# Critique of *Roading Law As It Applies To Unformed Roads* (Hayes, 2007a)

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## Abstract

This critique corrects errors, omissions and misconceptions in *Roading Law As It Applies To Unformed Roads* (RLAIATUR) (Hayes, 2007a), a dissertation as advice to the New Zealand Government's Walking Access Consultation Panel. The Panel found Hayes's publication persuasive when recommending to Government how recreational access issues in the countryside might be resolved.

Using extensive case law, statutes and experience, this critique demonstrates that the advice offered by Hayes is flawed in key aspects and is therefore not a sound basis on which to redefine recreational access rights in New Zealand. Its central premise—that the law has never differentiated between formed and unformed public roads—is correct, but is contradicted by Hayes's proposition that 'occupation' of unformed roads by adjoining landholders (engaged principally in farming activities) should be accommodated in law and practice as a 'special need'. This constitutes a dangerous challenge to the defining essence of public roads in New Zealand—that no one has the right to occupy or assert private ownership, or veto rights of public passage. Hayes's advice to Government threatens to subordinate these fundamental principles to private interests, setting an ominous precedent for public-access rights nationwide.

Hayes strengthens his argument for enhanced private and local authority interests over unformed roads by seriously understating the nature of existing public rights of passage over such roads. This critique challenges Hayes's proposal and its selective reasoning by reiterating the subordinate relationship of private rights to long-standing public rights. The relationship is not 'undefined' in law as Hayes claims. It is well established, being supportive of the common law. Review of applicable statute and bylaw confirms that unformed roads are capable of effective management by local authorities without new legislation to overturn or prejudice existing public-access principles.

Similarly, this critique shows that Hayes's recommendations for 'access strips' (with much inferior public access) are based on a flawed assertion that there are insurmountable difficulties to creating new unformed roads when realignment of poorly sited unformed roads is justified. Though acknowledging that access strips would confer lesser rights of public passage, Hayes does not specify the degree to which they would be inferior. His proposal would assign to local authorities and adjoining landholders pre-eminent powers (without due public process) to control, restrict or extinguish public rights of access to the countryside.

This critique highlights the pressing need for Government to critically re-examine the basis of recommendations made by Hayes and the Access Panel for the recreational use of unformed roads.

# Preface

The author of this critique, Bruce Mason, has a long history of professional involvement in the outdoors:

- National Parks and Reserves Ranger 1975-82.
- Researcher for the former Public Lands Coalition 1982-92.
- Researcher for Public Access New Zealand 1993-2005.

Mason is currently researcher for Recreation Access New Zealand.

His publications on public access issues include:

- *Public Roads: A guide to rights of access to the countryside* (Mason, 1991)
- *Public Access to Land* (Mason, 1992a)
- *Proof of dedication as public road* (Mason, 1992b)
- *Public Roads. A Users' Guide* (Mason, 1992c, 2002)
- *Public Roads: Rights of way for all* (Mason, 1998)
- *Improving public access to the outdoors: A strategy for implementing Government's election policies* (Mason, 2003)

In *Public Roads*, Mason argued that unformed public roads should become the basis for a 'public way' system throughout New Zealand. In *Improving Access*, Mason discussed the nature of public roads, identified major shortcomings in access strips and Walkways, and presented a detailed strategy for use of unformed roads for recreation. This was provided to the Land Access Ministerial Reference Group, the Walking Access Consultation Panel, and all relevant Ministers of the Crown (see Appendix 1).

*Roading Law As It Applies To Unformed Roads* (RLAIATUR) is an edited publication. It is not clear to what extent all of its content or omissions can be attributed to its author. It is assumed for the purposes of this critique that, as author, Hayes is in agreement with its content. Hayes is a former Registrar-General of Land, and barrister and solicitor, with an interest in the outdoors.

A second report by Hayes—*Elements of the Law on Movable Water Boundaries* (2007b)—is not reviewed here.

Hayes's *Roading Law as it Applies To Unformed Roads* and the subsequent report of the Walking Access Consultation Panel (2007) are available from www.walkingaccess.org.nz

In this critique, all emphases in citations and elsewhere are those of the author alone. So too are the opinions expressed.

The author acknowledges the critical comment and review by friends and colleagues of drafts of this critique. This greatly improved the readability of this work.

Every effort has been made in this critique to cite and represent accurately the law, Hayes, and the Access Panel. Errors made are those of the author, who accepts the possibility of public correction and rebuke in the interests of participatory democracy. It is not author's intention to rely on the conventional practice of using disclaimers to avoid such criticism (see for example RLAIATUR, p. ii).

Further explanation of terminology used in this critique, of 'The Law of Highways', and of alternative access mechanisms, is available from the Recreation Access New Zealand web site www.recreationaccess.org.nz

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# Public access review

In January 2003, the Minister for Rural Affairs, for New Zealand's Fifth Labour Government, appointed a Land Access Ministerial Reference Group to inquire into public access to waterways and along rivers, access across private land to public land, and onto private land for public recreation. Minister Jim Sutton promoted codified access irrespective of land ownership and tenure. This was at variance with the Government's 2002 election policies on public access.

In June 2003, Public Access New Zealand (PANZ) published a strategy for implementing the Government's access policies (Mason, 2003); (see Appendix 1). The position taken by the PANZ strategy was that implementation required little more than enhanced use of existing information, legal mechanisms, public roads and the Queen's Chain.

In August 2003, the Reference Group reported its findings. Sixteen months later, in December 2004, the Government abandoned its preference for extending 'Queen's Chain' reserves (signaled in 2002 election policies) and proposed 'footways' over private land along water margins instead.

In June 2005, after heated opposition from rural interests, and with an election approaching, Government abandoned proposed legislation for 'footways'. In August of that year, a Walking Access Consultation Panel was appointed with a mandate to consult further and to achieve greater consensus on a way forward.

In February 2007, the Access Panel reported to Government. Its emphasis shifted from investigating access options over private lands to existing access opportunities and options for enhancing these. Public roads—particularly *unformed* public roads—became a major focus of attention.

Officials from the Ministry of Agriculture and Forestry serviced both the Reference Group and Access Panel. Some of their advice was published. The Panel felt confident of the advice offered by Mr. Brian Hayes, barrister, solicitor and a former Registrar-General of Land. Recommendations in his report on unformed roads—*Roading Law as it Applies To Unformed Roads* (RLAIATUR) (Hayes, 2007a)—were given weight in the Panel's report to Government. RLAIATUR is the subject of this critique.

## *Roading Law As It Applies To Unformed Roads*

Hayes's report is a major contribution to public understanding of roading law. It provides coverage of many aspects of applicable law which have not previously been published in New Zealand.

Hayes's central conclusion that the law has never differentiated between formed and unformed roads *should* put to rest persistent myths that somehow unformed roads are not 'real' roads with public rights of use. By documenting the principle that public roads are public highways in public ownership and control, Hayes confounds those adjoining landowners and occupiers who assume veto rights over public use.

His report places major emphasis on the historical origins of roading, ownership, and repair and maintenance, though this is only of interest and not central to the key issues of providing recreational access to the countryside. Given the public-access mandate of the Access Panel for whom it was written, Hayes's report is perplexingly deficient in its treatment of public rights to use roads.

In addition to its significant factual errors, the report arrives at key conclusions and recommendations that do not accurately reflect the law. Uncritical acceptance of these errors and misconceptions has potentially dire consequences for the public interest.

Reports received from advisors of Hayes's stature and authority tend to influence Government policy and action. It is vital therefore to correct errors and omissions in these sources and to challenge ill-founded advice developed from flawed reasoning. That is the function of this critique. Its purpose is to alert Government to these matters and their proper remedy before it determines its ultimate course of action.

## Public roads are public highways

Much of the content of Hayes's report, and this critique, is probably new to many readers. 'The Law of Highways', a body of law dating from the earliest recording of English law (Hayes, 2007a:v), is applicable with modification to public roads in New Zealand.

The public verses private discord over the use of public roads is not new. However issues of current contention have been settled by our common law-makers—the Courts—for centuries.

Lack of familiarity, both within government, local government in particular, and the public at large as to the existence and nature of public highways, is the single greatest contributor to misunderstanding and tension on the topic of public access to the New Zealand outdoors.

The consequences are serious if, deliberately or unwittingly, Governments and their advisers set about depriving the public of what they do not know they own. There are adverse implications for all public roads, formed as well as unformed, arising from Hayes's recommendations.

The right of unhindered passage over roads is 'owned', not by central government, or local government managers of roads, but by every citizen. Hayes makes this point as does this critique. It is this fundamental civil liberty that is in greatest danger of being lost during the current land access review, despite its purpose of enhancing public access to the outdoors. Loss of these liberties is avoidable, as this critique demonstrates. It is a question of choice—not one of legal necessity or for political expedience.

A motivating aspiration of this critique is that the growing body of publications on public roads (including this work) will engender mutually reciprocated respect for public and private rights over New Zealand's extensive unformed roading network. Public roads of all types are the foremost means of passage throughout New Zealand. They extend for more than 156,000 km. Thirty-six percent (56,900 km) of these are unformed (WACP, 2007:133)—the equivalent of four times the distance by road from Peking to Paris. The unformed network is an immense but largely overlooked strategic asset, much of which is amenable to recreational use.

In preparation for what follows, there hardly seems a more succinct statement on the subject of 'public highways':

> "The term "highway" is applicable to all public ways over which every member of the public has a right to pass, and includes roads, streets, and rivers. A highway may be a way for foot-passengers only, for persons going on horse or on foot, or for vehicles as well as for passengers.
>
> Under the common law the right of the public in regard to the user of highways is the right of passage, the right to pass and repass, together with what is generally recognised as a reasonable and usual mode of using a highway as such. Any other user of a highway may give rise to an action for trespass or for nuisance according to the circumstances.
>
> ...at common law a landowner whose land abuts on the highway is entitled to access to the highway from his land...(from any part of his frontage). If any obstruction is placed to prevent his obtaining access from his premises to the highway, this would be an interference with a right.
>
> The rights of the public to pass along the highway are subject to this right of access; just as the right of access is subject to the rights of the public and must be exercised subject to the general rights of nuisance and the like imposed upon a person using the highway".
>
> Adams (1954: 314)

## What this critique covers

This critique addresses key contentions of Hayes:

- An implied limited extent of public rights
- The proposition that farmers can 'occupy' roads
- The notion of an 'undefined relationship' between public and private interests which makes room to accommodate farmers' activities as a new class of 'special-needs' rights over public roads
- The claim that the law does not allow adequately for the management of farming and public uses of unformed roads

- The claim that there are formidable if not insurmountable difficulties to creating new unformed roads when realigning access (and the consequent view of the Access Panel that new unformed roads cannot be created)

- The proposal to substitute 'access strips' (with inferior rights of public passage) for new unformed roads when realignments are justified

The critique explains where each of these propositions overturns or is inconsistent with existing law and how each subordinates public rights and the public good to private interests. It follows a logical progression in subject matter and argument through each point of contention, ending with conclusions and recommendations.

The Walking Access Consultation Panel was apparently lacking prior familiarity with much of this subject matter when it described the Hayes report as a "robust examination of the law applying to unformed roads" ... "extremely thorough research" ... "a very comprehensive analysis" (WACP, 2007:10,ii,30). PANZ described the Hayes's report as "brilliant" (PANZ, 2007).

This critique concludes that such faith is perilously ill-founded.

## 2 Terms of reference

At the outset, Hayes adopts terms of reference for RLAIATUR which defy the lack of legal distinction between public roads despite differing origins:

> "To avoid doubt, the following classes of road, which do not meet the criterion of Crown ownership of the land at the time when first legalised as road are excluded from discussion": roads created by the dedication of landowners; roads vested under the Local Government 1974, Resource Management Act, Public Works Act, and roads taken under the PWA" (Hayes, 2007a:v).

This exclusionary criterion is both perplexing and unjustified. Aside from historic public rights that carry forward to the present, the origins of our roading network are of little consequence to recreational users or providers. A road is a road. Whether it is created over Crown land or not is immaterial to a road's suitability and availability for public recreational use. Once dedicated as a public highway, common rights of use exist with powers to control roads vested in local authorities.

Hayes does not declare who stipulated the criterion for exclusion. Its effect is to remove from consideration roads in rural areas created subsequent to initial subdivision and settlement by the Crown. What useful purpose this exclusion serves is not obvious since, as Hayes states, "the law on formed and unformed roads is in material respects the same law" (Hayes, 2007a:1).

Hayes's approach implies an exclusion from consideration of most post-settlement unformed roads as well as the possibility of new roads, including foot-paths, originating from private land. The full range of creation, (that is, dedication by private owners and by all current means of statutory authority) is inexplicably "excluded from discussion".

Approximately two-thirds of New Zealand is privately owned (lands of the Crown being the balance). It is through private lands that the greatest need exists for improved public access. The need to relocate some roads and create new public access through private land was a recurrent theme arising from public submissions to the Access Panel's Consultation Document (WACP, 2006).

*Exclusion of formed roads*

The Hayes report confines itself to unformed roads but walkers and other recreational users would benefit from a consistent approach over all public roads—formed and unformed.

There are two justifications for the broader perspective. First, the distinction between formed and unformed roads has no legal basis in New Zealand. Second, an arbitrary distinction between the two will be counter-productive to achieving Government's stated recreation objectives: "Labour believes that these [recreation] opportunities must be accessible to all New Zealanders of all ages and lifestyles" (Labour Conservation [Outdoor Recreation] Policy, 2002).

Many of the access problems common to unformed roads affect formed roads too. In rural areas, for instance, remedies are required for pressing issues of unlawful obstruction and misleading, or absent sign posting. Problems of obstruction to walking access extend into urban areas. Remedies would benefit all users of public roads.

It is difficult to see how Government initiatives to improve public access can succeed if consideration of recreational access to public lands is confined to unformed roads whilst access remains obstructed over formed roads.

Many vegetated but previously formed roads would fall within modern perceptions of 'unformed', but would be ideal for recreational use. As well, in many places it is necessary and desirable to create formed paths for walking.

## 3 The right of 'free' passage

*Absence of explanation*

Hayes identifies four 'key elements' of current roading law, including 'the right of free passage' (Hayes, 2007a:3-9). Comment is confined to this last element. There are also other components to the public interest.

The phrase 'right of free passage' is Hayes's summation of the central component of public rights. A more accurate reflection of case law would be 'right of unhindered passage'.

Hayes provides no full or definitive explanation of public rights, despite copious law on the subject. There have been significant recent developments of public recreational rights by the Courts (*Re* Ruapehu DC (2002), *Re* Upper Hutt CC (2003)). These cases recognise for the first time recreation as a distinct and deserving form of public passage over roads. This is directly relevant law that was not addressed by Hayes.

Despite stating that his report "explains what the right of free passage is" (Hayes, 2007a:1), it does not.

Hayes identifies the origins of public rights—the historic entity of the "Queen's [King's] Highway"—and affirms (correctly) that these rights are held by the public and not by the local authorities in which the ownership of roads is vested. However, Hayes confines his observation about the 'right of free passage' to references to 'a' right or 'the' right, without explaining much about what that right entails.

For instance, he says:

> "In New Zealand as in England ... the crucial distinction is that a public highway is a public right of way ... This refers to the right of all subjects to pass over it and not to any rights of ownership in the Crown" (Hayes, 2007a:4).
>
> "A road is a public highway providing a right of free passage for the public. The courts have always provided rigorous protection for the right of passage" (Hayes, 2007a:6).
>
> "Unless a road is positively documented as a bridle path or a footpath, a full right of passage with or without vehicles may be assumed" (Hayes, 2007a:7).
>
> "When a road has once been made or has become a public road, the right of the public to use it as a public road continues forever unless it has been legally stopped by process of law, or "once a highway, always a highway" (Hayes, 2007a:9).

*Case-law definitions of public rights of passage*

Public rights over roads are nowhere to be found in New Zealand statute. This is not because they do not exist. They are derived from case or common law progressively developed and modified over time. New Zealand is a common-law country, with a body of legislation, which either extinguishes, modifies or supports the common law. In the case of public roads, our statutes are largely silent about public rights but are, with a notable exception (see 13), supportive of the common law.

The process of judicial development of the common law continues to this day, delivering copious judgments relevant to 'the public right of passage'. In a chapter headed *'Leading decisions in roading law'* (Hayes, 2007a:22), there is no case law cited concerning the public right of passage.

In a summary entitled *'Summary: preserving the right of passage'*, Hayes states:

> "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 want to use it. The territorial local 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" (Hayes, 2007a:52).

This is a warranted observation but it does little to further define the nature of the public right.

*Private rights as well*

Public rights of passage are not the only rights applying to public roads. There are also private rights (frontagers' rights of access) attached to the property abutting roads, as distinct from the right to use the highway as one of the public. These private rights are most comprehensively expressed in *Fuller v. MacLeod:*

> The Court observed that:
>
> (i) a frontager has the right of egress and ingress at all points on his street boundary
> (ii) the right of access encompasses access of pedestrians to the footpath and of vehicles to the carriageway
> (iii) the rights of the frontager arise from his ownership of land abutting the street and are not dependent on any prior dedication of the land comprised in the street or the ownership of the subsoil
> (iv) the rights of the frontager are not absolute and involve an accommodation of his private rights with the rights of passage of the public...This is a right that must be reasonably exercised so as to not interfere with the reasonable exercise by the public of their rights of way...the rights of the public are subject to the reasonable exercise by the adjacent owner of his private rights."
>
> *Fuller v. MacLeod* (1981) NZLR 390 CA, at 393, citing *Pratt and McKenzie's Law of Highways* and *Halsbury's Laws of England*

Understanding both sets of rights, public passage and private access, is necessary in any consideration of user rights over public roads. Hayes omits any discussion of the nature of private rights or their relationship to public rights. Given the above citation, particularly para (iv) which clarifies the public-private relationship, it is disappointing that Hayes adopted this view of *Fuller*:

> "The common law rights of frontagers as expressed in Fuller do not directly provide assistance in clarifying the rights of the public on unformed roads and the case is not therefore included in the substantive discussion in "Roading Law as it Applies to Unformed Roads." " (Hayes, 2007c).

