear government policy statement on the circumstances where the Minister would exercise it, to assure the public that their interest in the use of the roads is being protected. The Crown could then enter into binding agreements for the exchange of road for alternative access.

The Panel notes that the advantage of this process is that it would avoid the difficulty of any prior agreement prejudicing the outcome of an Environment Court hearing in the event of there being an objection to the stopping of a road under the Local Government Act 1974.

The form of the alternative access, for non-water margin access, would most likely be an easement over the land, registered against the title. The use of this mechanism as a way to realign water margin access is also considered in section 10.2.

The Panel considers that Te Ara o Papatuanuku could implement this, in conjunction with central and local government and stakeholders.

8.5.4 Mapping of all unformed legal roads and forms of access

The Panel is advised that it is technically straightforward to overlay the network of legal roads from the LINZ cadastral[8] database over the 1:50 000 topographical maps published by LINZ. This gives a reasonable indication of the location of unformed legal roads as the legal roads that do not closely align with the formed roads on the topographical maps can be assumed to be unformed legal roads.

Some submitters, including territorial authorities, did not want maps of unformed legal roads to be published because many of them are not suitable for use by vehicles or, in some instances, even for walking. In their view, many unformed legal roads do not lead "anywhere interesting". The Panel was also advised of grids of unformed legal roads that were set aside in the anticipation of the establishment of towns that did not eventuate.

One suggestion was that unformed legal roads should be evaluated for their "access value" before they are mapped, and only those "suitable for access" should be publicised. A further suggestion was for territorial authorities to be empowered to designate unformed legal roads for appropriate uses (for example, vehicle, cycle, walking or closed to access) and only then map and label roads accordingly.

[8] Cadastral information is information about legal boundaries and legal rights over land.

The Panel acknowledges the concerns of some territorial authorities and landholders about publicising roads that may be of little value for access. It is, however, difficult to see a basis for not including all legal access in a mapping database, as this is already public information and is already monitored by some recreation organisations.

The Panel supports the idea of providing territorial authorities with more appropriate powers for managing unformed legal roads, but this must not delay the publication of access maps. Where, for example, councils are concerned about the topography affecting the practicality of access, then the appropriate response is to close the road to specific uses. Section 9.2 has a detailed analysis of mapping issues.

The Panel concludes that there is potential to make better use of unformed legal roads for access.

8.5.5 Obstructions on roads

The Panel is aware of a high level of public concern about the obstruction of unformed legal roads. Responsibility for administering unformed legal roads rests with territorial authorities, which sometimes face practical difficulties in enforcing public access over unformed legal roads. Many examples exist of unformed legal roads being blocked by adjoining landholders, usually by fences or locked gates. This often has the effect of incorporating the roads into farms or forests.

Keeping unformed legal roads open seems to be a low priority for most councils. Examples exist where the territorial authority has failed to deal with an obstruction, despite an apparent legal obligation and duty to do so.

The Panel is aware of a parliamentary petition made in 2000 on behalf of the Federated Mountain Clubs of New Zealand asking that the provision in the Local Government Act 1974 relating to swing gates across unformed legal roads be amended to make it more effective. The Local Government and Environment Committee reported on the petition in November 2004, noting that the law already adequately covered the issue and recommending that work be done to ensure that local authorities meet their obligations under the law. In response, the Minister of Local Government wrote to Local Government New Zealand (LGNZ) seeking that organisation's co-operation in reminding territorial authorities of their obligations under the law and the desirability of enforcement where disputes about access arise. The Minister also suggested that there might be a need to review the provisions under the Local Government Act that provide for the regulation of unformed legal roads.

LGNZ supported such a review, but was silent on the enforcement issue. The Panel is concerned that the suggestion of a review may have been taken by some councils as licence to ignore obstructions to access pending a possible review.

The Panel has, therefore, considered two possible remedies. One is a remedy available to the public, and enforceable in the District Court, for the unlawful blocking of unformed legal roads to walking access. This would provide a more practical remedy than is available at present, where an order would need to be sought in the High Court. It could also include provision to restrict the access provided to walking or some other specified level of access in order to avoid, for example, inappropriate access by vehicles.

The second, suggested in Hayes (2007a), would be for an amended set of statutory duties for territorial authorities in respect of unformed legal roads. These duties would balance a statutory duty to keep unformed legal roads open to access against a new power to restrict the level of access to various classes of users depending on the location, potential use and environmental considerations relating to the road. For example, some roads might be restricted to walking access only if their location and environmental considerations meant that they were quite unsuitable for any form of vehicle access. These restrictions could be effected by new provisions in the Local Government Act 2002 to make by-laws. Any such provisions would need to be subject to clear statutory guidelines.

The Panel concludes that both remedies have merit. They would create an appropriate balance between public requirements for access and reasonable, but not onerous, obligations on local authorities.

Recommendations on types of access

The Panel recommends that:

7 Te Ara o Papatuanuku works with territorial authorities to develop consistent and appropriate policies for managing unformed legal roads for access;

8 the mapping of unformed legal roads be a priority for Te Ara o Papatuanuku;

9 territorial authorities generally be required to retain unformed legal roads for possible future use by the public;

10 an effective legislative remedy be available to the public (and enforceable in the District Court) for the removal of unlawful obstructions on unformed legal roads;

11 territorial authorities be provided with more powers to manage the use of unformed legal roads, provided that this is associated with a duty to keep unformed legal roads open to appropriate uses;

12 Te Ara o Papatuanuku considers developing national guidelines on the administration of unformed legal roads;

13 consideration be given to assessing whether it may still be possible to stop some unformed legal roads in exchange for alternative access (this could involve more procedural flexibility and Te Ara o Papatuanuku's participation in the promotion of alternative access arrangements that are in the public interest);

14 consideration be given to the use of the Crown's power to resume ownership of the land comprising unformed legal roads to facilitate an exchange for alternative access.

9 Information about existing access

The Panel agrees that the public and landholders should be able to readily obtain information about land that is open to use by the public.

9.1 Background

The Panel notes that there is currently no readily accessible, complete and authoritative source of information on the location of water margin reserves or public access ways to and along water margins and to public land. Many recreational groups and individuals think this information needs to be identified on topographical maps. Some council websites provide cadastral information (that is, information about legal boundaries and legal rights over land) superimposed on aerial photographs, which is helpful but does not clarify all access rights. For the public, lack of information can constrain opportunities to use public land. Further, some landholders are unsure whether they have legal public access ways through, or adjacent to, their land. This lack of certainty means that people may inadvertently stray onto private property or landholders may inadvertently deny access to public land.

The following reasons are given for the lack of readily available information on access.

- Public access is not mapped in a readily accessible manner. Cadastral maps are no longer published and are therefore difficult to obtain, and are, in some cases, indicative only. Some access arrangements are found only on individual property titles and not on cadastral maps.
- Most elements of public access can be found on Landonline, a database containing cadastral information held by LINZ. Some submissions noted that Landonline data is difficult for the layperson to obtain and interpret, and the data is only available to those who pay for a subscription (that is, it is a database for specialists and not the public).
- Some of the maps that are obtainable are out of date.
- There is no authoritative public database overlaying cadastral data on topographic and photographic data. Therefore, even if the location of the public access is known, available maps do not show whether this provides practical access to or along a water margin or to public land.
- Signage for public rights of access varies between territorial authorities, and often depends on the amount of tourism in the area.

9.2 Mapping

9.2.1 Role of proposed access organisation

The Panel considers that Te Ara o Papatuanuku should be responsible for facilitating and co-ordinating the provision of information about access. Maps should be available both through the internet and as printed copies, at a reasonable cost. Information centres may have a role in providing access to the maps. Although several commercial mapping databases are now available, these are not complete or authoritative in terms of defining legal access rights.

The Panel agrees that Te Ara o Papatuanuku should undertake a stocktake of existing mapping information and a preliminary analysis of the public's likely requirements before any further information is prepared.

9.2.2 Pilot mapping database

LINZ has compiled a pilot database that can show spatial cadastral information overlaid on either topographical maps or aerial photographs. The spatial cadastral data has been coded to identify all legal roads and most other reservations and Crown land that seem likely to be open to public access.

A shortcoming in the spatial cadastral data is that the geographic location of the marginal strips established since 1990 is not identified. The database identifies only those areas of land disposed of by the Crown that were subject to the statutory provisions establishing the strips. Data on the marginal strips established from 1987 to 1990 are also understood to be incomplete. LINZ is considering how this problem might be overcome. The Panel considers that this issue needs to be resolved in a timely way.

The database does not include information about esplanade strips or access strips, as this information is not included in the spatial cadastral database. This information is available but requires additional searching on the LINZ database. Nor does the spatial cadastral database include restrictions on access that may apply to esplanade reserves or other reserves administered by local authorities. Te Ara o Papatuanuku will need to seek the co-operation of local authorities to incorporate this information in the database.

The status of undesignated Crown land – the use and accessibility of some land shown as held by the Crown – is sometimes unclear from the spatial cadastral database. It may include land held for purposes incompatible with access, such as defence or prisons. LINZ has made an initial evaluation of Crown land that is publicly accessible, but this will need to be reviewed and refined.

The Panel notes that the LINZ pilot database demonstrates that the mapping of most legal access is technically feasible. Further work on the development of a mapping database is a matter that Te Ara o Papatuanuku might pursue. A complete and authoritative database will require the marginal strip information to be completed, and esplanade strips and access strips to be identified. It will also need to identify access restrictions on reserves such as esplanade reserves. This will require co-ordination with, and the co-operation of, LINZ and local authorities.

The Panel envisages that developing an access database will be a staged process, starting with the existing cadastral information as in the pilot, and then remedying the shortcomings identified above. It could then be enhanced with more detailed information, such as the location of walkways, information about the location of formed tracks, and perhaps information about access on private land that is open to the public. These information layers would need to identify the legal status of the additional information and its source. Te Ara o Papatuanuku could be responsible for ensuring that this information eventually becomes available in a usable form.

A concern was raised in consultation that it is not clear whether some roads and tracks on topographical maps are public or private. This can lead to an assumption that these roads and tracks are open to the public. LINZ explained to the Panel that topographical maps do not purport to represent legal or cadastral data. Rather, they seek to represent the physical topography of the area they cover and include private roads if they are significant physical features of the landscape. Moreover, their inclusion can be important for safety and emergency organisations, such as the fire service, ambulance organisations and the Police. The proposed access maps will distinguish between public roads and any private roads that are shown.

9.2.3 Mapping of unformed legal roads

The Panel has already noted that there are strong views about the mapping of unformed legal roads. Although the cadastral information that identifies most public access such as unformed legal roads (which in the cadastral database are not distinguished from formed roads) is already public, some local authorities and landholders consider that there is a need to manage how this information becomes more public, as there may be impacts on adjoining landholders and on territorial authorities if the information is widely publicised.

One view is that unformed legal roads should first be reviewed and classified in terms of their suitability for access, and only those roads

suitable and useful for access should be included in an access database. The Panel notes that this proposition has some shortcomings.

- There is no current legal basis for classifying or designating roads in this way. Although there are powers to make by-laws in section 72 of the Transport Act 1962 to regulate the use of roads, it is doubtful that they extend to enabling a general classification of roads in this way. Dunedin City Council has made by-laws to restrict the use of vehicles on a few unformed legal roads near the city, but this is far from a general process of road designation that would include closing some roads to access entirely.
- A process of reviewing and designating all unformed legal roads would be a huge task that would take many years to complete if the necessary empowering legislation were enacted. The Panel considers that it would be unacceptable to delay what would only be the first stage of the mapping process in this way. The demand for at least the basic information on legal access is an urgent one and the Panel found consensus that this be undertaken.
- The cadastral information is already public and commercial providers are selling products that allow it to be overlaid on topographical maps. These products do not meet the need for a complete and authoritative access database, but they will identify to the public in reasonably accessible form the location of unformed legal roads. The different versions now available, however, could lead to confusion and uncertainty in interpreting the location and nature of the various forms of legal access. In addition, some recreational groups have developed their own databases of the location of legal roads that they are interested in.

The Panel concludes that there is a legitimate need for a single, publicly accessible and officially recognised database, supported by an authoritative process for interpreting and resolving any dispute or uncertainty about the legality of any access.

9.3 Signposting

Signposting is a useful means of providing the public with immediate information about access. Signposting could, for example, indicate the existence of public access where rivers intersect with formed public roads.

The Panel agrees that there is a need for better signposting. It is not necessary or desirable to signpost every legal access way, but those that are suitable and useful for access should be clearly marked. In some areas, marker poles may be desirable to ensure that the public stay on a defined route. The need for route marking should be decided on a case-by-case basis.

Signs should be small and discrete (for example, the old Walkways symbol). Signs could be produced in different colours to signify access characteristics, such as whether restrictions apply or whether the land is public or privately owned with negotiated access. Signage will need to be consistent with any national or international standards or practice (for example, DOC has a national sign policy and manual, and a very identifiable "brand").

The Panel expects that Te Ara o Papatuanuku would work with local councils, landholders and recreation organisations to supply, install and maintain signage. It notes that there is already a statutory requirement (in Part 21 of the Local Government Act 1974) to place a standard sized and worded sign on any lawfully erected swing gate across an unformed legal road indicating that it is a public road. As noted in section 8.5, the Panel is aware of the low level of compliance with this requirement and has made recommendations for improvement.

9.4 Refusal of access

The Panel has registered the public concern about refusals to allow access. There are claims that refusals to allow access are becoming more frequent. The Panel explored the reasons for this concern and possible remedies. It notes that granting or refusing access occurs in two quite different circumstances: public land and private land.

9.4.1 Public land

An example of refusal of access on public land occurs when unformed legal roads, esplanade reserves, or esplanade strips or marginal strips are blocked. Most landholders acknowledge the right of the public to use these public lands, although there were examples of landholders obstructing unformed legal roads, and there are some landholders who seem reluctant to accept that "paper roads" are lawful public highways.

It is unclear whether instances of landholders fencing unformed legal roads have arisen from confusion regarding the legal status of unformed roads or in the knowledge that they can do so with impunity because some territorial authorities are reluctant to enforce the law. Some landholders' submissions stated or implied that they had or should have the prerogative to grant or deny access over unformed legal roads that intersect their property.

The Panel emphasises that landholders do not have the right to refuse access to people wishing to enter adjoining public land, via existing public land (such as an unformed legal road).

9.4.2 Private land

The other situation is where landholders refuse access across private land. Some recreational groups regard such refusals as unreasonable and a break with the tradition of rural landholders permitting reasonable access over their land (see section 1). The Panel fully accepts that it is the prerogative of landholders to refuse access to their land, even if such access may have been traditional and the request seems to be reasonable, for example, to gain access to a river or a national park.

The concerns heard by the Panel indicate that access by permission is no longer serving the public as well as it once did. Different reasons were suggested for this, including the increased number of absentee or multiple owners (which makes it difficult to request permission), land use change, concerns over health and safety liability or fire risk, the growing number of smaller lifestyle blocks, better roads and the practical difficulty of finding the landholder on the day. Changes in land ownership were considered by many submitters to be causing access issues for all New Zealanders.

This perceived or real increase in refusal of access by landholders links in with other public concerns, such as claimed misuse of the Trespass Act 1980 and the lack of secure legal access. The claim of misuse of the Trespass Act 1980 relates to suggestions that some landholders provide access over their land to areas of high value for sports fishing or game hunting only to those who pay for some form of commercial recreational package. This can result in the effective exclusion of the public from these areas, and commercial benefit to the landholder deriving from the exclusive access to these resources (see section 18.1). The Panel notes, however, that the public has no right to cross private land to access sports fish or game, or any other public resource, without permission.

The Panel concludes that, whatever access arrangements are agreed to or promoted, there still may be disputes about exactly where access is permitted and the behaviour of people. For example, the information about existing access rights, however provided, will be subject to a margin of error that will depend on the accuracy of the source information. There may also be uncertainties about the application of the information in practice.

The Panel concludes that better information and improved access to information will undoubtedly help to clarify access entitlements. A local solution for some areas may be to maintain a voluntary database of landholder contact information to simplify the process of seeking permission for access.

The Panel considers that a non-binding mediation service would help to resolve conflicts between parties on access matters.

9.5 Water margin access and the Trespass Act 1980

Hayes (2007b) explores in depth the uncertainties surrounding the law on water boundaries, including the impact of erosion and accretion on water margin reserves and the extent of Crown ownership of riverbeds. The paper establishes that there are uncertainties for both the public and landholders about the application of the law of trespass in these circumstances:

- where water margin access was provided for by reserving land in the form of road, marginal strip or some other means and the reservation has been made ineffective by erosion;
- where the bed of the river is owned by the Crown and the Crown has no objection to the use of the riverbed for access.

The paper recommends minor changes to the Trespass Act 1980. The essence of these proposed changes is the provision of a defence against trespass where there is uncertainty about the exact location of public access along water margins or uncertainty about Crown ownership of riverbeds. Specifically, the amendments would:

- provide a defence against trespass for persons using or attempting to use public access rights along water margins or Crown-owned river beds;
- protect the interests of landholders by providing that this defence depends on persons keeping as close as possible to the dry margin of the relevant water margin.

These proposed amendments to the law would not create any new "right" of access.

The Panel concludes that this is an interesting proposal and recognises that it is a complex issue. The proposal may also apply more generally, for example, to unformed legal roads that do not adjoin water margins. As Hayes' paper (2007b) was not completed until after the consultation process was completed, the Panel did not have an opportunity to consult on the proposal.

Recommendations on information about existing access

The Panel recommends that:

15 Te Ara o Papatuanuku be responsible for facilitating and co-ordinating the provision of information about access. Maps should be available both through the internet and as printed copies, at a reasonable cost;

16 the provision of access maps be a priority for Te Ara o Papatuanuku;

17 Te Ara o Papatuanuku does a stocktake of existing mapping information and a preliminary analysis of the public's likely requirements before any further information is prepared;

18 Te Ara o Papatuanuku be made responsible for establishing and managing a single, publicly accessible and officially recognised database of access information, and that work on this task commences as soon as possible;

19 Te Ara o Papatuanuku works with territorial authorities, landholders and recreation organisations to supply, install and maintain signage;

20 Te Ara o Papatuanuku provides a non-binding mediation service to help resolve conflicts between parties on access matters;

21 Te Ara o Papatuanuku considers the opportunities and risks of making landholder contact details more readily available;

22 LINZ examines ways of depicting private roads on topographical maps in a way that makes them more readily distinguishable from public roads;

23 the Government sets a definitive timetable for LINZ to complete its assessment of the means to map marginal strips created since 1987;

24 the Government considers in more detail the implications of the proposal for minor changes to the Trespass Act 1980 for access along water boundaries where there is or has been public land.

10 Restoring and realigning lost access

Many access-related discussions touch on the high level of legal complexity associated with land law. The matter of how and whether to realign "lost" water margin access illustrates this complexity. The Panel examined this topic in detail, as solutions are not immediately evident and it is sometimes not clear whether the solutions are readily workable.

10.1 Background

Often, public access – by a road, marginal strip, esplanade reserve or some other means – was originally established to adjoin a water margin, but has become separated from that margin as a result of natural erosion or accretion. In these circumstances, public access may be difficult to locate and may be submerged by the sea or a river. Fixed, surveyed access, such as legal roads, then often no longer fulfil their original objective of bordering water margins.

In some instances, erosion may have resulted in the access being completely submerged by the formerly adjoining water. On the other hand, accretion can result in the original water margin access being separated from the water margin. In this instance, the land between a river and the legal access way takes on the character of the original access strip, so water margin access is preserved but there is now a much wider strip of reserved land than was originally intended. This impact is not widely recognised by landholders and, generally, the accreted land is simply treated as being part of the adjoining private land, thus inhibiting public access.

The effects and extent of erosion and accretion are apparent when the spatial representation of the cadastral database is superimposed on either topographical maps or ortho-photographs.

The Panel concludes that the clarity and continuity of access provided by water margin reservations (the "Queen's Chain") has in many areas been affected by changes in the courses of rivers and streams and erosion of the coast.

Consultation showed widespread support for the restoration of the original water margin reservations to the relevant water margins, especially where this would have an impact on access, and provided that it could be done in a way that is fair to all parties.

The Panel recognises that access set aside in the past may not be currently needed or appropriately located. Restoration of lost access should be prioritised alongside negotiation of new access, according to needs.

10.2 Realignment of access along rivers

Where there has been erosion and accretion along a river, there would appear to be scope for exchanging the public land gained as a result of accretion for the public land lost as a result of erosion. This is a legally complex matter and the outcome is very difficult to realise in practice. Frequently, the owner of the land that has been subject to erosion, and will have to give up land to restore access, will not be the same as the owner of the land that has been subject to accretion, who could potentially gain as a result of the access being moved back to the water margin.

As noted in section 8.1, water margin reserves can take a number of forms, each with its own issues in terms of restoration to the water margin.

Realigning originally reserved land with the water margin is technically difficult. The legal boundaries to the land adjoining the reserves need to be changed, and consequential changes made to affected land titles. Such changes can be especially problematic if the land has been used as a security for a mortgage. Legislation may be required to achieve realignment on a significant scale, but legislating in this area is also fraught with difficulty. It could involve the statutory taking of land and the associated compensation issues.

Account needs to be taken of the legal status of the reserved land. For example, section 8.5 considered a proposal to simplify the road stopping process. Provided the Government forms a clear policy on the circumstances where the Minister of Lands would exercise the proposed power, the Crown could then enter into binding agreements for the exchange of road for alternative access. The question would then be the form the restored water margin access would take. If, for example, it is an esplanade strip, then it would move with changes in the location of the water margin. It does not, however, have the same security of access as road. It would require at least a tripartite negotiation to achieve an exchange of this kind, the parties being the Crown (through the Minister of Lands), at least one and probably more landholders, and the territorial authority.

