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LAND ADJACENT TO WATER -
PUBLIC AND PRIVATE RIGHTS AND RESTRICTIONS

R. I. Gordon

A thesis submitted in partial fulfilment of the requirements for the degree of Master of Laws at the University of Otago, Dunedin, New Zealand.

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CHAPTER 1

INTRODUCTION

The 8000 kilometres of coastline, the thousands of kilometres of rivers, and the numerous lakes of this country are capable of providing the New Zealand public with a wide range of recreational pursuits. A conflict can however arise between reconciling the private interest in the lands adjacent to those waterways, from the growing pressure being placed on such lands by a variety of industries, tourism, and public utilities such as sewage treatment plants, and also by an increasing population desirous of participating in recreational, sporting, scenic, or other opportunities or pastimes. It is submitted, that notwithstanding that a great proportion of the lands adjacent to our waterways are in private ownership, there is a growing feeling within the public that such lands are part of New Zealand's national heritage, which should be available for all to use and enjoy, and not just the private owner. The conflict has intensified over the past twenty years with increasing numbers of people living near the coast, or resorting to the coastline as the principal area of recreation.

In August 1974, the then Minister of Works and Development stated;¹

The coastline offers a wide variety of recreational opportunities and these are

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¹ Coastal Planning and Development Statement By The Minister of Works and Development, August 1974.
becoming of more and more importance as an increasing proportion of our people live and work in the towns and cities. I would like to see access to and public use of the coast made easier, and more people, not less, enabled to enjoy the recreation and relaxation that the coast can provide.

The common law however, has consistently denied the existence of any recreational or general rights in the public to use the land adjacent to waterways. Having regard to the widespread public usage of foreshore areas, it is somewhat surprising to find that the common law confers no right on the public to use the foreshore for recreational or general purposes, despite the fact that the foreshore is prima facie vested in the Crown or in public authorities under statute, and despite the fact that public activities on the foreshore may be controlled through bylaws or under the Police Offences Act 1927 or the Crimes Act 1961.

Harman L.J. recently stated: 2

It is notorious that many things are done on the seashore by the public which they have no legal right to do.... Bathing, for instance, is not a public right but goes on by tolerance ...

As the Crown is the prima facie owner of the foreshore, and traditionally tolerated public recreation and usage upon it, a strong tradition of coastal recreation has developed, even though the common law failed to recognise any recreational or general rights in the public to utilise the foreshore. However as the

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land adjacent to the foreshore and along the margins of non-tidal rivers and lakes is usually held in private ownership, and not by the Crown, public recreation and usage of such lands was traditionally resisted by the adjacent riparian owner, whose private interest was strongly protected by the common law. Consequently, the tradition of public recreation and usage which arose in respect of the foreshore, did not arise to the same extent in respect of the land adjacent to the foreshore, nor on the margins of non-tidal rivers and lakes; such lands being private property in which the public had no interest.

This paper will therefore be principally orientated towards a study of the common law rights and restrictions over the foreshore as the principal place of public recreation, and the extent to which such rights and restrictions have been modified by statute in New Zealand. Consideration will also be given to a study of the common law rights and restrictions over the lands adjacent to the foreshore, and along the margins of non-tidal rivers and lakes, and the extent to which those rights and restrictions have been modified by statute in New Zealand also. The development of reserves in New Zealand adjacent to our waterways will be traced, and recent legislative and administrative initiatives which have affected public and private recreation and usage of the lands adjacent to our waterways will also be discussed.

This thesis shall deal with legislation in force or proposed as at 10th December 1977.
CHAPTER II

COMMON LAW RIGHTS AND RESTRICTIONS OVER THE FORESHORE

A. Ownership:

The Crown's claim that it was prima facie entitled to the ownership of the foreshore was accepted in 1795 by Macdonald C. B. in Attorney-General v. Richards. Doubts have, however, been expressed as to the validity of the original claim by the Crown to the foreshore developed in the reigns of Elizabeth I and James I, but the prima facie theory is now firmly embodied in the common law, having been accepted by a number of high authorities. Recently, Megaw J. in Fowley Marine (Emsworth) Ltd. v. Gafford stated:

There is no doubt that prima facie ownership of the foreshore and of the sea-bed of tidal rivers and creeks is in the Crown.

The Crown's prima facie title to the foreshore extends

3 (1795) 145 E.R. 980 where the learned judge stated at 983: "It is clear that the right to the soil, between high and low watermark, is prima facie in the Crown."

4 See Moore, A History of the Foreshore (3rd ed. 1888) where the author exhaustively reviews the development of the prima facie theory by the Crown and at p. 29 states: "... the theory of the prima facie title is one on which little reliance can be placed." See also Coudert, "Riparian Rights and Stare Decisis" (1909) 9 Columbia Law Rev. 217 where the development of the prima facie theory is more briefly examined by that writer.

5 Attorney-General v. Parmeter (1811) 147 E.R. 345 per Macdonald C.B. at 352 and Attorney-General v. Emerson 1789/1 A.C. 649 per Lord Herschell at 653.