The rights expressed in *Fuller v. MacLeod* are long-standing. At a working level that relationship is defined in other Court determinations, and in legislation concerning farming-related activities (see 9). There is no 'undefined relationship' as Hayes asserts:

> "The principal deficiency in the law for managing unformed roads relates to the undefined relationship between the occupiers of such roads and the recreational users" (Hayes, 2007a:54).

## 4 Public rights from case law

Compilation of all that Hayes has to say on "the public right of passage" is that it constitutes:

- Rights exercisable by all subjects.
- Free passage.
- Rights of vehicle use can be assumed unless dedication of a road is expressly confined to horses or foot.
- Territorial local authorities are obliged to see that the right of passage is preserved.
- These rights continue until such time as a road is stopped.

These do not reflect the full extent of public rights. What Hayes omits to say is what New Zealand's Courts have also held (those elements of the public right not identified by Hayes underlined):

- It is an absolute right to pass and repass without hindrance.
- The customary uses of roads extend beyond mere passage from one point to another. They include ancillary activities, including recreation, so long as these do not conflict with the passage of others to an unreasonable degree.
- The right of assertion by the public, including removal of appreciable interferences (i.e. obstructions) and/or legal action against those creating or authorising such nuisances.
- A road is incapable of occupation to the exclusion of the public.
- Frontagers have rights of access between their properties and public roads, which are not absolute, and involve an accommodation of private rights with the rights of passage of the public.

The summations above are derived from cases and authorities cited in *Mason, 1991,* and the following cases (see Appendix 2):

1896. Queen v. Mayor, Councillors, and Citizens of Wellington
1977. Lower Hutt City v. AG ex Moulder
1977. Moore v. MacMillan
1981. Fuller v. MacLeod
1988. Frecklingham v. Wellington City Council
1992. Paprzik v. Tauranga District Council
2002. *Re* Ruapehu District Council
2003. *Re* Upper Hutt City Council v. Akatarawa Recreational Access Committee

**Hayes has seriously misrepresented applicable law by omitting from his dissertation the public right of assertion of unhindered passage, including for recreation, and the principle that roads are incapable of occupation to the exclusion of the public.**

# 5 Short's 'Roads and Bridges'

Amongst his supporting references, Hayes refers to Short's '*Roads and Bridges*' (Short, 1907). Hayes describes Short as "... perhaps the most comprehensive [text] on roads ever written in New Zealand and his style is crisp and authoritative" (Hayes, 2007a:6).

Despite this endorsement Hayes is curiously selective in his use of this authority. On page 136 of RLAIATUR Hayes cites the first paragraph on page 44 of Short, entitled 'How road rights arise in N Z.', but omits the content of two succeeding paragraphs on that page which bear directly on 'the right of passage' (see Appendix 3).

Paragraph 2:

> **"Public right to use highway**
> "The public has a right to use a highway only for the purpose of passing and repassing along the same, with or without vehicles, horses, cattle, etc., and not to enter it for any other purpose. No one has the right to occupy the soil of a highway which does not belong to him by right of ownership. If he does so he is in law a trespasser; and though, as one of the public, he has a right to be on the highway, he must move on" (Short, 1907:44, para 2).

Paragraph 3 of page 44, entitled 'rights of foot passengers' is also relevant to the issue of 'the public right of passage'.

One possible explanation for Hayes overlooking these two paragraphs is that it clears the way for the assertion that there can be road 'occupiers', and that there is an 'undefined relationship' between public and private users (Hayes, 2007a:54). His failure to cite Short, in this instance, is only helpful to that assertion.

Dispensing with confounding authority, and the legal precedent that forms its basis, appears to be necessary preparation for his subsequent recommendation that farming uses be accommodated, through law change, as a 'special need'.

**Whether such conspicuous omission was intentional or not, advice given under these circumstances to the Access Panel, and ultimately to Government, cannot be construed in any way as either full or fair or in accord with best public-service practice** (State Services Commission, 2005). **Given their grievous implications for public rights, these omissions are inexcusable.**

There are other authoritative texts worthy of reference. Pratt and Mackenzie's *'Law of Highways'*, (1923:1-5) is as emphatic as Short on the question of 'occupiers and trespassers' but is not cited by Hayes.

## 6 Adjoining land occupiers as road 'occupiers'?

Hayes's use of the term 'occupier' is a central area of contention in this critique.

*Confusion and partiality, not clarity*

Hayes claims in his opening summary in RLAIATUR that his:

> "commentary...removes some common uncertainties by making clear that:
> • no rights may be acquired by occupancy, use, or care over any road whether formed or unformed" (Hayes, 2007a:1).

However any initial clarity is negated by his following extended references to what he terms 'occupiers' of unformed roads and recommendations to give such 'occupancy' unspecified legal force.

Anyone in 'lawful occupation' of any place or land has trespass rights (s. 2 Trespass Act 1980).

In the context of a legal discourse, the use of 'occupation' terminology attacks the very foundation of roading law and public rights. Hayes offsets this in part by stressing, paradoxically, that a public right of passage exists. Such a dichotomy could only exist if rights of public passage were subordinated to private rights. That would be a spectacular reversal of the law of highways.

Subsequent to RLAIATUR Hayes suggests (Appendix 4, 3rd para from end), that a lesser right of trespass/occupation may exist without 'lawful occupation'. Such explanation was not evident in RLAIATUR.

Hayes goes on to state in RLAIATUR:

> "The theory of both the common law and statute law, which together underpin unformed roading, is well enough settled when identified" (Hayes, 2007a:54).

The trouble with Hayes's RLAIATUR is that he has not identified the large body of relevant case law and statute that confounds his assertions about 'occupiers' and an 'undefined relationship'.

*Adjoining land and roads confused*

There is confusion by Hayes between –

- occupiers of adjoining land, and
- 'occupiers' of roads

–even when citing the same legal authority (s 353(b) LGA 1974)

This confusion is apparent in the following:

> "The council may require the occupier of any land (including a road) [*]) that contains a hole or other place dangerous to people passing along it to fill in, over, or enclose the danger. [8]" (Hayes, 2007a:39).
>
> "Footnote
> "8 = Section 353 (b) Local Government Act 1974".
>
> [ * Incorrect ]

> "The council may require the occupier of any adjoining land [+] that contains a hole or other place dangerous to people passing along the land to fill in, over, or enclose the danger [14]" (Hayes, 2007a:40).
>
> "Footnote
> "14 = Section 353 (b) Local Government Act 1974".
>
> [ + Correct ]

Suggestions throughout of existing 'occupiers' rights are confused by Hayes's overarching conclusion that:

> "There may be situations where councils should provide bylaws to protect the interests of legitimate users of unformed roads, as well as those of adjoining owners" (Hayes, 2007a:46).

"The special character of unformed roads which generally are in the occupation of adjoining owners creates a series of special needs **not** catered for in existing law" (Hayes, 2007a:46).

*This prompts Hayes to suggest legislative remedies*

> **"Occupiers' peaceable use**
> "Territorial bylaws may therefore be the most appropriate way of:
> • regulating good order on an unformed road intersecting private property;
> • preventing damage to the surface of the road and any structures on it;
> • making sure that people exercising a right of passage do not unreasonably interfere with the occupier's use of the land." (Hayes, 2007a:48).

The first two points are already capable of implementation by either bylaw or statute. The last point would be a reversal of the current legal duty of non-interference by adjoining occupiers on public passage. More is added about statutory powers and bylaws at 10.

Hayes's confusion continues:

> "Suggested statutory framework for bylaws
> • ensure that persons exercising the right of passage over any unformed road so behave themselves as to avoid undue interference with the enjoyment of the land comprising the road by other persons and occupiers [4] " (Hayes, 2007a:49).
>
> "Footnote
> 4 = adjoining landowners' occupancy to be respected.

Hayes's confusion of roads and adjoining land is complete: adjoining ownership and occupation have become indistinguishable from road 'occupation'.

In legal parlance, Hayes's use of the phrase 'enjoyment of the land' is synonymous with private benefit, and possession to the exclusion of others.

**Hayes's admission that his "perceived series of special needs" are not catered for under existing law** (Hayes, 2007a:46), **indicates an agenda for law change to cater for so-called 'occupiers'.**

## 7 Does occupation confer ownership or other rights?

Hayes discusses the issue of ownership at length and correctly answers the question that occupation of roads does not and cannot confer ownership. Although important, ownership is not the only question that needs to be addressed in relation to land occupation.

Hayes cites section 172(2) of the Land Act 1948:

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

Section 172 excludes any interest, not just ownership or possession, from being acquired by adverse possession or "user adversely to...the title...of any local authority".

In response to this reviewer's initial criticism of his report (Hayes, 2007c), Hayes focused on 'ownership' and 'possession' without addressing his implication that 'occupation' may not necessarily be reliant on either.

Hayes relied on his statements in RLAIATUR to rebut what he saw as this reviewer's "confusion" over this issue:

> "The law, however, is very clear. There is no possibility of the occupier acquiring any rights of ownership or possession through occupancy, use, or care of any unformed road." (Hayes, 2007a:9).

> "Many unformed roads have now been occupied by, and incorporated into the holding of, the owner of the surrounding land for very long periods—in some cases more than a hundred years. Questions have often been raised about ownership, and opinions expressed about supposed rights to the land so occupied. The law, however, is very clear. There is no possibility of the occupier acquiring any rights of ownership or possession through occupancy." (Hayes, 2007a:19).

These statements do not rule out Hayes's 'less-than-ownership-or-possession-occupier' thesis (Hayes, 2007c, 3rd para from end). Aside from the prohibitions of the Land Act, it is difficult to envisage that such 'rights' can exist independently of statutory allowances made for grazing and fencing, as set out in 9 below.

Hayes's attempts, in rebuttal of this reviewer's initial criticism of RLAIATUR (Mason, 2007a), to define 'occupier' by way of ordinary dictionary meanings—as something less than ownership or possession—are unobtainable and futile under existing law.

As an 'occupier' of a road cannot, by Hayes's admission acquire any legal rights, there appears to be no useful purpose to his extended and varying explanations as to what he means by 'occupier'. Only confusion is served.

*The Land Act and Short have the final say*

Contrary to Hayes's repeated suggestions of legal entitlement, the legal reality is that section 172(2) of the Land Act precludes any form of user through occupation ("right, privilege, or easement") from being acquired over roads.

Short is unequivocal on the subject. There are no qualifiers to his view of occupiers:

> "No one has the right to occupy the soil of a highway which does not belong to him by right of ownership. If he does so he is in law a trespasser..." (Short, 1907:44, para 2)

Given Hayes's possession of this legal authority, and page 44 in particular, the above should have been evident to him from the outset (see Appendix 3).

**Hayes should have directed his discourse to a full, balanced presentation of roading law. If that had been accomplished, then areas for possible policy and legislative change could have been identified in an open and transparent manner to the owners of the right of passage—the public—as well as to the Access Panel and Government.**

# 8 'Occupiers', in relation to roading statute

*Local Government Act 1974*

Part XXI and Schedule 10 of the Local Government Act 1974 are the primary statutory provisions dealing with local authority roads. The powers given to Councils are generally of two types:

- General powers in respect of construction, diversion, alteration and stopping of roads.
- Particular powers in furtherance of these general powers and which may interfere with public and private rights.

The only 'occupiers' any of these provisions recognise are not occupiers of the roads themselves but:

> "the occupiers of all land adjoining the road proposed to be stopped or any new road proposed to be made in lieu thereof" for the purpose of notification
>
> Clause 2, 10th Schedule), LGA 1974

The occupiers of land "in the vicinity of roads" are further recognised whereby the construction of cellars or any excavation requires prior council consent (s 354 LGA 1974).

Section 341 of the Local Government Act 1974 permits councils to grant a lease above roads or of the subsoil beneath roads, provided that in the case of airspace, the Council ensures that sufficient airspace remains above the surface of the road for the free and unobstructed passage of vehicles and pedestrians. This provision is usually used for electricity, telecommunications and other utilities, or bridges and tunnels. It specifically excludes usage's that obstruct public passage.

Section 341(3) precludes the granting of leases over the surface of roads. The scheme of the LGA 1974 suggests that Councils have no general leasing power in respect of roads. The application of the Public Bodies Leases Act 1969 to LGA s341 leases is expressly excluded.

*Public Bodies Leases Act 1969*

The Public Bodies Leases Act has extensive leasing powers over lands held by Councils, but section 4(1) precludes leasing under its provisions in substitution to other statutory powers or if contrary to any trust. Roads are held in trust by local authorities as public highways. The PBLA should therefore be inapplicable to roads. Leasing, with inherent rights of exclusive occupation, would be contrary to the purpose of public highways.

*Public Works Act 1981*

Section 45 of the Public Works Act 1981 enables land "held for public work" to be leased, but this should be inapplicable to public roads. They do not require any 'work' to be effected for their status—they fulfil their function as roads 'held' as public highways with or without formation.

*Other statutory provisions*

There are statutory provisions that 'deem' (declare by way of a legal fiction) roads, or part thereof, to have 'occupiers' for the purposes of making telecommunication facilities rateable (s 341(2) LGA 1974). Adjoining occupiers may also be deemed to be road 'occupiers', creating liability for weed control over roads but with no rights created (s 2 Biosecurity Act 1993).

Section 357 of the Local Government Act 1974 allows for council-authorised site-specific encroachments on a road in the form of "buildings, fences, ditches, or other obstacle or work of any kind", including the planting of trees or shrubs. However, council is not entitled to create a nuisance or deprive any person of any remedy against a local authority in respect of any nuisance (s 191 LGA 2002). The Courts have held that encroachments can be lawful, but not to the extent that they create an appreciable interference with public or private rights (i.e. by impeding pedestrian or other traffic).

*Land Act precludes any rights being acquired*

Again, the Land Act 1948 confounds Hayes's suggestions that there can be farming-type road 'occupiers' with implicit use rights extending generally over roads. Such a view is in defiance of the express terms of section 172(2): "no right, privilege, or easement in, upon, or over any such land shall be acquired".

# 9 How statutes and the Courts treat farming activities

In this section, this critique outlines the relationship between public and private users of roads insofar as it affects farming activities. Many relevant statutes and the Courts have made the nature of this relationship explicit. Their provisions and determinations contradict Hayes's fundamental premise that no such relationship is defined. They reinforce the fundamental legal principle that no-one is entitled to rights of occupation, of what-ever form, over roads.

## 9.1 Grazing

*"The King's Highway is not to be used as a stable-yard"*

Lord Ellenborough, C.J. in Rex v. Cross (1812), 3 Camp. 224.
*In* Pratt and MacKenzie, 1923:137

The Impounding Act 1955 treats stock on roads as 'straying or wandering' (s 2). This includes "being on or near the road without being under proper guidance and control; and being herded or drafted or grazed upon or near the road other than in the course of being driven." This is consistent with the common law (Pratt and Mackenzie, 1923:67).

*Impounding Act 1955*

> **"Section 33 Stock straying or wandering on roads**
> (1) Where at any time of the day or night any stock is found straying or wandering on any road, or tethered on any road in such a manner as to obstruct or be reasonably likely to obstruct the road, any person may seize the stock, and may either impound it or, where the owner thereof is known to him, return it to the owner; and in any such case the owner of the stock, in the case of entire animals, is liable to a fine not exceeding $100 for every head thereof and, in the case of other animals, to a fine not exceeding $50 for every head thereof, in addition to any other rates and charges payable under this Act".

Section 33 reinforces public rights of passage and the common law. Any member of the public may seize or impound stock if they "obstruct or be reasonably likely to obstruct the road". This conceivably includes obstruction of non-motorised traffic: e.g., danger or hazard to pedestrians. Section 33 also reinforces the fact that the public are the holders of the rights of passage that may be interfered with by stock, not the local authorities.

**An exemption from the above impounding provisions is particularly applicable to unformed roads.** Section 34 is a non rights-based accommodation of grazing without degradation of public rights.

> Section 34 IA 1955
> **"Section 33 not to apply in certain cases**
> (1) Where —
> (a) A local authority is satisfied that any road or any portion of a road within its district is so infrequently used by motor traffic that stock depasturing on or near the road will not constitute an inconvenience or danger to the users thereof; and
>
> (b) The road or portion thereof is unfenced or only partially fenced on one side only or on both sides,—
>
> the local authority may, by resolution publicly notified, declare that the provisions of section 33 of this Act shall not apply with respect to that road or portion thereof.
>
> (2) Where any such declaration is made under this section, the occupier of the land by which the road or portion thereof is bounded shall —
>
> (a) Erect and maintain in some permanent manner and in some conspicuous place at each entrance to the road or, as the case may be, at each end of the portion thereof, a warning notice in a form approved by the local authority to the effect that stock is depasturing on or adjacent to the road; and
>
> (b) If the local authority so requires, and subject to section 344 of the Local Government Act 1974, erect cattle stops or swing gates at such places on the road or portion thereof, as the case may be, as the local authority specifies—
>
> and the declaration shall have effect only so long as those notices and the cattle stops and swing gates required by the local authority are so erected and maintained".

It is an indulgence on the part of local authorities to tolerate stock depasturing on roads. There is no 'right' to depasture stock. There are clear rules as to cattle stops, gates and signage (see 9.3). The owner of stock has no ability to recover damages for loss. The relationship between the public, public authorities, and private graziers of roads is well defined.