If the reserved land is in the form of a fixed marginal strip (a section 58 strip), there is a possibility that restoration to the water margin access could be achieved though an exchange of land under section 24E of the Conservation Act 1987. Under this section, a marginal strip can be exchanged for a more appropriate strip of land that is then deemed to be a new marginal strip. Such an exchange would need to be agreed

between the Minister of Conservation and the affected landowners, with compensation paid if necessary. The new strip would then be able to move with any movement in the water margin. The Panel is unaware of any exchange of this kind being made to date.

The Panel concludes that:

- the restoration of water margin access where it has been affected by movement in the water margin is legally complex, and must take account of any impact on property rights;
- the common law on water margin boundaries can result in gains and losses of land to property owners when the boundaries are affected by erosion and accretion, and these impacts can be complicated by the existence of water margin reserves;
- there may be scope in some circumstances for restoration of access to water margins to be negotiated and agreed by the affected landholders and the Crown, given that there may be opportunities for trade-offs between the effects of erosion and accretion.
- where negotiation and agreement among landholders and the Crown cannot be achieved and restoration of the eroded access is important, consideration should be given to direct negotiation of access with the holder of the land that has been affected by erosion.

The Panel was made aware of a practical suggestion that would alleviate some of the uncertainties around water margin access that has been subject to erosion and accretion. This proposal (discussed in section 9.5) involves a defence against trespass in areas where there is some form of public access and there is uncertainty as to its exact location.

In situations, however, where there has been major erosion and accretion and where there is public demand for restoration of access, the appropriate solution may be best achieved by negotiation.

The Panel concludes that there is no simple solution to these water margin access problems, but they may be alleviated if suitable amendments were made to the Trespass Act 1980, as recommended for consideration in section 9.5, so that persons making a reasonable effort to walk along water margin reservations have a defence against trespass if they accidentally stray onto private land.

10.3 Restoring lost coastal access

Much of the focus of this report is on water margins. Where public access has been lost through coastal erosion, the situation is somewhat different. For example, there is generally no corresponding gain in public land through accretion, as is usually the case with rivers, and, consequently, there is no scope for swapping or trading public land for

lost water margin access. Further, the Foreshore and Seabed Act 2005 now provides that any unformed legal road that occupies the foreshore (that is, is below mean high water springs) is automatically stopped.

The Foreshore and Seabed Act provides public access around the coast below mean high water springs, except where the land is in private title. A small amount of foreshore access is effectively blocked by private title below mean high water springs. A significant additional amount of foreshore access is being lost where the road reserve has been completely eroded. Both dry land and foreshore public access has in some areas been lost though erosion.

Walking access is concerned with coastal access above the foreshore, but where both foreshore and dry land access are unavailable it is a priority to restore dry land access. The Panel notes that the restoration of lost coastal dry land access would seem to be a matter of negotiation, except where it takes place as the result of an esplanade reserve being created on subdivision or as a condition of an overseas acquisition of land (see section 11).

The Panel is also concerned about the loss of access to the coast (as opposed to access along the coast), and considers that access across private land to the coast should be negotiated in the same way as other new access.

10.4 Future erosion

Consultation found support for fixed water margin access to be made "movable" (that is, following the margin of the water rather than a fixed position on the ground), as is currently case with the more recent marginal strips and with esplanade strips. Again, this is a complex issue, as it would have to take account of the areas where the originally reserved land has already been separated from the water margin.

In principle, making water margin access movable is possible, given the established law on esplanade strips and movable marginal strips, but its implementation would depend on dealing with the currently separated reserves. These currently separated reserves are the very ones likely to be affected by future erosion. The Panel concludes that there is no easy way to restore existing fixed water margin reserves to the relevant water margins and make them move with future changes in the water margins. Sections 10.2 and 10.3 discuss some of the problems involved in the realignment of access affected by erosion and accretion.

The Panel considers that the proposal in section 9.5 to clarify the law of trespass along water margins could be a partial remedy to the uncertainties arising from continuing erosion and accretion.

Recommendations on restoring and realigning lost access

The Panel recommends that:

25 Te Ara o Papatuanuku facilitates negotiations among landholders, the Crown and, where relevant, territorial authorities, to restore access to water margins in appropriate cases where such a solution is feasible;

26 areas of the coast where public access on both the foreshore and the dry margin is unavailable be considered a priority for negotiated access;

27 access across private land to the coast be negotiated in the same way as other new access.

11 New access

At the start of this report, the Panel lists a set of principles that help guide its analysis and, it hopes, the work of Te Ara o Papataunuku. Principle 2 holds that new access should be established by negotiation in ways that are fair to all parties. This principle, in particular, guides and influences the analysis in this section.

11.1 Background

There is a concern that water margin access is "incomplete", that is, for various reasons, some major rivers, lakes and areas of the coast are not subject to public access reserves of any kind.

This concern covers access across private land to water margins and to other public land, such as national parks and other land administered by DOC. This lack of access may occur because public land is, in some instances, "landlocked" by private land, or an area to which access is sought is only otherwise accessible by a long trek along a water margin. Although 31 percent[9] of New Zealand is public land administered by DOC and generally open to the public, parts of this are under-used because there is no access to it.

11.2 Current initiatives

The Panel is aware of many access initiatives by councils and community or recreational groups throughout the country. The Panel commends and encourages these initiatives. The Panel is concerned, however, that because community initiatives often emphasise action they do not consider the cost of "back office" needs such as the legal paper work. A result is that some new voluntary access arrangements may lack endurance and legal certainty (Principle 1). The access organisation could help strengthen those arrangements.

This section looks at two types of initiatives. The first is the use of "strategies" and the second considers some community projects.

11.2.1 Recreation, walking and cycling strategies

Most territorial authorities and some regional councils have prepared recreation strategies. The strategies do not generally deal with creating new access. Some territorial authorities have prepared other types of strategies that relate to walking access. For example, Kapiti Coast District Council has prepared a comprehensive Cycleways, Walkways and Bridleways Strategy. The strategy's vision is "the Kapiti Coast is renowned for its network of pathways that are extensively used by

[9] According to DOC, 31 percent of New Zealand's land area is national park, forest park or other land administered by DOC.

walkers, cyclists and horse-riders". The Council has also formed a long-term advisory group made up of key community and advocacy group representatives interested in walking, cycling and horse-riding issues. As another example, Timaru District Council has an "Active Transport Strategy" that proposes projects such as the development and promotion of rural tramping and walking tracks.

11.2.2 Regional land transport strategies

Regional land transport strategies are the responsibility of regional councils. Their wider policy outcomes include economic development, safety and security, access and mobility, public health and environmental sustainability. Regional land transport strategies should consider all relevant modes of transport, where appropriate, including: travel on foot, by bike and by car; freight transport (by road, rail and coastal shipping); and public passenger transport (including ferries, taxis and transport for the mobility impaired).

11.2.3 Community access projects

This section looks at four examples of community access projects. The Panel warmly acknowledges the excellent work undertaken by many community groups throughout the country.

11.2.3.1 Fish & Game Councils

In recent years, Fish & Game Councils have undertaken a comprehensive signage programme to inform anglers (and in appropriate locations, hunters) where they may fish and hunt, either as a right or as a negotiated outcome with a private landholder. For example, in the last six years, the Eastern Region Fish & Game Council has erected 280 access signs, developed 45 kilometres of stream and lakeside access tracks and published eight pamphlets identifying access locations.

A welcome benefit of Fish & Game's signage is that it assures all visitors that they are able to enjoy such places without having to first seek access permission from the landholder.

11.2.3.2 Waiau Fisheries and Wildlife Habitat Enhancement Trust

The Waiau Trust was created in 1996 when the resource consents for the Manapouri Power Scheme were renewed. Water from the Waiau River has been diverted through the West Arm Power Station to Doubtful Sound, resulting in a reduction in river flows. The Trust was formed as part of a mitigation and remediation package for the loss of fisheries and wildlife habitat values and amenity values of the Waiau River.

One of the key objectives of the Trust is to facilitate public access to fisheries and wildlife habitats and resources within the Waiau catchment. The Trust takes a wide perspective on public access. It can mean physical construction of vehicle roads and tracks, walking tracks and other facilities.

The Trust has constructed 10 public access roads and tracks in the Waiau catchment. It has also built nine kilometres of walking tracks at its Rakatu Wetlands project. The security of this access for the public in perpetuity is considered to be paramount by the Trust. In its negotiations with landholders, access has been legally established through:

- land ownership by the Trust; or
- formation of access over unformed legal roads; or
- easements registered against titles; or
- signed agreements with other parties.

11.2.3.3 Te Araroa – The Long Pathway

Te Araroa Trust's mission is to have in place a New Zealand-long walking trail by the end of 2008. The Trust has successfully negotiated with many landholders for access where sections of Te Araroa – The Long Pathway cross private land.

The Trust designed the route in consultation with local authorities, regional authorities, iwi and other interested groups. The Trust encourages local authorities to help put the route in place. For example, Whangarei District Council adopted a walkways plan – part of Te Araroa – for the length of its district and other councils have the route in their district plan. In March 2001, the trail project was adopted by the Mayors Taskforce for Jobs, an alliance of over 50 councils. The Trust is also a trail builder. It has opened many kilometres of track through Northland and the Waikato since 1995.

The Panel notes that it is unclear how much of this access meets the requirements of Principle 1, that is, access should, among other things, be "certain and enduring".

11.2.3.4 Waikato River Trails Trust

The Waikato River Trails Trust has its origin in the local council's initiative to provide a community project that would bring economic and social benefits to the people of South Waikato. It is a registered charitable trust. The project is now a regional initiative, which enables the Trust to benefit from a much wider funding base. Nearly 12

kilometres of trails have been officially opened for public use, with over 100 kilometres planned by 2010. The long-term aim is to create a trail from Taupo to Hamilton.

The Trust's policy is to consult and gain support from the owners and occupiers of the land that the trails traverse as well as those neighbouring the trails' corridor. Up to 95 percent of the trails, both current and planned, traverse land owned by the Crown (and managed by LINZ). Almost exclusively, this land has upon it a primary easement in favour of Mighty River Power for power generation purposes. In some cases, this Crown land has a secondary use for grazing or recreation. There are some limited areas where it is understood forestry rights are also sought. There are also areas where Mighty River Power owns the land outright.

Again, it is unclear how much of this access aligns with Principle 1 for, although much of the land is in some form of Crown ownership, public access might not be certain and enduring. For example, in some cases, the trail is fourth in legal "priority".

11.3 Voluntary access

As noted previously, many landholders provide access to their land by explicit agreement or by implied consent.

Some landholders are concerned that, where there is significant public use of access routes or tracks by landholder agreement, these may be regarded as a de facto public right by local authorities and the Environment Court for Resource Management Act 1991 (RMA) purposes, and put at risk some land use options. The example given was an Environment Court decision to protect the landscape views from a walking route on private land near Wanaka.[10]

11.4 Existing legal provisions

The Panel considers that, where possible, new access should be established using existing legal mechanisms. Any new access along a water margin need not strictly follow a water margin if an alternative route is more practical and can be readily identified.

11.4.1 Resource Management Act 1991 (RMA)

Section 6 of the RMA states that "the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers" is a matter of national importance.

[10] *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council* [2004] BRM Gazette 61 NZCLD, 5th Series, 6285.

11.4.1.1 Esplanade reserves, esplanade strips and access strips

Esplanade reserves are areas of land adjoining a water margin vested in the relevant territorial authority. **Esplanade strips** are a form of easement over water margin land, created in favour of the territorial authority. Esplanade strips remain in the landholder's title and are ambulatory (move with the water margin).

Both esplanade reserves and esplanade strips are usually created at the time of subdivision and have a width of 20 metres or less. They can also be created by agreement with the landowner. Esplanade reserves and esplanade strips can have one or more of the purposes set out in s229 of the RMA. The possible purposes include the protection of conservation values, enabling public access and enabling recreational use.

Esplanade reserves or strips are mandatory in the case of subdivision to lots of less than four hectares. No compensation is payable to the landowner, as the benefits accruing from the subdivision can be seen as compensation for the reserve or strip that is taken. For subdivision into larger lots, the creation of esplanade reserves or strips is discretionary, depending on the provisions included in district plans, and there is a requirement for the payment of compensation. The requirement for compensation greatly limits the likelihood of the creation of esplanade reserves on subdivision of lots of four hectares or more. There is also scope for district plans to limit the application of the esplanade reserve and strip requirement to lots of four hectares and less.

The process of creating water margin access through the creation of esplanade reserves or strips is seen by some as slow and fragmentary. It is most likely to have a positive impact on access in peri-urban areas where subdivisions into areas of less than four hectares are more likely to occur. Submitters considered that territorial authorities have too much discretion to waive the access requirements. This can mean a property is subdivided with no reservation taken at all, and the opportunity to provide for public access is lost.

The Panel received submissions suggesting that this four-hectare limit be removed, but others, especially landholders, oppose such a change. A disadvantage of the four-hectare limit is that it encourages subdivisions for lifestyle blocks of just over this limit to avoid the taking of esplanade reserves or strips, whereas subdivision into smaller lots may be a more efficient use of the land. If the limit were to be raised, it would change the trade-off between avoiding the esplanade strip requirement and subdividing into lot sizes that maximise the use of the land. The potential benefits and costs of increasing this limit need to be investigated because, from an access perspective, there is scope for increasing the incentive to create more esplanade reserves

or strips. Raising the limit would, however, reignite concerns that this would be a mandatory taking of land (or an interest in the land in the case of strips) without explicit compensation.

Access strips are statutory easements created under the RMA, either on subdivision or by negotiated agreement with the landholder. Access strips can be a valuable mechanism for providing access across private land to water margins or other public land. Their creation is a matter of negotiation with landowners and may involve compensation. The cost of reaching an agreement, however, often stops councils pursuing this option. Some councils prioritise their access needs and, in these cases, may pay compensation.

The Panel sees scope for Te Ara o Papatuanuku to influence the provisions in district plans so that there is a more comprehensive and consistent approach throughout New Zealand to the creation of esplanade reserves, esplanade strips and access strips. This may be achieved through dialogue with local government. There may also be scope to affect plans in respect of subdivisions through National Policy Statements.

11.4.1.2 National Policy Statements

National Policy Statements are made under part 5 of the RMA, and could influence local government decisions under that statute. This may be a useful supplement to section 6 of the RMA.

The Panel understands that a number of such statements are currently being prepared. Where relevant, these statements should consider walking access issues. The Panel has not investigated the merits of this mechanism in depth but notes that it may be considered by Te Ara o Papatuanuku.

New Zealand Coastal Policy Statement

A New Zealand Coastal Policy Statement (NZCPS) is a mandatory requirement under the RMA. One aspect of the NZCPS is the provision of recreational access to land, especially in respect of the conditions attached to coastal subdivisions. The NZCPS must be taken into account by local authorities in discharging their duties under the RMA. The present statement is being reviewed, and an extensive consultation process has begun.

DOC, which has responsibility for the NZCPS under the RMA, is currently seeking stakeholder comment on an Issues and Options paper. It is anticipated that following this consultation process DOC will prepare a draft NZCPS, which will be referred to a Board of Inquiry during the first half of 2007. The Board of Inquiry will seek public submissions, and report back to the Minister of Conservation in

late 2007 or early 2008. The Government will then consider the Board's recommendations and issue the new NZCPS.

The Issues and Options paper covers nine topics related to management of the coastal environment. One of these is access to and along the coast. The Panel was advised that MAF was consulted on the chapter on access.

11.4.1.3 Regional and district plans

Implementation of the esplanade reserve, esplanade strip and access strip provisions of the RMA is subject to regional and district plans. These plans can provide for the circumstances and extent to which esplanade reserves, esplanade strips and access strips may be required either on subdivision or by agreement with landowners. Plans may specify the rivers and coastal areas that are a priority for the establishment of reserves or strips. The priority and consistency that regional and district plans place on the establishment of esplanade reserves, esplanade strips and access strips for walking access is an area where Te Ara o Papatuanuku could work constructively with local government.

11.4.2 Overseas Investment Act 2005

The Overseas Investment Act 2005 governs acquisition of land by overseas persons. Specifically, the Act provides (section 17(2)) that the "benefits" to be considered in assessing overseas investments in sensitive land include:

> (c) whether there are or will be adequate mechanisms in place for –
>
> (i) protecting or enhancing existing areas of significant habitats of trout, salmon, wildlife protected under section 3 of the Wildlife Act 1953, and game as defined in sections 2(1) of that Act (for example, any 1 or more of the mechanisms referred to in paragraph (b)(i) and (ii)); and
>
> (ii) providing, protecting, or improving walking access to those habitats by the public or any section of the public:
>
> ...
>
> (e) whether there are or will be adequate mechanisms in place for providing, protecting, or improving walking access over the relevant land or a relevant part of that land by the public or any section of the public

It is unclear at this early stage if the inclusion of these "benefits" will result in significant new walking access or significantly enhanced

access to sports fish and game birds. Around half of the submissions support scrutiny of land purchased by overseas persons to improve public access opportunities.

11.4.3 New Zealand Walkways Act 1990

11.4.3.1 Background

The general purpose of the New Zealand Walkways Act 1990 (the Walkways Act) is to:

> establish walking tracks over public and private land so that the people of New Zealand shall have safe, unimpeded foot access to the countryside for the benefit of physical recreation as well as for the enjoyment of the outdoor environment and the natural and pastoral beauty and historical and cultural qualities of the areas they pass through.

The rights of property owners, both public and private, are to be fully respected. The rights of public access created by the Act are for walking purposes only unless otherwise provided for in any particular walkway or part of a walkway.

In the case of walkways to be established over private land, the Act provides for access to be secured by the establishment of either easements or leases. These easements or leases obviously require the agreement of the landholder.

There are 126 walkways throughout New Zealand (New Zealand Conservation Authority, 2003). Of these, 31 are gazetted walkways, and only these can be considered legal walkways under the Walkways Act. The Panel understands that an impediment to the establishment of legal walkways under the Act is the unwillingness of landowners to commit to "certain and enduring" access by means of an easement or lease, especially in the absence of compensation. A factor in this concern is a possible loss in property value.

The Panel looked at three particularly interesting aspects of the walkways concept.

- Walkways are open to walking access by the public, but there is provision for them to be closed temporarily for such purposes as safety or construction work, or at the request of a landholder.
- There is a wide range of offences specified in the Act. These include prohibitions against lighting fires, carrying firearms on or near a walkway, taking a horse, dog or motor vehicle on a walkway, damaging property, and being a nuisance to other users.
- Walkways were first legislated for in 1975, and were originally under the jurisdiction of a central Walkways Commission supported by

district Walkways Committees. In 1990, the Walkways Commission and its Committees were abolished, and their functions transferred to DOC and Conservation Boards.

During consultation, the Panel heard concerns about a loss of focus and impetus regarding walkways following the abolition of the Commission. The work and structure of the Commission and its Committees was commended as a model for a future walking access organisation. Both the Commission and the Committees included representation from landholder and recreation groups.

11.4.3.2 Possible transfer of legislation

The Panel is mindful of the close parallel between the objectives of its task and the intention of the Walkways Act. The Panel is aware of the apparent deep support that still exists in the community for the original walkways concept and the way it was managed – with local support and involvement.

The Panel agrees that the spirit of the walkways legislation needs to be revitalised, which could be achieved by transferring the administration of the Walkways Act to Te Ara o Papatuanuku. The Act's statutory mechanism for the negotiation of new access would be a valuable tool for the organisation.

This transfer has the potential to give impetus to the creation of new walkways, especially if some funding is available to acquire access over private land.

The Panel notes that DOC could carry on the operational management of walkways, especially those that include public conservation land (see section 7.2). This arrangement could be the subject of a Memorandum of Understanding between Te Ara o Papatuanuku and DOC.

11.4.4 Public Works Act 1981

Some submitters suggested the Public Works Act 1981 be used to establish new access over private land. In most instances this was based on the incorrect assumption that some form of mandated access over private land was being contemplated by the Government or promoted by the Panel. The Public Works Act 1981 was seen as an appropriate vehicle for determining compensation for a mandatory taking of land for access.

The Panel does not support any mandatory taking of land for access. The Panel agrees that any new access over private land for walking access be by negotiation and agreement.

Some submitters suggested the Public Works Act 1981 be used as a means of establishing access where a landholder refuses to negotiate

access on "reasonable" terms or refuses to negotiate at all. Although there is no statutory limit on the public purposes that the compulsory acquisition powers in the Public Works Act 1981 can be used for, the Panel notes that the use of these powers can be controversial and is confined to what could be seen as projects of regional or national importance or related to critical economic infrastructure.

The Panel notes that it is possible that an access problem might arise in the future that is not able to be resolved through negotiation with the landholder and is of sufficient magnitude to justify the use of the compulsory acquisition powers in the Public Works Act 1981. Nevertheless, the Panel wishes to make it clear that does not recommend this Act be used to acquire new access over private land, except as a last resort in exceptional circumstances.

11.4.5 Tenure review of Crown pastoral leases

The Crown Pastoral Land Act 1998 provides a mechanism for the review of Crown pastoral leases, and the conversion of land subject to these leases into freehold or conservation land. One of the objectives of tenure review is to secure public access to and enjoyment of "reviewable" land.

This provides two opportunities for new public access rights to land. One is the creation of new conservation land that will generally be open to public access. The other is the establishment of certain and enduring access rights over the land converted to freehold in the form of easements.

Section 26 of the Act requires the Commissioner of Crown Lands to consult with whomever the Commissioner thinks fit over tenure review proposals. In practice, there is a public consultation process. Some submitters considered that access had been poorly or inadequately dealt with in tenure reviews.

11.5 An access strategy

No existing agency is responsible for evaluating and prioritising future access requirements, especially at a national level, or co-ordinating assessment and action at the regional and local levels. This is one of the reasons the Panel sees a need for a new access organisation. Work of this kind is divided between local and central government agencies, each evaluating or dealing with access from a different perspective, with different priorities and under a variety of statutory powers.