6 LT967 2 Q.B. 808 at 818.
only to mean high water mark, and land above that point even though overflowed by high spring or extraordinary tides does not form part of the foreshore, and is presumed to belong to the adjoining owner. 7

The prima facie theory, 8 developed on behalf of the Crown, asserted that the Crown possessed the *jus privatum*, or private title to the foreshore in its own right, and that the soil of the foreshore could therefore be alienated by the Crown. The Crown however, also held the foreshore as representative or trustee of the people, charged with the duty of protecting the public rights of navigation and fishing in tidal waters. These public rights, or *jus publicum*, took priority over the *jus privatum* of the Crown. The Crown, or its grantee, therefore held the foreshore in its private capacity, being able to use it or dispose of its private interest subject to the *jus publicum* of navigation and fishing in tidal waters.

New Zealand courts have also accepted the Crown's prima facie title to the foreshore. The nature of the Crown's interest in the foreshore was first considered by the Court of Appeal in *Crawford v. Leçren*, 9 where an area of the foreshore at Timaru harbour had been granted pursuant to the Public Reserves Act 1854 to the Superintendent of the Canterbury Province for loading and unloading of goods. The defendant had refused to pay

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8 Coudert, loc.cit., 223.
9 (1868) 1 N.Z.C.A. 117.
tolls levied by the Provincial Council, asserting a common law right to load and unload goods on the foreshore, and that the grant was in derogation of the alleged common law right. Arney C.J., giving the judgment of the Court, assumed that the grant of lands made under the Public Reserves Act 1854 passed no larger estate than the *jus privatum* of the Crown, and commented that the *jus privatum*;¹⁰

... must remain subject to the *jus publicum*, as recognised in like situations by the common law of England.

After noting the public rights of navigation and fishing, Arney C.J. then stated;¹¹

These are claimed as natural rights in respect whereof it has been said that the Crown, in its possession of land covered by tidal or navigable waters, is in fact a trustee for the subject.

The effect of the judgment of the Court was that the loading and unloading of goods on the foreshore was not part of the *jus publicum*, and not a right recognised by the common law. The plaintiff was accordingly entitled to judgment.

The Crown's prima facie ownership of the foreshore has also been acknowledged by Herdman J. in *Mayor of City of Auckland v. Dixie Island Ltd.* ¹² and by Turner J.¹³ and North J.¹⁴ in *Re An Application For Investigation of Title*

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¹¹ *Idem.*

¹² *At 927* G.L.R. 436 at 487.

¹³ *At 969* N.Z.L.R. 673 at 675.

¹⁴ *At 963* N.Z.L.R. 461 at 468.
To The Ninety Mile Beach (Wharo Oneroa A Tohe).

B. Extent:

In Mellor v. Walmesley, the terms "foreshore" and "seashore" were held to be synonymous, though as Adams notes in popular usage a more extensive meaning may be given to the terms to include that area of land that lies between the ordinary high water mark and the land that may be cultivated or built upon.

The foreshore is defined in Halsbury to be:

... that portion of the realm of England which lies between the high water mark of the ordinary tides and the low water mark.

The leading case establishing the landward boundary of the foreshore is Attorney-General v. Chambers. The Court determined that the landward boundary of the foreshore was that part of the shore which lay between high and low water marks of ordinary tides; being the medium high tide line between the spring and the neap tides.

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15 2 Ch. 164.
16 See Romer L.J. at 177 and Stirling L.J. at 179.
17 Adams, The New Zealand Encyclopaedia of Forms and Precedents (1965) vol. 6, 27.
18 39 Halsbury's Laws of England (3rd ed. 1962), 557. In Lord Fitzhardinge v. Purcell 2 Ch. 139 Parker J. at 166 stated that the foreshore of a tidal river when covered by the tide was part of the sea, and the public had no rights over the foreshore of a tidal navigable river when not covered by the tide except such as ancilliary to their rights of fishing and navigation in the sea.
19 (1854) 43 E.R. 486.
20 See Alderson B. at 489 and Cranworth L.C. at 490. This test was applied in Earl of Ilchester v. Raishleigh (1889) 61 L.T. 477 per Kekewich J. at 479.
It appears to be accepted that on the analogy of the test in Chamber's case, the seawards limit of the foreshore is the medium line of low tide.\textsuperscript{21}

The test in Chamber's case for establishing the extent of the foreshore has been applied in New Zealand by Cooper J. in Attorney-General v. Findlay\textsuperscript{22} in interpreting the meaning of "ordinary tides" in section 35 of the Crown Grants Act 1908.\textsuperscript{23}

The limits of the foreshore are not permanent, and it has been held\textsuperscript{24} that a Crown grant of the foreshore would convey not that which at the time of the grant was between the high and low water marks, but the land which from time to time may be between high and low water marks. These points may vary by the land gaining on the sea by accretion, or the sea gaining on the land by encroachment. Where owing to the gradual and imperceptible recession of the tide land is added to the dry land so that it becomes situate above high water mark of ordinary tides, such land shall belong to the owner of the land to which it is added.\textsuperscript{25}

\begin{itemize}
  \item \textsuperscript{23} Ibid., at 513. See also Chamberlain v. Regan (1912) 7 N.C.R. 39 where C.C. Kettle S.M. applied the test in Chamber's case to determine the limits of part of the foreshore of Ponui Island in the Hauraki Gulf.
  \item \textsuperscript{24} Scratton v. Brown (1825) 107 F.R. 1140 at 1145.
  \item \textsuperscript{25} R v. Lord Yarborough (1824) 107 E.R. 668. "Imperceptible" was defined by Abbott C.J. at 674 as being "... imperceptible in its progress, not imperceptible after a length of time."
\end{itemize}
Conversely, where the tide gradually and imperceptibly encroaches upon the land adjoining the foreshore the land which was formerly situate above high water mark shall become the property of the Crown, or the owner of the foreshore.26