An important point to note is that, in relation to roads, this Act defines 'occupier' as "the occupier of the land by which the road or portion thereof is bounded, i.e. the adjoining occupier" (s 34(1)(c)).

## 9.2 Fencing

At common law, an owner or occupier of land is under no duty to fence off their land from the adjoining land of a neighbour or from a road or highway. There is, however, a common law duty to erect or repair a fence where a person who is using the highway might otherwise be endangered by a nuisance on the land close to the highway. Again, there is no recognition of any 'right' to graze highways, only that there is a duty not to create nuisances for users of highways as a result of leaving road boundaries unfenced.

*Local Government Act 1974*

The LGA 1974 extends beyond 'endangerment' under common law, to instances of public inconvenience.

> "Whenever the public safety or convenience renders it expedient, require the owner or occupier of any land not separated from a road by a sufficient fence to enclose the same by a fence to the satisfaction of the council" (s 353(c) LGA 1974)

*Fencing Act 1978*

The Fencing Act 1978 provides (section 9) for adjoining occupiers to share the cost of fencing their common boundaries. "...[U]nder this Act, the occupiers of adjoining lands not divided by an adequate fence are liable to contribute in equal proportions to work on a fence". However, section 3 expressly excludes application of the Fencing Act to roads. Councils are not required to contribute to fencing costs if an adjoining owner wishes to fence their boundary with a road.

The Courts have considered the question as to who are 'occupiers' for the purpose of contributing towards fence construction and maintenance if only one boundary of a road is fenced. *Rhodes v. Beckett* determined that, when one proprietor attempted to establish that another proprietor on the other side of an unformed road was an 'occupier' of the road and so liable to contribute to fencing costs, the other had no liability as he could not be an occupier for the purposes of the Fencing Act.

However, if a person takes advantage of fencing along the road boundary of an adjoining occupier's land, there is provision to recover a portion of fencing value and repairs (s 18). This is by deeming (by way of creating a legal fiction) that a person is an occupier for this purpose alone. Section 18 does not recognise any person as having entitlement to use a road for private purposes, only that they may take advantage of another's fenced road boundary.

> Section 18 Fencing Act 1978
> **"Person taking advantage of fence**
> (1) In any case where there is a fence along the boundary between any land and a road, if a person (other than the owner or *occupier* or some other person lawfully in possession of *that* land) adopts or takes advantage of any means by which the fence is rendered of beneficial use to himself, or avails himself of the fence, the occupier of that land may serve on that other person a notice in writing requiring him to pay interest at the rate of 10 percent per annum on half the value of the fence at the time of the serving of the notice; and, so long as that other person continues to take advantage or avail himself of the fence, he shall be liable to pay that interest to the giver of the notice or his successor in title, and he shall also be liable for repairs to the fence as if he were an adjoining occupier".

In regard to fences as encroachments (i.e. not on boundaries), section 357 LGA 1974 makes it an offence to erect any fence without Council authorisation.

## 9.3 Gates and cattle stops

*Local Government Act 1974*

Section 344 of the Local Government Act 1974 authorises local authorities to permit the erection of an approved swing gate with 'public road' signs affixed, a cattle stop, or both, and fencing to either side of a road, where it is not practicable or reasonable to fence the boundary of a road. The local authority may not place conditions or restrictions on or confer rights or obligations on the permit holder.

If a permit to have a gate so as to avoid boundary fencing is granted, then the permit holder can control the resting position of the gate at any time. Persons who are enjoying their right to pass and repass on the public road must accept that limitation and honour the integrity of the permit (*Hanning v. Cooke).*

If a gate or cattle stop is considered redundant or an inconvenience, either by the council or by a petition supported by 20 or more local residents, the council may require their removal.

There is an on-going obligation on the permit holder to maintain permitted fences, gates and cattle stops to the council's satisfaction.

These provisions are an indulgence granted to owners of land adjoining a public road to avoid the obligation they otherwise may have to fence the roadway. Such indulgence does not create any form of 'right of user' over a road, or 'occupation'.

## 9.4 Noxious plants

*Biosecurity Act 1993*

The Biosecurity Act 1993 repealed the Noxious Plants Act 1978. Comparable provisions for control of 'pest plant organisms' under section 6 BA 1993 were enacted, whereby land may include all or parts of roads, and occupiers of land adjoining roads may be required to control or destroy pests, including weeds on roads.

No rights are created over roads, only obligations for adjoining occupiers. Obligations are not automatic; they depend on the express provisions of Regional Pest Management Strategies. Different rules may apply over the berms of formed roads, and over unformed roads.

## 9.5 Overhanging and encroaching vegetation

The common law, and provisions of the LGA 1974, reinforce the principle that roads are public highways, not private domains. Adjoining occupiers can be ordered to remove any vegetative encroachments on or over roads. These are liabilities additional to those of the Biosecurity Act 1993.

*Local Government Act 1974*

> Section 355 Local Government Act 1974
> **"Council may require removal of overhanging trees, etc**
> (1) The council may, by notice in writing under the hand of the Chairman or the principal administrative officer, require the owner of any land *abutting upon* any road within the district to do any of the following acts:
>
> (a) To remove, lower, or trim to the satisfaction of the council any tree or hedge overhanging or overshadowing the road in cases where, in the opinion of the council, the removal, lowering, or trimming is necessary in order to prevent injury to the road or obstruction to the traffic thereon or to any channel, ditch, or drain appertaining thereto:
>
> (b) To cut down or grub up, as the council directs, and remove all obstructions to traffic or drainage arising from the growth of plants or the spreading of roots upon or under the road up to the middle line thereof along the whole frontage of the land occupied or owned by him:
>
> (c) To remove, lower, or trim to the satisfaction of the council any tree or hedge, or to lower any fence or wall, if in the opinion of the council the tree, hedge, fence, or wall is likely, by reason of its obstructing the view, to cause danger to the traffic on that or any other road".

In *Bremner v Dunn* the Court held that the owner or occupier of land fronting a road could be ordered...to cut down or grub up and remove any obstruction to traffic or drainage arising from the growth of plants up to the middle line of a road. There was no limitation or qualification of the liability. It was an absolute obligation imposed upon an occupier or owner. Nothing was said as to the origin of the nuisance (e.g., plants spreading from an adjoining occupier's land or from a road fronting an occupier's land) for which the abatement was ordered.

## 9.6 Obstructions

The Courts have strenuously upheld public rights of passage in the face of encroachments—both unauthorised and Council-authorised—that constitute a nuisance. Many farming-related activities encroach on to roads; fencing and other structures can constitute actionable nuisances. The resulting case law is directly applicable to unformed roads. It has been held in a succession of leading cases interpreting the provisions of the LGA 1974:

*Queen v Mayor, Councillors, and Citizens of Wellington,* Court of Appeal Wellington. 1896

> "*Re* s357 Local Government Act 1974 - An obstruction by or with the authority of a council is lawful unless it is a public nuisance or interferes with individual rights. Whether a structure is a public nuisance, interfering unduly with the reasonable use of the street under the circumstances, is a question of fact".

*Queen v Mayor, Councillors, and Citizens of Wellington,* Court of Appeal Wellington. 1896

> "*Re* s357 Local Government Act 1974 - Where a council authorises private work to be constructed on a road and that work subsequently becomes a nuisance, the council will be liable if it permits the work to remain on the road or otherwise fails to abate the nuisance if the council has knowledge of the existence of the nuisance".

*Moore v MacMillan* [1977] 2 NZLR 81

> "*Re* s341 Local Government Act 1974 - A road is incapable of occupation to the exclusion of the right of every member of the public to assert their right to pass and repass without hindrance over every part of it. (cf. *Mayor of Christchurch v Shah* (1902) 21 NZLR 578).
>
> *Re* s341 Local Government Act 1974 - A person who erects cattle-yards on a road cannot maintain an action in trespass against a person who demolishes part of the yards".
>
> The Court held that this was analogous to the principle enunciated in *Hill v Tupper:* the law did not recognise a personal licence as creating any interest in land sufficient to found an action for trespass; likewise the law did not recognise the "right" of any person to occupy a road to the exclusion of the public.

*Re New Plymouth District Council* (1997) 2 NZED 699 [Road stopping]

> "Olsen Street [unformed]... still has the status of public road, even though the public have in practice been prevented from using it as such because it is fenced off and used as part of the Selbys' property... While it remains a public road they [the objecting neighbours] have a right at law to exercise access over it... The New Plymouth District Council is directed to carry out its duty as the road controlling authority to ensure that any obstacles to public use of the eastern end of Olsen Street as public road are removed".

Hayes's contention is that unformed roads differ from formed roads in having a 'special character', being "generally in the occupation of adjoining owners...creating a series of special needs not catered for in existing law" (Hayes, 2007a:46).

He argues that "the existing statutory powers of councils to create bylaws, not surprisingly, are clearly more applicable to roads which are formed and in use". Giving weight to this view, he subjects existing powers to control the use of unformed roads to scant assessment (Hayes, 2007a:46). It is true that the full body of statutory authority for bylaws applies more to formed roads, because there is greatest need for day-to-day regulation of vehicle use. But contrary to Hayes's inference, existing statutory authority for bylaws, and some bylaws, are applicable to unformed roads.

Hayes observes that "there may be situations where councils should provide bylaws to protect the interests of legitimate users of unformed roads, as well as those of adjoining owners" (Hayes, 2007a:46).

**Clearly there is a need for councils to control the use of roads, as public highways. This is the purpose for which they are vested in Councils. The vesting is not to condone or foster private ancillary purposes, such as implicit in the proposition that adjoining owners are or may be 'occupiers' of roads.**

**Preserving the public right of passage and frontagers' private right of access to and from their properties are the full, legitimate and only existing lawful purposes to be served.** Any other uses, must remain conditional on the preservation of public passage and frontager access. Common and statutory law is supportive of this and the Courts have been strident in upholding these principles.

Limiting his discussion of bylaws to Section 72 of the Transport Act 1962, and Section 146 of the Local Government Act 2002, Hayes asserts that further bylaw-making powers are necessary for unformed roads. To determine whether or not the law is deficient in this regard requires a broader review, particularly of existing statutory and bylaw provision.

## 10.1 Common law relating to nuisance

> "Nuisance may be defined, with reference to highways, as any wrongful act or omission upon or near a highway, whereby the public are prevented from freely, safely, and conveniently passing along the highway...Persons who are entitled to use the highway for purposes of passage may become wrongdoers by abusing their right to the inconvenience or hindrance either of other passengers or of adjoining owners". Pratt and Mackenzie, 1923:125

Pratt and Mackenzie identifies *'Excessive and Unreasonable User'* by members of the public which creates injury to the private right of access to the highway as a category of nuisance to which there are legal remedies. These include indictment, abatement, and damages (Pratt and Mackenzie, 1923:155). Damage to any road, for instance by inappropriate vehicle use, is one kind of nuisance.

Remedies to nuisance are open to members of the public, adjoining owners, and local authorities. In addition there are many applicable statutory and bylaw powers vested in local authorities:

## 10.2 General powers of councils in respect of roads

Part 21 of the Local Government Act 1974 (s 315 to s 361) provides for the administration and management of roads vested in the ownership of territorial local authorities. Part 21 remains the principal statutory provision for roads despite the revocation of many other Parts of the LGA 1974 by the Local Government Act 2002.

*Local Government Act 1974*

> Section 319
> **"General powers of councils in respect of roads**
> The council shall have power in respect of roads to do the following things:
>
> (a) To construct, upgrade, and repair all roads with such materials and in such manner as the council thinks fit:
> ...

(c) To lay out new roads:
(d) To divert or alter the course of any road:
(e) To increase or diminish the width of any road subject to and in accordance with the provisions of the district plan, if any, and to this Act and any other Act:
(f) To determine what part of a road shall be a carriageway, and what part a footpath or cycle track only:
(g) To alter the level of any road or any part of any road:
(h) To stop or close any road or part thereof in the manner and upon the conditions set out in section 342 and Schedule 10 to this Act:
(i) To make and use a temporary road upon any unoccupied land while any road adjacent thereto is being constructed or repaired:
(j) To name and to alter the name of any road and to place on any building or erection on or abutting on any road a plate bearing the name of the road:
(k) To sell the surplus spoil of roads:
(l) For the purpose of providing access from one road to another, or from one part of a road to another part of the same road, to construct on any road, or on land adjacent to any road, elevators, moving platforms, machinery, and overhead bridges for passengers or other traffic, and such subways, tunnels, shafts, and approaches as are required in connection therewith".

General powers of this sort are applicable to any road, with power to undertake (or not undertake) works anywhere as councils see fit. There is nothing peculiarly limiting councils' management of unformed roads. 'Laying out' of new roads, with or without formation, is envisaged by para (c).

These general powers are supplemented by specific powers:

Section 332 authorises councils to form public cycle tracks on any road, and may make bylaws under section 684 of the LGA 1974 regulating and controlling their use.

Section 334 authorises the provision of facilities on, over, or under roads for the safety, health, or convenience of the public. Such facilities could be for the benefit of recreational users.

As noted earlier, section 344 authorises gates, cattle stops, and related fencing across roads, with attendant sign posting as 'public road'.

Section 357 makes it an offence, amongst other matters, to do or cause "any act whatsoever by which any damage is caused to a road or any work or thing in, on, or under the same". This creates liability for anyone who damages a road, including an unformed road, for instance from inappropriate 4WD use. Fines "not exceeding $1,000 and, where the offence is a continuing one, to a further fine not exceeding $50 for every day on which the offence has continued" are provided for. Such offence provisions can be supplemented by bylaws.

Clause 13 of the Tenth Schedule permits the temporary prohibition of motor vehicle traffic where:

> "it appears to the council that owing to climatic conditions the continued use of any road in a rural area ... not being a road generally used by motor vehicles for business or commercial purposes or for the purpose of any public work, may cause damage to the road, the council may by resolution prohibit, either conditionally or absolutely, the use of that road by motor vehicles or by any specified class of motor vehicle for such period as the council considers necessary".

Under clause 16 no person shall "use a motor vehicle, or permit a motor vehicle to be used, on any road where its use has for the time being been prohibited by a resolution under clause 13 of this Schedule".

The above clauses are designed to prevent damage and are particularly applicable to poorly surfaced or unformed roads.

## 10.3 Bylaws

Under the Local Government Acts 1974, 2002, and Transport Act 1962, there is a statutory framework for making bylaws. Many of the provisions are applicable to unformed roads.

*Local Government Act 1974*

**The bylaw provisions of the Local Government Act 1974 are omitted from RLAIATUR.**

The range of bylaws permitted by s 684 "concerning roads...and the use thereof" is unlimited.

**"Section 684. Subject-matter of bylaws**

(1) Without limiting the power to make bylaws conferred on the council by any other provision of this Act or by any other Act, the council may from time to time make such bylaws as it thinks fit for all or any of the following purposes:

Roads

(13) Concerning roads and cycle tracks and the use thereof, and the construction of anything upon, over, or under a road or cycle track:

(17) Requiring any allotment in such parts of the district as are specified in the bylaws to be fenced along its line of frontage to any road, and to be kept clear of noxious plants:

(18) Prohibiting the cutting of grass for seed on roads or on any specified roads without the previous consent in writing of the council, either at all times or during any specified part of the year".

The Dunedin Consolidated Bylaw 1991: Part 11 Roading, illustrates the application of section 684 LGA 1974. It is applicable to all roads, with many provisions applicable to unformed roads.

"11.2 **Things in Roads -**

(1) No person shall without the consent of the Council or in accordance with the provisions of this Bylaw place or leave anything on any road other than a vehicle lawfully parked.

(2) Without limiting the generality of 11.2 (1) no person shall:

(e) Erect any scaffolding, fence or structure of any kind on or over any road; or

(g) Erect or install or cause to be erected or installed any gates or doors capable of being swung over or across any roads.

11.3 **Council may Require Things to be Removed** - Where any thing is on the road contrary to the provisions of 11.2 the Council may serve notice on the person who left the thing on the road or any other person who has any interest in or control over the thing requiring that the thing be removed within the period stated in the notice.

11.4 **Council may Allow Things in Roads**

(1) - The Council may grant to any person on such terms as it thinks fit permission for a specified thing or things to occupy a place or places in a road.

(2) The Council may in granting permission under 11.4 (1) impose conditions on the grant of permission in relation to the health, safety and convenience of users of the road and for the protection for the road and for another relevant matter. The Council may charge such fee as it may fix in respect of the grant of permission for the thing to occupy roads.

(3) If a thing is left in the road in breach of conditions imposed pursuant to 11.4 (2) or the fee payable under the clause has not been paid the Council may require the thing to be removed pursuant to 11.3.

11.5 **Activities that Damage Roads**

(1) No person shall undertake any activity that causes or may cause damage to any road.

(2) Without limiting the generality 11.5 (1) no person shall:

(c) Use any vehicle whose wheels or tracks causes or may cause damage to the surface or any part of any road.

(d) Drag or trail anything whether on a sledge or skids or otherwise so as to damage any road.

11.8 **Fences**

(1) No barbed wire may be used in the construction of any fence within one metre of any road except at a height of not less than two metres above ground level or in any case where the Council is satisfied that the fence has been designed and constructed in a way that prevents any likelihood of injury to persons or damage to clothing through accidental contact with the barbed wire.

This Clause shall not apply to any area zoned for rural purposes under the Council's District Plan except where the barbed wire is on a fence abutting a public footpath or a recreation reserve.

(2) No person shall construct or allow to remain on any property of which they are the owner or occupier:

(a) Any fence which is in breach of 11.8 (1); or

(b) Any fence which by reason of its design or state of repair is or may be a hazard for users of any road".

*Local Government Act 2002*

Section 145 of the Local Government Act 2002 provides general powers to make bylaws for one or more of the following purposes:

> "(a) protecting the public from nuisance:
> (b) protecting, promoting, and maintaining public health and safety:
> (c) minimising the potential for offensive behaviour in public places".