An evaluation process needs to occur at a regional and national level, in full consultation with existing agencies. Once there is a better understanding of access priorities and bottlenecks, attention can be paid to potential remedies. These remedies include the

existing mechanisms for improving access outlined above, and the voluntary initiatives being undertaken. The resources available to Te Ara o Papatuanuku will be limited and should not be dissipated by replicating existing statutory measures where these are effective, or used to crowd out voluntary initiatives.

The Panel considers that there is a clear consensus about the methods of achieving new access over private land. Te Ara o Papatuanuku could negotiate and seek agreement with the affected property owners. The focus needs to be on remedies that are certain and enduring. The terms of access will be negotiated, including the possibility of hunting, dogs, horses, vehicles and other activities, should these be able to be agreed without compromising walking access or walking access funding.

The Panel considers that an early task for Te Ara o Papatuanuku should be to generate a national access strategy, including new access and priorities for funding. This would become the first (and to date, the only) core public policy framework within which access policy and decisions might be made. The strategy will need to be developed in consultation with community groups, recreation organisations and local government.

11.6 Negotiated access

The Panel considers that negotiations should generally occur locally and on a case-by-case basis. Te Ara o Papatuanuku would be responsible for the national co-ordination of access negotiations and the provision of a framework or guidelines that may then be implemented at a local level. There may be a need for regional co-ordination, especially as access needs are often driven by visitors outside of the territorial authority district.

The Panel has already commended the many access initiatives by councils, community groups and other organisations. The Panel considers that Te Ara o Papatuanuku should encourage and support these initiatives rather than replace or undermine them.

Some of the topics that the Panel considers may be necessary to include in negotiations are:

- location of access (with the focus on water margin access and access to public land);
- payment for enduring access rights, including legal and survey costs (if necessary);
- formation and ongoing management of any facilities;
- any restrictions, for example, during lambing;
- risk management, for example, fire risk.

This is only an indicative list. The Panel acknowledges that many agencies, councils and individuals have a great deal of experience in this area.

There is no doubt that access by horses and vehicles, including bicycles, and with firearms and dogs will arise in negotiations. These concerns will require careful handling. For example, Te Ara o Papatuanuku's board will need to develop a policy on the use of the proposed contestable fund (section 11.7) for access other than walking. There may be instances where access that goes beyond walking access may be able to be negotiated in association with walking access for little or no extra cost.

Obtaining certain and enduring access may incur costs, both in terms of cost recovery and compensation paid to landholders, and will be a matter of negotiation. Te Ara o Papatuanuku will need to set priorities for using available funding.

The Panel believes that, with goodwill on the part of those involved, compensation will not always be necessary. In its experience, some landholders will agree to access, especially if it is confined to walking access, at little or no cost. Some landholders may find it difficult, however, to agree to permanent formal access, especially in the form of an easement that will transcend changes in ownership, without some form of recompense. The Panel notes that the Walkways Act "enables compensation to be paid if losses occur that are directly attributed to the use of the walkway".

Where access requires expenditure on private land (for example, the construction of gates or stiles, or the forming of a track), it is reasonable for this to be done at no cost to the landholder. In some cases, it may be appropriate for the landholder to receive some funding to recover his or her costs for maintaining the track or repairing damage to the land. Walkways established under the Walkways Act are generally, although not necessarily, formed paths or tracks and, in that case, there could be significant expenditure on formation and maintenance. These formation and maintenance costs would be expected to be met by Te Ara o Papatuanuku, which would need to be funded for this purpose, or by the organisation appointed to manage the walkway, which could be a local authority or DOC.

11.7 A contestable fund

The Panel considers that, for it to be effective, Te Ara o Papatuanuku would need to have reasonable funding to:

- support local authority and community access initiatives;
- provide access signage on both public and private land;

- provide access facilities, such as stiles and other structures to facilitate access;
- negotiate access;
- provide for other matters relevant to the promotion of walking access.

The Panel agrees that it is appropriate for central government to assist initiatives, particularly where councils with a low population base have to fund access due to external demand. For example, Wellington residents use the Eastern Wairarapa coast for fishing and surfing and disputes have developed between landholders and visitors. Councils are beginning to focus more on access issues, but long term council community plans and district plans need to be very specific to justify the provision of ratepayer funding.

The funding provided by Te Ara o Papatuanuku would be contestable and for activities additional to Te Ara o Papatuanuku's core business (such as managing the database and providing information). Te Ara o Papatuanuku would have a national overview and set national criteria to help allocate funding. Access to waterways and to other public land is considered to be as important as access along waterways. The fund could also be used to pay for easements through subdivisions to reach the coast where the council has limited funds to achieve this.

The Panel agrees that Te Ara o Papatuanuku should be funded to establish and administer a contestable fund for access (Te Ara o Papatuanuku Fund for Access) to which local authorities and other organisations (for example, hapū, trusts, landcare groups, tramping clubs) might apply. The funding would be allocated according to the national priorities and criteria set by Te Ara o Papatuanuku (in consultation with interested stakeholders such as Local Government New Zealand). The Crown would need to provide the base fund but there should be provision for private donations and sponsorship.

11.8 Conflict resolution

Conflict over access is most likely to arise where property rights are not clearly defined or where information about property rights is unclear or not readily accessible.

There will be occasions where people will knowingly break the law. These situations are primarily ones for the Police to deal with. The Panel acknowledges that there are very genuine concerns about criminal behaviour and personal security in rural communities, but it is difficult to establish the extent of crime associated with walking access (see section 16).

The Panel's earlier recommendations on accurate and authoritative mapping of legal access in a form readily accessible to the public is the single most important action that can be taken to deal with potential conflicts.

The Panel believes that a widely supported and publicised code of responsible conduct (see section 13) will be a valuable guide to proper and considerate behaviour by both landholders and the public. A code should deal not only with legal issues but give positive guidance on considerate behaviour. For example, even if someone has a clearly defined right of access across what is obviously a working farm, it is a courtesy to the landholder to notify the intention to cross the land, and to give the landholder the opportunity to warn of any issues of safety or inconvenience that may arise. Appropriate signage could help reduce problems in locations where tensions might arise.

The Panel has no doubts that, from time to time, conflicts will arise. The Panel agrees that Te Ara o Papatuanuku should be empowered to provide facilitation and mediation services if requested in the event of conflict. Where a problem cannot be resolved through mediation, its resolution will depend on the nature of the conflict and the legal remedies available.

The Panel considers that Te Ara o Papatuanuku should not have powers of arbitration. The range of potential conflicts that might arise and the complexity of the law as it applies to access and trespass mean that exceptional cases not amenable to resolution though mediation should be dealt with on a case-by-case basis. In addition, the Panel considers that Te Ara o Papatuanuku should focus on promoting understanding and co-operation between landholders and visitors. Having a power of arbitration would raise questions of conflict of interest and objectivity.

The Panel considered two possible options for resolving more difficult access problems.

- **Environment Court** – It was suggested to the Panel that there should be scope for the access organisation to refer matters that cannot be resolved through mediation to an appropriate body such as the Environment Court for determination. The Panel does not consider this to be necessary or desirable, unless the issue is already subject to Environment Court jurisdiction, for example, the role of the Environment Court in determining road stopping proposals where there is public objection. If the dispute involves the right to access land in a particular instance, then the final resort will be to the Trespass Act 1980 if private land is involved, and this would normally be a matter for the District Court.

- **Ombudsman** – Access issues might be referred to an "access ombudsman". The Panel notes that it is not a role for the Ombudsmen appointed under the Ombudsmen Act 1975 to resolve civil disputes of this kind. The Ombudsmen could, however, investigate complaints about the carrying out of statutory duties by local authorities regarding unformed legal roads.

11.9 New access legislation

The Panel was asked "What should happen if a landowner will not negotiate, or will not negotiate on reasonable terms?" This question concerns sports fishers and game hunters in particular. The Panel had a very robust debate on whether it should recommend a remedy of last resort. The Panel concludes that any new access over private land should be by negotiation and agreement with the property owner.

The Panel has already considered the implications of using the Public Works Act 1981 (see section 11.4). It does not support this approach, except in exceptional circumstances. It does not see a need for special legislation that would compel landowners to sell an interest in their land for access purposes.

A further suggestion is to provide for an "access order" very similar to a "heritage order" under the RMA. Indeed, the heritage order provisions of the RMA could be extended to include walking access when the access is deemed to be of national significance. The Panel notes, however, that a heritage order does not create a right to go onto land. Rather, it vetoes uses inconsistent with the heritage values it seeks to protect.

If, under the heritage order process, an interest in land is being sought from an unwilling landowner, a heritage protection authority needs to resort to the compulsory acquisition powers under the Public Works Act 1981. As noted above the Panel does not recommend that the provisions of that Act be called on to deal with access unless as a last resort in exceptional circumstances.

The Panel considers that there is a wide range of measures available to improve walking access opportunities without entering into the controversial area of compulsory taking of land or an interest in land. The Panel much prefers an approach that is based on building on the existing goodwill and co-operation of landholders, rather than one of confrontation and compulsion.

Nevertheless, consideration should be given to providing the access organisation with status similar to that of a heritage protection authority so that ultimately it could initiate the compulsory acquisition powers under the Public Works Act in respect of access.

Recommendations on new access

The Panel recommends that:

28 any new access over private land for walking access be by negotiation and agreement;

29 Te Ara o Papatuanuku develops and implements a New Zealand Access Strategy, including new access and priorities for funding;

30 Te Ara o Papatuanuku works with central government to assist councils with funding to compensate landowners, where appropriate;

31 Te Ara o Papatuanuku supports community initiatives to ensure "quality access" (Principle 1);

32 the administration of the New Zealand Walkways Act 1990 be transferred to Te Ara o Papatuanuku, subject to a Memorandum of Understanding between Te Ara o Papatuanuku and DOC on the operational management of walkways;

33 the acquisition of access over private land and the funding of the acquisition of such rights be a function of Te Ara o Papatuanuku;

34 Te Ara o Papatuanuku be funded to establish and administer a contestable fund for access (Te Ara o Papatuanuku Fund for Access) to which local authorities and other organisations (for example, hapū, trusts, landcare groups, tramping clubs) might apply. The purpose of the Fund would be to enhance public access over private land and other matters relevant to access;

35 Te Ara o Papatuanuku's board sets policies on compensation and the use of the Te Ara o Papatuanuku Fund for Access for access other than walking;

36 Te Ara o Papatuanuku be empowered to provide facilitation and mediation services if requested in the event of conflict, but not have powers of arbitration;

37 Te Ara o Papatuanuku works with local government on the use of district and regional plans to enhance public access;

38 Te Ara o Papatuanuku works with central and local government to investigate how the use of the RMA for access could be improved, including the merits or otherwise of the four-hectare requirement for esplanade reserves;

39 the Government investigate options for amending the RMA to ensure that landholders who voluntarily provide access on their land are not penalised as a consequence;

40 consideration be given to providing Te Ara o Papatuanuku with status similar to that of a heritage protection authority so that

ultimately it could initiate the compulsory acquisition powers under the Public Works Act in respect of access (in exceptional circumstances only);

41 a review of the effectiveness of the Overseas Investment Act 2005 in improving public access takes place in five years.

12 Māori land and access

The Panel is aware that legal differences between some types of Māori land and general title land mean that access arrangements require careful consideration. For this reason, the Panel believes that a brief summary of the provisions and processes applicable to Māori land is useful in this report.

12.1 Background

Māori land is defined in Te Ture Whenua Māori Act 1993 as Māori customary land and Māori freehold land. It does not include general title land owned by Māori. The majority of lands that have been handed back to Māori in Treaty settlements are general title land, not Māori freehold land. Māori land is subject to restrictions and protections under Te Ture Whenua Māori Act 1993 that do not apply to general land.

Many submitters stated that Māori land should be treated like any other private land, and in some instances implied that Māori had been given special privileges regarding their land. However, this view does not reflect the history of Māori land ownership, the grievances associated with the transfer of ownership away from Māori, the special legislation governing Māori land and the positive actions of Māori regarding public ownership and access. Concerns were expressed to the Panel that Māori land is frequently subject to "public roaming" without permission, as if it were public land.

There are 1.54 million hectares of Māori land, mainly in the central and east coast of the North Island. Māori land makes up 5.7 percent of New Zealand's total land area and around 8.6 percent of all private land. A large proportion of Māori land is rural and of limited use for horticulture or agriculture. The undeveloped nature of this land increases its attractiveness for recreation purposes.

Māori land often has multiple owners, usually with ownership structures such as Māori trusts or Māori incorporations representing the owners. It is estimated that 80 percent of Māori land is held under such ownership structures. Understanding the history of Māori land title is important for understanding why water margin reserves do not exist on most Māori land.

During the period 1862–1909, almost all Māori customary land was converted to Māori freehold land. This process differed from general (non-Māori) land, which permitted a coastal or riverside reservation to the Crown. The conversion to Māori freehold land was through an investigation of ownership rights by the then Native Land Court and subsequent formal grant of the land from the Crown. The Crown did not at any stage own the land, thus there was no scope to reserve land from sale and hold it as some form of reserve.

Where Māori titles had been converted to general title, Māori owners could sell the land free of tribal constraints. Large areas, including land adjacent to water, were sold to settlers through Crown purchases, confiscations and direct sales from Māori.

The Land Subdivision in Counties Act 1946 provided for the taking of water margin land on the subdivision of general land. Māori land was, however, exempt from this provision. Subsequent legislation, starting with section 432 of the Māori Affairs Act 1953, made various provisions whereby it was possible for reserves to be made on the subdivision of Māori land. From 2002, by section 47 of Te Ture Whenua Māori Amendment Act 2002, any water margin land reserved on the subdivision of Māori land is set apart as a Māori reservation for the common use and benefit of the people of New Zealand.

12.2 Treaty of Waitangi

Article Two of the English text of the Treaty of Waitangi granted to Māori "full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties". The Waitangi Tribunal has expressed its preference for defining the rights under Article Two as "rangatiratanga", rather than the "exclusive possession" used in the English text of the Treaty.[11] Treaty settlements generally protect or provide for public access.

Māori submitters assert that, under the Treaty of Waitangi, the Crown, as a Treaty partner, is obliged to actively protect Māori property and customary interests.

[11] According to Crengle (1993:11), who has published a commentary on implementing the RMA in the context of the Treaty principles, the use of the term "rangatiratanga" denotes "an institutional authority to control the exercise of a range of user rights in resources, including conditions of access use and conservation management. Rangatiratanga incorporates the right to make, alter and enforce decisions pertaining to how a resource is to be used and managed, and by whom."

12.3 Public access to Māori land

As with general title land, access along waterways in Māori land requires the permission of the landholder. The rules are no different. It may be hard to identify from whom to seek permission where the land has multiple owners and no defined ownership structure.

As with other landholders, both Māori trust and incorporation managers are bound by requirements and obligations imposed by legislation such as occupational health and safety. In some cases, trust and incorporation managers may adopt management policies that may prevent all shareholders or beneficial owners entering the land. In these cases, shareholders and beneficial owners may have to follow the same process for seeking access as the public. However, shareholders and beneficial owners would expect to have access to their sacred sites (such as wāhi tapu) and customary food resources (for example, to exercise mahinga kai).

In general terms, legal access (such as the laying out of roadways) cannot be granted over Māori land except by agreement with the landholders or by order of the Māori Land Court. This is reflected in section 11 of the RMA, which exempts Māori land from the restrictions on the subdivision of land.[12] An amendment to Te Ture Whenua Māori Act 1993, however, provides that a Māori reserve (that is not a wāhi tapu) may be held for "the common use and benefit of the people of New Zealand".

Forest land transferred to Māori under the Crown Forest Assets Act 1989 is still subject to the marginal strip provisions in part 4A of the Conservation Act 1987, unless Treaty settlement legislation specifically overrides it. Advice received from Crown Forestry and a preliminary scoping of the legislation suggests that, in most cases, part 4A does apply. Section 28 of the Crown Forest Assets Act 1989 allows public access easements to be reviewed and cancelled after land is transferred to Māori, and in most cases such easements are cancelled at the request of iwi.

Even within Māori land, there are variations, such as the access strip along the shore of Lake Taupo. This access strip was created through the Māori Land Amendment and Māori Land Claims Adjustment Act 1926 as part of an agreement between Ngati Tuwharetoa, the tangata whenua of the Lake Taupo region, and the Crown. This agreement provided that the bed of Lake Taupo and the Waikato River, down to

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

and including Huka Falls, would be the property of the Crown, but did not give title to the Crown. In 1992, ownership of the beds was re-vested in Ngati Tuwharetoa.

The deed in respect of Lake Taupo allows continued freedom of entry to, and access on, the lake waters for recreation and enjoyment, subject to conditions and restrictions by the Taupo-nui-a-Tīa Management Board to protect and control public use. To reflect the access privileges given to the public, the Crown makes an annual payment to Ngati Tuwharetoa equivalent to half of the annual income from fishing licences for the Taupo fishing area, which is administered by DOC. The Panel considers that this is a useful model for negotiating access.

The Panel notes the history of Māori land and the legislation under which it is administered and the need not to impact upon customary rights and resources.

12.4 Location of and respect for wāhi tapu and rāhui

Facilitating greater access for the public has particular consequences for Māori, with examples where open public access has resulted in the desecration of tāonga, such as wāhi tapu and sacred sites not identified on legal plans.

The Panel recognises that information about the location of wāhi tapu and rāhui is customary knowledge and acknowledges reluctance to reveal these locations. Iwi must be free to control this information as they see fit.

A code of responsible conduct should contain provisions specific to Māori land and issues, particularly relating to identifying and contacting Māori landholders. The code may also contain provisions relating to respect for wāhi tapu, and compliance with local prohibitions on the taking of resources (rāhui). Such provisions would need to be developed in consultation with Māori.

12.5 Access for Māori to tāonga located on private land

Māori expressed concern that there are instances where it is difficult to obtain access to located tāonga on private land or reached by crossing private land.

The Panel understands that some iwi authorities are arranging access to wāhi tapu and other tāonga with private landowners; these initiatives are positive and encouraged. The Panel considers that Te Ara o Papatuanuku should explore opportunities to improve access by Māori to tāonga both through the use of existing access rights such as unformed legal roads and through negotiation and agreement with private landowners. This would be a means by which the Crown could

meet its duty of "active protection" of Māori property and customary resources.

12.6 Economic issues

Māori submitters noted that charging for access to Māori land may be the only or one of the few economic uses of the land, and they would not like to see this precluded. For example, forestry and eco-cultural tourism present new opportunities to develop a sustainable revenue stream from such land. An example is the Mt Tarawera guided walk, which has proven controversial but, for the iwi/hapū involved, provides a steady stream of income. Owners of Māori land strongly oppose any policy that would disrupt or constrain their future ability to benefit economically from the land.

Consultation revealed some concern about the current access arrangements to Mt Tarawera. The Panel sees this as an issue about access to private land. Te Ara o Papatuanuku could assess the situation at Mt Tarawera and ascertain if there is scope to negotiate a more flexible arrangement for walking access, perhaps using the Lake Taupo model.

Recommendations on Māori land and access

The Panel recommends that:

42 access over Māori land (other than may already be provided for in statute) be by a suitable process of negotiation and agreement with the owners (this is consistent with the Panel's view on the establishment of new access over all private land) – Te Ara o Papatuanuku would need to consult with Māori about a suitable negotiation approach;

43 Te Ara o Papatuanuku explores opportunities to improve access by Māori to tāonga both through the use of existing access rights such as unformed legal roads and through negotiation and agreement with private landowners.

13 Code of responsible conduct

13.1 Background

A common theme raised by landholders is the public's lack of knowledge of farming and rural practices. There is a growing concern that public understanding of rural New Zealand is being lost as the urban population increases. It is possible that the public will come to regard rural New Zealand as a place for recreation only, rather than a working environment. With nearly 86 percent of New Zealanders living in or close to urban areas, it is inevitable that pressures on rural New Zealand will increase. Demand for access is one of those pressures.

Consultation found agreement that the majority of users act responsibly. Not all members of the public belong to recreational groups that maintain formal or informal codes of conduct.

A small percentage of people behave badly, which erodes goodwill with landholders and leads to reduced access opportunities for all. Many landholders stated that they experience problems stemming from poor behaviour by the public, such as damage to property, gates left open, litter, cannabis cultivation and vandalism.

Many landholders believe that increased public access will lead to more problems and compromise or disrupt rural economic activity, such as farming or forestry operations. Visitors can impact on stock management, vehicles cause track damage and landholders are often involved in providing emergency assistance to persons lost or in distress.

13.2 Existing legislation

A large body of legislation already deals with the kinds of behaviour of concern to landholders and rural residents. Relevant statutes include:

- Arms Act 1983;
- Biosecurity Act 1993;
- Conservation Act 1987;
- Crimes Act 1961;
- Dog Control Act 1996;
- Forest and Rural Fires Act 1977;
- Harassment Act 1997;
- Land Transport Act 1998;

- Litter Act 1979;
- Local Government Act 1974;
- Local Government Act 2002;
- New Zealand Walkways Act 1990;
- Summary Offences Act 1981;
- Trespass Act 1980 (some landholders suggested that penalties could be increased as a further deterrent);
- Wildlife Act 1953;
- Wild Animal Control Act 1977.

13.3 Existing codes of conduct

The Panel found a high level of consensus for a code of responsible conduct to guide both landholders and the public. Te Ara o Papatuanuku could publish and promote such a code without needing legislation. For example, a voluntary code was proposed by Federated Farmers in 2004 in the context of the Government's policy of dealing with walking access issues.