The fact that accretion may be achieved through the actions of the landowner, such as the erection of groynes to prevent erosion will not disentitle that owner to such accreted land.27 However, an owner of land will not be entitled to an accretion to his land if that accretion has arisen through works constructed for the purpose of reclaiming land from the sea.28

C. Public Rights:

1. Public Recreation and Usage:

Despite a long-established tradition of public recreation and usage of foreshore areas, the common law has consistently denied the public any recreational or general rights to use the foreshore, except for limited purposes incidental to the established common law rights of navigation and fishing in tidal waters. The courts' attitude is well typified by Johnston J. in Attorney-

26 Re the Matter of The Hull and Selby Railway Co. (1839) 151 E.R. 139 per Abinger C.B. at 141. These principles were recently applied by McLoughlin J. in Mahoney v. Neenan and Neenan [1967] I.R. 559 at 565.

27 Brighton and Hove General Gas Co. v. Hove Bungalows Ltd. [1924] 1 Ch. 372.

The foreshore is property of a very anomalous character. It cannot be said to be either sea or land, and at the same time it cannot be said to be neither the one nor the other; but its characteristics and uses are such that it must be guarded from encroachments on the part of the public.

Whilst the issue to be determined in Blundell v. Catterall was the existence of an alleged common law right of bathing in the sea by the public and crossing the foreshore for that purpose, the wider implications relating to all public recreation and usage of foreshore areas were also discussed by the court. The case is of considerable importance in that it was held by the majority of the court that the public at common law have no right of bathing in the sea, nor of crossing the foreshore for that purpose, even where the foreshore could be crossed without creating a nuisance, or where the soil was in the Crown, and so clothed with the *jus publicum*. Having regard to the widespread public usage of foreshore areas in New Zealand, the judgments of each of the members of the special court of King's Bench call for close scrutiny.

Best J. (the dissenting member of the court) upheld the general common law right of bathing in the sea and crossing the foreshore for that purpose claimed by the defendant, initially commenting that bathing in the sea, if done with decency, was not only lawful but proper, and often necessary for many of the inhabitants of England.

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30 (1821) 106 E.R. 1190.
Best J. foresaw a possible development where owners of the foreshore would be able to control public recreation and usage if such a right did not exist and he remarked; 32

... the free access to the sea is a privilege too important to Englishmen to be left dependant on the interest or caprice of any description of persons.

His Lordship held that the universal practice 33 of England showed a right of way existed over the foreshore which was recognised by the common law. As part of this general right of way, the public had, in the opinion of Best J., the right of embarking and disembarking from boats, walking and riding on the sands, and bathing in the sea. 34 Best J. concluded his judgment stating; 35

The shore of the sea is admitted to have been at one time the property of the King. From the general nature of this property it could never be used for exclusive occupation. It was holden by the King, like the sea and the highways for all his subjects. The soil could only be transferred, subject to this public trust; and general usage shews that the public right has been excepted out of the grant of the soil ... Unless I felt myself bound by an authority as strong and clear as an Act of Parliament, I would hold on principles of public policy, I might say public necessity, that the interruption of free access to the sea is a public nuisance.

Holroyd J. denied the existence of the common law right

31 Ibid., at 1193.
32 Idem.
33 Best J. at 1194 referred to Ball v. Herbert [1775 - 1802] All E.R. Rep. 472 where Kenyon C.J. had stated at 473: "Common law rights are either to be found in the opinions of lawyers, delivered as axioms, or to be collected from the universal and immemorial usage throughout the country."
34 Idem.
35 Ibid., at 1197.
claimed by the defendant of bathing in the sea, and crossing the shore for that purpose, but noted that such a right could arise through custom or prescription.\textsuperscript{36} The public rights of navigation and fishing were also noted by His Lordship who stated however that the existence of public rights on the foreshore "was a very different question."\textsuperscript{37} Holroyd J. rejected the contention that the public had a right to appropriate the seashore for general purposes holding that such a public use would constitute "... a purpresture, an encroachment, and intrusion upon the King's soil ...,"\textsuperscript{38} even where the soil remained subject to the \textit{jus publicum}, and where the particular public use could be effected without creating a nuisance. After further holding that bathing in the sea and crossing the foreshore could not be justified under the alleged general right to use the foreshore, Holroyd J. then turned to consider whether bathing could be justified as a specific common law right. Whilst the learned judge rejected the existence of such a right he did however comment;\textsuperscript{39}

Where the soil remains the King's, and where no mischief or injury is likely to arise from the enjoyment or exercise of such a public right, it is not to be supposed that an unnecessary and injurious restraint upon the subjects would, in that respect, be enforced by the King, the parens patriae.