These powers apply over all public places. Nuisances can be regulated, whether they be obstructions or activities by public or private road users. In view of the specific powers for control of roads under s 684 LGA 1974 use of these would appear more appropriate.

Section 146 provides for specific bylaws.

On page 47 of RLAIATUR, Hayes writes:

> "Section 146 of the Local Government Act 2002 provides for specific powers of territorial authorities to make bylaws. Paragraph (b) provides for bylaws for the purpose:
> (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:
> ...
> (v) reserves, recreation grounds, or other land under the control of the territorial authority:
>
> For a bylaw to apply to unformed roads, such roads would have to come within the category of "other land" in subparagraph (v). 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, it would appear that any power to make bylaws should be a prescribed power rather than a general power ... the general power to make bylaws (ss 146 Local Government Act 2002) may be inadequate for the purpose (Hayes, 2007a:47)."

If Hayes had reviewed the prescribed powers for roads in s 684 LGA 1974 his focus on s 146 LGA 2002 would have been unnecessary. It is apparent that Hayes's 'purpose' is to accommodate private 'occupiers'. If not, there would be no need for further powers as he suggests. Additional powers would only be necessary to override "the high degree of protection provided by the courts, and the unique public access unformed roads provide to the outdoors".

*Transport Act 1962*

The Transport Act 1962 contains powers to make the following bylaws applicable to unformed roads.

> **"Section 72. Bylaws as to the use of roads**
> (1) Subject ... to the provisions of this Act or of any other enactment in respect of any of the matters referred to in this subsection, any Minister of the Crown in respect of any roads under his control, or any local authority in respect of any roads under its control, may from time to time make bylaws for any of the following purposes:
> (d) Prescribing the routes by which and the times at which horses, cattle, sheep, pigs, or other animals, or specified classes of vehicles may pass over any such roads; and prohibiting the driving of loose horses, cattle, sheep, pigs, or other animals along any such road, otherwise than at the times and by the routes so prescribed, except with the permission of the said Minister or of the local authority, as the case may be, and on such conditions as the said Minister or the local authority, as the case may be, thinks fit:
> (dd) Prohibiting, either absolutely or conditionally, the driving of horses, cattle, sheep, or pigs along any road, and requiring that no horses, cattle, sheep, or pigs shall be taken upon or enter any road unless they are confined within a motor vehicle:
> (f) Prohibiting any specified class of heavy traffic that has caused or is likely to cause serious damage to any road unless the cost of reinstating or strengthening the road, as estimated by the said Minister or the local authority, as the case may be, is previously paid:
> (i) Prohibiting or restricting absolutely or conditionally any specified class of traffic (whether heavy traffic or not), or any specified motor vehicle or class of motor vehicle which by reason of its size

or nature or the nature of the goods carried is unsuitable for use on any road or roads specified in the bylaw:

(1) Prescribing fines, not exceeding $500, for the breach of any bylaw made under this section.

(2) Any bylaws made under this section may apply generally to all roads under the care, control, or management of the Minister or local authority making the bylaws, or to any specified road, or to any specified part or parts thereof, and may apply to all vehicles or traffic or to any parts thereof, and may apply to all vehicles or traffic or to any specified class or classes of vehicles or traffic, and may operate at any time or at any specified time or times".

Hayes believes that:

> **"Section 72 of the Transport Act 1962**, which extensively authorises roading bylaws, seems largely inapt for passing bylaws affecting unformed roads. Sub-clauses (a) to (l) of subsection (1) are very specific and bylaws directed at unformed roads do not appear to pass the "reasonable" test which all bylaws must meet. For example, when an unformed road is physically incorporated within a farmer's landholding, a bylaw in terms of para (dd) which would prohibit either absolutely or conditionally "the driving of horses, cattle, sheep or pigs along any road" would not be "reasonable". Each of the other sub-paragraphs in some degree with the exception of sub-paragraph (i) would similarly create unreasonable bylaws for unformed roads" (Hayes, 2007a:46).

In all respects, section 72 bylaws meet the test of being specific rather than general. Hayes's comment is predicated on a desire to be 'reasonable' to farmers who have unlawfully "incorporated" roads into their landholdings.

Section 72 provides the most specific bylaws for dealing with vehicle use of roads liable to damage. It is difficult to envisage a council applying bylaw controls under s 72(1)(dd) over the driving of stock on unformed roads, as there would be few if any vehicles for conflicts with stock to arise.

The application of section 72 of the Transport Act is illustrated by a 2004 Dunedin City Council bylaw over a specified reach of an unformed road that was being badly eroded by vehicle use. Such control is consistent with the nature of public highways. Hayes's proposals are not. If these provisions were 'inept' as Hayes states, it is unlikely that the DCC would have utalised them and they would not remain operative (see Appendix 5). The DCC has subsequently extended such controls over four other roads.

*Road management powers reasonable and adequate*

The existing bylaw provisions in the three Acts are reasonable, given "the primary purpose of a street [road] is passage" (*Fuller v MacLeod* [1981]: Somers J at 414).

The powers outlined above are not obligatory. Individual councils may enact specific bylaws, recognising the circumstances of particular roads or periods of time. They are not obliged to prohibit stock on roads but this may be necessary in cases where there is regular vehicle traffic. For almost all unformed roads it will be neither necessary nor practical.

**Section 34 of the Impounding Act and section 344 LGA 1974 (gates, cattle-stops and fencing) are a means of regulating stock grazing in the absence of applicable bylaws.**

If disturbance of stock from public passage becomes a problem, the owner(s) can elect to fence their boundaries. They would be obliged to do so if stock become a hazard for road users.

The public can continue to tolerate stock on unformed and unfenced roads, as long as the owners of the stock do not obstruct or endanger the public in their lawful passage. This covenant or compact has persisted for 157 years in New Zealand and can continue indefinitely.

**The considerable body of common law, statute and bylaw, makes it clear that the interests of councils as owners of roads on behalf of the public, and the interests of road users, are well protected. The central difficulty presented by RLAIATUR is Hayes's implicit desire to subordinate public rights to private interest.**

## 11 Realignment of unformed roads

The occasional need to realign unformed roads is a key consideration in their use for recreation. This may arise in situations where unformed roads do not serve public needs but public access to recreation areas or waters in the vicinity is desired. In effect, roads in this position can become bargaining points for negotiating alternative routes.

There may be strong incentives for adjoining owners to agree to exchanges of land if an existing road alignment is inconvenient to them, particularly if they have illegal encroachments they do not wish to remove. Roads for recreational use, especially walking, generally do not need to be 20 metres wide, so there may be additional incentives to agree to stopping of standard 20 m unformed roads and replacement by narrower alternatives.

Independent of realignment, it is desirable to dedicate new roads from private and Crown land for public recreation purposes. These could be confined to footways, cycle-ways, bridle-paths, or combinations of these. Contrary to popular myth, there is no legal requirement to dedicate (and form) new public roads for motor vehicle use.

Irrespective of public recreation needs there are private access rights of frontagers that must be considered during road stopping. This is a matter overlooked by Hayes and the Access Panel. Public roads serve both public passage and private access.

Hayes considers that:

> **"Exchange for other forms of public access**
> There are formidable if not insurmountable difficulties in exchanging unformed road for a new unformed road in the same vicinity. The whole network of unformed roads is predicated on the laying out of unformed roads on Crown land whether pegged on the ground or laid out as paper roads. It is not possible to lay out unformed roads in a state of nature over private land; **since** the enactment of the Public Works Amendment Act 1900 it has been unlawful for the owner to do so when land is subdivided. The Public Works Amendment Act required all new roads to either be formed (in rural areas) or formed and metalled (in boroughs and in proximity to boroughs). Over the last 100 years standards of formation have been progressively increased. Private owners cannot dedicate road without the acceptance of the council. Councils do not accept the dedication of roads which are unformed." (Hayes, 2007a:49).

Such advice presumably influenced the Access Panel to the view that "it is not...possible to create new "unformed legal roads"" (WACP, 2007:33). As a statement of fact this is wrong (see + below).

Proceeding on the above erroneous assumptions Hayes recommends "an alternative form of public access", with "something less in terms of public rights" than offered by public roads (Hayes, 2007a:51), (see 12).

Hayes justifies the replacement of roads with a "something less" alternative by referring to Section 20 of the Public Works Amendment Act 1900, as if it, or consequent equivalent provisions, were still operative. Unfortunately for his argument section 20 was repealed long ago and no generally applicable equivalent legislation is in force. Hence, there is no foundation for his contention that "since the enactment of the Public Works Amendment Act 1900, it has been unlawful for the owner to [to lay out unformed roads] when land is subdivided."

The only statutory prohibition on councils acquiring unformed roads is when private roads or rights of way (ROW) are declared to be public roads (section 349 LGA 1974). It is likely that most negotiated alternative public access routes would be over private or Crown land in the absence of existing rights-of-way. If ROW exist on a desired route, Councils can accept these as public road "if properly formed". The quality of formation is a judgement for councils to make. Their assessment would be influenced by the nature of the traffic anticipated. In any event a light formation may be necessary or desirable for foot traffic.

(+) Subdivision of land is governed by Part 10 of the RMA 1991 not Part 20 of the LGA 1974 as Hayes states (Hayes, 2007a:50). Part 20 was repealed by the RMA (Eighth Schedule). There is nothing in Part 10 of the RMA specifying any requirement for road formation. Standards for road construction, if any, are relevant only to matters of gradient, as per section 329 LGA 1974:

> **"Road gradients**
> (1) No road shall be laid out or constructed by the council, and no road or proposed road on any scheme plan shall be approved by the council, with a grade in any part of its length steeper than—
> (a) That fixed by any operative district plan for the district; or
> (b) Where there is no such district scheme or no such grade is specified in any such district scheme, that fixed by any bylaw or resolution of the council; or

(c) One metre in 8 metres, in any case where that grade is not fixed by any such district plan or by any bylaw or resolution of the council.

(2) In this section the term road does not include an access way".

Section 329 does not require construction of a road. It provides a minimum gradient of 1:8 for laying out (i.e., legal and survey action without formation) of a road in the absence of a district plan or any bylaw or resolution of council. This section was clearly intended for vehicle provision.

It is not an 'insurmountable problem' for councils to pass bylaws and resolutions permitting specific roads, or unformed roads in general, to be footways steeper than 1:8. In the absence of any such administrative action, a gradient of 1:8 would normally be very suitable for pedestrian use.

When a new unformed road is being negotiated from private land in exchange for an existing unformed road, gradient would no doubt be taken into account so that the new road was suitable for intended users.

In a recurrent pattern, Hayes does not separate law and policy. He states that "Councils do not accept the dedication of roads which are unformed (Hayes, 2007a:49) and, "new unformed roads are no longer laid out on Crown land (Hayes, 2007a:50). Such policies and practices, not being statutory strictures, are matters for local and central government to determine according to changing needs. If government decides on new unformed roads for walking purposes it can do so.

In regard to Crown land held under lease or licence, land can be resumed at any time for roads, subject to either rent reduction or compensation. There are no stipulations for formation (s 117 Land Act 1948).

**There are no significant statutory obstacles in the way of dedicating new unformed roads from private** [or Crown] **land, as claimed by Hayes, and accepted by the Access Panel** (WACP, 2007:33). It is largely a matter of discretion for local authorities. The main obstacle is perceived additional liability for road management. However almost all liabilities fall on adjoining occupiers (see 9), unless councils authorise nuisances, then they are liable—as they should be. Central government could overcome most difficulties by encouraging or directing local authorities to create pedestrian ways with the status of legal road and that they, and others, obey the law by not obstructing public passage.

Construction standards for roading vary between Councils, reflecting variations in the provisions of their district plans, roading policies and engineering standards. These are applied as conditions to resource consents as considered appropriate by the consent authority (s 108 RMA 1991).

## ***Bushey Park Road Stopping and Road Dedication***

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

Having considered the proposal for road stopping, the alternative access proposed, and the statutory requirements of the LGA 1974, the Environment Court agreed to the stopping subject to vesting of the new road in the Council (*Re Waitaki District Council*. C100/05, C074/06).

Contrary to the Access Panel's prediction that Court process is likely to be prejudiced by 'prior agreement' between parties to swaps of this kind (WACP, 2007:34), no such difficulty occurred. In the Bushey Park case, the Court made up its own mind. It was required to consider the district plan, among other matters, apart from any 'agreements' reached between parties (Cl 6, Tenth Schedule LGA 1974).

This case is an illustration of matters that the Access Panel was required to consider on a national scale when forming its advice to Government. Such matters should have been addressed more accurately in the advice Hayes provided to the Panel.

[* Mason was the negotiator on behalf of the objectors]

# 12 An alternative form of public access?

On the insupportable premise that it "is not possible to lay out unformed roads in a state of nature over private land" (Hayes, 2007a:49), Hayes offers an alternative—'access strips'.

*Access Strips*

Hayes recommends that "the territorial local authority negotiates an access strip (under section 237B Resource Management Act 1991) along another route" (Hayes, 2007a:50). Other than acknowledging that this would be "something less in terms of public rights" than over a public road (Hayes, 2007a:51), Hayes offers no further information about these rights nor does he state to what degree they would be "something less" than existing rights over roads.

Access strips are easements over private land, unlike publicly-owned roads with rights of passage held by and enforceable by the public. Public passage over access strips is granted by the landowner and the territorial authority as a result of private negotiations, with extensive powers of restriction and closure. Only the views of those with registered interests in the land are required to be considered. An access strip may be cancelled or varied at any time with no obligations to public process (see Appendix 6).

In the event of obstruction of access, local authorities can exercise discretion in their choice to uphold, what may be limited, public rights to use access strips. Unfortunately, most public authorities have a conspicuously poor track-record on such matters.

**Given the dire implications for public use, it is most disturbing that Hayes did not see fit to make clear the major distinctions between roads and access strips.**

*Road resumption*

Rather than using the LGA's procedures for public notification and objection to road stopping, in exchange for access strips Hayes envisages that the Minister of Lands resumes into Crown ownership unformed roads under s 323 of the Local Government Act 1974. This would become Crown land able to be disposed of to the adjoining owner (Hayes, 2007a:50).

The only protection offered for the public interest is:

> "Given that a road is being exchanged for something less in terms of public rights, there is a case for amending legislation which could make the terms of the easement conditional on the approval of the Minister of Lands [Information], and any surrender thereof subject to Ministerial approval" (Hayes, 2007a:51).

However, it won't be the Minister who will be making the decisions. His powers will most likely be delegated to officials of Land Information New Zealand (LINZ).

There is no cause for optimism here. LINZ has an dismaying record on public access provision. This has been demonstrated amply by their decisions on tenure review (most notably in the Ben Avon 'access-over-the-cliff' case (see www.recreationaccess.org.nz), and in their circumventing of marginal strip requirements when disposing of Crown land (e.g., on banks of the Manuherikia River, Otago). How will the public interest be kept at the forefront of official consciousness when decisions to dispose of public roads are made in-camera?

*Road-stopping procedure essential*

It is essential that public road-stopping procedures apply on a case-by-case basis because both the interests of public passage and private access are served by public roads. The Environment Court has proved its ability to consider road-stopping applications and alternative access proposals. Unlike official and political decision-making that is not so open to public view and scrutiny, the Court is guided by legal principles and a large body of precedent evolving from case law.

If accepted as a tenable alternative to realigned/new unformed roads, the proposed access strips would be a major derogation of the public interest: private landowners would gain freehold ownership of stopped roads without having to provide equivalent alternative public access.

**Given the unique character of public rights over public roads, if public roads are stopped and disposed of in exchange for realigned access, equivalent public rights of passage should result. Exchange of like for like is imperative.**

## 13 Walkways over unformed roads

Hayes notes (Hayes, 2007a:45) that section 6 of the New Zealand Walkways Act 1990 contains "a curious provision which is inconsistent with the common law, the statutory law protecting the status of roads, and the rigorous protection the New Zealand courts have provided for the interests of the public".

Hayes continues—

> "An unformed road may be included in a walkway with the prior consent of the territorial local authority in which the road is vested.
>
> Before giving consent, the territorial local authority has to consult with every owner who has a frontage on or access to the unformed road. Those owners retain the right to use as a road the unformed legal road after it is incorporated in a walkway. However, the public are restricted to using the road as a walkway. The Minister of Conservation may specify any other conditions of use in the notice designating the unformed legal road as a walkway" (Hayes, 2007a:45).

*New Zealand Walkways Act 1990*

> **"6 Walkways over public land**
> (3) In every case where the land to which the recommendation relates includes unformed legal road the prior consent of the local authority shall be obtained, and the following provisions shall apply in relation to such consent:
> (a) The local authority shall consult with every owner of land having a legal frontage or access to the unformed legal road before giving its consent:
> (b) Every owner of such land shall retain the right to use the unformed legal road.
>
> (4) Where any consent under subsection (3) of this section is obtained subject to conditions as to the use of unformed legal road, the Minister shall specify in the notice the conditions under which it may be used".
>
> **"28 Closure of walkways**
> (1) Every controlling authority—
> (a) May close any walkway or part of a walkway under its control for reasons of safety or during emergencies, or for the purpose of maintenance or development work:
> (b) May close any such walkway or any part of such a walkway, at the request of the occupier of the adjacent land:
> (c) Shall close any such walkway or any part of such walkway established over private land in order to comply with any condition as to use to which the establishment of the walkway is subject—
> for such period as the controlling authority considers necessary or as may be necessary to comply with the condition as to use, as the case may be".