The Panel notes that there are other codes that could also be drawn on in compiling a general walking access code. The former Public Lands Coalition, DOC and Mountain Biking New Zealand have created their own codes and the New Zealand Four Wheel Drive Association supports the *Tread Lightly!* concept.[13] It is highly desirable that the core of these codes is as consistent and compatible as possible. There is also a list of offences in the Walkways Act that acts as a statutory code of conduct for gazetted walkways.

The Panel agrees that Te Ara o Papatuanuku should co-ordinate the development of a code of responsible conduct with other agencies and organisations involved in outdoor recreation, with the objective of having an agreed core code. A code could address problems that result from a lack of public knowledge about acceptable conduct in rural areas, and clarify the rights and responsibilities of all parties. Many aspects of poor conduct are already covered by existing laws and by-laws, for example, littering, vandalism and excessive noise. Disturbing domestic animals, setting traps, shutting an open gate and opening a closed gate on private land are all offences under the Trespass Act 1980. These provisions do not apply to land that is subject to public access rights.

[13] See www.treadlightly.org for further information.

13.4 Possible content of a new code

The code could:

- promote the use of access maps to find the location of access and any restrictions on it;
- encourage the public to notify adjoining landholders as a courtesy, where this is appropriate;
- explain the need to ask before accessing private land or when in doubt;
- provide guidance on the appropriate disposal of human waste for good hygiene and to minimise biosecurity risks;
- provide guidance on the law and best practice regarding firearms and dogs;
- advise on the use of farm gates (leave as you find them) and on how to negotiate fences without damaging them;
- advise on appropriate and safe behaviour in the vicinity of farm animals;
- promote respect for landholders, including their privacy, and farm operations;
- promote respect for other users;
- explain users' responsibility to care for the environment;
- provide guidance on Māori land and issues;
- advise on safety, risks (including fire risk) and proper preparation for trips;
- recommend that landholders warn visitors of hazards on their property.

The Panel considers that a code of responsible conduct should apply to both public and private land. The Panel notes that landholders who wish to have more than a voluntary code as a basis for access over their land could negotiate behavioural conditions as part of an access agreement, or seek to have access across their property designated as a walkway. Once gazetted as a walkway, the enforceable conditions in the Walkways Act would then apply.

The Panel received other suggestions to help manage conduct. One interesting idea is to provide walkers with something that would identify them as a "responsible walker". This would be a voluntary arrangement that Te Ara o Papatuanuku could manage.

13.5 Possible status of a new code

The Panel sought views on whether a code should be statutory, and enforceable, or voluntary. Responses were divided. Both approaches

have costs and benefits. For example, a statutory code could have a higher level of enforceability in law. A voluntary code would be much less expensive and "authoritarian" and lead to much greater adherence in the long term. The supporters of a voluntary code stressed the need for education on acceptable behaviour and the value of peer pressure.

The Panel considers that a code will be of most value if it applies to all walking access, whether over legal access ways, negotiated public access over private land or access over private land by permission. Only a voluntary code could have general application of this kind. An educative approach is best, given that there is already a very wide range of laws covering virtually every form of behaviour that might be of concern.

If the Government adopts the Panel's recommendation on the use of the Walkways Act as one vehicle for negotiating new access, any new access having the status of a walkway will be subject to the wide range of constraints on behaviour in the Walkways Act. An important consideration behind the Panel's thinking is that the extent of the practical enforceability of both existing law and any new laws will be constrained by available enforcement resources, and that consequently the educative and peer pressure approach is likely to be more effective.

The Panel agrees that, as part of its work on a code, Te Ara o Papatuanuku should contact educational organisations to ascertain how information about accessing and behaving on rural land can be built into teaching material. This need not be a new requirement, but simply part of the existing outdoor education activity.

Recommendations on a code of responsible conduct

The Panel recommends that:

44 Te Ara o Papatuanuku co-ordinates the development of a voluntary code of responsible conduct with other agencies and organisations involved in outdoor recreation and rural land management (including DOC, Federated Farmers, local authorities and recreational groups), with the objective of having an agreed core code;

45 Te Ara o Papatuanuku promotes and encourages the teaching of good behaviour in the outdoors, especially in primary schools. It should also investigate the scope for providing overseas tourists with information about good behaviour in the outdoors (such as the proposed code of responsible conduct) at the point of entry into New Zealand.

14 Landholder liability

14.1 Background

Consultation on access matters in 2003 highlighted landholder concerns about the health and safety implications of public access. The Panel received similar expressions of concern during its consultation. This is despite increased amounts of information on the topic.

The Panel is concerned that there remains a degree of confusion about liability regarding people on land for recreation. The Panel firmly believes that education is needed to change incorrect perceptions of the current law about landholder liability to visitors, rather than any wholesale change to the law.

A large number of landholders felt that public access poses safety risks to the public and those living or working on rural properties. Many submitters mentioned the dangers associated with livestock such as bulls or deer, heavy equipment, activities such as tree felling or the use of chemicals, as well as natural hazards such as bluffs and rivers. It was felt that these dangers are not well understood by many urban people.

Many landholders felt that their liability for injuries to others on their land needs to be clarified. They are concerned about duties under the Health and Safety in Employment Act 1992, with a few also mentioning the Occupiers' Liability Act 1962. These concerns lead some landholders to restrict access. Some argue that they should have no liability at all for members of the public on their land.

14.2 Accident compensation

Since no-fault accident compensation was introduced to New Zealand in 1972, there has been no right to sue for compensation for injury, except for punitive damages. The current law is provided by the Injury Prevention, Rehabilitation and Accident Compensation Act 2001 (ACC legislation).

The Panel is concerned that few people distinguish between the remedies provided for injuries arising from accidents under the ACC legislation and the possible criminal liability of employers under the Health and Safety in Employment Act 1992. The Panel considers that it is important that landholders acknowledge that, except in exceptional circumstances, they cannot be sued for compensation should someone be injured on their property.

14.3 Liability under the Health and Safety in Employment Act 1992 (HSEA)

As noted above, many landholders misunderstand their obligations under the HSEA regarding persons on or adjacent to their land for the purposes of recreation. This is in spite of the publication of a Farm Bulletin by the Department of Labour in 1999 (the contents of which had been agreed with Federated Farmers) explaining the limited liability of landholders to persons on their land for the purposes of recreation. Some landholders feel that there is still too much uncertainty about their possible liability, especially that arising under section 16(1) concerning hazards to persons in the vicinity of a place of work.

Part of this concern seems to have arisen from the publicity of one or two cases that are not directly relevant. One is the Berryman case, but this did not involve recreational access to land. Rather it concerned the death of a beekeeper as the result of the collapse of a bridge used to access Berryman's farm. The bridge was ruled not to be a place of work, and the case brought by the Department of Labour against Berryman was dismissed. Nevertheless, the case gave rise to concerns by farmers as to their liability to visitors. In 1998, the Act was amended to clarify the duty of landholders to visitors.

The Panel invited, and appreciates, the helpful briefing it received from the Department of Labour on the liability of landholders under the HSEA. The Panel has identified four practical situations with an access dimension.

1 Landholders have no duty to any visitors who do not have explicit permission to be on the land.

2 Landholders have a duty to warn visitors who are on their land with explicit permission of any out-of-the-ordinary hazards likely to arise while they are in a place of work.

3 Landholders have a duty to take all practical steps to ensure that no hazard that is or arises in the place of work harms visitors who have paid to be in a place of work or to undertake an activity there.

4 Landholders have a duty to take all practical steps to ensure that no hazard that is or arises in a place of work harms people in the vicinity of the place, including people who are in the vicinity of the place solely for the purpose of recreation or leisure.

The Panel observes that, in this context, the definition of "a place of work" does not necessarily equate to the whole property. Rather, it covers areas where work is actually being carried out, or is customarily carried out. It also includes a public place where work is being carried out (for example, moving stock along or across a public road).

The Panel considers situation 1 to be straightforward and requiring no further comment.

Landholders have raised some concerns about situation 2. However, the Department of Labour advised the Panel that no warning need be given about hazards that would normally be expected to be encountered on a farm, such as livestock or farm machinery, or about natural hazards such as cliffs or tomos, so there seems to be little justification for such concerns. The Department of Labour comments that, in any case, the duty to warn would in practice be very difficult to enforce. It is unlikely that the Department has ever investigated a possible breach of this duty, and has certainly never contemplated a prosecution. However, such warnings would be good practice by landholders. This could be included as a recommended practice in the code of responsible conduct.

Regarding situation 3, the focus of the Panel's work has been on access provided free of charge, but it can also see that in some circumstances landholders might want to recover costs that they have incurred in facilitating access. The Panel considers that there may be a case for amending the duty to exclude from the "all practical steps" category circumstances where there is charge to recover such costs, but not extending to a charge for gain or reward.

The Panel has some concerns about situation 4. Much of the Panel's work has focused on the better definition of existing lawful rights of access and how the use of these existing rights could be better managed. These existing legal rights of access include various forms of water margin reservation, including unformed legal roads. Unformed legal roads can also provide non water margin access. A number of submitters were concerned about their duty in respect of persons on legal access adjoining their land. For example, unformed legal roads are generally not fenced off from the adjoining land, and persons using such roads are therefore not physically separated from any livestock in the vicinity. Some livestock can be dangerous (bulls, cows with young calves, stags during the "rut"). There may also be other potential hazards in the vicinity of these areas of legal access. The concern also applies to persons on private land with the landholder's consent.

These areas of public (and permitted) access could also, in some circumstances, be places of work (a place of work can include places occupied or under the control of an employer, permanently or temporarily), in which case the exemption in respect of recreation or leisure would apply. Where they are not a place of work but are in the vicinity of a place of work, the duty to take all practical steps would seem to apply. In these circumstances, however, the land surrounding the unformed legal road will also usually not be a place of work so that

it is unlikely that persons on the road or area of permitted access will be exposed to hazards from a place of work. The Panel considers that, while the risk to landholders from this provision is minimal, there is a need to explain its application so that it is better understood by landholders.

The Panel notes that, despite the above analysis, there remains a concern that, within a rural property, there are three different situations concerning the duties of the landholder (assumed here to be an employer for the purposes of the HSEA) to persons on their land for recreation or leisure with the landholder's permission. These depend on where the person is at any particular time in relation to that part of the property that is at that time a place of work. The three locations and their consequences are:

1 in a place of work – there is a duty to warn of any extraordinary hazards;

2 adjacent to a place of work (this may include public land such as an unformed legal road that is occupied by the landholder) – there is a duty to take all practical steps;

3 not in or adjacent to a place of work – there is no duty.

The problem for the landholder is that a warning will not be sufficient to cover the possibility of liability in respect of the second location. The Department of Labour has indicated that it would oppose changing the definition of a place of work to reduce the uncertainty in the area, but will consider whether some assurance can be provided in terms of the Department's compliance policy as it applies to persons on rural land for recreation or leisure.

The Panel notes that some landholders seek complete indemnity from any possible liability to persons accessing their land for recreational purposes. The Panel does not support this because it would imply an indemnity from the consequences of negligent or reckless behaviour by the landholder. Although some recreational users are willing to enter private land at their own risk, the Panel would be surprised if this included an acceptance that there was no remedy at all for negligent or reckless behaviour by landholders.

14.4 Other liability

The Panel notes that there may also be landholder liability under the Occupiers' Liability Act 1962. The extent of liability under this Act is unclear, but the Panel notes that there is a partial exemption in the Walkways Act in respect of the possible liability of landholders to walkers on gazetted walkways. The Panel agrees that an exemption of

this kind should be considered for persons on rural land for recreation or leisure with the permission of the landholder.

Recommendations on landholder liability

The Panel recommends that:

46 consideration be given to amending the Health and Safety in Employment Act 1992 to exclude from the "all practicable steps" category circumstances where there is a charge to recover costs incurred in facilitating access, but not extending to a charge for gain or reward;

47 the Department of Labour reviews the bulletin *If Visitors to My Farm are Injured, Am I Liable?* in consultation with landholders, recreation organisations and Te Ara o Papatuanuku to further clarify landholder liability and to explain the Department's relevant compliance policies;

48 an exemption to the Occupiers' Liability Act 1962 similar to the Walkways Act be considered for persons on rural land for recreation or leisure with the permission of the landholder.

15 Fire risk

15.1 Background

Landholders are concerned that fire risk may increase as a result of easier access. The Panel is aware that perceptions of the risk of fire and liability for fire suppression costs can be a disincentive for landholders to allow walking access.

There are several key matters for landholders in respect to fire risk:

- the possibility that more people on or near their land might mean more risk of fire;
- if access was allowed without landholder permission, landholders would no longer be able to refuse access at times of heightened fire risk;
- responsibility for costs associated with fire.

15.2 Access and fire risk

The National Rural Fire Authority has only fairly basic data on the cause of fires. The data do not include fires caused by the public, and cause is often difficult to establish.

The Authority's information shows that land clearances by landholders are a significant cause of fire. Land clearances were responsible for 54 percent of the total area burnt in 2002/03. Although access can pose a fire risk (usually from related activities, such as campfires, hunting or smoking), the public is not the source of most human-caused rural fires.

While not wishing to downplay this concern, the Panel concludes that it is not possible to accurately determine the degree of any causal link between access and rural fires. The risk posed by walkers could be lowered further by educating the public about fire safety through a code of responsible conduct.

15.3 Managing access to minimise fire risk

There are extensive powers under the Forest and Rural Fires Act 1977 (FRFA) to regulate not only the lighting of fires in forests (and other areas of risk), but also restricting access to areas of risk. Under section 21 of the FRFA, designated Rural Fire Officers may restrict all access in times of extreme fire risk.

The Panel notes that a negotiated access could include a provision for landholders to close access ways in times of high fire risk. There appears, therefore, to be ample provision in the law to regulate access to forests to manage fire risk.

15.4 Liability for costs

15.4.1 Liability under the Forest and Rural Fires Act 1977

Suppressing rural fires can be very costly. Costs include any damage to property, including damage to a neighbour's property. However, the Panel considers some concerns expressed by landholders to be based on a misunderstanding of the FRFA.

Some landholders consider that if a visitor is on their property (in particular, if they are on a rural property without the landholder's knowledge) and start a fire, and then cannot be found, the liability for costs would rest with the landholder.

The Panel notes that, in respect of at least one aspect of fire costs, this is not the case. If person(s) cannot be identified as responsible for the fire, suppression costs can be recovered from the Rural Fire Fighting Fund. The FRFA allows for the recovery of fire suppression costs from the person responsible for starting the fire. Financial liability requires a direct admission of responsibility, or proof of causation. For most land holdings, liability for suppression costs does not transfer to the landholder if a fire is started on their land by someone else, including cases where the responsible person cannot be located.

Where, however, a fire occurs in a commercial or semi-commercial forest, or defence area, a claim on the Rural Fire Fighting Fund cannot be made. Forest owners are, therefore, directly liable for suppression costs if a fire is started by a member of the public who cannot then be found. Most owners of commercial forests carry, at a minimum, fire suppression insurance to cover such costs on their, or neighbouring, properties.

15.4.2 Other costs

Suppression costs are only part of the potential losses that a rural fire can impose. There is also the possibility of loss of property, crops or even human life. These costs can be significant, particularly to owners of commercial forests. A fire can be potentially devastating to a commercial forest, representing the loss of a slow-growing investment. The risk of fire associated with walkers is still likely to be a concern in the minds of some landholders, given that the risk, however small, could have severe consequences.

15.4.3 Indemnity

Of greater concern to forest owners than the cost of suppressing forest fires is the potential asset loss from a major fire. The Panel considered an option where the Government would provide an indemnity to cover this risk. It is, however, difficult to identify the source of a forest fire,

much less attribute it specifically to any new walking access. Such an indemnity would leave the Crown at risk of covering the costs of all fires that could not be attributed to a specific non-access cause.

In light of the fact that many insurance companies deem potential costs to be too high to cover asset loss attributed to forest fires, it is unlikely that the Government will be willing to indemnify landholders against loss possibly caused by the public.

The Panel understands the Government is generally very cautious about entering into indemnity agreements, but there are instances, such as DOC-administered tracks and walkways that cross certain private land, where such an indemnity can be provided. Rather than settle on a generic position, the Panel accepts that the possibility of indemnities for negotiated access must depend on the costs involved for the Government compared to the public benefit, and would need to be decided on a case-by-case basis.

15.4.4 Fire damage fund

The possible need for an additional fund to cover property damage costs was raised during consultation. Some landholders are concerned that insurance for this kind of risk was either unobtainable or prohibitively expensive. The Panel considers that the extent of the link between walking access and the risk of property damage by fire has not been clearly established, and that the investigation of the need for such a fund is outside the scope of the Panel's terms of reference. It is possible that increased walking access is one factor that could increase the risk of fire damage, but there are other probably more significant causes, such as deliberate burn-offs that get out of control.

The Panel notes that, while there appears to be some merit in establishing such a fund, it does not see the potential risks of walking access as the primary reason for doing so.

15.5 Department of Internal Affairs fire legislation review

The Panel is aware that the Department of Internal Affairs commenced a review of fire management legislation in late 2003. The purpose of the review is to acknowledge the evolving rescue role of the Fire Service and resolve inconsistencies between urban and rural fire systems. For example, people who cause fires in rural fire districts are liable for the costs of fighting those fires, while those who cause fires in urban areas are not penalised (Department of Internal Affairs, undated). There are also inequities in fire suppression cost recovery between different types of landholders (for example, between forest owners and orchardists). Addressing these inconsistencies may alleviate some of the concerns of

rural landholders, particularly forest owners, which may make them more comfortable about allowing walking access.

The Panel's analysis indicates that current policy settings strike a reasonable balance in respect of fire risk. Moving too far towards covering fire-related costs could create an unacceptably high fiscal risk for the Government. The management of risk is a specialised area and interested stakeholders should participate in the review of fire legislation.

Recommendation on fire risk

49 The Panel recommends that a code of responsible conduct contain provisions to help reduce fire risk.

16 Rural crime and security

16.1 Background

Crime is a concern to New Zealanders, no matter where they live. Based on their own experience, members of the Panel recognise that the distance between rural households and from emergency services often increases rural people's sense of vulnerability. These concerns are heightened by occasional high-profile cases of home invasion.

Landholders attribute crimes such as burglary, theft of stock and farm equipment, threats and intimidation, cannabis cultivation and petty offences such as vandalism and littering, to strangers or "undesirable types" entering rural areas. These actions are not experienced by landholders alone; visitors to rural areas, particularly in carparks, are also targets of crime.

16.2 Correlation between access and crime

The link between access and crime is uncertain. On one hand, it is possible that having more people in remote rural areas could increase the possibility of crime occurring. Without any public access, a landholder could easily identify a stranger on their land as a potential threat to their security. If access increases, "undesirable types" might be able to enter a property without arousing suspicion. In addition, people accessing a rural property could well notice the presence of valuable items, such as machinery or farm bikes, leading to opportunistic crime.

On the other hand, it is not certain whether mapping, clarifying and improving public access will always result in a substantial increase in the number of people entering rural areas. The result may be improved quality of access for those already seeking it, rather than an increase in the number of people wanting access.

There are also questions whether walking access would have any bearing on the actions of those who have a disregard for the law. People who go onto a rural property with the intention of breaking the law are unlikely to be concerned as to whether or not they have a legal right of access. The argument here is that if a person is prepared to vandalise or commit theft or acts of violence, they will probably not be deterred by the more minor crime of trespass.

In addition, having responsible people walking in the countryside would decrease the isolation, and perhaps the vulnerability, felt by some rural people. The possibility of having people walk past could actually deter some kinds of crime. Criminals generally seek out secluded places where they will not be discovered to undertake some crimes, such as growing cannabis or consuming drugs.

The Panel recognises that landholders will at times need to restrict access and the Trespass Act 1980 plays a necessary role. The Panel considers there is a need for better liaison between rural communities, recreation groups and the Police.

The Panel concludes that:

- rural crime is an issue for communities, community leaders, councils and the Police, and that Te Ara o Papatuanuku may be able to help by implementing security measures;
- more "honest eyes" will result from increased access;
- defined access is likely to see fewer people "wandering all over the place".

Recommendations on rural crime and security

The following suggestions fall outside the scope of an access organisation, but **the Panel considers that it would be useful to:**

50 strengthen Neighbourhood Watch in rural areas (although this was commonly suggested by some recreational submitters, many landholders objected to the idea that they should take on yet more responsibility here – especially if necessitated by increased public access);

51 increase the amount of active engagement between the Police and rural communities;

52 improve links between recreation groups and rural communities;

53 build a case for having more Police in rural areas, and/or create a law enforcement position (for example, community/rural constables or residents warranted by councils) so that there are more people in rural areas with a law enforcement role.

17 Biosecurity

17.1 Background

Some landholders are concerned that allowing greater public access without their consent would create biosecurity risks, with the possible increased risk of the spread of organisms that are already here or that could arrive at some point in the future, for example:

- diseases of people and animals, such as foot rot, sheep measles, foot-and-mouth disease (not present in New Zealand), giardia and cryptosporidium;
- weeds, such as barley-grass, burdock and ragwort;
- plant diseases, such as pitch pine canker (not present in New Zealand);
- plant pests, such as gum leaf skeletoniser and scale insects;
- invasive organisms, such as didymo.

The Panel's experience is that, in the majority of situations, walking access is unlikely to cause additional biosecurity risks, because:

- many diseases and pests cannot be spread merely by a person walking over land (for example, bovine tuberculosis);
- most diseases and pests are spread by natural distribution (that is, birds, wild animals, insect vectors, wind or water) and the additional threat from walkers is minimal (for example, spread of ragwort in a person's socks);
- many diseases and pests are already prevalent in New Zealand (for example, giardia);
- most areas are already used by people to a greater or lesser extent, including the landholder, employees, contractors and others on the land with the landholder's permission.

There are, however, situations where a disease or pest is not prevalent in New Zealand and it can be spread by people walking or fishing, or by accompanying dogs. Specific examples are sheep measles, phylloxera (a disease of grape vines) and didymo (a freshwater diatom, a type of algae).