Where there was a necessity or urgency for a right

\textsuperscript{36} Ibid., at 1198.
\textsuperscript{37} Ibid., at 1200.
\textsuperscript{38} Ibid., at 1202.
\textsuperscript{39} Ibid., at 1202. J. Miller S.K. in \textit{Burnley v. Flutey} (1940) 35 M.C.R. 142 at 143 held that Holroyd J. was referring "... to a supposed right and not to an established right."
of bathing in the sea, Holroyd J. was of the view that custom would be adequate to support such a right in localised areas.\textsuperscript{40}

Bayley J. also refused to recognise the common law right claimed and thought it necessary to distinguish between the rights recognised under the \textit{jus publicum}, and an alleged right of bathing in the sea. He stated;\textsuperscript{41}

... the public may have a right of navigation, which is for the general benefit of all the kingdom; and a right of fishing, which tends to the sustenance and beneficial employment of individuals; but it does not thence follow that they have the right of bathing.

Bayley J. however recognised that where the crown retained the foreshore;\textsuperscript{42}

The King, for the public welfare, may suffer such a right to be exercised in those parts of the shore which remain in his hands to any extent which the convenience of the public may require ...

The common law right claimed by the defendant was also rejected by Abbott C.J. who stated;\textsuperscript{43}

One of the topics urged at the Bar in favour of this supposed right was that of public convenience. Public convenience, however, is, in all cases, to be viewed with a due regard to private property, the protection whereof is one of the distinguishing characteristics of the law of England.

Abbott C.J. also held there was insufficient practice of bathing by the public from the foreshore "... to be the

\begin{itemize}
\item \textsuperscript{40} Idem.
\item \textsuperscript{41} Ibid., at 1203.
\item \textsuperscript{42} Ibid., at 1204.
\item \textsuperscript{43} Ibid., at 1206.
\item \textsuperscript{44} Ibid., at 1207.
\end{itemize}
foundation of a judicial decision," so as to support the existence of a common law right, but he did recognise that where the King had ownership of the foreshore, it would not be probable that any obstruction to the practice of bathing would be interposed by the King.45

The majority judgments given by Abbott C.J. and Holroyd and Bayley J.J. in Blundell's case thus rejected the alleged common law right of bathing in the sea and using the foreshore for that purpose. More importantly (from the New Zealand position) the alleged existence of this right was also rejected even where the Crown had retained ownership of the foreshore, and the soil of the shore remained subject to the jus publicum. However, it is to be noted that whilst the majority of the court rejected the existence of a broad common law right of bathing, and using the foreshore for that purpose, the same judges recognised that where the Crown was in possession of the foreshore, public bathing and usage of the foreshore would be unlikely to be restrained by the Crown, in order to satisfy the requirements of the public.

The decision in Blundell's case has however been criticised by Hall,46 who believed the effect of the majority view had;47

... put in the power of every owner of the

45 Idem.

soil of the sea-shore to levy a tax ad libitum upon the bathers, not only at fashionable watering-places, but throughout the coasts of England, wherever such ownership of the shore can be proved.

Hall states that if the practice of bathing had generally prevailed throughout the realm, the silence of authorities as to its existence, could be interpreted as a recognition of the existence of the practice, and not a denial as interpreted by the majority of the judges in the Blundell decision. Hall then comments:

It is not easy to point to a custom more universal, more natural, or more ancient on the sea-coasts not of England only, but of the whole world, than that of bathing.

If the above statement is correct, and applying the comments of Kenyon C.J. in Ball v. Herbert as to the establishment of a common law right through immemorial usage, it is difficult to see why a public common law right of bathing was not recognised by the majority judges in Blundell's case, when the foreshore was used necessarily anyway for purposes incidental to the rights of navigation and fishing in the sea. The majority judges in Blundell's case however denied the existence of a continued and immemorial custom of bathing from the foreshore and chose to regard bathing as existing through local custom only, or through the tolerance of the Crown if it had retained

47 Ibid., at 860.
48 Ibid., at 835.
49 Ibid., at 836.
the ownership of the foreshore.

However Hall notes,51 the exercise of fishing in tidal waters was only practised by a particular class of the public such as the inhabitants of a seatown, yet the right of fishing was held to be a general common law right of fishing in all tidal waters, and not by way of local custom to fish in certain local areas. Hall therefore argues, that as the custom of bathing was at the time as general as fishing amongst the inhabitants of the seacoast, it was strange to define bathing as a local custom when it was at least equally general amongst that class of persons as the acknowledged general right of fishing in tidal waters.

It is of course difficult, having regard to the fact that Blundell's case was determined over 150 years ago to know the extent of public bathing from foreshore areas, but if Hall's observations as to the extent of public bathing are correct, then it can be argued that the majority judges in Blundell's case should have recognised the general usage as alleged as existing from time immemorial, and accorded the practice the status of a common law right. It is the writer's view, that the decision of Best J. is supported by the observations of Hall in his essay on the seashore, and that the public usage of foreshore areas for bathing or other purposes that has increased since 1821, is perhaps an endorsement of the minority view in Blundell's case.

51 loc. cit. at 857.
Subsequent decisions however, concerning public recreational rights over the foreshore have largely reiterated the majority view of the Blundell decision, in that the common law recognised no right in the public to use the foreshore except for limited purposes incidental to the rights of navigation and fishing in the sea.