It appears that section 6, and consequent bylaw, offence and closure provisions (ss 9, 20, 21, 23, 26, 28) are the only direct statutory derogation of common law rights of passage over New Zealand's public roads. **They are peculiar provisions that have no regard for the law of highways, except for the interests of frontagers** (Cf. s 6(3)(b)). **The Walkways Act changes roads from public highways, open to all, to private rights of way.**

As a member of a district walkway committee (convened by the Department of Lands and Survey) before and after the passage of the Walkways Act 1975, this reviewer was unaware of any debate on this issue. At that time there was little or no public understanding of the nature of public highways and of what may be lost as a consequence of designating roads as walkways.

To this reviewer's knowledge, section 6, has not been used. However, it remains operative opening the possibility that adjoining landholders may invoke it to impose unlimited restrictions on public use of roads. **As these provisions have proved to be unwarranted, and remain potentially very damaging to the public interest, they should be repealed.**

To a large degree these particular provisions mirror the state of public consciousness at the time the first Walkways Act was passed 30 years ago. Widespread ignorance of public rights, their nature, and the implications of their loss condoned passage of that legislation.

The intent of the Walkways Act was good. The legislation received uncritical support. Is Hayes's and the Access Panel's erroneous advice on unformed roads going to lead to a repeat of history 30 years later?

## 14 Conclusions

*"The King's Highway is not to be used as a stable-yard."*

Lord Ellenborough, C.J. *in* Rex v. Cross (1812)

Although it adds significantly to the sum of public knowledge about roads in matters not impacting directly on public use, Hayes's dissertation is flawed in key areas concerning the public right of passage and the relationship between public and private interest. Hayes did not identify (and consequently did not take into account) key case and statute law, and legal principles directly related to The Law of Highways. Nor did he cite pertinent material that he did obtain—material that directly contradicts his assertions about road 'occupiers' and the entitlement of farmers to unspecified rights.

These are bewildering omissions. This critique found that the relevant laws and legal authorities are readily available, and they articulate explicitly the principle that public roads are 'public highways', not private domains.

*Roading Law As It Applies To Unformed Roads* misrepresents the essence of roads as public highways. If enacted by Parliament, Hayes's misrepresentation of public roads would create precedent for privatisation, the desire for which was evident in the user-pays and tolling policies of the last National Government (Williamson, 1998). Since Hayes acknowledges that the law always has been (and remains) the same for unformed and formed roads, his diminishing of public rights over unformed roads will likely lead to future Government assaults on the fundamental civil right to freedom of movement over roads in general.

The specific findings of this critique focus on the following key issues.

### 14.1 The nature and extent of public and private rights

Although stressing that the right of passage vests in each and every member of the public, and not in government, Hayes seriously understates the magnitude of that right.

Hayes omits reference to the public right of assertion of unhindered passage (including for recreation) and the principle that roads are incapable of occupation to the exclusion of the public.

Collectively, Hayes and Mason identify the following characteristics of the public right of passage and the private right of 'frontager' access:

- It is an absolute right to pass and repass without hindrance, exercisable by all subjects.
- The customary uses of roads extend beyond mere passage from one point to another. They include ancillary activities, including recreation, so long as these do not conflict with the passage of others to an unreasonable degree.
- The right of assertion, including removal of appreciable interferences (i.e. obstructions) and/or legal action against those creating or authorising such nuisances.
- A road is incapable of occupation to the exclusion of the public.
- Rights of vehicle use can be assumed unless dedication of a road is expressly confined to horses or foot. Use of vehicles cannot however cause nuisance by damaging the road surface.
- Territorial local authorities are obliged to see that the right of passage is preserved.
- These rights continue until such time as a road is stopped.
- Frontagers have rights of access between their properties and public roads, which are not absolute, and involve an accommodation of private rights with the rights of passage of the public.

In any discourse on public roads, it is necessary to understand both sets of rights (public passage and private access). Although Hayes acknowledges the existence of 'frontagers', he does not discuss the nature of their rights or their relationship to public rights. That relationship is articulated extensively in case law and legislation.

### 14.2 Farmers as 'occupiers' of roads

Hayes argues at length that informal, unsanctioned use of unformed roads by adjoining farmers gives rise to the existence of unspecified 'occupation' rights over those roads. His arguments are convoluted and confused.

Legal authorities and the full body of statute and common law refute suggestions of 'occupation' rights by anyone, with or without rights to exclude others. The Land Act 1948 rules out any form of special user-rights being acquired, informally or otherwise, over roads. Use of the term 'occupier' is totally repugnant—in any context—to the concept of public highways.

Hayes's recommendation that farming uses be accommodated through law change as a 'special need' requires him to dispense first with confounding arguments and precedents. He achieves this by omitting them from consideration. Whether his omissions are intentional or not, advice given accordingly to the Access Panel (and ultimately to Government) cannot be construed in any way as either full or fair, or in accord with best public-service practice. Given their grievous implications for public rights, these omissions are inexcusable.

Hayes should have directed his discourse to a full, balanced presentation of roading law. If that had been accomplished, then areas for possible policy and legislative change could have been identified in an open and transparent manner to the owners of the right of passage—the public—as well as to the Access Panel and Government.

## 14.3 Unformed road management and the public-private relationship

The Courts have strenuously upheld public rights of passage in the face of encroachments—both unauthorised and Council-authorised—which constitute a nuisance. Other forms of nuisance by public users or private encroachers are also actionable. Members of the public can create a nuisance if, for example through 'excessive and unreasonable user', they injure the private right of access to the highway. This too is a category of nuisance for which there are legal remedies.

Common law remedies for nuisance are available to members of the public, adjoining owners, and local authorities. In addition, there are many applicable statutory and bylaw powers vested in local authorities.

Many farming-related activities encroach on to roads; fencing and other structures can constitute actionable nuisances. However, unless there is an appreciable interference with others' rights to use roads, there is no basis for legal action. Encroachments of this sort and passive uses such as grazing may be tolerated as they have since time immemorial. This does not create any 'right of user' or 'occupation' over a road.

Relevant statutes and the Courts have made the nature of the relationship between public and private rights explicit. Their provisions and determinations contradict Hayes's fundamental premise that such relationship is undefined. They reinforce the fundamental legal principle that no one is entitled to rights of occupation, in whatever form, over roads. The 'accommodations' noted in 9 and 10 of this critique do not derogate from the common law. They are indulgences granted by local authorities acting as trustees for the public.

Hayes claims that the law is inadequate to allow provision for and management of farming as well as control of public use. This critique demonstrates that the law is quite adequate for management, for grazing and vehicle use in particular.

***Grazing***
Straying and wandering stock on roads may be impounded. However, as an exemption under section 34 of the Impoundment Act 1955, Councils may permit grazing on roads used infrequently by motor traffic if this does not constitute an inconvenience or danger to road users. Warning notices must be erected and maintained. Gates and fencing may also be authorised. If desired, section 34 has direct application to many unformed and unfenced roads. No 'right of user' or 'occupation' is created.

As long as adjoining farmers do not obstruct public passage or create other nuisances, their informal use of unformed roads may make use of the Impoundment Act unnecessary.

***Gates, cattle-stops, and fencing***
There is no obligation to fence a boundary with a road unless highway users are endangered by a nuisance on the adjoining land.

As an indulgence granted to owners of land adjoining a public road to avoid any obligation they otherwise may have to fence the boundaries of roadways, Councils may authorise the erection of gates, cattle-stops, and associated fencing across roads. Gates must have 'Public Road' notices.

***Weeds***
The law is clear: adjoining occupiers are liable for weed control on adjoining roads unless councils accept the responsibility. Liability for 'pest plant organisms' depends on the provisions of Regional Pest Management Strategies. Different rules may apply over the berms of formed roads, and over unformed roads.

***Road damage***
There is widespread dismay at the damage caused to unformed and poorly surfaced roads by recreational vehicles. Rapid expansion nationally in the number of four-wheeled drives has ominous implications for use of unformed roads. Many 4WD owners show little apparent concern for the environment or for other road users. 'Tread lightly' codes of practice have not moderated driver behaviour or attitudes discernibly.

An exponential increase in damage to many roads creates potential liabilities for local authorities and is a basis for their reluctance to encourage public use of unformed and other roads.

Powers to prevent damage to roads are already available to local authorities but only a few councils have exercised controls over unformed roads. Contrary to the views held by many vehicle users, the law does not recognise an *absolute* right of passage, no matter what damage is caused.

Both common law and statute are well equipped to deal with damage to roads and to prevent damage of any origin, including by vehicles.

***Existing powers adequate***
Hayes gives scant assessment of bylaws and the statutory licence to create these. The bylaw provisions of the Local Government Act 1974, being the primary bylaw provisions, are omitted from *Roading Law As It Applies To Unformed Roads.*

Local authorities have a portfolio of statutory and bylaw powers applicable over all roads under their control, with a range of substantial penalties for offences. No further powers are necessary or desirable.

Clearly, councils must control the use of roads as public highways—that after all is the sole purpose for which they are vested in Councils. The vesting is not intended to condone or foster private ancillary purposes such as those implicit in the proposition that adjoining owners are, or may be, 'occupiers' of roads.

The full, legitimate and only existing lawful objective served by the administration of public roads is to preserve the public right of passage and frontagers' private right of access to and from their properties.

A considerable body of common law, statute and bylaw makes it clear that the interests of councils and the interests of road users are well protected. The central difficulty presented in *Roading Law As It Applies To Unformed Roads* is Hayes's implicit desire to subordinate public interest to private interest.

## 14.4 Creating unformed roads

The occasional need to realign unformed roads is a key consideration in their use for recreation. This may arise in situations where public access to recreation areas or waters is not served by existing unformed roads in the vicinity. Under these circumstances, roads can become points on which alternative routes may be negotiated.

Hayes claims that there are formidable if not insurmountable difficulties to creating new realigned unformed roads. He implies that Councils can only accept formed roads. As a consequence of these erroneous propositions, the Access Panel concluded that it is not possible to create new 'unformed legal roads'.

Review of relevant law in this critique reveals that are no significant statutory obstacles in the way of dedicating new unformed roads from private or Crown land. The Resource Management Act 1991 repealed and replaced the provisions in the Local Government Act 1974 on which Hayes relies to support his position on unformed roads.

There is nothing in the RMA specifying any requirement for road formation. Standards of construction, if any, are matters for local government to determine. If Government decides on new or substitute roads for public walking purposes, it can do so readily. Roads can be dedicated as carriageways for cycles, bridle paths or footpaths. There is no necessity for creating formations suitable for vehicle use.

It is of paramount importance that there is 'road for a road' swap in any deals with private landowners. There are no comparable rights of public passage under any other legal mechanism in New Zealand.

## 14.5 'Access strips'

Following his erroneous advice that it is not possible to create new (realigned) unformed roads, Hayes advocates resumption of existing roads (without public process), disposal, and replacement by alternatives on new alignments over private land. His alternatives are 'access strips'.

Access strips are easements over private land. They do not confer the same enforceable rights of passage which apply over public roads held by the public. The discretion to restrict or close access on access strips is extensive. Strips may be cancelled or varied at any time with no obligations to public notification and no provisions for public appeal.

Hayes did not see fit to make these distinctions between roads and access strips explicit. Instead, he confined himself to observing that access strips conferred "something less in terms of public rights". Calculated or otherwise, this obfuscation is disturbing—its implications for public use are dire.

There is no justification for replacing unformed roads with any form of easement over private land, and certainly no justification based on the flawed reasoning Hayes presses into service for his 'access-strips' proposal.

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*"Experience teaches us to be most on guard when the government's purpose is benevolent. The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning but without understanding."*

Justice Louis Brandeis, of the United States Supreme Court
Attributed to: *Omstead v United States*. 1928.

# 15 Recommendations

*Recommendations are confined to those issues addressed by this critique and do not extend to all matters concerning roads raised by the Walking Access Consultation Panel.*

1. Government should address the issue of obstruction of all roads, formed and unformed.

2. Government should remind territorial local authorities that roads under their control are held in trust on behalf of the public and are to be managed in accordance with statutory and common law.

3. Public rights of passage and frontager rights of access must remain subject to the determinations of the Courts, with no codification of the law concerning public passage and private access.

4. No statutory provisions must be made which have the effect of extending private rights over roads.

5. Road-stopping procedures involving rights of objection and appeal must continue to apply.

6. The Minister of Land Information must not exercise his powers of resumption over unformed roads to achieve realignment of recreational access, whether or not this is at the request of Councils.

7. Realignment of access must be by negotiation and road-stopping procedures, with alternative access retaining the status of legal road and dedicated as pathway, bridle-track, cycle-way or vehicle carriageway as appropriate.

8. The New Zealand Walkways Act 1990 must be amended to prohibit walkways over unformed legal roads.

9. Government must advise local authorities that:

- grazing of unformed roads should be regulated, if necessary, by section 34 of the Impoundment Act 1955, with associated fencing and gates bound by section 344 Local Government Act 1974;
- existing bylaw provisions of the Local Government Act 1974 and Transport Act 1962 should be used more extensively to protect unformed and poorly surfaced roads from vehicle damage;
- the requirement for 'Public Road' signs on gates across public roads should be adhered to.

# 16 References


**Publications**

Adams, E. C., 1954. Garrow's Real Property in New Zealand. Fourth Edition. Butterworth & Co. (Australia) Ltd, Wellington.

Hayes, B. E., 2007a. *Roading Law As it Applies to Unformed Roads* (RLAIATUR). Ministry of Agriculture and Forestry, Wellington, New Zealand

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

Hayes, B. E., 2007c. *Roading Law As it Applies to Unformed Roads*. [Response to B. J. Mason, 27 April 2007].

Mason, B. J., 1991. *Public Roads: A guide to rights of access to the countryside.* Public Lands Coalition, New Zealand [available from www.recreationaccess.org.nz]

Mason, B. J., 1992a. Public Access to Land. In: *Handbook of Environmental Law*, Royal Forest and Bird Protection Society of New Zealand, Wellington, New Zealand, pp 126-138

Mason, B. J., 1992b. *Proof of dedication as public road.* PANZ. [Available from www.recreationaccess.org.nz]

Mason, B. J., 1992c, 2002. *Public Roads. A Users' Guide.* PANZ. [Available from www.recreationaccess.org.nz]

Mason, B. J., 1998. *Public Roads: Rights of way for all.* PANZ Monograph Series Number 10. [available from www.recreationaccess.org.nz].

Mason, B. J., 2003. *Improving public access to the outdoors: A strategy for implementing Government's election policies.* Public Access New Zealand [available from www.recreationaccess.org.nz]

Mason, B. J., 2007a. 'Criticism of RLAIATUR' by Hayes, 2007a. Recreation Access New Zealand [available from www.recreationaccess.org.nz, 5 April 2007

Mason, B. J., 2007b. Development of New Zealand case law related to the public right of passage over roads. Recreation Access New Zealand (see Appendix 2).

New Zealand Labour Party. 2002. Conservation [incl. Outdoor Recreation] Policy.

Pratt and Mackenzie's Law of Highways. 1923. Seventeenth Edition. (Scholefield. J., Cockburn, A. W.). Butterworth & Co. London.

Public Access New Zealand, 2007. www.publicaccessnewzealand.com, 5 July 2007.

Short. W. S. 1907. A Treatise Upon the Law of Roads, Bridges, and Streets in New Zealand . Timaru Post Newspaper Co Limited.

State Services Commission, 2005. ISBN 0-478-24481-9. New Zealand Public Service Code of Conduct.

Walking Access Consultation Panel. 2006. Outdoor Walking Access: Consultation Document. Ministry of Agriculture and Forestry, Wellington.

Walking Access Consultation Panel. 2007. Outdoor Walking Access: Report to the Minister for Rural Affairs. Ministry of Agriculture and Forestry, Wellington.

Williamson, Maurice. 1998. Better Transport Better Roads. Ministry of Transport, Wellington.

**Case Law**

Brandeis, L., (1928) Omstead v. United States. Referred to at <http://en.wikipedia.org/wiki/Louis_Brandeis>

Bremner v. Dunn (1902) 22 NZLR 22

Frecklingham v. Wellington City Council [1988]. 1 NZLR 72.

Fuller v. MacLeod (1981) NZLR 390 CA

Hanning v. Cooke 18/8/88, Robertson J, HC Dunedin AP117/87.

Hill v. Tupper (1863) 2 H & C 121; 159 ER 51.

Lower Hutt City v. AG ex Moulder [1977] 1 NZLR 184

Mayor of Christchurch v Shah (1902) 21 NZLR 578.

Moore v. MacMillan [1977] 2 NZLR 81

Paprzik v. Tauranga District Council [1992]. 3 NZLR 176; (1991) 1 NZRMA 73

Queen v. Mayor, Councillors, and Citizens of Wellington (1896) 15 NZLR 72 CA.

*Re* New Plymouth District Council (1997) 2 NZED 699

*Re* Ruapehu District Council 2002. Environment Court. Decision A083/02.

*Re* Waitaki District Council. 2005, 2006. Environment Court. Decisions C100/05, C074/06.

Rex v. Cross (1812), 3 Camp. 224.

Rhodes v. Beckett [1910] 29 NZLR 361.

Upper Hutt City Council v. Akatarawa Recreational Access Committee. 2003. Decision W21/2003.

**Statutes**

Biosecurity Act 1993

Fencing Act 1978

Impounding Act 1955

Land Act 1948

Local Government Act 1974

Local Government Act 2002

New Zealand Walkways Act 1975 (repealed)

New Zealand Walkways Act 1990

Noxious Plants Act 1978 (repealed)

Public Bodies Leases Act 1969

Public Works Act 1981

Public Works Amendment Act 1900 (repealed)

Resource Management Act 1991

Transport Act 1962

Trespass Act 1980

**Bylaws**

Dunedin City Council Bylaw 2004. Restriction of Traffic on Part of Halfway Bush Road and Friends Hill Road.