The Panel understands that some landholders appear to relate the issue of consent to the degree of risk, that is, they can control the risks so long as they can restrict access on a case-by-case basis. The Panel believes this is a matter that can be covered in access negotiations.

The Panel notes that promoting or removing barriers to existing access rights does not appear to pose a significant change to the existing level of biosecurity risk.

17.2 Managing biosecurity risks

The Panel notes that there are extensive powers under the Biosecurity Act 1993 to investigate, regulate and control biosecurity risks. Nevertheless, negotiations for access may include provision for temporary closure of access on biosecurity grounds.

The Panel believes that a code of responsible conduct could play an important role in regulating behaviour and thus minimising biosecurity risks. For example, the code could include advice about proper disposal of toilet waste (this advice may help manage the spread of beef measles). The Panel suggests that overseas visitors receive information when they arrive in New Zealand about appropriate behaviour in rural areas to minimise biosecurity risks.

The Panel concludes that:

- walking access poses limited additional biosecurity risks;
- walking access clearly poses fewer biosecurity issues than access with vehicles, horses and dogs;
- biosecurity concerns could be covered in access negotiations;
- serious biosecurity risks can be managed under the Biosecurity Act 1993.

Recommendation on biosecurity

54 The Panel recommends that measures to minimise biosecurity risks be included in the proposed code of responsible conduct, particularly the appropriate disposal of human waste.

18 Other matters

The Panel's terms of reference specifically refer to walking access but allow it to report on any "other matters" related to access that appear to require the consideration of the Minister for Rural Affairs.

18.1 "Exclusive capture"

Consultation found a high level of concern from anglers and wildlife hunters about a matter they term "exclusive capture". The Panel considers that, in view of the depth of concern, it has an obligation to report on the matter. This necessarily includes an analysis of the concept and its implications for landholders as well as anglers and hunters.

The Panel acknowledges that "exclusive capture" is part of the trend away from landholders providing the public with free access across their land, and that this is a particular concern to fishers and hunters where commercial ventures in certain areas can be in conflict with the voluntary provision of free access to sports fish and game.

The Panel agrees that there is an issue, but did not find consensus on an appropriate solution.

18.1.1 Background

The Panel recognises that fishing and game hunting are recreational activities in New Zealand for which access has traditionally been granted. These sports are part of our heritage and identity.

"Exclusive capture" is a term used by Fish & Game Councils to cover the practice of, and scope for, landholders denying access to anglers and hunters and establishing exclusive private use of public natural resources (that is, sports fish and game) for commercial benefit.

The management of sports fish is governed by the Conservation Act 1987, while the management of game is governed by the Wildlife Act 1953. These statutes prohibit the sale of sports fish and game per se, and the sale of sports fishing and game hunting rights (but seemingly not the access rights for these activities).

The legislation does not, however, provide any right of access either to private land or across private land to public land, for the purpose of sports fishing or game hunting. Section 21 of the Wildlife Act 1953 makes it clear that a licence or authority under that Act does not entitle the holder to hunt or kill game on any land without the consent of the occupier of the land. Regulation 19 of the Freshwater Fisheries Regulations 1983 specifies that no licence (to fish) shall confer any right of entry upon the land of any person.

The legislation does not grant any special rights to landholders to utilise sports fish or game that exist on their property, save for an exemption from the need to hold a current fishing or hunting licence, which is required of all other anglers and hunters.

18.1.1.1 The fishing and hunting perspective

Anglers (in particular) and hunters are concerned that they are unable to gain practical access to sports fish and game in areas that involve crossing private property where "exclusive access" arrangements exist. They consider that landholders should not be able to generate commercial benefit from an exclusive fishery access arrangement, where that includes denial of public access.

18.1.1.2 The landholder perspective

Landholders argue that the "rights to" sports fish and game have never carried with them a right to enter private land. They argue that the right to exclude is fundamental to the concept of property and it is a matter for the landholder to decide who, if anyone, enters or crosses their land. Thus, excluding the public cannot be seen as a misuse of the law of trespass.

18.1.2 Possible solutions

The Panel investigated regulatory and non-regulatory options that might enhance access to these particular resources and foster outdoor recreation.

The Panel notes that decisions on regulatory approaches rest largely with the Minister of Conservation, who is responsible for the legislation under which these resources are managed.

18.1.2.1 Extension of legislation

In this option, the prohibition on the sale of access rights would include the provision of access across private land for the purpose of accessing sports fish and game birds. Supporters of this option feel that section 26ZN of the Conservation Act 1987 and section 23 of the Wildlife Act 1953, which specifically prohibit the sale of fishing and hunting rights respectively, are being undermined by an apparent loophole in the law that allows the sale of access rights for these same purposes.

In response, the Panel notes that landholders have no obligation to provide access. Access to the areas cited as being a problem is frequently part of a package that includes services such as transport, accommodation and guiding.

The Panel has not seen any documented example of the bare sale of exclusive access. The Panel is aware, however, that because of the contentious nature of the issue, "exclusive capture" arrangements may be informal. There is no doubt that the value of such services as transport, accommodation and guiding is greatly enhanced by the access to sports fish that they facilitate.

The provision of access other than in association with these services would require the permission of the landholder to cross or be on private land, and this permission is a prerogative of the landholder. The Panel notes that legislation prohibiting the sale of access for the purpose of access to sports fish and game would raise interpretative issues in respect of transport, accommodation and guiding packages that incidentally provided access to and across private land. It would also run the risk of inhibiting some tourism ventures.

The Panel considers that it is unlikely that legislation of this kind would affect the examples of "exclusive capture" that have been drawn to its attention. The Panel has not examined any other options for legislative amendment.

18.1.2.2 Closure of fisheries

It was suggested to the Panel that a remedy for "exclusive capture" might be to close, or threaten to close, a fishery that is practically accessible only by crossing private land. The implication of the proposal is that the fishery would only be reopened (or the threat of closure not carried out) if the landholder provided satisfactory public access.

Freshwater fisheries may be closed (or not opened) by means of a public notice by the Director-General of Conservation under section 26ZL of the Conservation Act 1987. The Panel understands that Fish & Game New Zealand has approached the Director-General about this possible remedy, but that the Director-General has not yet agreed to this course of action. A possible difficulty with any form of closure of a freshwater fishery is that its immediate impact would be to reduce the opportunities for fishing. Conversely, fisheries closed to all angling would effectively become sports fishery reserves and may enhance the quality of fishing in adjoining open waters, in the same way as occurs with marine reserves. This may have unintended effects on the river ecosystem.

The Panel considers that threatening to close a fishery for the purpose of obtaining access would not be conducive to seeking amicable resolution through negotiation. Non-closure conditional on the relevant landowners agreeing to public access may be perceived as undermining their property rights. The Panel does, however,

support further investigation of options to close fisheries that are not practically open to the public, although it cautions that such administrative decisions are judicially reviewable. They must be a proper use of the statutory power.

18.1.2.3 Concessions regime

Commercial tourism is permitted, through a statutory commercial concession regime, on public conservation lands, and for wildlife species off the conservation estate, while still providing recreational opportunities for the public. The Panel was invited to consider the merits of a similar statutory concession regime for sports fish and game. This would authorise Fish & Game New Zealand, as the statutory manager of fish and game, to issue concessions for their commercial use with negotiated conditions to also provide for fair and reasonable public access to these same public resources.

The Panel comments that this approach would not deal directly with the access issue, although it might be possible to make public access to private land a condition of a concession held by private landholders. This remedy would require empowering legislation and will need further consideration.

18.1.2.4 Licensing of fishing guides

The Panel notes that there is provision in sections 48 and 48A of the Conservation Act 1987 for setting the conditions for licensing fishing guides. At present, there is no requirement for fishing guides to be licensed. Such a requirement was enacted in the Conservation Amendment Act 1996 but will come into effect only on the making of an Order-in-Council for this purpose. The Panel understands that regulations governing the operation of fishing guides are being prepared, and the intention is that, when they are ready, the necessary Order-in-Council will be made, bringing the licensing requirement into effect.

The Panel notes that it may be possible for fishing guide licences to be conditional on not providing guiding services to persons involved in the practice of "exclusive capture".

18.1.2.5 Non-regulatory options

Non-regulatory options include:

- clarifying and enforcing existing public access rights to the relevant area (this would include both water margin access and "cross-country" access where, for example, an existing unformed legal road might exist);

- clarifying the extent of Crown ownership of riverbeds (Hayes (2007a) suggests that the extent of Crown ownership of riverbeds may be more extensive than is often assumed);
- negotiating a public right of access (the Panel acknowledges that doing so may be difficult, for example, the only practical access may be across land where the landholder has an exclusive concession arrangement that may preclude any public access agreement. The Panel suggests that, where the access is primarily for the benefit of anglers or game bird hunters, there is a strong case for any such negotiated access to be carried out or financed by Fish & Game New Zealand).

18.1.3 Conclusions

The Panel found this topic to be extremely difficult to assess. There is clearly a conflict between the aspirations of anglers and game hunters for access to sports fish and game and the right of landholders to determine who enters their land and under what conditions.

The Panel concludes that any "rights" to sports fish and game do not carry a corresponding right to cross private land. The "right" to fish and hunt is fundamentally separate from the ability to cross private land. The Panel considers that current legislation makes this distinction clear.

Consequently, the Panel does not support any change in the law that would oblige landholders to provide access. All of the regulatory remedies outlined above would, if successful, have this effect. The majority considers that a better approach would be to improve public access to the areas susceptible to the practice of "exclusive capture" and where there is an identified demand for public access. This would include:

- identifying, mapping and signposting existing public access;
- clarifying, where possible, Crown ownership of riverbeds;
- ensuring that access concerns are drawn to the attention of the Overseas Investment Office in the event of a relevant overseas land acquisition;
- ensuring that pastoral lease reviews take appropriate account of access to relevant areas;
- negotiating access over private land, where this is possible and relevant.

Recommendations on "exclusive capture"

The Panel recommends that the Minister of Conservation:

55 considers the options in this report, with the aim of resolving the matter quickly as the concern has existed for many years;

56 makes a decision as quickly as possible on the need for and conditions of fishing guide licensing.

18.2 Access with motor vehicles, horses and bicycles

Walking is the least intrusive form of access. The Panel has defined walking access to include access with mobility devices and with disability-assist dogs. Nevertheless, consultation generated questions about motor vehicle and other forms of access (including hunting and dogs). The Panel recognises that walking access cannot always be neatly separated from these other forms of access.

Matters raised during consultation included:

- the changing nature of recreation means that more equipment is used, for example, kayaks that require vehicle transport;
- four-wheel-drive enthusiasts wish to maintain and enhance access for vehicles;
- some people use mobility devices and vehicles to access places they may not otherwise be able to reach;
- landholders and others are concerned about damage to the ground surface and other environmental damage;
- unformed legal roads are inherently available for use by vehicles and horses.

The Panel understands that much of the concern about the potential environmental damage from access relates to the irresponsible use of motor vehicles. In particular, improving the availability of information on the location of unformed legal roads will carry risks and benefits outside the strict limits of walking access. There is also a potential conflict between the scope for negotiating improved walking access in exchange for the stopping of unsuitable unformed legal roads and the aspirations of the public to whom vehicle and other forms of access are important. There is, however, strong support for the position that any "swapping" of road access should be on a like-for-like basis.

The Panel accepts that there are limits on the amount of resource available to a walking access organisation. Focusing this resource on walking access is likely to achieve better results than if it were spread across other, more controversial access issues.

The Panel proposes that Te Ara o Papatuanuku co-ordinates its activities with organisations concerned with other forms of access, such as mountain-biking clubs, four-wheel-drive clubs and Fish & Game Councils, but, in doing so, Te Ara o Papatuanuku should not compromise walking access outcomes. The Panel considers, however, that there would be efficiencies in an access organisation dealing with all forms of access.

Recommendations on access with motor vehicles, horses and bicycles

The Panel recommends that:

57 Te Ara o Papatuanuku be empowered to consider all forms of access (there are efficiencies in an access organisation dealing with all forms of access) but with walking access as its priority area of concern;

58 Te Ara o Papatuanuku co-ordinates its activities with organisations concerned with other forms of access, such as mountain-biking clubs, four-wheel-drive clubs and Fish & Game Councils, but, in doing so, Te Ara o Papatuanuku should not compromise walking access outcomes;

Note: the Panel's recommendation on a policy on unformed legal roads is set out in section 8.

18.3 Hunting

Hunters seek the right to cross land to places where hunting is legal or permitted, and argue that any risks associated with simply carrying a firearm can be minimised by requiring firearms to be carried in a suitable scabbard. Hunting requires both the carrying and the use of firearms, which are two separate issues. The use of firearms is regulated by the Arms Act 1983.

To the extent that the Panel's earlier recommendations lead to the clarification and better use of existing legal access, the right to carry firearms will depend on the existing rights that run with access. For example, if the access is by way of an unformed legal road, then persons using that access will be able to do all of the things that are lawful on a public road. That would generally include the right to carry a firearm, but may not include the right to use a firearm. Other forms of legal access may have more restrictions on the carrying and use of firearms.

Recommendation on hunting

59 The Panel recommends that the carrying of firearms be a matter of negotiation among the parties involved in any negotiated access arrangement.

18.4 Dogs

The Panel received submissions seeking improved access with dogs (both hunting dogs and domestic dogs).

Landholders are concerned about dogs spreading diseases such as sheep measles. The risk of spreading animal diseases is discussed in section 17. Landholders are also concerned about the possibility that dogs will worry stock.

To the extent that the Panel's report leads to the clarification and better use of existing legal access, the right to walk with a dog will depend on the existing rights that run with access. For example, if the access is by way of an unformed legal road, then the persons using that access will be able to do all the things that are lawful on a public road. Other forms of legal access may have restrictions on the form of access.

Private landowners are able to place whatever restriction they consider appropriate in terms of dogs on their land, including prohibiting them entirely.

The Panel notes that the Dog Control Act 1996 applies to dogs on both public and private land.

Recommendation on dogs

60 The Panel recommends that access with dogs be a matter of negotiation among the parties involved in any negotiated access arrangement.

PART 4

CONCLUSION

19 Conclusion

The Panel believes that its report closely reflects a consensus on access. The Panel's long-term objective is to revitalise traditional goodwill on access. Consequently, this report affirms the importance of the present incremental, largely voluntary and negotiated processes. Any new approach on access will evolve only as demands change.

The Panel recognises that not everyone will agree with this approach. There will still be a need to consider the extent to which the available access, both formal and informal, falls short of public expectations. How these expectations will be met will depend on the scope and resources available for negotiating more formal access.

The Panel did not find a consensus for the more regulatory approach to access proposed in the alternative view of one Panel member in section 21.

The proposed access organisation (Te Ara o Papatuanuku) is the core of the strategy described in this report. The Panel wishes to emphasis that, without the leadership found in a dedicated, independent agency, the current frustrations and problems will remain. The functions and success of Te Ara o Papatuanuku will require stakeholder support and adequate funding. The Panel considers that an establishment board should assess and report on required funding.

The Panel urges the Government to reflect the spirit of the consultation and consensus by willingly adopting this report. The suggested "plan of action" (see section 22) demonstrates how the proposed access policy could be achieved. This is a staged approach. The Panel is aware that an access policy must be based in law and implemented well.

The major legislative initiative recommended by the Panel is to review the New Zealand Walkways Act 1990 so that it becomes more generic while capturing the spirit that the walkways concept originally engendered. The Panel also concludes that rights and obligations in respect of unformed legal roads be reviewed. While it can be a risk to attempt to capture the past, the Panel recognises that reviving the walkways legislation (and the manner in which it was administered – national guidance, local implementation) would rekindle the "access spirit". The legislation received the support of key stakeholders: landholders, local government and the public. The Panel strongly advocates that the Minister for Rural Affairs and the Government advance similar legislation in consultation with these stakeholders.

Overall recommendations

The Panel recommends that:

61 the spirit of the consultation and the consensus be reflected by the Government willingly adopting this report;

62 the effectiveness of the proposals in the report (assuming they are adopted by the Government) be subject to an external review in 10 years;

63 an establishment board of Te Ara o Papatuanuku assess and report on required funding;

64 the Minister for Rural Affairs and the Government advance legislation similar to the Walkways Act in consultation with stakeholders.

20 Summary of recommendations

Recommendations on leadership

The Panel recommends that:

1 an access organisation be established that combines the characteristics of a statutory organisation with those of a trust (the Panel considers that this option is most likely to involve local landowners, users and enthusiastic volunteers);

2 the organisation be called Te Ara o Papatuanuku (the New Zealand Access Commission), to reflect the importance of rural New Zealand for all New Zealanders;

3 Te Ara o Papatuanuku be accountable to a Minister and be required to report to Parliament in accordance with the Crown Entities Act 2004.

The Panel recommends that Te Ara o Papatuanuku:

4 has a governance board appointed by the Minister responsible for the organisation, after consultation with key access stakeholders, with appointees having skills and experience relevant to the organisation's functions;

5 has a structure that reflects the need to work with, co-ordinate and promote the recreational access activities of local government and voluntary organisations;

6 be empowered to carry out the following functions:

- provision of national leadership, including a national strategy, and co-ordination of access among key stakeholders and relevant central and local government organisations;
- the provision of impartial and robust advice on access;
- local/regional leadership and co-ordination to help local groups with their access issues;
- mediation of disputes over walking access issues, including the ability to initiate negotiations;
- the reference of disputes about legal access to an appropriate authority;
- the creation and administration of walkways made under the Walkways Act 1990, with planning and supervision focused at a local level;
- the establishment and maintenance of a public access mapping database;

- administration of a contestable fund for the purpose of negotiating walking access either under the provisions of the Walkways Act 1990 or new or other existing legislation;
- creation of a trust structure able to hold land or interests in land for the purpose of providing walking access;
- the receipt and management of private funding contributions (including sponsorships) for the promotion of walking access;
- research, education and participation in external access-related topics and programmes;
- the development, promotion and maintenance of a code of responsible conduct.

Recommendations on types of access

The Panel recommends that:

7 Te Ara o Papatuanuku works with territorial authorities to develop consistent and appropriate policies for managing unformed legal roads for access;

8 the mapping of unformed legal roads be a priority for Te Ara o Papatuanuku;

9 territorial authorities generally be required to retain unformed legal roads for possible future use by the public;

10 an effective legislative remedy be available to the public (and enforceable in the District Court) for the removal of unlawful obstructions on unformed legal roads;

11 territorial authorities be provided with more powers to manage the use of unformed legal roads, provided that this is associated with a duty to keep unformed legal roads open to appropriate uses;

12 Te Ara o Papatuanuku considers developing national guidelines on the administration of unformed legal roads;

13 consideration be given to assessing whether it may still be possible to stop some unformed legal roads in exchange for alternative access (this could involve more procedural flexibility and Te Ara o Papatuanuku's participation in the promotion of alternative access arrangements that are in the public interest);

14 consideration be given to the use of the Crown's power to resume ownership of the land comprising unformed legal roads to facilitate an exchange for alternative access.

Recommendations on information about existing access

The Panel recommends that:

15 Te Ara o Papatuanuku be responsible for facilitating and co-ordinating the provision of information about access. Maps should be available both through the internet and as printed copies, at a reasonable cost;

16 the provision of access maps be a priority for Te Ara o Papatuanuku;

17 Te Ara o Papatuanuku does a stocktake of existing mapping information and a preliminary analysis of the public's likely requirements before any further information is prepared;

18 Te Ara o Papatuanuku be made responsible for establishing and managing a single, publicly accessible and officially recognised database of access information, and that work on this task commences as soon as possible;

19 Te Ara o Papatuanuku works with territorial authorities, landholders and recreation organisations to supply, install and maintain signage;

20 Te Ara o Papatuanuku provides a non-binding mediation service to help resolve conflicts between parties on access matters;

21 Te Ara o Papatuanuku considers the opportunities and risks of making landholder contact details more readily available;

22 LINZ examines ways of depicting private roads on topographical maps in a way that makes them more readily distinguishable from public roads;

23 the Government sets a definitive timetable for LINZ to complete its assessment of the means to map marginal strips created since 1987;

24 the Government considers in more detail the implications of the proposal for minor changes to the Trespass Act 1980 for access along water boundaries where there is or has been public land.

Recommendations on restoring and realigning lost access

The Panel recommends that:

25 Te Ara o Papatuanuku facilitates negotiations among landholders, the Crown and, where relevant, territorial authorities, to restore access to water margins in appropriate cases where such a solution is feasible;

26 areas of the coast where public access on both the foreshore and the dry margin is unavailable be considered a priority for negotiated access;

27 access across private land to the coast be negotiated in the same way as other new access.

Recommendations on new access

The Panel recommends that:

28 any new access over private land for walking access be by negotiation and agreement;

29 Te Ara o Papatuanuku develops and implements a New Zealand Access Strategy, including new access and priorities for funding;

30 Te Ara o Papatuanuku works with central government to assist councils with funding to compensate landowners, where appropriate;

31 Te Ara o Papatuanuku supports community initiatives to ensure "quality access" (Principle 1);

32 the administration of the New Zealand Walkways Act 1990 be transferred to Te Ara o Papatuanuku, subject to a Memorandum of Understanding between Te Ara o Papatuanuku and DOC on the operational management of walkways;

33 the acquisition of access over private land and the funding of the acquisition of such rights be a function of Te Ara o Papatuanuku;

34 Te Ara o Papatuanuku be funded to establish and administer a contestable fund for access (Te Ara o Papatuanuku Fund for Access) to which local authorities and other organisations (for example, hapū, trusts, landcare groups, tramping clubs) might apply. The purpose of the Fund would be to enhance public access over private land and other matters relevant to access;

35 Te Ara o Papatuanuku's board sets policies on compensation and the use of the Te Ara o Papatuanuku Fund for Access for access other than walking;

36 Te Ara o Papatuanuku be empowered to provide facilitation and mediation services if requested in the event of conflict, but not have powers of arbitration;

37 Te Ara o Papatuanuku works with local government on the use of district and regional plans to enhance public access;

38 Te Ara o Papatuanuku works with central and local government to investigate how the use of the RMA for access could be improved, including the merits or otherwise of the four-hectare requirement for esplanade reserves;

39 the Government investigate options for amending the RMA to ensure that landholders who voluntarily provide access on their land are not penalised as a consequence;

40 consideration be given to providing Te Ara o Papatuanuku with status similar to that of a heritage protection authority so that ultimately it could initiate the compulsory acquisition powers under the Public Works Act in respect of access (in exceptional circumstances only);

41 a review of the effectiveness of the Overseas Investment Act 2005 in improving public access takes place in five years.