In Mace v. Philcox\(^\text{52}\) the defendant was licensed to place bathing machines on a particular part of the foreshore at Hastings in Sussex County. The defendant however placed his machines on a part of the foreshore leased by the plaintiff from the Crown. Erle C.J., in response to a submission by counsel for the plaintiff that there was no common law right of bathing in the sea or crossing the foreshore for that purpose commented;\(^\text{53}\)

\[
\text{If you can lawfully get to the sea-shore, I apprehend you may lawfully bathe there.}
\]

In his judgment, Erle C.J., whilst holding that the defendant was not authorised to place the machines on that particular part of the foreshore stated;\(^\text{54}\)

\[
\text{I am desirous of guarding my judgment so as not to restrict the valuable usage or right of Her Majesty's subjects to resort to the sea-shore for bathing purposes.}
\]

\[
\text{It may well be that in these comments Erle C.J. was referring to a custom of bathing at the particular}
\]

\(^{52}\) (1864) 143 E.R. 920.

\(^{53}\) Ibid., at 925.

\(^{54}\) Ibid., at 926. Counsel for the plaintiff contended on the authority of Blundell's case that the public had no right of bathing in the sea or crossing the foreshore for that purpose, but the decision was not referred to by the four judges of the Court of Common Pleas.
locality, but it is submitted that if he was asserting a
general common law right of bathing, his comments are
contrary to the majority view in the Blundell decision.

In Llandudno Urban District Council v. Woods the
defendant, a Church of England clergyman, attempted to
justify delivering sermons on the beach at Llandudno
as a right of a clergyman to preach on the seashore; it
being an ordinary highway. The defendant further attempted
to distinguish Blundell's case on the basis that the
foreshore there was privately owned, while the foreshore
at Llandudno was under lease from the Crown. The
plaintiff council, relying on Blundell's case in that they
were entitled to the possession of the foreshore as lessees,
contended the public had no right at common law to enter
upon the foreshore when dry except for the purposes of
navigation and fishing. Cozens-Hardy J. accepted the
council's contention stating;

The public are not entitled to cross the
shore even for purposes of bathing or
amusement. The sands on the seashore are
not to be regarded as, in the full sense
of the word, a highway.

Cozens-Hardy J. then remarked that the council had...

... prima facie a right to treat every bather,
every nursemaid with a perambulator, every
boy riding a donkey, and every preacher, on
the shore at Llandudno as a trespasser.

55 [18927] 2 Ch. 705.
56 Ibid., at 709. His Lordship did add that rights
could be gained through custom and prescription.
57 Idem.
The possibility that the decision in Blundell would be reversed by a court of high authority all but vanished with the decision of the Court of Appeal in Brinckman v. Matley, where Blundell's case was unanimously affirmed. Buckley J., at first instance, noted the rights of navigation and fishing in tidal waters but added:

... when the sea recedes and the foreshore becomes dry, there is not, as I understand the law, any general common law right in the public to pass over the foreshore.

The Court of Appeal rejected the claim asserted by the defendant of a common law right of bathing in the sea from the foreshore. Vaughan Williams L.J. referred to the situation where the Crown owned the foreshore and stated:

... it is sufficient to say that the Crown holds the foreshore upon the terms that it must recognise the jus publicum, whatever it may be, over the foreshore, and do nothing inconsistent with that jus. This jus, as regards the rights of navigation and of fishing - the right to use the foreshore for these purposes - has a great deal of authority to support it, but except as regards these rights; and in so far as any act of the Crown would defeat those rights, the Crown has the beneficial ownership of the foreshore ...

Romer L.J. whilst noting that the public had certain rights of necessity over the foreshore stated:

... I am compelled to say that in the eyes of the law bathing cannot for this purpose be regarded as a matter of necessity.

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58 [79047 2 Ch. 313.]
59 Ibid., at 316.
60 Ibid., at 325.
61 Idem.
In The Mayor Of Brighton v. Packham\(^{62}\) the defendants, who were members of an open air mission who held meetings on the foreshore at Brighton, sought to justify their actions on the ground that members of the public had since time immemorial enjoyed the right of holding such meetings. Warrington J. did not refer to Blundell's case, but held that as the law recognised no right in the public to hold public meetings on private property, there could be no right in the defendants to hold meetings on the foreshore, the property of the plaintiff council.

Wright L.J. in Williams-Ellis v. Cobb\(^{63}\) noted the decisions in Blundell and Brinckman had held the public had no right to use the foreshore for the purposes of bathing; and then he stated that there was no right in the public to pass and repass over the foreshore for all purposes.\(^{64}\)

Whilst the right of the public to use the foreshore for recreational purposes was not in issue in the recent case of Alfred F. Beckett Ltd. v. Lyons,\(^{65}\) all judges of the Court of Appeal commented on the extent of public recreation

\(^{62}\) (1908) 24 T.L.R. 603.

\(^{63}\) 1 K.B. 310.

\(^{64}\) Ibid., at 320-321. See also Luxmoore J. in Bournemouth-Swanage Motor Road and Ferry Co. v. Harvey and Sons (1929) 94 J.P. 10 where the learned judge noted at 14 the only rights at common law over a foreshore in private ownership were those outlined in Blundell's case.

\(^{65}\) 1 Ch. 449.

\(^{66}\) Ibid., at 469.
and usage of foreshore areas. Though such comments are obiter, they reiterate the principles enunciated 146 years previously by the majority, in Blundell's case.

Harman L.J. stated; 66

It seems also clear enough that there is no public highway along the foreshore. It is, on the other hand, notorious that in many and indeed most places the use of the foreshore by the public for purposes of recreation and bathing is tolerated.

Russell L.J. commented; 67

It is a well-known aspect of English law that in relation to the foreshore a great many activities have been generally tolerated without giving rise to any legal right to continue them.