Dunedin Consolidated Bylaw 1991

# Improving public access to the outdoors

*A strategy for implementing Government's election policies*

Public Access New Zealand

# Contents




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# Improving public access to the outdoors

*A strategy for implementing Government's election policies*

*Version 1 – 19 June 2003*

## A. Unfulfilled potential

New Zealand has had Labour-led governments, this term and last. Labour's 1999 election policies for outdoor recreation were assessed by Public Access New Zealand to be very good, with a comprehensive programme which addressed many pressing outdoor issues. What Labour offered was considerably better than any other party. It is reasonable to assume that these policies influenced the vote, and contributed to Labour's ascendancy to Government.

Throughout last parliamentary term PANZ and other NGO's pressed Government for implementation of election policies in the outdoor recreation area, in particular for improvement of the Queen's Chain. However, Labour's outdoor recreation policies remained unfulfilled apart from greatly increased funding for back country huts and tracks.

In 2002 Labour offered much of the same to the electorate. The development of a public access strategy for extension of the Queen's Chain was a key highlight of Labour's 1999 policy. This was expanded to also embrace rural and urban walkways, to ensure access to natural areas as well as waterways and coastline.

## B. A way forward

In conjunction with other national NGO's last year PANZ commenced preparation of a public access strategy to demonstrate to Government that there are a number of actions that could be relatively easily taken to implement their outdoor recreation policies.

PANZ was well advanced in this when Jim Sutton, the Minister for Rural Affairs, announced the appointment of a Land Access Reference Group with the object of developing a strategy for access over private as well as public land. Mr. Sutton had previously published a wish to "clarify" the law and create one code of enforceable access everywhere irrespective of land tenure. However a quest for commonality over all land has considerable dangers for existing public rights over public lands. The public cannot expect the same rights over private land as they currently enjoy over public lands.

Codified access could result in loss of impetus for further public reserve creation, particularly in 'Queen's chain' situations, under a misguided belief that recreation needs are confined to the provision of access, with no need for public controls over the use, occupation and management of water margins. Any active outdoors' person knows that the protection and management of the settings for recreation is as important as having access to such areas. That is why public reserves are created.

PANZ has met the reference group and exchanged views with it. Based on that experience PANZ has decided to complete it's access strategy and submit it to both the reference group and to government as independent expert advice. Our impression is that the reference group could be considering oversimplified solutions to access which could threaten the integrity of existing access mechanisms.

By comparison PANZ sees no need for radical reform of access laws to achieve Government's stated aims. We do however see urgent need for action in accord with Labour's election policies for improving public access to the countryside, including to the coast, rivers and lakes. Our proposals, if implemented, would result in dramatic improvement to public access to the countryside and to public lands and waters. Such improvement would exceed any achievements of previous Governments.

The recreational electorate is looking to Government to honour its undertakings. If these remain unfulfilled, or are breached by negative changes with no electoral endorsement, we believe electoral confidence in the Labour government will be damaged.

This strategy primarily consists of an examination of the law relating to each major category of land or water, identification of inadequacies in law or practice, and recommended remedies in accordance with Labour's election policy.

# C. What Labour promised in 2002

OUTDOOR RECREATION

"New Zealand's unique natural heritage offers a wide range of exciting recreational opportunities from the mountains to the sea. Labour believes that these opportunities must be accessible to New Zealanders of all ages and lifestyles. Time spent in the outdoors can enhance physical and mental health, awareness of the environment and pride in our nation. Co-existence between the natural environment and recreational activities is essential if New Zealanders and overseas visitors are to gain maximum benefit from outdoor recreation".

"Labour will:

- Protect the quality of outdoor recreational experiences for all New Zealanders, including those who are currently under-represented in outdoor recreation, such as people with disabilities or on low incomes.
- Promote outdoor recreation, and continue to improve the conservation infrastructure, including backcountry huts and tracks.
- Ensure that DOC's visitor policy is consistent with the requirement to foster the use of natural and historic resources for recreation and allow their use for tourism where this is not inconsistent with their conservation.
- Monitor and manage visitor impacts on the conservation estate.
- **Develop a public access strategy, including the extension of the Queen's Chain and the provision of rural and urban walkways, to ensure New Zealanders have ready and free access to our waterways, coastline and natural areas.**
- Ensure that New Zealand's natural recreational resources are not captured for exclusive commercial use but remain freely available for reasonable public enjoyment.
- **Protect public sports fishing and game bird hunting and, if necessary, amend the provisions of the Conservation and Wildlife Acts relating to the sale of fishing and hunting rights to close any loophole that permits the sale of access rights for these activities.**

- Encourage the completion of Te Araroa, 'the long pathway' from North Cape to Bluff, and encourage public and community consultation on proposed routes.
- Investigate ways of mitigating any negative impacts of tourism activities on the natural quiet and the quality of the visitor experience at key tourist sites".

Source: Labour Conservation Policy 2002. www.labour.org (July 2002)

The strategy below (section E) focuses on the **highlighted** policies above.

# D. Public expectations for outdoor recreation

Access to the outdoors is a key necessity for public recreational participation. However this is but one facet of recreational need. Protection and management of the settings for recreation is equally important so as to ensure that areas and resources remain attractive and suitable for recreational activity. There is no point in providing access to a resource if it is depleted, obstructed, or developed for incompatible purposes. Public ownership of public recreation areas has proved to provide greatest protection of the public interest through public input into management, public accountability for that management, and statutory bars to privatisation of the resource. Recreation need is much more than just 'access'. However the pre-determinant of recreation remains 'access'.

## Obstacles to access

- **Difficulty in obtaining authoritative information.**
  Leading to intimidation through lack of empowerment, and failure to visit otherwise available areas (largest single factor in deterring public recreation).
- **Misleading sign-posting, failure to signpost.**
  The same consequence as above.
- **Obstruction of public access – a national epidemic.**
  Public roads in particular, by locked gates, private property signs, fencing across roads – deliberate diversions over private property. Roads off legal alignments.
- **Institutional disinterest,** by DOC, LINZ, Local Authorities.
  Most authorities reluctant, and many hostile to actioning public complaints over access obstruction.
- **Too much official discretion to close access, and misuse of powers.**
  Law honoured more in the breach, pandering to entrenched private interests or to suit institutional convenience, rather than upholding public purposes.
- **Trespass criminal offence brought about by changes to trespass law in 1968 and 1980.**
  "...the ordinary decent citizen who does no harm to stock or property, who wants merely to picnic by the river, to roam across the hills, or to catch fish, is not likely to be affected in any way or by any degree by this Bill". Hon J R Hannan, Minister of Justice, on Criminal Trespass Bill. *Hansard* 1968 p 3379.
  The reality is that the Trespass Act is probably the most draconian deterrent to public access over private land anywhere in the western world.
- **OSH as a reason to exclude non-paying recreational visitors.**
  Concerted MAF education of landholders of absence of liability from natural hazards for non-client recreational visitors has had little effect on land occupier attitudes. There is only a duty to warn authorised visitors of work related, out-of-the-ordinary hazards. Natural hazards are excluded. Farmers

are not liable for warning trampers or visitors of natural hazards on their farm. However liabilities arise from use of man-made structures. If people pay to use farm land for any purpose, the relationship changes and a farmer has a duty to take "all practicable steps" to ensure that they are not harmed by any hazard arising on a farm.

- **Commercial capture of public resources and enhanced monetary value of privately owned resources.**
  The outdoors has become comodified into 'products' whether physical resources, opportunities, or events. There are strong incentives to exclude non-clients. Wealthy and foreign visitors paying high access and service charges set standard for domestic population. Now a prevailing factor in denying public access or participation.
- **Changing farming practices, more intensive land use, deer fences.**
  Areas previously available no longer so (e.g. 'lifestyle blocks', viticulture and dairying displacing sheep). Deer fences physically shutting off large tracts of countryside. Sometimes used to deliberately exclude public rather than contain stock.
- **Inflated rural land values - closer subdivision - increasing exclusivity mentality.**
  Customary access over private land now increasingly challenged by new owners with non-traditional aspirations.
- **Threats of loss of access to private lands if public assert rights of access to public lands.**
  A frequent deterrent to all but the most determined (requires certainty as to legal rights, making value judgements over what's most important, and resolve not to be intimidated).
- **Alternatives to publicly owned access insecure.**
  Lack of security for easements and covenants granting public access over private land. Liable to extinguishment without public process. Authorities likely to not enforce their terms when breached by landowners. No remedies for public. Public can be expelled not withstanding rights of access granted (Section 58 Crimes Act).

## Public expectations

PANZ experience and contact with a wide spectrum of recreationists indicates the following nationally held expectations –

- Practical, convenient, and free pedestrian access TO all existing public lands and waters* unless there are express nature conservation or public emergency reasons to permanently or temporarily deny access.
- As of right unobstructed and free foot and non-motorised water craft public recreation OVER public lands and waters unless for the above reasons.
- Liberal provision for different forms of access for recreation including rights to use motorised vehicles and craft, cycles and horses conditional on land protection and nature conservation, while ensuring a range of recreational opportunities regionally (by separation of incompatible recreations through management planning).
- A right of access to hunt publicly owned fish and game resources on public lands and waters.
- Public lands and waters will be managed primarily for public rather than private or commercial benefit.
- Equality of public access, recreation and benefit for all citizens irrespective of social or economic status, ethnicity or race.
- Further provision of public lands and waters at national, regional and local level to meet growing and changing recreational needs of communities.
- All the coastline, all significant rivers, streams and lakes and their banks, be protected from private occupation and exploitation, and reserved for public recreation purposes whenever the opportunity arises.

with

- Security, certainty, clear delineation of boundaries and access on ground, no necessity for prior permission or registration, no obstruction, no harassment, and citizen remedies if obstructed.
- Readily available authoritative information on public land and access provision and rights, and adequate signage.

* For the purposes of this discussion 'public lands and waters' are deemed to include reserves held by DoC and local government for a variety of public purposes, and Crown Lands and Forests held by LINZ, SOE's, and licensees which are available for public recreation.

## E. A strategy for implementing Government's election policies

This strategy consists of **six themes** –

- **Lost Lands** (reclaiming information on the public estate)
- **Public Roads & Paths** (access for all to the countryside)
- **Queen's Chain** (extending public reserves along water margins)
- **Rivers and Lakes** (securing public ownership and public recreation)
- **Bathing at the Beach** (overturning antiquated law – securing public recreation)
- **Fishing & Hunting Access** (equal access for all)

The strategy is presented with **three action levels** –

*Level 1.* Application of existing law (no law changes, just action).

*Level 2.* Extension of existing law (building on what already exists).

*Level 3.* New law and significant changes.

This will allow Government to quickly assess what actions can be taken immediately, and what will require law changes with their degree of significance.

PANZ believes that much can be achieved without legislative change, and that further progress can be made with only minor amendments. It is largely unnecessary to overturn a heritage of proven statutory and common law with radical new and unproven approaches to improving public access to the outdoors. A danger is that the reverse may result.

## G. Public Roads & Paths — "Access for all to the countryside"

Under existing law there are a variety of mechanisms for creating public rights of way (ROW) over private land. They are often confused with or portrayed as if they are synonymous with public roads. They are not. ROW remain private lands notwithstanding any public privileges granted. This is in marked contrast to the protections and certain rights afforded by public roads which are wholly public property.

With only minor exceptions, public roads provide legal frontage to the boundaries all property, private and public. The network already exists. Roads provide Centuries old rights of unhindered passage – the leading form of 'wander at will' in New Zealand.

### Popular mythology

1. **Public roads are just for vehicles.** However many roads predate motor vehicles. They are for pedestrians, horse riders, cyclists, and vehicles. All roads serve some purpose, including legal access to individual properties. Public highways (which include navigable rivers) are recognised in statute as a form of public road, along with carriageways, bridle paths and foot paths, as is every square or place intended for public use generally. Motorways (use confined to motor vehicles) are not public roads.
2. **Roads can only be created for motor vehicles.** Not so. New roads can be 'dedicated'* or created for one form of access or combination thereof. Again, roads don't automatically mean cars.
3. **'Paper roads' aren't real roads.** The colloquialism 'paper road' has no legal standing. A road is a form of highway, whatever its state. All public roads have the same legal status and public rights. Formation or fencing is not required. No one can identify 'freehold' on the ground – is this then merely 'paper freehold'?
4. **Adjoining landowners 'own', or must be consulted before using unformed roads.** However public roads are public property. They do not pass over private land – they bisect it. The freehold is vested in the roading authority (a major difference from English law). Use does not require consent from adjoining owners or local authorities. The right of passage is vested in the public.
5. **Roads need to be surveyed to be legal**. Roads do not require survey to 'legalise' them – survey often follows the opening up to public use of road realignments, as *confirmation* of amended property boundaries. 'Dedication'* is the key to legality. This involves either an express or implied intention by a landowner to "throw open" a 'public highway' and EITHER a roading authority accepting it OR the public using it.
6. **There is a legal obligation to form or maintain roads.** However dollars spent is entirely within the controlling authorities' discretion, – there is no financial liability from retaining or creating roads. Most unformed or 'green roads' need only marking to be used.
7. **Roads are just the responsibility of local government.** However roads can be vested in either central or local government. Government purpose roads or paths could be created for public access to public lands – doesn't necessarily entail vehicle roads and associated costs. That is a matter for case by case decision. Public roads are the most secure form of access devised.

New Zealand's public road network is a vast web of formed and unformed roads that ties the whole settlement of New Zealand together. With few exceptions every property, private and public, 'fronts' onto a public road, providing **assured legal access to property** and the sole means for citizen passage throughout the country. Without this network there would be no means for citizens to exercise their rights of freedom of movement or the ability to utilise private property. Therefore **public roads have immense constitutional importance.**

**Public rights of unhindered passage** are derived from the common law of England. Centuries of development of case law are embodied in our legal system. The New Zealand courts have refined this law to our circumstances and continue to make important rulings affecting roads and recreational use.

Despite a longevity of legal history, there is almost universal **ignorance of the law** and little or no reflection on the diverse purposes roads serve. Roads are such an integral part of our daily lives that they are taken for granted. Roads are widely assumed to be synonymous with motor vehicles – that they serve no purpose, and have no status in law or reality unless they can be driven along (giving rise to the notion of "paper roads"). Whereas most roads in New Zealand predate the advent of motor vehicles – they are "the King's Highway" for pedestrian, horse or horse-powered vehicle passage, as well for latter-day motorised contrivances.

Avarice and ignorance has resulted in **widespread abuse of roads by adjoining landowners** assuming proprietary rights and excluding others by way of illegal barriers, buildings, and misleading signage. Local authorities whom administer most roads, have generally condoned obstructive private occupation despite the law being well established. Generally there has been no resolve to ensure that roads continue to serve their public purposes. PANZ's experience is that common and statute law is breached almost as a matter of course in the daily administration of roads. Despite having all necessary powers to ensure that roads remain open and unobstructed, generally there is a lack of resolve to do so. Many councils see roads as liabilities, rather than as assets serving more than the interests of the transport and commercial sectors.

Not all roads serve, or are capable of serving purely recreational needs, however **a vast untapped resource of 'green roads' exist that could be utilised for greatly improved public recreational access**. Where roads don't exist on convenient alignments, negotiated re-alignment can be instigated, or new roads dedicated.* Dedication does not necessitate vehicle access and the creation of carriageways. The fear of ongoing maintenance costs, through an erroneous "roads mean vehicles" presumption, deters most councils from considering other options. These include dedicating new roads solely for pedestrians, or pedestrians and cycles, or pedestrians, cycles and horses. The law already allows this and precedents exist.

Other than along vehicle roads, **the English path network** provides the primary means of recreational access through the countryside. This is based on roading law, a mix of common law and statute, known as 'The Law of Highways'. Approximately 140,000 miles of path exist and more are being opened up. Many visitors to New Zealand comment that the English countryside is far more accessible than that in New Zealand, despite almost identical law and a greater network of public roads existing here. The key difference is public and institutional awareness. The law relating to public roads/paths is widely known and fiercely defended in the UK. This is because of extreme population pressure and a dearth of alternative open spaces in which to recreate. The latter deficiency is starting to be addressed through the recently enacted Countryside and Rights of Way Act. In New Zealand we have the reverse 'problem' – a generous provision of public lands and waters (greater than 30% of land area) but inadequate access to this and through the countryside generally.

There is immediate scope to greatly improve access to the countryside by **opening up strategic and well-placed public roads for recreational use**. Priority should be given to improving access to public lands, river margins, the sea coast, etc. This would entail using existing roads if suitable or realigning or dedicating new roads/paths.

Secondly, the recreational potential of unused roads that don't go to public lands or waters should be utilised. An example of what can be achieved is on the Otago Peninsula where a network of twenty unformed or green

roads linking vehicle roads have been opened up for walking, greatly extending recreational opportunities on the margin of a large urban area.

**No national plan is required, just local action.** However national impetus is needed to encourage action. Most roads are under local authority control. These authorities should instigate a programme entailing consultation with DoC, their own reserves and recreation departments, LINZ concerning Crown land access, adjoining landholders, and the public to identify all public roads, existing access to public lands, deficiencies, and options for improvement. New roads/re-alignments will require negotiation with affected landowners. One-off compensation for land taken should be payable, with DoC or other public landholders benefiting from the access being asked to contribute. Land acquisition can be minimized by taking only sufficient width necessary for the form of access proposed (e.g. 3m for a walking path, rather than usual 20 m for vehicle roads).

**Development, sign posting and way-marking** should follow. A unified national standard of marking and sign posting would greatly enhance public understanding of access rights and responsibilities. Concurrent publication of guides setting out local authority, adjoining owners' and public responsibilities and rights relating to roads is an essential step to overcome the current "universal ignorance", and to encourage compliance with the law.