Recommendations on Māori land and access

The Panel recommends that:

42 access over Māori land (other than may already be provided for in statute) be by a suitable process of negotiation and agreement with the owners (this is consistent with the Panel's view on the establishment of new access over all private land) – Te Ara o Papatuanuku would need to consult with Māori about a suitable negotiation approach;

43 Te Ara o Papatuanuku explores opportunities to improve access by Māori to tāonga both through the use of existing access rights such as unformed legal roads and through negotiation and agreement with private landowners.

Recommendations on a code of responsible conduct

The Panel recommends that:

44 Te Ara o Papatuanuku co-ordinates the development of a voluntary code of responsible conduct with other agencies and organisations involved in outdoor recreation and rural land management (including DOC, Federated Farmers, local authorities and recreational groups), with the objective of having an agreed core code;

45 Te Ara o Papatuanuku promotes and encourages the teaching of good behaviour in the outdoors, especially in primary schools. It should also investigate the scope for providing overseas tourists with information about good behaviour in the outdoors (such as the proposed code of responsible conduct) at the point of entry into New Zealand.

Recommendations on landholder liability

The Panel recommends that:

46 consideration be given to amending the Health and Safety in Employment Act 1992 to exclude from the "all practicable steps" category circumstances where there is a charge to recover costs incurred in facilitating access, but not extending to a charge for gain or reward;

47 the Department of Labour reviews the bulletin *If Visitors to My Farm are Injured, Am I Liable?* in consultation with landholders, recreation organisations and Te Ara o Papatuanuku to further clarify landholder liability and to explain the Department's relevant compliance policies;

48 an exemption to the Occupiers' Liability Act 1962 similar to the Walkways Act be considered for persons on rural land for recreation or leisure with the permission of the landholder.

Recommendation on fire risk

49 The Panel recommends that a code of responsible conduct contain provisions to help reduce fire risk.

Recommendations on rural crime and security

The following suggestions fall outside the scope of an access organisation, but **the Panel considers that it would be useful to:**

50 strengthen Neighbourhood Watch in rural areas (although this was commonly suggested by some recreational submitters, many landholders objected to the idea that they should take on yet more responsibility here – especially if necessitated by increased public access);

51 increase the amount of active engagement between the Police and rural communities;

52 improve links between recreation groups and rural communities;

53 build a case for having more Police in rural areas, and/or create a law enforcement position (for example, community/rural constables or residents warranted by councils) so that there are more people in rural areas with a law enforcement role.

Recommendation on biosecurity

54 The Panel recommends that measures to minimise biosecurity risks be included in the proposed code of responsible conduct, particularly the appropriate disposal of human waste.

Recommendations on "exclusive capture"

The Panel recommends that the Minister of Conservation:

55 considers the options in this report, with the aim of resolving the matter quickly as the concern has existed for many years;

56 makes a decision as quickly as possible on the need for and conditions of fishing guide licensing.

Recommendations on access with motor vehicles, horses and bicycles

The Panel recommends that:

57 Te Ara o Papatuanuku be empowered to consider all forms of access (there are efficiencies in an access organisation dealing with all forms of access) but with walking access as its priority area of concern;

58 Te Ara o Papatuanuku co-ordinates its activities with organisations concerned with other forms of access, such as mountain-biking clubs, four-wheel-drive clubs and Fish & Game Councils, but, in doing so, Te Ara o Papatuanuku should not compromise walking access outcomes;

Note: the Panel's recommendation on a policy on unformed legal roads is set out in section 8.

Recommendation on hunting

59 The Panel recommends that the carrying of firearms be a matter of negotiation among the parties involved in any negotiated access arrangement.

Recommendation on dogs

60 The Panel recommends that access with dogs be a matter of negotiation among the parties involved in any negotiated access arrangement.

Overall recommendations

The Panel recommends that:

61 the spirit of the consultation and the consensus be reflected by the Government willingly adopting this report;

62 the effectiveness of the proposals in the report (assuming they are adopted by the Government) be subject to an external review in 10 years;

63 an establishment board of Te Ara o Papatuanuku assess and report on required funding;

64 the Minister for Rural Affairs and the Government advance legislation similar to the Walkways Act in consultation with stakeholders.

21 Alternative view

One member of the Panel, Mr Bryce Johnson, while supporting most of the individual recommendations, believes that taken overall the full suite of recommendations, if adopted, may not actually achieve the Government's stated policy objective of completing the Queen's Chain. He believes the package of recommendations is conservative and, while assisting clarification of public access that already exists, may draw the focus away from completing the Queen's Chain and continue the dominance of landholder interests over the public interest in access to the great outdoors and natural resources. He feels the recommendations ought to include pro-active advice predicated on the Panel's positive aim for New Zealanders to have fair and reasonable access on foot to and along the coastline and rivers, around lakes and to public land.

Mr Johnson notes and strongly supports the Panel's recognition that the fundamental access issue in New Zealand is centred upon the intersection of rights associated with private property and those associated with the legitimate public interest in access to public land and public natural resources for sustenance and recreation. However, he feels the recommendations do not adequately reflect this recognition and are unlikely to achieve either the Panel's own stated aim for public access or its recognition of the issues around this intersection of private and public interests. What he seeks is a restoration of a reasonable balance between the two, which he feels has always been the intent of successive New Zealand Parliaments but which has been allowed to drift towards a favouring of private property rights in land to the detriment of the public interest in public land and public natural resources.

Mr Johnson believes the Panel has therefore favoured recommendations on the obvious and/or easy matters perhaps more likely to find initial political comfort, and which generally maintain the status quo for landholders, than on developing recommendations directed towards the Government's stated policy objective of completing the Queen's Chain and providing for the public interest in access to public land and public natural resources. In his view it is the Government that should exercise any due political judgment between options, not the Panel.

Specifically, Mr Johnson believes the report should include stronger or alternative recommendations in the following four critical areas.

Leadership (section 7)

In Mr Johnson's view, the Panel has correctly concluded there is a need for strong national leadership to provide direction for and co-ordination of access arrangements nationwide, and also correctly identified the need for any new access organisation to have sufficient authority, mana and resources to accomplish its goals. However, he is concerned the Panel has then explicitly required the new access organisation to position itself as an impartial and knowledgeable adviser on access issues, as opposed to it being an advocate or champion for public access. It has also been given what he believes is a relatively weak functional role, without any explicit powers to pro-actively initiate, pursue and settle the realignment of lost access (through erosion) or the creation of new access where none presently exists, or to decide best outcomes and disputes in the public interest. Rather, he feels it will have only a potentially inconclusive negotiation role in relation to both the restoration of misaligned (lost) existing Queen's Chain and the creation of new access, and only a mediation role, again with no certainty of result, in relation to the resolution of access related disputes.

In both cases under such limited powers of involvement (and therefore with no negotiating position of strength) he believes there can be no certainty of an outcome in the public interest, when parties (including territorial authorities) could refuse to negotiate or take part in mediation. For this reason Mr Johnson believes the proposed access organisation, in order to have sufficient authority and mana to position itself as the champion of public access to the outdoors, be empowered with an ability to initiate and settle, and an ability to make determinations (responsibility backed up with authority). It perhaps could also have an ability to refer any particularly complex and highly contentious matters to a higher authority such as the Environment Court, noting that section 6(d) of the RMA recognizes the "maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers" as a "matter of national importance".

Alternative recommendation

Mr Johnson recommends that the goals and functions of the new access organisation explicitly include:

- a goal of becoming the recognised lead agency for public access to the outdoors;
- authority to pro-actively initiate and settle new access to and along water bodies and to public land where none presently exists, to

determine and settle realignments of misplaced (lost) existing Queen's Chain and to arbitrate disputes;

- an ability to refer complex and highly contentious matters to a higher authority for determination.

Restoring and realigning lost access (section 10)

Because there exists a very high expectation of public access to water body margins, Mr Johnson believes it is insufficient to leave the restoration and realignment of misplaced (lost) existing Queen's Chain to a simple "participation optional" negotiation process. In his view, given that in this situation a Queen's Chain already exists and is generally known to all parties, albeit in the wrong place due to accretion or erosion, the issue should not be *if* it should be realigned with the water margin, but rather *how* it should be realigned and under *what* settlement agreement. Compensation could be paid in cases where the need for realignment arises because of erosion. Any negotiation process requires the involved parties to be able to participate from a position of strength in relation to the other but, as noted in the section above, under the Panel's present proposal he believes the new access organisation would have no such position of strength. The already established provision for the public interest in access to the water margin would therefore be difficult to reinstate, and the Government's stated policy objective to 'complete the Queen's Chain' would be undermined.

Mr Johnson believes the remedy lies in providing the new access organisation with appropriate authority to resolve such realignment.

For recommendations relating to this point, see under "Leadership (section 7)".

New access (section 11)

The Government has confirmed its wish to complete the Queen's Chain and the Panel has proposed that any new access be a matter of negotiation. As with the realignment of lost access, Mr Johnson believes simple, discretionary negotiation is insufficient to achieve the Government's stated objective. In his view, a more pro-active approach is required, including a range of new trigger mechanisms and negotiation incentives for participation and settlement. In particularly controversial situations of high public interest in the establishment of new access, he believes the access organisation should have the authority to refer a case for new access to a higher authority, such as the Environment Court. The higher authority would make a determination via a judicial process of inquiry designed to fairly and reasonably consider the interests of all parties but focused on

ultimately providing for the public interest, in recognition of the intent of section 6(d) of the RMA.

Regarding trigger mechanisms for creating new access , the Panel has recommended, in response to being made aware that the intent of Parliament is being subverted by subdivisions to lifestyle blocks just over the four-hectare trigger limit, that the Minister "investigate the merits" of the existing and arbitrary four-hectare rule in relation to subdivision-derived esplanade reserves. Mr Johnson believes this will simply delay the improvement of this existing trigger mechanism for creating new Queen's Chain, and that it should simply be replaced with a less arbitrary trigger, in light of the identified circumvention of the present one.

Alternative recommendation

Mr Johnson recommends the current four-hectare trigger be replaced with a requirement that all subdivision of land shall trigger the esplanade provision criteria test.

Mr Johnson believes that in the vast majority of subdivisions (especially urban related) very little would change, but with rural subdivisions into life-style blocks the Government's objective to complete the Queen's Chain could obtain some real traction in key water margin locations.

Mr Johnson also believes the new Overseas Investment Act 2005, which has established a very useful precedent with its provisions specifically intended to protect the public interest in public natural resources and associated recreational access, offers a further opportunity as a triggering mechanism to establish new access. In his view, who buys the land ought not to have a bearing on the implementation of provisions to protect and provide for the public interest in recreational access, especially when the goal is to complete the Queen's Chain for all New Zealanders.

Alternative recommendation

Mr Johnson recommends a simplified version of the public interest provisions of the Overseas Investment Act 2005 be developed and applied to sales of all land.

As with the subdivision trigger discussed above, he believes very little would change for the vast majority of land sales but a useful test would become available for the sale of some larger land blocks in key public interest locations and would therefore aid the Government's objective to complete the Queen's Chain.

Other matters (section 18)

Mr Johnson believes the Panel has overly complicated the issue of "exclusive capture", and in so doing has marginalised its relevance to the public access debate. In his view, "exclusive capture" is, in practice, no more than the use of the Trespass Act by a land occupier to acquire de-facto private ownership (including for commercial purposes) of a public natural resource not attached to land title, but which exists on or adjacent to their property. He therefore believes the fundamental elements of "exclusive capture" are at the very centre of the public access debate as they bring into sharp focus the overt and covert contest between private land and public natural resources.

Mr Johnson acknowledges that the extreme form of exclusive capture, where a land occupier is operating an exclusive commercial tourism venture based on excluding ordinary sports fish anglers from a high quality trout fishery in order to offer exclusive fishing to high paying clients, is not yet a common occurrence in New Zealand. However he believes simple provisions ought to be put in place now to guard against its expansion, both within the trout fishing sector and across other public natural resources generally. In his view to not do so would be to sanction its continuing occurrence and expansion, the inevitable result of which would be the further gradual privatisation of public resources akin to what early British settlers came to New Zealand to escape. Given that real estate advertisements now regularly refer to fishing and hunting opportunities as a selling feature, he believes the transition to greater exclusive use of the public sports fish and game resource (and public natural resources and landscape features in general) is inevitable if provisions are not put in place now to provide for and protect the public interest in them.

Regarding possible options in relation to sports fish, Mr Johnson believes the more effective and timely option would be to authorise the Minister of Conservation to require commercial users of the sports fish resource to obtain a concession similar to that required of commercial users of the public conservation estate and other species under the jurisdiction of the Conservation Act. This would include negotiated conditions to provide for fair and reasonable public angler access to these fisheries.

Alternative recommendations

Mr Johnson recommends that:

- a Fish and Game concession regime, similar to that required by the Minister of Conservation of persons operating commercial enterprises on public conservation lands, should be established as a matter of urgency for commercial users of the sports fish and

game resource and include a requirement to provide for fair and reasonable public angler access to these fishery resources.

- the Minister of Conservation be assigned the discretion to close sections of a sports fishery in order to strengthen Fish & Game's ability to negotiate fair and reasonable angler access with unreasonable land occupiers who otherwise wish to use public sports fish resources for their exclusive use.

22 Plan of action

If the Government considers the Panel's conclusions and recommendations to have merit, the Panel proposes that the following plan of action would be an appropriate way to give effect to its recommendations.

Set up an establishment board for Te Ara o Papatuanuku (the New Zealand Access Commission)

This can be done without legislative authority. An establishment board should be appointed immediately to implement the recommendations agreed to by the Government. It would initially be an advisory board to the appropriate Minister.

Map existing access rights (initially under the supervision of the establishment board)

This process could take up to three years to complete, with the operational work contracted to one of several existing commercial organisations with GIS (geographical information system) capability. The process would draw on existing LINZ data and would need to be co-ordinated with local authorities to ensure that maximum use is made of existing data held at a local level.

Prepare recommended legislative changes

Should the Government accept the recommendations of the Panel, the following legislative changes will be required in the short term:

- provision to set up Te Ara o Papatuanuku;
- transfer of responsibility for the New Zealand Walkways Act 1990 to the department responsible for Te Ara o Papatuanuku and of specified functions under the Act to Te Ara o Papatuanuku;
- any further amendments to the New Zealand Walkways Act 1990 needed to reflect the Panel's report;
- any other legislative amendments needed to give effect to the Panel's recommendations.

These changes could be dealt with in a small "Walking Access Bill" that would set up Te Ara o Papatuanuku and amend the New Zealand Walkways Act 1990. There would need to be a legislative amendment to transfer responsibility for the New Zealand Walkways Act 1990 (this cannot be done administratively because of the specific references in the Act to the Director-General of Conservation and Conservation Boards).

Preparation of the legislation would be the responsibility of the Minister and department responsible for Te Ara o Papatuanuku, with guidance from the establishment board.

In the longer term, the Government may wish to consider amendments to the Trespass Act 1980 to provide a defence against trespass to persons attempting to exercise established public rights of access along water margins and along riverbeds.

Plan and consult on new access needs

This process partly depends on progress on the mapping of existing access. The work will involve identifying, in consultation with local interest groups, gaps in access along water margins, to water margins and to other public land. The process would include prioritisation of these gaps in terms of their value for public access, and could take around two years to complete. The two years could overlap with the three-year period for the mapping.

Develop the code of responsible conduct and co-ordinate signage needs

This work could be done in parallel with the mapping and new access planning. The development of the code will require co-ordination with those organisations, including DOC, that already promote codes of conduct. Signage will need to be co-ordinated with both DOC and local government.

Lead and co-ordinate the negotiation of new access rights

This would follow the completion of the mapping and planning processes. To achieve any significant progress, there would need to be funding through the proposed Te Ara o Papatuanuku Fund for Access.

Ongoing role of Te Ara o Papatuanuku

Te Ara o Papatuanuku would have a continuing role in:

- maintenance of mapping;
- co-ordination and funding of new access negotiations (mostly carried out at a local level);
- co-ordination and funding of signage;
- management of a mediation process for resolution of disputes over access.

APPENDICES

Appendix A: List of abbreviations

DIA: Department of Internal Affairs

DOC: Department of Conservation

FRFA: Forest and Rural Fires Act 1977

HSEA: Health and Safety in Employment Act 1992

LINZ: Land Information New Zealand

MAF: Ministry of Agriculture and Forestry

NZCPS: New Zealand Coastal Policy Statement

Panel: Walking Access Consultation Panel

Panel's consultation document: *Outdoor Walking Access* (2006)

Reference Group: Land Access Ministerial Reference Group

Reference Group's report: *Walking Access in the New Zealand Outdoors* (2003)

RMA: Resource Management Act 1991

Appendix B: References

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

Department of Internal Affairs (undated) *The Need for New Fire Legislation: A Short Background*, available www.dia.govt.nz/Pubforms.nsf/URL/FireBackground.pdf/$file/FireBackground.pdf [2006].

Department of Labour (1999) I*f Visitors to My Farm are Injured, Am I Liable?* Department of Labour, Wellington.

Hayes, B (2003) *The Law on Public Access Along Water Margins,* Ministry of Agriculture and Forestry, Wellington.

Hayes, B (2007a) *Roading Law as it Applies to Unformed Roads,* Ministry of Agriculture and Forestry, Wellington.

Hayes, B (2007b) *Elements of the Law on Movable Water Boundaries,* Ministry of Agriculture and Forestry, Wellington.

Land Access Ministerial Reference Group (2003) *Walking Access in the New Zealand Outdoors*, Land Access Ministerial Reference Group, Wellington.

Land Access Ministerial Reference Group (2004) *Analysis of Written Submissions on the Report Walking Access in the New Zealand Outdoors*, Land Access Ministerial Reference Group, Wellington.

New Zealand Conservation Authority (2003) *New Zealand's Walkways*, New Zealand Conservation Authority, Wellington.

Walking Access Consultation Panel (2007) *Outdoor Walking Access: Analysis of written submissions*, Ministry of Agriculture and Forestry, Wellington.

Appendix C: Glossary

Accretion: The process by which soil, sediments and other matter accumulate, increasing the area of land. This process is the reverse of "erosion". The term accretion is usually applied to deposits formed in river valleys and deltas.

Access strip: A statutory easement made under Part 10 of the Resource Management Act 1991.

Biosecurity: The protection of a territory from the invasion of unwanted plants, animals, micro-organisms or diseases.

Cadastral data: Information defining the legal dimensions of land, including property boundaries.

Cadastral maps: Maps representing cadastral data in graphical form.

Crown land: Land vested in Her Majesty the Queen in right of New Zealand that is not set aside for any public purpose (such as a national park or conservation land) and not held in private title.

Disability-assist dogs: Defined in the Dog Control Act 1996 to include "seeing eye" dogs, hearing dogs for the deaf and other dogs certified for assisting people with disabilities.

Erosion: The process of gradually wearing away land, commonly by the action of water.

Esplanade reserve: A strip of water margin land vested in a local authority under Part 10 of the Resource Management Act 1991.

Esplanade strip: A statutory easement along a water margin made under Part 10 of the Resource Management Act 1991.

Landholder: Includes owners of land, lessees, licensees, sharemilkers, trustees and other persons who have authority to grant access permission.

Marginal strip: A strip of land along a water margin reserved by the Crown on the disposal of the adjoining land by the Crown. These were originally made under various Land Acts and were fixed in location irrespective of movements in water margins. Since 1987, they have been made under the Conservation Act 1987, and those made since 1990 move with any change in the location of the water margin.

Mobility device: A vehicle that is designed and constructed (not merely adapted) for use by persons who require mobility assistance due to a physical or neurological impairment and is powered solely by a motor that has a maximum power output not exceeding 1500 W or any other device that meets the definition in the Land Transport Act 1998.

Paper road: A commonly used expression for an unformed legal road. See "unformed legal road".

Queen's Chain: A commonly used expression for a strip of land (usually 20 metres wide) reserved for public use alongside a water margin, including the sea, lakes and rivers.

Rāhui: A declaration by a Māori person with authority to do so that a specific area of land is tapu. See "tapu".

Tapu: Restricted; forbidden; set apart; sacred.

Territorial authority: A city council or a district council recognised as such under the Local Government Act 2002.

Topographic map: A map that shows a limited set of features, but including at the minimum information about elevations or landforms. Topographic maps are common for navigation and for use as reference maps. They have a specified scale.

Unformed legal road: Land legally set aside as being road, but not formed as road. That is, it may be unsurfaced, unfenced and often indistinguishable from the surrounding land but it is still subject to all the legal rights and obligations that apply to formed roads, including the right to pass and re-pass with or without vehicles and animals.

Vehicles: Cycles, horses, motorbikes, four-wheel-drives, cars, etc.

Wāhi tapu: A particular category of ancestral land or water that is held in the highest regard by Māori. It can include places, sites, areas or objects that are tapu, sacred and special to an iwi.

Walking access: The right to pass and re-pass on foot, which includes the use of mobility devices and disability-assist dogs.