Whilst the comments of Winn L.J. were perhaps more cautious than those of his colleagues he did state; 68

It seems to be clear that there has for long been a common - though it may be no less fallacious - belief entertained fairly generally by the public that there is a right of access to the foreshore for the purpose of bathing: it would be outside the scope of this appeal to pronounce on the existence or non-existence of any such right to bathe from the foreshore, but it is at least clear that the only well-established rights of user of the foreshore are those ancillary to fishing and navigating.

Blundell's case has only been expressly followed in New Zealand in Crawford v. Lechey, 69 where it was held that there was no common law right of loading and unloading goods upon the foreshore. Two decisions however call for comment, in that they could be construed as asserting that a public right of recreation exists upon New Zealand

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66 Ibid., at 475.
67 Ibid., at 486.
68 Ibid., at 486.
69 (1868) 1 N.Z.C.R. 117.
foreshore areas. In *Re An Application For Investigation Of Title To The Ninety Mile Beach (Wharo Oneroa A Tohe)*\(^70\) North J. commented that, after the issue of a freehold title, or the making of a freehold order by the Maori Land Court in respect of land adjacent to the foreshore;\(^71\)

From then on, pakeha and Maori alike were entitled to enjoy the beaches of the country.

Similarly, in *Shelley v. Painton*,\(^72\) Coates S.M. seems to have assumed\(^73\) that the public had a right of access to, and usage of Orewa beach. It is the writer's view that if either North J. or Coates S.M. was asserting the existence of common law rights in the public to use foreshore areas for recreational or other purposes, their comments are against the weight of authority. It is more probable, that both were referring to public usage of such areas by toleration or sufferance of the Crown, and not asserting a general common law right.

The public therefore at common law, are given no rights to resort to foreshore areas for bathing or recreation, and there is also no common law right of passage along the foreshore, even where it is vested in the Crown.

Because however, the Courts have been unwilling to grant injunctions to restrain harmless public usage of the foreshore, and because private owners of the foreshore or the Crown did not generally enforce their private rights,

\(^70\) \(\text{1963}^2\) *N.Z.L.R.* 461.
\(^71\) Ibid., at 474.
\(^72\) (1969) 12 *M.C.D.* 432.
\(^73\) Ibid., at 437.
resort to beach areas has become an integral part of the English way of life. Such a tradition of coastal recreation has developed even further in New Zealand with its suitable climate, and the fact that virtually all the foreshore is vested in the Crown, which since the first days of colonisation has permitted public usage of beach areas.

It is nevertheless interesting to note the English courts attitude to attempts that have been made to prevent harmless public usage of foreshore areas, and the attempts by the courts to control public conduct and activities on the foreshore.

In *B v. B*,[74] Cockburn C.J. held that where bathing in the sea was practised by the public, standards of decency had to be observed. It is submitted that this control over the mode of public bathing is as relevant today as in 1871, having regard to the increasing demands being made on local authorities and the Crown, for the reservation of certain beach areas in the country for nudist or similar recreation, and the differing interpretations as to what today may be classed as "decent", or "indecent".

The English courts have generally been reluctant to restrain public usage of foreshore areas, and have expressed their reluctance on a number of occasions by refusing to exercise their discretion in favour of a private owner of a foreshore who is seeking an injunction to deprive members of the public from gaining access to, or using, a particular beach area. The Courts would not generally act against

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74 (1871) 12 Cox C.C.1.
members of the public unless a privilege extended was being abused, or unless some private right of the owner of the foreshore was being infringed. The Courts' attitude to attempts made by private owners of foreshore areas to restrain public usage was expressed by Abbott C.J. in 1821 when he remarked:

The law has provided suitable checks to frivolous and vexatious suits; and, in general, experience shews that the owners of the shore do not trouble themselves or others for such matters.

A strong tradition of coastal recreation has therefore developed without the authority of, but recognised by, the common law. Thus in Llandudno Urban District Council v. Woods, Cozens-Hardy J., while accepting the principles laid down by the majority in Blundell's case, refused to grant an injunction in favour of the plaintiff council to prevent the defendant from delivering sermons on the beach at Llandudno. His Lordship stated:

I feel bound to say that I consider this action wholly unnecessary, and one which ought not to

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75 See for example Lord Fitzhardinge v. Purcell [1898] 2 Ch. 139 where a member of the public attempted to assert a common law right to shoot wildlife over the foreshore in derogation of the private owner's right. Parker J., in refusing to recognise such a right stated at 168-169: " ... I am satisfied in the present case that the defendant's sport would never have been interfered with had he not persistently asserted a right to shoot wildfowl and that, too, in the immediate neighbourhood of the plaintiff's decoys."

76 In Blundell v. Catterall (1821) 106 E.R. 1190 at 1207.

77 [1899] 2 Ch. 705.

78 Ibid., at 709. Injunctions were however issued against members of the public to prevent usage of the foreshore in Ramsgate Corporation v. Debling (1906) 22 T.L.R. 369 and in The Mayor of Brighton v. Packham (1908) 24 T.L.R. 603.
have been brought.... This action is an attempt to assert rights which the Crown would never have thought of putting forward .... I decline to grant an injunction. This is a formidable legal weapon which ought to be reserved for less trivial occasions.