All the above actions can be implemented without changes to the law. What is required is the vision and will to do so. Central government needs to create the right climate conducive to local action. It all doesn't have to happen at once. Progressive action over time will allow improved access provision according to changing local needs.

Public rights over public roads are determined by the common law. This is law that is common to all roads – it applies everywhere. This commonality should assist national education of the public of their rights as well as their obligations, leading to better observance of the law and greater respect for adjoining private property.

### Alternative access mechanisms

Under existing law there are a variety of mechanisms for creating public rights of way (ROW) over private land. ROW are different entities from roads, with the underlying land ownership remaining private. They are however often confused with or portrayed as if they are synonymous with roads and their rights of passage. They are not.

Various forms of easement (Walkways, access strips and other easements) have made only limited headway in securing public access over private land. This is primarily due to the reality that very few private landowners are prepared to commit themselves and future owners to permanent access arrangements. For instance, 30 years of effort to establish **New Zealand Walkways** (a form of easement) has resulted in only 170 established nationwide. The founding object of establishing a coherent national walkway system has not been even remotely realised. Through difficulty in obtaining consent for Walkways over private land, most Walkways are over public land – where legal rights of access already existed and other legislation could have been used for establishment of tracks. While extending Walkways over private land is a laudable object, experience indicates that the likely betterment to public access that may result can only be minimal compared to what is possible by utalising an existing nation-wide network – 'green' public roads.

**Most easements fail the essential public expectation of secure access.** They can be modified or extinguished without public process (section 126G Property Law Act 1952). This is despite often being registered "in

perpetuity" against property titles and appearing legally secure on paper. These provide true "paper access". Most have highly variable conditions attached to entry and can be closed from time to time. There are no lawful remedies available to the public when obstructed. The public is totally dependent on the authorities to uphold their rights. However most authorities are reluctant to enforce the terms of agreements, more often ignoring breaches or amending the terms to suit the new situation. Under the Crimes Act (section 58) the public is liable to eviction notwithstanding rights under any easement. In effect these arrangements last for only as long as the current landowner's goodwill remains. **The reality is that these are private lands notwithstanding any public privileges granted.** This is in marked contrast to the protections and certain rights afforded by public roads which are wholly public property.

Since 1993 **'access strips'** have been able to be voluntarily negotiated between district councils and private land owners (section 237B Resource Management Act). Very few have resulted; the primary obstacles being lack of impetus from councils, and reluctance by private owners to commit themselves and future owners to restrictions on the use of their land.

Since 1977 Government has had express powers to acquire private land and any interest therein **"for the improvement, protection, or extension of or access to an existing reserve, or to establish a public right to wander at will on foot within specified limits in any reserve, or to provide recreational tracks in the countryside"** (section 12 Reserves Act 1977). The creation of recreation reserves under section 17 is one means to achieve the latter end. These provisions can be used either for voluntary or compulsory acquisitions. Despite the long-standing existence of these laws, PANZ is aware of them only being used once in recent years. Given their almost identical objects to those of Government's Land Access Reference Group, it is cause for wonder at what aspects of the law need to be "clarified" to achieve greater public access to the countryside. **Vision, energy, and determination appear to be the primary determinants for public access provision, rather than alleged shortcomings in the law.**

## SUMMARY OF ROAD STRATEGY

- **Locate** existing roads that serve a useful recreation or access purpose and establish sign-posted, obstruction-free public paths. *Level 1*
- **Relocate** existing roads to more practical routes. Exchange old roads for new roads (local authorities use bargaining power with adjoining land owners). *Level 1*
- **Dedicate*** new roads for foot, cycle, horse, or vehicle passage as the primary public access provision to public lands and waters where existing access is absent or inadequate. *Level 1*
- **Educate** government and local authority staff about 'The Law of Highways' and their responsibilities. Concurrent public education about rights and responsibilities. *Level 1*

## DETAILED ROAD STRATEGY

**1. Create public path network.**

When access to public lands, and to (as opposed to along) water margins (the 'Queen's Chain'), is being created, public roads are to be preferred to other forms of access such as easements and covenants over private land. Easements, etc., are insecure, and have no public remedies when obstructed. 'Dedication' of public highways for classes of user, other than for motor vehicles, has had only limited application in New Zealand, but is capable of much wider use without any necessity to change the law.

Action:

- Local authorities to instigate a programme involving consultation their own reserves and recreation departments, DoC, Fish & Game, LINZ and the public to **identify all legal roads**, existing access to public lands, deficiencies, and options for improvement. *Level 1*
- When **creating new access** to public lands and waters, preference to be given to **dedication of public foot paths, cycle paths, and bridle path**, as alternatives to vehicle roads when vehicle access is unnecessary or undesirable. *Level 1*
- Central Government actively encourage local authorities to define, signpost, and develop 'green roads' for foot, cycle, horse, or vehicle use as appropriate, using unified **national standards of marking.** *Level 1*

**2. Provide public information.**

Lack of public awareness of the legal nature of public roads and an accessible map record are the primary deterrents to public use.

Action:

- In conjunction with local authorities, Government initiate **an education programme** for roading authorities on 'The Law of Highways'. Concurrent public education about rights and responsibilities. *Level 1*
- **All public road alignments** (formed and unformed) be overlaid on LINZ topographical information and **made available electronically** and by publication (refer to section F). *Level 1*

**3. Counter obstruction of roads.**

Obstruction of many public roads, through a mix of ignorance and willful intent, is very prevalent. Despite obstructions being unlawful and road controlling authorities having enforcement powers, most fail to protect the public interest.

Action:

- Introduce a legislative equivalent to that in the UK Highways Act creating **a duty for authorities in control of roads to "assert and protect public rights of passage".** *Level 2*

  Obstruction of public roads is the largest access problem in New Zealand. PANZ deals with such cases on a daily basis, when called upon to provide advice to aggrieved members of the public. The biggest obstacle to resolution is invariably official reluctance to bat for the public interest. Despite having extensive powers to deal with illegal obstruction, most councils are very reluctant to exercise these and more than occasionally hostile to public representations. This results in the law being repeatedly flouted and the public barred, or members of the public being forced to take direct action at the risk of confrontation.
- Introduce **offence provisions for failure to signpost gates** as 'Public Road' across formed roads (an existing requirement, section 344(2) Local Government Act) that is universally ignored). *Level 2*

  Councils currently have power to authorise gates across public roads provided signs are erected and maintained stating 'Public Road'. It is however exceptional to see this requirement observed. The absence of such signs creates uncertainty in most peoples' minds as to their right of use, by implied assertion of private property. It should be an express offence not to erect and maintain such signs, with councils having a duty to either ensure compliance, or remove offending gates.

- Introduce **offence provisions for misleading signs or notices** on or near roads containing false or misleading content that is likely to deter public use. *Level 2*

The only sign posting concerning the legal status of roads should be 'public road'. The erection of sign posting stating or implying some other status should be made an offence, along with signs implying that roads are closed when they are not. Councils should have powers of removal and recovery of costs. Misleading sign posting should be deemed to be an obstruction, triggering the proposed Council duty to assert and protect the public right of passage.

**4. Retain citizen rights of unhindered passage.**

Continued public ownership and control of public roads is essential for continuation of common law rights of unhindered passage. The New Zealand Courts have proven that they are far more reliable upholders of these rights than politicians.

Action:

- Retain public ownership and control of public roads. *Level 1*
- **Reject any attempt to codify or define/qualify public rights of passage in statute**, due to the major risk of reduction in existing rights, and once legislated, the further weakening or revocation of these. *Level 1*

**5. Amend road stopping procedures.**

If the Crown so wishes, unformed roads can be disposed of without public process, despite public use rights being the same over all roads. The presumption that unformed roads serve no purpose is erroneous because many unformed roads are regularly used, particularly by pedestrians, and many are capable of use with greater awareness of their existence.

Action:

- Amend statutes to make an existing power of Crown resumption of unformed roads (section 343 Local Government Act) subject to public 'stopping' procedures. *Level 2*
- Add a requirement to the 10th Schedule of the Local Government Act to ensure retention of property frontage and practical, public access to public reserves, lakes, rivers, and the sea coast when local authorities and the Environment Court make road-stopping decisions. *Level 2*

References

Federated Mountain Clubs. 1989. The Future of Walkways. Proceedings of the First NZ Walkways Conference, Auckland.

McRae, J A (Ed.). 1981. The Surveyor and the Law, NZ Institute of Surveyors: Chapter 8.

McVeigh's Local Government Law in New Zealand. 1984. Vol. V. Brooker & Friend, Wellington.

Mason, Bruce. 1991. Public Roads: A Guide to Rights of Access to the Countryside. Public Lands Coalition.

Mason, Bruce. 1992. Public access to land. Handbook of Environmental Law. Royal Forest & Bird Protection Society, Wellington.

Mason, Bruce. 1994/2002. Public Roads. A Users' Guide. Public Access New Zealand.

Mason, Bruce. 2002. Proof of dedication* as public road: A brief guide. Public Access New Zealand.

Re application by Ruapehu District Council. Environment Court Decision A83/2002.

Re application by Upper Hutt City Council. Environment Court Decision W21/2003.

* **'Dedication'** is the key requirement for creation of public roads. Before there can be a dedication, there must be *"animus dedicandi*. This means a land owner's intention of setting apart as public road, followed by either official or public acceptance. The effect of dedication is that the freehold of the road is transferred to the roading authority, usually a district council. A landowner's intention may be either explicit or implicit. Acceptance by the public requires no formal act just acceptance through use. These days an intention by a landowner to dedicate a public road is usually by express action. This usually involves statutory law, but does not require this. Many historic roads are derived from informal actions and practices covered by common law.

# Appendix 2

## Development of New Zealand Case Law
### Related to the public right of passage over roads

1896
**Queen v Mayor, Councillors, and Citizens of Wellington**
(1896) 15 NZLR 72

**The Court held that every person was not necessarily entitled to unrestricted access to every part of a street**... an obstruction by or with the authority of the Corporation was legal unless it was a public nuisance or interfered with individual rights. Whether a structure was a public nuisance, interfering unduly with the reasonable use of the street under the circumstances, was a question of fact.

1977
**Lower Hutt City v AG ex Moulder** [1977] 1 NZLR 184
...although the roads are vested in the local corporation they nevertheless retain their character as highway so that the ownership of the corporation is in general subject to the rights in respect of highways enjoyed both by the public and by adjoining owners. . Citing Shah: **At common law a permanent obstruction created upon a highway without lawful authority, and which renders the way less commodious than before to the public, is a "public nuisance" provided that the obstruction is an appreciable interference with the traffic in the street**. *Follows* R v. Batholomew [1908] 1 KB 554. It may also be noted that it is no defence that the obstruction, though a nuisance, is in other ways beneficial to the public. ('Traffic' is use in all its forms).

1977
**Moore v MacMillan** [1977 ] 2 NZLR 81
[Concerning a substantial **encroachment** on a public road, in the form of cattleyards, that were removed by the defendant. The plaintiff unsuccessfully sued for trespass and damages].

**Subject to the powers of a council, express or implied, the public has the absolute right at common law to pass and repass over the highway without hindrance.**

**A road is incapable of occupation to the exclusion of the right of every member of the public to assert their right to pass and repass without hindrance over every part of it.** This is no mere exercise in theory: Chilwell J

**A person who erects cattle-yards on a road cannot maintain an action in trespass against a person who demolishes part of the yards.**

Held that ... **the law did not recognise a personal licence as creating any interest in land sufficient to found an action for trespass**; likewise **the law did not recognise the "right" of any person to occupy a road to the exclusion of the public.**

1981
**Fuller v MacLeod [1981]** 1 NZLR 390
Held: A frontager's common law rights of access to a highway were applicable in New Zealand subject to any statutory limitations.

*The Court held [citing Pratt and McKenzie] that at common law* these English principles were applicable in New Zealand:
*(i) a frontager had the right of egress and ingress at all points on his or her street boundary*

*to the carriageway*
*(iii) the rights of the frontager arose from his or her ownership of land abutting the street and were not dependent on any prior dedication of the land comprised in the street or the ownership of the subsoil and*
*(iv)* The rights of the frontager are not absolute and involved an accommodation of his private rights with the rights of passage of the public. - or as put by by Cozens-Hardy MR in *Tottenham Urban District Council v Rowley* [1912] 2 Ch 633, 644:

> "...the owner of adjoining land has a private right attached to his property to gain access to the highway. *This is a right that must be reasonably exercised so as not to interfere with the reasonable exercise of the public of their rights of way*...the rights of the public are subject to the reasonable exercise by the adjacent owner of his private rights."

**The Court held that the public right of passage was essentially a right to pass along the street and the right of access was a private right. ... The land comprised in the street was vested in the Council for highway purposes and the right of the public to pass and repass along the highway did not include an inherent right to access to and from private property**;

Citing *The Queen v Wellingtom City Council* [1896]
An obstruction by or with the authority of the Council was legal "unless it a public nuisance", and then added "or interferes with individual rights."

The common law has drawn a sharp distinction between the private right of the frontager to access to the highway and the right of the public to pass and repass along the highway, and there is no support...for...argument that access to and from private property is inherent in the public right of passage.

Citing *Attorney-General v Thames Conservators* [1862]
"...the right of a man to step from his land onto a highway is something quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road."

*Citing* Lord Cairns *in Lyons v Fishmongers' Company* [1876]
"...a right of immediate access from private property to a public highway, as a private right, distinct from the right of the owner of that property to use the highway itself as one of the public."

1988
**Frecklingham v Wellington City Council [1988]** 1 NZLR 72.
Citing *Moore v MacMillan*
A frontager's private right of access to a road involves no more than his right to gain access to the road so as to make it possible for him to exercise his public right, in common with other members of the public, to pass and repass along the road (see p 75 line 48).

1992
**Paprzik v Tauranga District Council** [1992 ] 3 NZLR 176; (1991) 1 NZRMA 73

Customary uses of urban streets
**The use of roads has never been confined to travel and transportation... Wherever people habitually pass or congregate in public there are likely to be social, political, recreational and commercial activities.**

**The dedication as a public road gives the public a right of passage over it subject to any limitations in the terms of the dedication and to any applicable legislation.**

**... the ordinary citizen's common law right to use a publicly dedicated highway is not absolute. In addition to any limitations in the terms of the original dedication, it is qualified by the fact that it is a right of passage only, the reasonable requirements of other road users, and any superimposed legislation. All three are relevant here.**

**... some degree of obstruction to passage may be acceptable if reasonable in quantum and duration. It is true that a citizen can object to an act which renders the right of passage more difficult... a highway will be obstructed if a trench is dug across it ... But each citizen's right of passage is subject to the reasonable requirements of other road users. Those requirements may extend to temporary and reasonable obstructions**

**Highways are no doubt dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it I do not think that he will be a trespasser**.

**The customary uses of such [urban] streets extend well beyond mere passage from one point to another. They include, inter alia, street trading....**

**At common law [councils] can authorise street trading ... so long as it would not conflict with the passage of others to an unreasonable degree.**

2002
Re **Ruapehu District Council**
Decision Number **A083/02**
ELRNZ Reference 8 ELRNZ 144
Digest Reference 7 NZED 516
Environment Court [reversal of RCC decision to stop Kokako Road, a former bridle track]

**The Court held that uses, even recreational type uses, are a factor to consider provided they are considered in the context of the overall use by the community and the reasonable expectations of such use.** Their importance will depend on the facts of a particular case. [para 46 ]

The Court found that the evidence clearly established that a significant number of the community used the road for a variety of purposes. These included trekking, tramping, camping and use of the road as part of a wider network of linking tourists and recreational passages. These were all uses one would reasonably expect the public to exercise on this sort of road. **There was a need by a significant section of the community for the road, albeit not in the ordinary sense of the right for vehicular passage, but for a wide range of uses including foot and horse passage.** The Kokako Road provided a necessary link in passage across the countryside, fulfilling a range of societal needs now and in the future.

**Full text of Ruapehu District Council**
Present Use
[31] That the road has fallen into disrepair is not disputed. Roads are seen as those pathways that enable the transport of humans and their cargo be it by foot horse or engine power. **Transport modes change over time and we should not be limited by vision of a road formed and serviced to vehicular standards this is not that sort of road.**

[32] Evidence by all parties acknowledged that in parts the road was difficult to traverse indeed slips and re-growth made some parts hard to find and bulldozer tracks have cut across it. **We do not place too much weight on the present condition of the road. It is clear that access by the public has been curtailed by the land use**

**management practices of the proprietor who owns the land on both sides of the road. The road is currently incorporated into the farm property. Surveillance cameras fences and barriers have prevented public usage and continue to do so. It appears that the owner has arrogated to itself a right to close the road.**

Alternative Route
[35] **We note that this alternative route an access and esplanade strip would not have the same legal status as a road and could be varied or discontinued by agreement between the landowner and the Council. A registered proprietor of any land subject to an esplanade strip may apply to the territorial authority to vary or cancel the instrument creating the strip. The territorial authority may at any time initiate a proposal to vary or cancel the instrument creating an esplanade strip.**

2003
**Upper Hutt City Council v Akatarawa Recreational Access Committee Inc.**
Decision Number **W 21/2003**

Road stopping case - excerpts relating to public use of unformed road:

**What is a 'paper road '?**
[9] The unformed section of Johnsons Road in question was referred to as a 'paper road '. **That is an informal way of referring to road that has not been formed.**

[10] There are many paper roads in this country. Many of them have been fenced and are used as if part of the private property through which they pass. **Yet a 'paper road 'remains a public road, even if the territorial authority has acquiesced in it being fenced and used as if it is private land. At law the public still have the right to pass along it**....