Water margin: A general term referring to the point at which the water in a sea, lake or river adjoins dry land. For legal purposes, more specific terms are used, such as mean high water mark or mean high water springs.

Appendix D: Members of the Walking Access Consultation Panel

John Acland (chair)

A high-country farmer with a long association with the primary sector through various appointments to Meat New Zealand, Federated Farmers and private companies, John Acland was also the chair of the former Land Access Ministerial Reference Group.

John Aspinall

A former Federated Farmers board member and spokesperson on land, environment and resource management issues, John Aspinall is a third-generation high-country farmer.

Bryce Johnson

An initiator of the New Zealand Landcare Trust, Bryce Johnson is an active advocate for outdoor recreation. He is the current Chief Executive of Fish & Game New Zealand.

Claire Mulcock

A resource management consultant and a member of the former Waitaki Water Allocation Board, Claire Mulcock has a strong policy background in environmental and rural issues.

Maggie Bayfield

A former chair of the Queen Elizabeth the Second National Trust and past Acting Executive Officer of Rural Women New Zealand, Maggie Bayfield is also a keen tramper and forest owner.

Professor Tom Brooking

A professor in the University of Otago's history department, with expertise in the history of rural society, land use and environmental change, Tom Brooking is an authority on the origins of the Queen's Chain.

John Forbes

A committee chair of a rural council for 18 years, John Forbes is currently the Mayor of Opotiki District Council and chair of the Rural Sector of Local Government New Zealand.

Peter Brown

A consultant with project management skills built over 25 years of community economic development, particularly in rural areas, Peter Brown is affiliated with Turanganui a Kiwa, Ngati Porou, Te Arawa and Tuwharetoa. He is also a member of the Waitangi Tribunal.

Appendix E: Walking Access Consultation Panel's terms of reference

The Panel will attempt to establish more clearly the concerns of interest groups and the extent to which agreement may be reached on measures to:

- clarify existing public access rights along water margins (that is, the location of the Queen's Chain);
- establish the location of "gaps" in the Queen's Chain, their significance and how they might be remedied;
- signpost access rights to water margin land so that the public will be better informed on where they may walk;
- establish a code of responsible conduct applying to persons walking on private land or on land adjacent to private land;
- protect the security of landholders where this is seen to be an issue;
- deal with issues which may arise in respect of walking access from a Māori perspective;
- provide access along rivers and lakes which may have no Queen's Chain at all;
- negotiate access across private land to the Queen's Chain or to public land where there is no other reasonable or convenient means to access this land;
- explore with interest groups and organisations how suitable unformed legal roads might be better used to provide walking access to the Queen's Chain or to public land.

The Consultation Panel should also explore the nature of the proposed Access Commission, and how a Commission might provide the necessary leadership on access-related issues.

The Panel may report on any other matters related to access policy that appear to require the Minister's consideration.

Process

The Walking Access Consultation Panel will hold working meetings in Wellington. It will meet on an "as needs" basis, expected to be of the order of five or six one- or two-day meetings, at regular intervals.

There will be two components to the consultation process. Firstly, the Minister will release a synopsis of the access work to date, and key issues, and invite submissions from the public. The role of the Panel will be to receive and consider these submissions. The second

component will be a process whereby the Panel hears the concerns of, and discusses areas of common ground with, identified interest groups and organisations. The above terms of reference will form the basis for these discussions.

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

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

MAF will service the Panel, and will assist the Panel in its report to the Minister.

MAF will obtain legal advice as the need arises, and may make this advice available to the Panel. Members of the Panel are expected to work co-operatively, to look for points of agreement between differing views, and to help construct a report and recommendations that can be accepted by the Panel as a whole.

Members of the Panel have been appointed for their background and experience relating to walking access issues, rather than as advocates for particular interests. They are, however, free to put forward the views of interest groups for discussion. Where the Panel cannot reach agreement, it must record the options for consideration by the Minister.

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

The report

The Consultation Panel will report back to the Minister by December 2005.[14]

The report will:

- summarise public submissions received;
- summarise the views and concerns of each of the groups or organisations met with;
- record the level of agreement on each of the issues in the terms of reference;
- advise areas of disagreement, and recommend possible solutions;
- describe any other matters which the Panel considers to be relevant to walking access, taking into account the stated policy objective.

[14] Subsequent to drafting the terms of reference, the Minister and the Panel agreed to a reporting date of early 2007.

Appendix F: Existing institutions

Department of Conservation (DOC)

DOC's key functions as set out in the Conservation Act 1987 are, in summary to:

- manage land and other natural and historic resources;
- preserve as far as practicable all indigenous freshwater fisheries, and protect recreational fisheries and freshwater habitats;
- advocate conservation of natural and historic resources;
- promote the benefits of conservation (including Antarctica and internationally);
- provide conservation information;
- foster recreation and allow tourism, to the extent that use is not inconsistent with the conservation of any natural or historic resource.

DOC is responsible for the administration of the New Zealand Walkways Act 1990. Recommendations on the establishment of new walkways are made by Conservation Boards through the New Zealand Conservation Authority, which contributes to walkways policy. As 31 percent of New Zealand's land area is administered by DOC, its role in providing for and promoting recreational access to that land is an important part of the context within which the Panel is considering its task.

Department of Internal Affairs (DIA)

DIA is responsible for the administration of the Local Government Act 1974, Part 21 of which contains the legislative provisions relating to roads. DIA is also responsible for policy advice on local government, one component of which is advice on the regulation of unformed legal roads.

Land Information New Zealand (LINZ)

LINZ holds authoritative information about land surveys and ownership, topographic maps and nautical charts. It makes sure that the rating valuation system is fair and consistent and oversees the buying and disposal of Crown land. LINZ administers unallocated Crown land, Crown-owned riverbeds and Crown pastoral leases. It is also responsible for the operation of the Overseas Investment Act 2005.

LINZ is the primary source of information about the ownership of land and legal survey records. Its roles in administering unallocated Crown land and dealing with overseas acquisitions of sensitive land

can be important for access. Access for recreation is one of the matters dealt with by LINZ in the process of reviewing the tenure of land subject to Crown pastoral leases.

Ministry of Agriculture and Forestry (MAF)

MAF provides policy advice to the Minister for Rural Affairs on walking access to land. It provided policy, research and support services to the Land Access Ministerial Reference Group and, more recently, to this Panel.

New Zealand Fish & Game Council

Fish & Game Councils are the statutory managers of sports fish and game. The New Zealand (national) Council (known as Fish & Game New Zealand) is responsible for developing, in consultation with regional Fish & Game Councils, national policies for the carrying out of its functions for sports fish and game, and the effective implementation of relevant general policies established under the Wildlife Act 1953 and the Conservation Act 1987. A specific function of Fish & Game Councils is to maintain and improve access to the sports fish and game resource.

Queen Elizabeth the Second National Trust

The Queen Elizabeth the Second National Trust is a statutory organisation. The general functions of the Trust are to encourage and promote, for the benefit and enjoyment of the present and future generations of the people of New Zealand, the provision, protection, preservation and enhancement of open space. It can do this either through the ownership of property or through the creation of covenants over private land. These covenants can provide for public access, but generally make access subject to the consent of the occupier. The Queen Elizabeth the Second National Trust has been commended as a possible conceptual model for an access organisation. The success of the Trust demonstrates that landholders and the Government can work together to achieve a particular objective. The Trust has charitable trust status and attracts private funding and sponsorship.

Regional government

Regional government is primarily responsible for environmental management, including water, coastal, river and lake management including flood and drainage control, regional land management, regional transport (including public transport), and biosecurity (pest management). They have a significant role in providing for and

managing access opportunities because of their responsibilities for regional parks and river margins.

Territorial authorities

Territorial authorities (district councils and city councils) are responsible for (amongst other things): local land use management (urban and rural planning); network utility services such as water, sewerage, stormwater and solid waste management; local roads; libraries; parks and reserves; and community development. Ownership of all public roads (excluding state highways) is vested in territorial authorities, and their role in the administration of unformed legal roads is important for access. In their community development role, they can also be involved in the promotion of recreational facilities and opportunities.

Appendix G: Access organisation – possible forms

Organisational form and functions	Comments
Parliamentary commissioner: Conducts inquiries and reports findings to Parliament.	Could improve accountability of existing institutional arrangements; unlikely to have any direct impact. Not within the scope of "Parliamentary Commissioners" as presently understood (they do not have regulatory, operational or funding roles, and do not have stakeholder or local representation).
Access ombudsman: Investigates complaints and reports outcomes.	Could improve accountability of existing institutional arrangements; unlikely to have any direct impact. Not within the scope of "Ombudsmen" as presently understood (they do not have a regulatory or funding role, and do not have local representation).
Access trust: Depends on trust deed, but could hold land for access purposes and negotiate and hold other interests in land, such as access easements.	Requires legislation to carry out statutory functions such as those in the Walkways Act, as this requires powers conferred by statute. Requires the co-operation of stakeholders to be effective. A trust could be set up by stakeholders without the need for legislation, and be a vehicle for negotiating new access and holding public access rights on behalf of stakeholders. Effectiveness may be limited without statutory backing or powers, as with Queen Elizabeth the Second National Trust. The Landcare Trust is an example of a trust that works well without statutory backing.
Queen Elizabeth the Second National Trust: Facilitates the establishment of open space covenants over private land; acquires and holds open space land.	Superficially appealing and has landholder support, but institutionally focused on conservation values rather than access. Pubic access provision in the Queen Elizabeth the Second statute is almost always negated in covenants. The Queen Elizabeth the Second National Trust website states that private property rights are not jeopardised by a covenant – the landholder retains ownership and management of the land. Visitor access is available only with the landholder's prior permission.
Statutory organisation: Carries out functions specified in statute. These functions could include those of the former Walkways Commission, suitably modified.	A statutory organisation would have the characteristics identified by the Panel. It could be responsible for the Walkways Act. Could be criticised as "yet another quango"; effectiveness depends on design details and quality of appointees.

Appendix H: Estimated length of unformed legal road by district

District	Estimated length of unformed road (km)	Estimated length of formed road (km)	Proportion of unformed road (%)
Auckland City	140	1 500	8
Ashburton District	810	2 770	23
Buller District	1 940	1 030	65
Carterton District	210	470	31
Central Hawke's Bay District	450	1 430	24
Central Otago District	2 490	2 510	50
Christchurch City	1 440	2 430	37
Clutha District	3 340	3 600	48
Dunedin City	1 920	2 150	47
Far North District	1 940	3 140	38
Franklin District	640	1 760	27
Gisborne District	1 240	2 530	33
Gore District	400	1 050	28
Grey District	1 040	790	57
Hamilton City	30	590	4
Hastings District	380	1 940	16
Hauraki District	290	790	27
Horowhenua District	160	660	20
Hurunui District	2 140	1 790	54
Invercargill City	260	650	28
Kaikoura District	740	350	68
Kaipara District	990	1 820	35
Kapiti Coast District	40	440	8
Kawerau District	0	50	2
Lower Hutt City	60	510	10
Mackenzie District	1 190	920	56
Manawatu District	710	1 670	30
Manukau City	70	1 350	5
Marlborough District	2 930	2 040	59
Masterton District	290	880	25
Matamata-Piako District	200	1 170	15
Napier City	20	390	5

District	Estimated length of unformed road (km)	Estimated length of formed road (km)	Proportion of unformed road (%)
Nelson City	90	330	22
New Plymouth District	830	1 530	35
North Shore City	20	740	2
Opotiki District	530	550	49
Otorohanga District	310	970	24
Palmerston North City	70	530	12
Papakura District	30	310	8
Porirua City	40	290	11
Queenstown-Lakes District	840	950	47
Rangitikei District	790	1 490	35
Rodney District	800	2 020	28
Rotorua District	190	1 260	13
Ruapehu District	1 340	1 820	42
Selwyn District	1 010	2 770	27
South Taranaki District	1 220	1 890	39
South Waikato District	120	790	13
South Wairarapa District	320	730	30
Southland District	4 770	5 940	45
Stratford District	890	810	53
Tararua District	1 330	2 290	37
Tasman District	2 700	2 470	52
Taupo District	120	1 190	9
Tauranga City	50	540	8
Thames-Coromandel District	450	1 020	31
Timaru District	510	1 880	21
Upper Hutt City	90	280	25
Waikato District	680	1 990	25
Waimakariri District	700	1 560	31
Waimate District	740	1 470	33
Waipa District	240	1 170	17
Wairoa District	600	1 080	36
Waitakere City	90	840	9
Waitaki District	1 860	2 310	45
Waitomo District	650	1 320	33
Wanganui District	660	1 050	39
Wellington City	100	760	12

District	Estimated length of unformed road (km)	Estimated length of formed road (km)	Proportion of unformed road (%)
Western Bay of Plenty District	380	1 250	23
Westland District	1 700	1 180	59
Whakatane District	500	1 210	29
Whangarei District	1 170	2 010	37
Total	**56 900**	**99 000**	**36**

Source: Ministry of Agriculture and Forestry, Land Information New Zealand and Eagle Technology (2006)

Appendix I: Summary of Roading Law as it Applies to Unformed Roads

Hayes, BE (2007a) *Roading Law as it Applies to Unformed Roads*, Ministry of Agriculture and Forestry, Wellington.

Roads and highways

The terms "road" and "highway" are very old, dating from the earliest recording of English law. The terms as generally used in New Zealand 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 19th century almost all roads when first legally constituted were not formed or made.

This was inevitable in a pioneering society where the demand for land-based services, for surveying, for access to land, and for title to land, outstripped the capacity of both central government and each of the provincial governments to provide for the needs of the settlers. In the era of provincial government (1854–1876) the demand for land was such that the surveying standards originally set for settlement as the provinces were established had to be loosened further, so that settlement would not be held back. Subdivision of Crown land on paper plans rather than plans of survey executed on the ground was allowed. A system of sale before survey was introduced. Paper roads rather than surveyed roads laid out on the ground were therefore permitted as part of the subdivisional explosion in provincial times as the bulk of the good land was taken up by the settlers. As roads in the beginning were almost always unformed, the essential law relating to roads and highways does not, and never has, differentiated between formed and unformed roads.

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, which was the statutory law in England in 1840, according to *Short's Roads and Bridges* by WS Short (1907) was held never to have been in force in New Zealand. As a result the law in New Zealand is as a result based on that part of the English law as was applicable to the circumstances of the Colony in 1840 as altered by the law of New Zealand since 1840.

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 of the Crown. Although from early settlement in New Zealand the Crown was the proprietor of all public roads whether formed or unformed in counties, in 1972 title in county roads was divested in favour of the then county councils. The rights of citizens were not affected by the change of ownership. Any doubt that unformed roads, whether pegged on the ground or shown as paper roads on plans of Crown subdivision, were in some way inferior to formed roads, has long been dispelled by the decision of the Supreme Court (then the High Court), and that of the Court of Appeal, both of which were confirmed by the Privy Council in 1923 in *Snushall v Kaikoura County* (1840–1932) New Zealand Privy Council Cases 670. An unformed road is a highway and as good as any other road.

The essence of a public road whether formed or unformed is that it offers a right of passage to all members of the public who desire to use it. The territorial authority in which a road is vested holds title to the road in trust for the public and is obliged to see that the right of passage is preserved, not for the council or its ratepayers, but for the public.

The concept of a "highway" – a public way – is central to the 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 paper roads are not suitable for passage), the theory of the law prevailing over practicality. The focus of this report is on the law applicable to highways, and any special attributes of the law relating to unformed roads originally laid out over Crown land.

Key elements of current law

Roading practices in 19th century New Zealand were of paramount importance to the new society being established. Although the network of unformed roads was established in the 19th century under the authority of the statutes of the General Assembly and of the Provincial Councils, the law in force when the roads were created now defers to the statutes which currently apply to roads whether formed or unformed. Section 315 of the Local Government Act 1974 and s43 of the Transit New Zealand Act 1989 provide the focus of current law applying to roads, formed and unformed.

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 terms "road", "street" and "public highway" are not further explained in the Local Government Act and it is necessary to turn to s43 of the Transit New Zealand Act for guidance. Section 43 says:

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

The Local Government Act 1974 as enacted by the Local Government Amendment Act 1978 preferred the universal term "road" and discarded "street", so 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".

The generality of the definitions in the Local Government Act and theTransit New Zealand Act points to a universal application of statutory principles for all roads whether formed or unformed. On the face of it "Crown land over which a road is laid out and marked on the record maps" would include all roads including unformed or paper roads. However, for a road to be "laid out" on Crown land the road-line must be demarcated on the ground – i.e. generally pegged. However, many early roads were simply shown as road on the plan of Crown subdivision – there was no physical laying out on the ground. Section 43 of the Transit New Zealand Act 1989 clearly establishes that roads which are demarcated on the ground and marked on the record maps are legal roads. *Snushall's* case (above) establishes, on the authority of the Privy Council, that roads shown on a plan of Crown subdivision under the authority of a statute or provincial ordinance or regulations but not physically laid out on the ground ("paper roads") equally may be legal roads. Roads and tracks may also continue to exist if established under the line of law which commenced with s245 of the Counties Act 1886 and latterly were provided for in s191(3) of the Counties Act 1956.

Some reference should be made at the outset 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 …

An unformed road is one which neither the Crown nor the council has formed in accordance with the definition. Public money has not been spent on construction nor on maintenance. There may be some formation such as that of a track, say, running alongside a river but if work as indicated in the definition has not been undertaken, the road is "unformed".

Roading in the early days

Much if not the greater part of the unformed roading pattern was created in the early days of settlement in particular in the time of provincial government (1854–1876). However, there was no truly large scale Crown granting of rural land in the period 1840–1853.

There clearly would have been some roading 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. Whether these roads were merely shown on early Crown plans or were shown on Crown plans and formally laid out on the ground as well, in the light of the law now expressed in s43 of the Transit New Zealand Act 1989 as interpreted by the Court of Appeal in *Wellington City Corporation v McRea* ((1936) NZLR 921) and in *Snushall's* case (above), may not be a matter of any significance.

Sale practices in the provincial period

Alienation of Crown land on a large scale commenced early in the era of provincial government subject to the statutory oversight of the General Assembly. The roading network was established as the provinces facilitated settlement. Each of the provinces administered either provincial regulations or statute law provided by central government to apply in a specified province for the sale of Crown land. 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. In some provinces roads may have been laid out in accordance with the current statutorily authorised practice i.e. the lines of road may have been pegged on the ground. In other provinces road lines may have been shown on record plans in accordance with provincial ordinances or statutes but not pegged or demarcated on the ground. There may have been a combination of practices.

In general under the law first applying, 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 shall be selected with "reference to their practical utility as a means of communication"; all roads shall be marked on the ground and distinguished on the map.

Soon, however, the demand for land outstripped the capacity of the provincial councils to survey the land prior to sale. To avoid the retarding of settlement, legislation was enacted to provide a system of sale before survey. Roads were to continue to be shown on record maps but need not be marked on the ground. The era of the paper road had arrived.

Ownership of roads

Early uncertainties

In a pioneering society a great deal of attention and effort is applied to the provision of roads. Whilst the statutes of the General Assembly, and, in provincial times (1854–1876), the ordinances of the provinces extensively authorised the laying out of roads the issue of ownership of roads 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. Roads in counties were similarly dealt with in 1876. Thereafter streets in towns were vested in the council and managed by the council, and roads in counties were vested in the Crown and managed by the county council or roads board. On the face of it from 1840 until 1876 the common law of England, which by a rebuttable presumption vested a road or street in the adjoining owner to the centre line, applied in New Zealand. There appears to be no early case law which might have clarified the matter.

In 1895 in *Clemison v Mayor of West Harbour* (1895) 12 NZLR 695 Williams J on the facts of the case before him decided that the English common law applied to a road constituted before 1876 so that the adjoining owners had title to the road. Five years later, however, in *Mueller v Taupiri Coal-mines Ltd* (1900) 20 NZLR 89 Williams J said in a more considered opinion that legislation in New Zealand has always proceeded on the assumption that the Crown has not parted with the ownership of the soil of roads or highways, although it might have parted with the land adjacent to them.

Some 36 years later Ostler J in the leading Court of Appeal decision in *Wellington City Corporation v McRea* (above) confirmed the retrospective nature of Crown 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 prior to 1876 are now owned by adjoining owners to the centre line as provided by English common law.

Recent developments

Up until 1 January 1973 when roads in counties, with certain exceptions of no relevance in the context of this discussion, were transferred to the then county councils, the Crown was the proprietor of roads. This was notwithstanding that district roads boards and county councils had since 1876 controlled and managed roads outside of cities and boroughs.

Section 316 of the Local Government Act 1974 now deals with the ownership of roads:

> 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 placed or laid on any road in order to be used for the purposes thereof.

What is vested in fee simple is the "roads and the soil thereof, and all materials of which they are composed", and materials placed or laid thereon.

The materials which comprise an unformed road are generally provided by the bounty of nature, or, when the road is occupied by a farmer, possibly the pasture (or crop) which the farmer has cultivated. To that extent the physical attributes of an unformed road differ greatly from a formed road. In addition, the legislature has laid four major inhibitions on unformed roads.

- Unformed roads are subject to return to the Crown, on the request of the Crown, when the land returned becomes Crown land subject to the Land Act 1948, i.e. available for sale; s323 Local Government Act 1974.
- Roads along rivers and the coast if stopped, must be made esplanade reserves vested in the council; s345(3) Local Government Act 1974.
- Roads in rural areas cannot be stopped without the prior consent of the Minister of Lands; s342(1) of the Local Government Act 1974.
- Unformed roads intersecting or adjoining Crown land may be closed by the Governor-General; s43(1) Land Act 1948.

Leading decisions

Authoritative decisions by the courts on the state of the roading law as enacted by statute in the 19th century were not delivered until the first part of the 20th. The time taken to explain the law may in retrospect

be seen to be of advantage for when the opportunity was presented the courts were to provide emphatic rulings on the status of roads.