Similarly in Behrens v. Richards, where a landowner blocked and prevented public usage of paths which had been used for many years by the public to gain access to the foreshore and the sea, the court declined to accede to the request of the landowner for the issue of an injunction. Buckley J. held that whilst the public had not established any rights over the paths, it did not necessarily follow that the plaintiff was entitled to an injunction, as the public use caused no injury to the landowner.

In summary, the attitude of the courts to public recreation and usage of the foreshore, and to attempts made to deprive the public of much usage, is well illustrated by the comments of Lord Watson in Lord Advocate v. Young His Lordship stated: ... it must always be kept in view that possession of the foreshore, in its natural state, can never be, in the strict sense of the term exclusive. The proprietor cannot exclude the public from it at any time; and it is practically impossible to prevent

79 1905 2 Ch. 614.

80 Ibid., at 621 - 622. See also Williams-Ellis v. Cobb 1932 1 K.B. 310 where Wright L.J. at 322, expressed agreement with Buckley J.'s comments.

81 (1887) 12 App. Cas. 544.

82 Ibid., at 553.
occasional encroachments on his right, because the cost of preventative measures would be altogether disproportionate to the value of the subject.

2. **Navigation:**

The ownership of the Crown or of a grantee of the Crown in the soil of the foreshore is subject to the exercise of the public right of navigation in all tidal waters including tidal rivers, estuaries, and arms of the sea.\(^\text{83}\)

The right of navigation over the foreshore is expressed in Halsbury's Laws of England as being;\(^\text{84}\)

All persons have a right to navigate over the foreshore, that is, to pass and repass in ships, including the rights attendant on the right of navigation, such as anchoring and mooring...

The right of navigation in the sea and in tidal waters has long been recognised by the Courts, and the decisions in Blundell v. Catterall,\(^\text{35}\) Denaby and Cadeby Main Collieries Ltd. v. Anson,\(^\text{36}\) and recently, the decision in

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83 Gann v. The Free Fishers of Whitstable (1864) 11 F.R. 1305 per Lord Westbury L.C. at 1312, The Mayor of Colchester v. Brooke (1845) 115 E.R. 518 per Denman C.J. at 531. See also Mayor of City of Auckland v. Dixieiland Ltd. 171 K.B. 171 while so covered they are subject to the free exercise by the public and every member of it of the rights of fishing and navigation.
Ivaegh v. Martin, have all affirmed the existence of the right in the public.

It appears that the common law has conferred only limited rights on the public to use the foreshore for purposes incidental to the right of navigation. It has been accepted that the public right of navigation includes as incidental thereto, the right to temporarily moor and anchor upon the foreshore. The courts have however, also had to determine firstly whether as incidental to the right of navigation, the public have a right to lay permanent moorings in the foreshore, and secondly, whether the public have a general right to use the foreshore incidental to the right of navigation, for purposes such as embarking and disembarking, grounding, and loading or unloading goods.

It seems that since the recent decisions in Fowley Marine (Emsworth) Ltd. v. Gafford and Evans v. Godber, that there is no right for members of the public to lay permanent moorings in the foreshore whether it be vested in the Crown, or in a grantee of the Crown.

Esher M.R. when considering this question in the Court of Appeal in Attorney-General v. Wright, held that

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87 __/T9617_ 1 Q.B. 232 per Paull J. at 272.

88 __/T9677_ Denaby And Cadeby Main Collieries Ltd v. Anson supra n. 86 per A.T. Lawrence J. at 176. See also Halsbury n. 84 ante.

89 __/T9677_ 2 Q.B. 808.

90 __/T9747_ 1 W.L.R. 1317.

91 __/T8927_ 2 Q.B. 318 at 321.
the laying down of permanent moorings on the foreshore was within the ordinary course of navigation, and was a right recognised by the common law. A.L. Smith L.J. also accepted that the laying down of permanent moorings was an ordinary incident of the public right of navigation, but it seems unclear whether his decision was based on a general common law right, or on the existence of a local custom.

The majority of decisions however favour the view that one cannot, without the permission of the owner of the foreshore, place permanent moorings on, or in, the soil of the shore. In Denaby and Cadeby Main Collieries Ltd. v. Anson the plaintiff contended that as part of the right to navigate in tidal waters it had an incidental right to permanently moor a coal hulk in Portland Harbour. Fletcher Moulton L.J., to this contention, held, that the vessel could not be permanently moored in the harbour by fixing it to the soil, without the permission of the Crown as owner of the land beneath the water.

Paull J. in Iveyagh v. Martin, considered that the right to place permanent moorings in the soil was doubtful, and after noting the conflicting decisions, he expressed preference for the view that the public had no

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92 Ibid., at 323.
93 [19117] 1 K.B. 171.
94 Ibid., at 204.
95 [19617] 1 Q.B. 232.
common law right to permanent moorings in the soil. In *Fowley Marine (Emsworth) Ltd. v. Gafford* Megaw J. held the statements of Esher M.R. and A.L. Smith L.J. in *Wright's* case to be obiter dicta, and then held after considering the authorities that there was no common law right to lay permanent moorings in another person's land without his permission. Recently Lord Widgery C.J. in *Evans v. Godber*, in referring to the statement in *Halsbury* that the public had a right to moor and fix moorings upon the foreshore, commented that if that statement referred to a right to lay permanent moorings, then it was questionable whether it was a correct statement of the law.