[12] The unformed section of road in the Upper Hutt City district is 20 metres wide. **Its route through the Woodhill land is not marked or otherwise evident on the ground. Its position can only be identified reliably by survey, or by use of global positioning system equipment.** The only exception is a short section on a saddle in the ridge where a farm track follows the same alignment to cross the ridge.

[21] ...**we understand it is the Court 's duty to consider objections on any relevant ground, whether of public interest or of private interest. That could include a wish by people to use for recreation the road proposed to be stopped. So with respect we do not follow the decisions based on the earlier law, but follow the decision in the Ruapehu District case in that respect.**

[44] ...We find that in its present state the unformed section is passable on foot by determined hikers. **We also find that if a track is cut through some dense scrub, a few trees removed, and the occasional steep cross- slope is benched, it would also be passable on horseback, on four-wheel drive quad bikes, mountain bikes, motor bikes and other recreational vehicles. The swampy sections and cross-slopes would be regarded as challenges of skill, rather than as impassable stretches.**

[45] **In short, the current impediments to passage along the unformed section could readily be attended to if the Council approved. The present condition of the unformed section is not a ground for stopping it as road.**

[61] **... we do not accept that the Council would have a duty to ensure that the unformed road reaches the same standard of safety or serviceability as a road fully formed to its standards for roads carrying conventional traffic. The standard of care would be related to the unformed state of the road for recreational use.** The Council might even consider it appropriate to erect signs warning that the unformed road is suitable only for defined classes of recreational activities.

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

[83] In respect of the section of Johnsons Road in question, the Council 's case was that the road is impassable, is not required for road now, and will not be in the future. **We have found that although in its present state the road is impassable by ordinary traffic, it is passable by some users, and could readily be made passable by more members of the public if the Council decides to carry out minor works to remove impediments to passage. We have also found that the section in question is required now as public road by some members of the public for use for recreational purposes. That is likely to continue in future.**

[84] We accept that the existence of the road through the Woodhill land is an impediment to the proposed subdivision of it. **However the road was surveyed some 130 years ago,** long before the present owners of the land acquired it; and **those responsible for designing the subdivision were not entitled to assume that the road would necessarily be stopped. Although the owners of blocks of land to which access might be obtained from this section of public road would benefit if it is stopped, that would be a consequential benefit rather than a substantial ground for disposing of this public asset.**

[85] **We do not consider that the Council 's responsibility for the safety of users of public assets under its control provides an independent ground for disposing of this asset.**

[87] **In short, it is our judgement that there is a public need for this section of road, and a public benefit from it continuing to have the status as public road; and that adequate cause has not been made out for stopping it.**

# A TREATISE

UPON

# THE LAW

OF

# ROADS, BRIDGES, AND STREETS

IN NEW ZEALAND

BY

**W. S. SHORT**

*A Solicitor of the Supreme Court of New Zealand,*

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## THE RIGHTS OF THE PUBLIC TO USE ROADS AND STREETS.

How road rights arise in N.Z.

These rights in New Zealand arise, first of all, from the English law in force at the date of the constitution of the Colony in 1840, and which was then applicable to the Colony (see "The English Laws Act, 1858"). "The Highways Act, 1835," 5 and 6, William IV., Chapter 50, which was the statutory law in England in 1840, and is so still, does not seem to have ever applied to the Colony, and the law in New Zealand is therefore based on such part of the English law as was applicable to the circumstances of the Colony in 1840, supplemented by various statutes passed in New Zealand since that date.

Public right to use highway.

The public has a right to use a highway only for the purpose of passing and repassing along the same, with or without vehicles, horses, cattle, etc., and not to enter it for any other purpose. No one has the right to occupy the soil of a highway which does not belong to him by right of ownership. If he does so he is in law a trespasser; and though, as one of the public, he has a right to be on the highway, he must move on. There may be a user of a highway for the purpose of pleasure, but if the person stand still and obstruct the passage of others he may render himself liable to indictment or penalty (see "The Law of Highways," Glen, 1897, p. 66). A right of passage extends over the whole surface of the road; but the local body has the right to determine what part of the road shall be a footpath or footway, and what part shall be for horses, cattle, vehicles and carriages (*ibid.* page 67).

Rights of foot passengers.

A foot passenger has a right to cross the carriageway, and persons driving vehicles along the road are liable if they are not careful to avoid driving against the foot passengers who are crossing the road. A man has the right to walk on the carriage way if he pleases, but it is to be assumed that if he does so, when there is a pathway in fair condition, and he gets injured he might find it very difficult to prove that he himself had not contributed to the accident by his negligence. The carriage way is a way for foot passengers as well as for vehicles, and the drivers of such vehicles must exercise reasonable care.

## Roading Law As it Applies to Unformed Roads

A reading of "Roading Law As it Applies to Unformed Roads" makes it abundantly clear that an unformed road is as good as any other road – that is the whole purpose of the commentary[1].

There should not be any confusion concerning the use of the term "occupier" in the commentary if the normal rules of statutory interpretation are applied correctly and regard is had to the dictionary definition of the words "occupier" and "possess" as used in the text.

First, reference should be made to the dictionary definition of each of these terms
"Occupier" at p834 of the Concise Oxford Dictionary, 5th Ed (revised) 1974 reads:
"Occupier, Person in (esp. temporary or subordinate) possession esp. of land."

At page 949 "possess" says "Hold as property, own; ...."

Within the meaning of the term "occupier" as understood in common language, a person in actual occupation of an unformed road, is in temporary and subordinate possession of it. "Possess" is a somewhat stronger term implying the holding of property as an owner. At p19 of "Roading Law as it Applies to Unformed Roads" under the heading "Does occupation confer ownership?" relevant law and practice are discussed to produce a firm conclusion:

[1] In this respect page 9 is particularly explicit.

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

Turning to the principles of statutory interpretation applicable to the word "occupier", the suggestion made by Mr Mason is that:

> "the term 'occupier' has extensive application in our statutes, and relates to possession of land to the exclusion of others, with trespass rights[2]."

We find however, that the law does not support his proposition. *Craies on Statute Law* 7th.ed, 1971 says at p164:

> In construing a word in an Act caution is necessary in adopting the meaning ascribed to the word in other Acts. "It would be a new terror in the construction of Acts of Parliament if we were required to limit a word to an unnatural sense because in some Act, which is not incorporated or referred to, such an interpretation is given to it for the purposes of that Act alone." *Macbeth v Chislett* [1910] A.C. 220, 223 (Lord Loreburn L.C.), 224 (Lord Shaw). It had been contended that the meaning given to "seamen" in the repealed Merchant Shipping Act 1854 was to be imported into the Employers and Workmen Act 1875 and the Employers' Liability Act 1880.

The law has been settled for 100 years on the authority of the House of Lords. It is not possible to arbitrarily take a meaning from one statute and apply it to another statute or situation. Words apply generally only if used in their normal meaning.

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[2] The author of "Roading Law as it Applies to Unformed Roads" as a young lawyer assisted in the drafting of the first New Zealand statute to deal with adverse occupation of land transfer title, The Land Transfer Amendment Act 1963. Neither at that time, nor subsequently, has he encountered the generality of the proposition advanced by Mr Mason.

In the context of an occupier in the possession of land owned by another person, or statutory body, rights can arise if the occupier can demonstrate an intention to occupy, with the objective of destroying the title of the documentary owner. When this intention is evidenced the type of occupation is called adverse possession. Adverse possession can never be applied to a road, being expressly excluded by s172 of the Land Act 1948. The author of the commentary was careful to use the word "occupier" (i.e. in the ordinary dictionary sense) as applying to the physical situation on the ground when a road is actually occupied by the adjoining owner.

Although an adjoining owner may not occupy a road in the sense of adversely possessing it, a road may be occupied, and most unformed roads are so occupied. To make any other assertion is to deny reality.

Mr Mason seems troubled with the right of frontagers and says that "our Courts have held that adjoining occupiers are no more than frontagers". The leading case, *Fuller v Macleod* (1981) 1NZLR CA 390 (noted at pages 3, 6, 17, 53 and by implication at p54 of "Roading Law as it Applies to Unformed Roads)" does not, however, decide that. *Fuller* decides that a frontager's common law rights of access to the highway were applicable in New Zealand subject to any statutory limitations.

The decision is clearly restricted to that point of law. Some of the judges in *Fuller* have provided very useful commentaries on the general law on roads and these have been referred to in a subsequent decision of the Court of Appeal, *Man O'War Station Ltd v Auckland City Council* (2000) 2 NZLR 267. Where relevant to unformed roads that case has been noted in "Roading Law as it Applies to Unformed Roads" as indicated above.

The common law rights of frontagers as expressed in Fuller do not directly provide assistance in clarifying the rights of the public on unformed roads and the case is not therefore included in the substantive discussion in "Roading Law as it Applies to Unformed Roads."

Under the heading "Exchange for other forms of public access" at p48 of the roading commentary, the author states "There are formidable if not insurmountable difficulties in exchanging unformed road for a new unformed road in the same vicinity". Mr Mason says however "Hayes claims that it is not legally possible to create new unformed public roads, in situations where exchange of a road is desired for alternative access". The author did not state that and took great care not to state that. The author goes on at p49 to note some of the difficulties, reflecting on more than 50 years of experience in dealing with these issues.

In conclusion, the use of the term "occupier" in relation to unformed roads is entirely appropriate in fact, language and law. "Occupation" as a legal term does not necessarily imply lawful occupation. All prescriptive rights begin life as a trespass i.e. one person unlawfully enters on the land of another and continues to occupy or use that land. The occupier of a road cannot, however, by occupation acquire any legal rights. The law applying to frontagers does not clarify the rights of the public over unformed roads and applies in a narrow compass.

Unformed roads are as good as any other road and like other roads may be managed by the territorial local authorities. The history of roading law is the history of the management of roads (see for example Appendix A of "Roading Law as it Applies to Unformed Roads" setting out roading

management law as if applied as long ago as 1905 when the unformed roading network had been largely set out).

Different classes of roads are managed in different ways. Unformed roads should be managed in a balanced way which reflects the needs of society today. Roading law as a vital part of our land law has developed continuously and has never been frozen in the past.

Appendix 5

## PART 19: RESTRICTION OF TRAFFIC ON PART OF HALFWAY BUSH ROAD AND FRIENDS HILL ROAD

**19.1 Purpose** - To prevent damage to the access track that links the maintained formations of Halfway Bush Road and Friends Hill Road in order to protect the water main under the track.

**19.2 Statutes** - The Council has jurisdiction to create such a bylaw under Section 72 of the Transport Act 1962.

**19.3 Restriction** - The use of motor vehicles on the identified section of Halfway Bush Road and Friends Hill Road is banned except for motor vehicles associated with:

(a) the Council and its contractors,

(b) Telecom and its contractors, and

(c) adjacent landowners and their contractors or agents.

**19.4 Section of legal road subject to bylaw** - (1) The section of legal road subject to the bylaw is approximately 1.95 km long and lies between:

(a) A point on Halfway Bush Road 2160 metres from Three Mile Hill Road, and

(b) A point on Friends Hill Road 1141 metres from Puddle Alley.

(2) A map showing the extent of the bylaw is attached.

**19.5 Date of Effect** - This bylaw shall come into effect on the 1st day of August 2004.

*Resource Management Act 'Access Strip' Provisions*

Resource Management Act 1991

**"237B Access strips**
(1) A local authority may agree with the registered proprietor of any land to acquire an easement over the land, and may agree upon the conditions upon which such an easement may be enjoyed.

(2) Any such easement shall—
(a) Be executed by the local authority and the registered proprietor; and
(b) Be in the prescribed form; and
(c) Contain the relevant provisions in accordance with **Schedule 10.**

(3) When deciding which matters shall be provided for in the easement, the parties shall consider—
(a) Which provisions in clauses 2, 3, and 7 of Schedule 10 (if any) to modify (including by the imposition of conditions) or to exclude from the easement; and
(b) Any other matters that the local authority and registered proprietor consider appropriate to include in the easement.

(4) When deciding under subsection (3) which provisions (if any) to modify or exclude or what other matters to include, the parties shall consider—
(a) Any relevant rules in the district plan; and
(b) The provisions and other matters included in any existing instrument for an esplanade strip, or easement for an access strip, in the vicinity; and
(c) The purpose of the strip, including the needs of potential users of the strip; and
(d) The use of the strip and adjoining land by the owner and occupier; and
(e) Where appropriate, the use of the river, lake, or coastal marine area within or adjacent to the access strip; and
(f) The management of any reserve in the vicinity.

(5) Any such easement shall take effect when registered at the office of the District Land Registrar.

(6) An access strip may be closed to public entry under **section 237C.**

(7) No easement for an access strip may be registered with the District Land Registrar unless every person having a registered interest in the land has endorsed his or her consent on the easement.

(8) The registered proprietor and the local authority may, by agreement, vary or cancel the easement if the matters in subsection (4) and any change in circumstances have been taken into account; and in any such case the provisions of **section 234(7) and (8)** shall apply, with all necessary modifications".

**"237C Closure of strips to public**
(1) An esplanade strip or access strip may be closed to the public for the times and periods specified in the instrument or easement under **Schedule 10**, or by the local authority during periods of emergency or public risk likely to cause loss of life, injury, or serious damage to property.

(2) The local authority shall ensure, where practicable, that any closure specified in the instrument or easement, or any closure for safety or emergency reasons, is adequately notified (including notification that it is an offence to enter the strip during the period of closure) to the public by signs erected at all entry points to the strip, unless the instrument or easement provides that another person is responsible for such notification".

**"234 Variation or cancellation of esplanade strips**
(1) The registered proprietor of any land subject to an esplanade strip may apply to the territorial authority to vary or cancel the instrument creating the strip.

(2) The application shall include —
(a) A description of the strip and its location; and
(b) An assessment of the effects of varying or cancelling the strip.

(3) The territorial authority may at any time initiate a proposal to vary or cancel the instrument creating an esplanade strip by preparing a statement covering the matters specified in subsection (2); and references to an application in this section shall include a statement made under this subsection.

(4) Upon receipt of an application under subsection (1) by the territorial authority, or after the preparation of a statement by the territorial authority under subsection (3), the provisions of sections 127 to 132 shall apply as appropriate, with all necessary modifications.

(5) The territorial authority, when considering an application to vary or cancel any instrument creating an esplanade strip shall have regard to—
(a) Those matters set out in section 104(1), with all necessary modifications; and
(b) The purpose or purposes, as set out in section 229, for which the strip was created; and
(c) Any change in circumstances which has made the strip or any of the conditions in the instrument creating the strip inappropriate or unnecessary.

(6) After considering the application for variation or cancellation of an instrument creating an esplanade strip, the territorial authority—
(a) May grant the application, with or without modifications; or
(b) May decline the application.

(7) When all the appeals (if any) are finally determined, the territorial authority shall lodge for registration with the District Land Registrar a certificate, signed by the chief executive or other authorised officer of the territorial authority, specifying the variations to the instrument or that the instrument is cancelled, as the case may be.

(8) The District Land Registrar shall make an appropriate entry in the register and on the instrument noting that the instrument has been varied or cancelled, and the instrument shall take effect as so varied or cease to have any effect, as the case may be".

**Schedule 10**
**"Requirements for instruments creating esplanade strips and access strips**

**"1 Prohibitions to be included in instruments**
(1) Every instrument creating an esplanade strip and every easement for an access strip shall specify that the following acts are prohibited on land over which the esplanade strip or access strip has been created:
(a) Wilfully endangering, disturbing, or annoying any lawful user (including the land owner or occupier) of the strip:
(b) Wilfully damaging or interfering with any structure adjoining or on the land, including any building, fence, gate, stile, marker, bridge, or notice:
(c) Wilfully interfering with or disturbing any livestock lawfully permitted on the strip.

(2) Notwithstanding subclause (1), the prohibitions in paragraphs (b) and (c) shall not apply to the owner or occupier.

(3) For the purposes of this Schedule, owner and occupier includes any employees or agents authorised by the owner or occupier".

**"2 Other prohibitions**
Subject to sections 232(4) and 237B(3), every instrument creating an esplanade strip and every easement for an access strip shall specify that the following acts are prohibited on the land over which the esplanade strip or access strip has been created:
(a) Lighting any fire:
(b) Carrying any firearm:
(c) Discharging or shooting any firearm:
(d) Camping:
(e) Taking any animal on to, or having charge of any animal on, the land:

(f) Taking any vehicle on to, or driving or having charge or control of any vehicle on, the land (whether the vehicle is motorised or non-motorised):
(g) Wilfully damaging or removing any plant (unless acting in accordance with the Noxious Plants Act 1978):
(h) Laying any poison or setting any snare or trap (unless acting in accordance with the Agricultural Pests Destruction Act 1967)".

**"3 Fencing**
The instrument or easement may include any fencing requirements, including gates, stiles, and the repositioning or removal of any fence".

**"4 Access on esplanade strips for conservation purposes"** [NA]

**"5 Access on strips for access purposes**
Where an easement for an access strip or an esplanade strip for access purposes is created, the easement or instrument creating the strip shall specify that any person shall have the right, at any time, to pass and repass over and along the land over which the strip has been created, subject to any other provisions of the easement or instrument".

**"6 Access on** [esplanade] **strips created for recreational purposes"** [ NA]

**"7 Closure**
(1) Any instrument creating an esplanade strip or any easement for an access strip may specify that the strip may be closed for any specified period, including particular times and dates.

(2) Any instrument or easement may specify who is responsible for notifying the public by signs erected at all entry points to the strip, and any other means agreed, that a strip or easement is closed as a result of closure periods specified in the instrument or easement".

Recreation Access New Zealand is a research-based advocate

RANZ's central aims are the promotion of minimum impact recreation, and obtaining secure access to public lands and waters

RANZ advocates public ownership and control of resources of value for public recreation with the supremacy of the public interest ahead of private or commercial interests


# Recreation Access New Zealand

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