The decision in *Snushall's* case 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" i.e. generally pegged by the surveyors. The decision of the Court of Appeal in *Wellington City Corporation v McRea* (above) 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" (s43 Transit New Zealand Act 1989).

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

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

Private subdivision

Unformed paper roads may be shown on private subdivisional plans deposited in the land titles office prior to 1900, when road lines could be privately laid out without dedication to the public. If land shown as road on these early plans of subdivision was not accepted as a road by the territorial authority the land never became a legal road. It remains in the paper title of the subdividing owner, until legally vested in the adjoining owner generally to become part of the adjoining farm property after at least 20 years of occupation by the farmer. These were never "legal" roads and are not "unformed roads".

After 1900, whenever land was privately subdivided, a road had to be dedicated if new access was required, and formed to statutory standards in accordance with s20 of the Public Works Amendment Act 1900. No question of unformed roading on private subdivision may therefore arise after 1900. As a result, all of the subdivisional law applying to private subdivision after 1900 has no bearing on unformed roads.

Occupation of unformed roads

Many unformed roads have now been occupied by and incorporated into the holding of the owner of the surrounding land for in excess of one hundred years, or, if for a lesser period, nevertheless a great many

years. Doubts have arisen and are often expressed on supposed rights to the land so occupied. The law is, however, 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 because section 172(2) of the Land Act 1948 absolutely excludes any such rights.

Roads along water

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 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.

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). Then the practice of setting aside a margin of Crown land, rather than a road, along water was introduced on a national basis. Much of the public land along major rivers and the coast is legal road.

From 1882 to 1952 roads along rivers were statutorily protected and could not be stopped. At various times subsequently, after 1952, a road along water if stopped became:

- if in a municipality, a public reserve for public convenience or utility (1954);
- an esplanade reserve (1972);
- a recreation reserve (1977);
- a reserve for the purpose of protecting the environment and providing access to a river, stream, lake or the sea (1978);
- an esplanade reserve (1991, 1993).

Powers and obligations

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, the management of roads and streets has been locally based.

Part XXI of the Local Government Act 1974 as enacted by the Local Government Amendment Act 1978 now provides the territorial 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.

The general powers in s319 have an origin in the early Public Works Acts of the 19th century (cf s87 Public Works Act 1876) and have variously been included in the Counties Acts and Municipal Corporations Acts of the 20th 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.

Repairs and maintenance

The territorial authority has full power under s319 to do all things necessary to construct and to maintain in good repair any road under its control. In construing these powers the question arises whether a territorial 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 and what responsibility continues for a legal road which once was used as a highway but which has been largely allowed to revert to secondary status or a state of semi-nature?

Notwithstanding the breadth of powers to execute works on roads there is no statutory obligation to do so and 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, and thereby causing damage. "Nonfeasance" means not doing anything at all.

General principles applying to unformed roads

All legal roads whether formed or unformed carry the general characteristics of roads as governed by 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 and may therefore be summarised:

- There is no obligation on the council to form or maintain an unformed road.
- If no work is executed by the council there is no liability.
- The immunity from liability for the council on unformed roads has been held to extend to the filling up of holes upon a portion of a

long line of road; in such circumstances there is no duty to repair the whole line of road.

- The council is immune from the operation of natural causes.
- If any artificial work, say a culvert or bridge, is executed by the council, a duty of reasonable care in construction prevails, and a duty of ongoing reasonable observation of that work would apply, to ensure that any dangerous condition is discovered and remedied.
- The council may require the occupier of any land (including a road) where there is a hole or other place dangerous to persons passing along a road to forthwith fill in, cover, or enclose the same.
- Whenever the safety of the public or convenience 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 by a fence which complies with the requirements of the council.

General principles applying to former highways now in secondary use[15]

The principles which apply to secondary use roads, say the old "ferry roads" which were originally formed and maintained by the Council, leading to a river, include:

- The council is immune from liability for the friction of traffic and the operation of natural causes.
- 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.
- There should be adequate signage relating to the state of the surface, blind ends etc.
- The council may require the occupier of any land (including a road) where there is a hole or other place dangerous to persons passing along a road to forthwith fill in, cover, or enclose the same.
- Whenever the safety of the public or convenience 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 by a fence which complies with the requirements of the council.

[15] A secondary-use road is one that is generally superceded by another newer road but that retains its legal status as a public road. It reverts to use that is largely recreational, say access to water. Abandoned roads would fall within this category – in this regard the council would appear to retain responsibility for any artificial structure remaining on the road.

Stopping of roads

Ministerial powers

A power to stop roads including unformed roads is contained in s116 of the Public Works Act 1981 which 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 previously to have been obtained. If a road as defined in s315 of the Local Government Act 1974 has been stopped under the Public Works Act, the road stopped may become the property of the territorial authority, and may be dealt with as though it had been stopped under the Local Government Act 1974. 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.

Territorial powers

Section 342 of the Local Government Act 1974 together with the Tenth Schedule of the latter Act establishes procedures for the stopping of roads by territorial authorities. Although the Tenth Schedule provides for updated procedures to stop roads, the requirements there stated clearly have an origin in the line of statutory authority encompassed in the early Public Works Acts and so have been in place for one hundred and thirty years. Council are required to prepare a plan of the road to be stopped, give public notice by publication and signage on the road and receive objections (if any). If any objections are received the Council must send the road stopping proposal to the Environment Court for a decision.

Under s342 (l) (a) of the Local Government Act 1974 a territorial authority may not stop a road in a rural area unless the prior consent of the Minister of Lands has been obtained.

Bylaws

The common law right to pass and re-pass on roads whether formed or unformed may be restricted by an appropriate bylaw. There may be situations where councils should provide bylaws to protect the interests of legitimate users of unformed roads. Also, the interests of adjoining owners may need protection. The fragile surface of some unformed roads could also be the subject of a bylaw. Specific powers to enact bylaws tailored for unformed roads have not yet entered the statutes. Given the new classes of motor vehicles which are now common – 4 wheel drive vehicles and 4 wheel bikes having soft tyres – specific powers for councils to enact bylaws may now be appropriate.

Section 72 of the Transport Act 1962 which extensively authorises roading bylaws seems largely inapt for the passage of bylaws affecting unformed roads.

Section 146 of the Local Government Act 2002 provides for specific bylaw making powers of territorial authorities. Paragraph (b) provides for bylaws for the purpose of:

> (b) of managing, regulating against, or protecting from, damage, misuse, or loss, or for preventing use of, the land, structures, or infrastructure associated with 1 or more of the following:
>
> (i) …
>
> (ii) …
>
> (iii) …
>
> (iv) …
>
> (v) …
>
> (vi) reserves, recreation grounds, or other land under the control of the territorial authority …

To make a bylaw to apply to unformed roads, such roads would have to come within the category of "other land" in sub-paragraph (vi). Given the history of the law on roads, the high degree of protection provided by the courts, and the unique public access unformed roads provide to the outdoors, any power to make bylaws should, it would appear, be a prescribed power rather than a general power.

Reform

Territorial bylaws may therefore be the most appropriate way of regulating good order on an unformed road intersecting private land, the prevention of damage to the surface of the road, and any structures on it, and requiring persons exercising a right of passage not to unreasonably interfere with the occupier's use of the land. Unformed roads across land or along water boundaries could each be subject to management and control through bylaws, to ensure, in addition, that rights of passage are preserved, obstructions should be removed, and that dangers which have been artificially created may be dealt with.

A constant call in New Zealand on matters of public access is that local solutions should be applied in preference to centralised authority. A highly prescriptive statutory solution to uncertainties affecting unformed roads – rights, control, obstructions and occupiers' peaceable use – may neither be legally warranted nor appropriate given the wide and diverse interests and views on use and management that may prove difficult to reconcile.

Given the special character of unformed roads – where public land subject to public rights is almost always occupied by private persons, a statutory framework providing for specific bylaws seems most appropriate in the interests of councils, adjoining landowners, and recreational users. The general power to make bylaws (s146 Local Government Act 2002) may be inadequate for the purpose.

Suggested statutory framework for bylaws

A definition of "unformed road" may be a first requirement and this could read:

"Unformed road" means –

(a) any road originally laid out over Crown land and marked on the record maps; or

(b) any road originally laid out on Crown land under the authority of any Act or Ordinance, on any Crown grant record map, but not marked or laid out on the ground where:-

the road has not been constructed by any of gravelling, metalling, sealing, or permanently surfacing the road, and is neither substantially formed or made for the use of the public.

It should be the duty of the territorial local authority to enact and enforce appropriate bylaws.

- A territorial authority may, as respects unformed roads in the district make bylaws:

(a) for the preservation of order[16] and rights of passage;[17]

(b) for the prevention of damage to the surface land comprising the road or anything on it;[18] and

(c) for securing that persons exercising the right of passage over any unformed road so behave themselves as to avoid undue interference with the enjoyment of the land comprising the road by other persons and occupiers.[19]

- Bylaws under these provisions may relate to all unformed roads in the district or any particular such roads.
- Bylaws under these provisions shall not interfere:

  (a) with the exercise of any public right of way;[20] and

  (b) with any authority having under any enactment functions relating to the unformed road to which the bylaws apply.[21]

This simple prescription should achieve a balance of rights and duties to satisfy occupying landowners and legitimate recreational users.

Exchange of unformed road for other forms of public access

A mechanism which would facilitate, in appropriate circumstances, the exchange of an unformed road for an alternative form of public access along another route is available under existing law. The exercise of this option would require the co-operation of the adjoining landowner, the Minister of Lands on behalf of the Crown (in practice, Land Information New Zealand) and the territorial authority. This mechanism is put forward as a possibility for consideration.

The Minister of Lands would resume a section of unformed road under s323 of the Local Government Act 1974. Any such resumption for the purposes of effecting an exchange would prudently be executed on the basis of an agreed policy statement. The former road when transferred by the council to the Crown would acquire the status of Crown land subject to the Land Act 1948 and be available for disposal by the Crown.

The territorial authority would negotiate an access strip (s237B Resource Management Act 1991) along another route, to be secured

---

[16] No boy racers etc.

[17] No forestry companies planting trees on roads; no artificial obstructions.

[18] For the protection of the surface rather than the express prohibition of classes of vehicles. Protection of utilities such as water and sewage pipes when owned by the council etc.

[19] Adjoining land owners' occupancy to be respected.

[20] The right of passage must always be preserved.

[21] Utilities' rights respected: Telecom, Electricity supply etc.

by an easement made between the registered proprietor of the land adjoining the former road and the local authority, to be registered under the Land Transfer Act 1952 against the title to the land.

When the easement is registered under the Land Transfer Act, the Crown would vest the former road in the adjoining owner under the provisions of s116 of the Land Act 1948.

Conclusion

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. Given the four Crown inhibitions on title indicated above (under the sub-heading *Recent Developments*), the territorial authorities may have a limited interest in ownership, but clearly have a substantial role as local guardians of the public interest.

The Crown has preserved its essential interest as donor of the unformed roading pattern, but has not done particularly much to equip councils with a range of relevant powers, given the environment in which local agencies managing access now have to work. Indeed, many of the management principles concerning the surface of unformed roads are, as have been demonstrated, derived from common law as interpreted by the courts rather than from the Crown.

The environment today is vastly changed from that when the unformed roading network was laid out in the 19th century. It is probably true that in most parts of the country local management of unformed roads has largely (but not of course completely) been left to chance for more than one hundred years. New classes of all-terrain vehicles, global positioning technology facilitating the location of unformed roads, and renewed public interest have in recent years generated an awakening of the value of the unformed roading network.

The theory of the law – the common law and the statute law (which together underpin unformed roading) – is well enough settled when identified. The principal deficiency in the law for managing unformed roads relates to the undefined relationship existing between the occupier of such a road and the recreational user. The territorial authorities have a role to play in this respect and bylaws as have been suggested would clarify rights and duties and provide the council with a better defined jurisdiction. The proposal to allow for altered routes looks towards flexibility in the management of recreational access to be achieved with appropriate safeguards.

Flexible local management would appear to be the key to acceptable and sustainable use of a unique national asset, which has always had

the Crown, and, in the opinion of this commentator, should in the public interest continue to have the Crown as the ultimate guardian.

Appendix J: Summary of Elements of the Law on Movable Water Boundaries

Hayes, BE (2007b) *Elements of the Law on Movable Water Boundaries*, Ministry of Agriculture and Forestry, Wellington.

Introduction

Public rights of access along water in New Zealand have accrued under statute law authorising public ownership of waterside margins in many different forms of title. Access over publicly owned water margins is popularly believed to be a right, but given the varied legal status of its components, true unfettered rights of public access apply only to waterside roads. Access over other publicly owned land or Crown land is authorised only by the appropriate statute or permitted on sufferance.

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.

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 to be of more plain and extensive effect than judicial opinion in the past may have indicated.

Marginal public land along watercourses, along the coast and around lakes in addition to roads includes:

- Crown land;
- land reserved from sale under s58 of the Land Act 1948 and earlier Land Acts;
- all reserves under the Reserves Act 1977 and earlier Reserves Acts;
- all land subject to part IVA of the Conservation Act 1987;
- all local purpose reserves for esplanade purposes vested under the Resource Management Act 1991 and earlier Acts relating to the subdivision of land;
- all esplanade strips or access strips under the Resource Management Act 1991;

- all reservations over Māori land whether under the authority of the Māori Affairs Act 1953, the Resource Management Act 1991 or earlier Acts relating to the subdivision of land or Te Ture Whenua Māori Act 1993.

Despite there being a variety of legal waterside margins, a general rule on boundaries may be formulated. The inland boundary of waterside reserved land is pegged to stay in a fixed position in relation to the land which it adjoins. The water boundary of the reserved land is a movable boundary, so that the rights which attach to the parent parcel or strip, including land reserved from sale, attach also to accreted lands. In respect of the inland boundary there is a strong analogy with the modern survey definition of roads, for the same survey techniques in demarcating inland and water boundaries are in practice applied to roads, land reserved from sale, waterside reserves for public purposes, and esplanade reserves.

The right or facility to be alongside the water is based in a strict legal sense on title: title to public land touching the water, banks or foreshore, separated by a surveyed line from title to the adjoining land. The concept of a fixed landward boundary was carried into effect on survey plans prepared for sale by the Crown and on subsequent titles, even though the riverine or coastal boundary of the publicly owned margins generally has been a movable boundary.

The general principles to attach to all publicly owned waterside reservations are that:

- the landward boundary of the parcel is fixed;
- accretion may attach to any of class of reservation along water taking the same status as the parent land;
- erosion may not necessarily affect legal title to reserved land which may retain its reserved status although under water, but may create a physical gap in public access.

Waterside margins

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 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.

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). Then the practice of setting aside a margin of Crown land, rather than a road, along water was introduced on a national basis.

In *Attorney-General and Southland County Council v Miller* (1906) 26 NZLR 348 the Supreme Court held that where a public road runs along the edge of a river, the owner of land abutting such road is under no obligation, if the land on which the road is 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 then in force, which is designed to preserve in perpetuity the law-based 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 or marginal reservation 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.

Cooper J in *Miller's* case noted that 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 anyone 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.

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 or any other form of public land along water is traversed without permission.

Publicly owned margins other than roads

Waterside reservations may be subject to the Reserves Act 1977 when land has been set aside for a public purpose, or as strip-like parcels when taken as esplanade reserves on subdivision. Road-like strips may have been reserved from sale under s58 of the Land Act 1948 and earlier Land Acts.

An accretion to a publicly owned margin along a river or stream, around a lake or along the coast will take the same character as the land to which the new land attaches so that the access rights of the public remain as before.

Apart from any question of title which may determine control by the council or the Crown, erosion may create a physical gap in a marginal strip or a reserve. In this respect, erosion of a marginal strip or esplanade reserve may be similar to erosion of a road i.e. the legal status of the strip or reserve may be preserved but continuous access may be lost.

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

Crown ownership of riverbeds

This is a summary of statute law and 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. It is intended to reflect on the law as it is today and to show 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* (1950) NZLR 247 at 267 "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: *Attorney-General ex rel Hutt River Board v Leighton* (1955) NZLR 750 (SC and CA).

Section 14 and succeeding sections in the various Coal Mines Acts form the basis of this opinion. It is 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.

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, was clearly not intended to be an inchoate vesting. The Water-power Act specifically identified hydroelectric power generation as 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 hydroelectric 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:

- Confirmed by declaration the ownership by the Crown of riverbeds:
- When riverbed formed part of the demesne lands of the Crown (i.e. land which has never been alienated by the Crown); and
- When ownership had previously been preserved for the Crown by the laying out of road or marginal strips reserved from sale along river boundaries;
- Had the effect of returning navigable riverbed to the Crown in circumstances where at common law prior to 23 November 1903

the adjoining owner may previously have claimed ownership to the centre line;

- Confirmed Crown ownership in special circumstances, whereas, in respect of the Waikato River, the river is a highway retained by the Crown.

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 that 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:

- of sufficient width and depth to be of actual or future use;
- need not when flow is diminished be always available for the use of craft.

Also, a further departure was made from common law to widen the class of traffic. 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 when considered in the light of *Attorney-General v Simpson*. However, with few exceptions, 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.

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 is inherent in s14);
- the outcome of court action is uncertain.

From early settlement, the ad medium filum rule of English common law – ownership to the centre line – was excluded in its application

to rivers, lakes and the coast, when roads were reserved alongside the water, ensuring Crown ownership of the bed and shore. However, the rule applied extensively when roads were not reserved. Given the opinions of the judges, the extent to which s261 of the Coal Mines Act 1979 (the latest version of the original section 14) supersedes the operation of the rule is not clear. Section 261 in fact may establish Crown ownership of the beds of most watercourses large enough to be rivers. Clearly, that was the original intention of the legislature.

However, given the unsettled state of the law we too often do not know in practice which of our rivers flow on Crown-owned riverbeds. This gives rise to a conflict between adjoining land owners, who may think their title extends to the centre of the water, and those who assert that the Crown owns the riverbed. Even when a riverbed dispute is placed before the court, there may be surprises. The 1984 High Court ruling that the Manawatu, a large river, was owned to the centre line illustrates the surprise aspect. Uncertainty multiplies, for expert opinion does not generally provide support for the Manawatu decision which is in conflict with an earlier decision on the Wanganui River.

The laying out of roads and reserves along water boundaries in a fixed position on the landward side and providing for a movable boundary on the water side makes public land vulnerable to alterations effected by nature. It may even, when erosion is severe, have the effect of obliterating public access along a stretch which previously carried a publicly owned margin.

Trespass clarified

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 under four heads:

- the effect of erosion and accretion on reserved land along water boundaries – gaps and alterations created by nature in the publicly owned water margins;
- the difficulty of applying either the presumption of title to the centre line of water, or Crown ownership of the bed;
- the administrative uncertainty of the effects of erosion – maps and official records may not show erosion;
- the intense statutory protection from trespass which is given the Crown contrasts 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 the fact of trespass is the dominant aspect of the offence, 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 (above). Although trespass extends to *any lands of the Crown* 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.

Amendments to the Trespass Act 1980 may serve to clarify aspects of the law on trespass in relation to these two areas of uncertainty. Extending the limited defences offered by sections 3 and 4 of the Trespass Act provides a suggested solution.

Trespass – a reform of the law

The application of the law on trespass is uncertain where natural boundaries which are inherently subject to change through erosion create gaps in roads and waterside reservations. Doubts over the ownership of riverbeds also create uncertainties in trespass law. The Trespass Act 1980 which applies criminal sanctions should not apply in circumstances where a person has a reasonable belief that public margin exists along a water boundary or that a river is navigable and owned by the Crown.

The law change proposed would be in the nature of a defence statutorily made available to any person who may be charged with an offence under the Trespass Act – an extension of the defences provided by sections 3 and 4 of that Act.

Conclusion

A driving force at the beginning of colonial settlement – that the old English law protecting landed privileges should not apply in New Zealand – was extensively but far from completely applied. Inconsistent administrative practices in provincial (1854–1876) and post-provincial times[22] put paid to the ideal of universal public access to waterways, lakes and the coast. Reservations for public access were

[22] National practice was not settled until s110 of the Land Act 1892 was enacted.

sometimes inexplicably omitted when Crown land was sold. However, waterside reserve allowances in the form of roads were nevertheless extensively applied as settlement proceeded. Other forms of waterside reservations were to apply after the provinces were abolished. In the post-provincial era these early roads were to receive special statutory protection at least up until 1952. Today, many forms of statutory restraint protect public access along water.

The robust development of indigenous riverine common law in New Zealand is best exemplified in *Mueller v The Taupiri Coal Mines Limited* (1900) 20 NZLR 89 case in 1900 when the Court of Appeal held that the Waikato river was a public though non-tidal navigable highway, the bed of which was owned by the Crown. The Court did not follow English common law which would have provided for private ownership to the centre-line of such a river. Section 14 of the Coal Mines Amendment Act 1903 then altered the English common law and provided for new statutory rules in New Zealand.

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.

A solution to the practical problems of identification of public land on the ground whether the land is along water, or the bed over which water flows, may be based on the law of trespass if suitably adjusted.

The language used in s14 of the Coal Mines Amendment Act was clearly intended to vest the bed of navigable rivers and streams in the Crown for a broad range of purposes. The old Department of Lands and Survey, under the superintendence of the Minister of Lands on behalf of the Crown, administered "title" to Crown riverbeds in a neutral setting. Given the competition that now exists for riverbed use, whether for recreation, conservation, flood protection, and uses authorised under the Resource Management Act 1991, the Crown agency which supervises the title of the Crown should have a neutral role. The Crown and the public will not be well served if riverbeds are "captured" by sectional management.

Land Information New Zealand, the successor to the Department of Lands and Survey, is the neutral agency under the Minister of Lands which should undertake this role.