Conflicting decisions have also been given as to the extent to which the public may, as incidental to the right of navigation, use the foreshore to ground boats, to embark and disembark persons, or load and unload goods.

The leading authority on the extent of such rights is again the decision in *Blundell v. Catterall*. Best J.

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96 Ibid., at 273.
97 *7967* 2 C.B. 308.
98 Ibid., at 821. See also the Court of Appeal judgment in *7963* 2 C.B. 613 where Wilmer L.J. at 633 stated that the comments of Esher M.R. in *Wright's* case to be obiter which; "... in my view did not in any event bear the meaning sought to be put on it."
99 *7974* 1 W.L.R. 1317.
2 Supra n. 99 at 1326.
3 (1821) 106 E.R. 1190.
acknowledged that, the public because of revenue laws, could not load or unload goods on the foreshore, except at particular places, or at ports. 4 Best J., however was of the view that the public had a right to land from boats, draw the boats onto the shore, and embark, as part of the general right of way over the foreshore. 5 Holroyd J., however, denied the existence of a right in the public both to unload goods on the foreshore, and to use the foreshore to disembark and embark persons incidental to the right of navigation. The public were able to gain access to the sea, in the opinion of Holroyd J., for the purposes of navigation and fishing, by using the ports established under the King’s prerogative, or public places. 6 In referring to incidental rights to the public rights of navigation and fishing, Holroyd J. commented; 7

The public common law rights, too, with respect to the sea, ... independently of usage, are rights upon the water, not upon the land, of passage and fishing on the sea, and on the sea shore when covered with water;

4 Ibid., at 1194.
5 Idem.
6 Ibid., at 1200.
7 Ibid., at 1202. See also Abbott C.J. at 1206 where he also denied the existence of a general common law right of loading and unloading goods upon the foreshore.
8 (1868) 1 N.Z.C.A. 117.
and though, as incident thereto, the public must have the means of getting to and upon the water for those purposes, yet it will appear that it is by and from such places only as necessity or usage have appropriated to those purposes, and not a general right of lading, unlading, landing, or embarking where they please upon the seashore, on the land adjoining thereto, except in case of peril or necessity.

In New Zealand, Arney C. J. in Crawford v. Lecren, after reviewing the judgments of Best and Holroyd J.J. in Blundell's case concluded that a subject in New Zealand could not claim a common law right to load goods at pleasure upon the foreshore.9

In Bournemouth-Swanage Motor Road And Ferry Co. v. Harvey and Sons, Luxmoore J. stated there was no general public right of landing on privately owned foreshore.11 The grounding of a boat was held not to be an ordinary right of navigation by Scrutton L.J. in The Carlgarth, The Otarama.12 However, if a vessel navigating a tidal river cannot reach its destination in one tide, it is no excess of the right of navigation to ground whilst awaiting the reflux of the tide.13

Paull J. in Iveagh v. Martin recently considered the extent of the public right of navigation and held that

9 Ibid., at 130.
10 (1929) 94 J.P. 10.
11 Ibid., at 14.
the right existed even where at certain states of the tide the water might disappear from the particular place where the navigation was in progress. The right of navigation, in the opinion of Paull J., included all rights necessary for the full enjoyment and exercise of the right of convenient passage, including the rights of anchorage, and remaining for a convenient time for the purpose of loading and unloading. The public also had a right, stated Paull J., to land or embark from any part of the land adjoining the foreshore if they had a right to go upon such land. 15 However, since the decision in *Iveagh's* case, Harman L.J. has commented; 16

I cannot find any clear decision that the public has the right to walk on the foreshore when the tide is out, nor of landing from boats or embarking except in cases of emergency.

There are therefore conflicting decisions as to the existence, or extent of rights conferred on the public to use the foreshore for purposes incidental to the right of navigation in the sea and in tidal waters. However, as with public recreation and general usage of the foreshore the Crown, or its grantee, has traditionally tolerated the public using the foreshore for all reasonable purposes connected with navigation, holding no objection to persons embarking, disembarking, loading or unloading goods or permanently mooring boats upon the foreshore. It is to be noted that such usage occurs however, generally through the tolerance or sufferance of the Crown or its grantee,

15 Ibid., at 272 - 273.
16 In *Alfred F. Beckett Ltd. v. Lyons* [1967] 1 Ch. 449 at 469.
as the common law, on the majority of decisions, appears to have recognised only very limited rights in the public to use the foreshore for purposes incidental to the exercise of the right of navigation.

3. Fishing:

At common law, the right of fishing arose from the title to the soil over which the water flowed. However, whilst the foreshore, and the bed of all tidal rivers and estuaries is of common right vested in the Crown, which as owner also held the right of fishing in the waters above the soil, by the common law the public were given a right of fishing in such waters whether the soil beneath was in the Crown, or a grantee of the Crown. For a public right of fishing to exist in a particular area of tidal water, that water must be subject to the tide flowing and reflowing in the ordinary course of things.

The public right of fishing in tidal waters and the sea, as with the public right of navigation in such waters, has been firmly established, and recognised as early as 1674 in Lord Fitzwalter's case. The right has been defined by


19 Reece v. Miller (1892) 8 Q.B.D. 626 per Grove J. at 631.

But though the King is the owner of this great waste, and as a consequent of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a publick common of piscary...

The public right of fishing seems to have developed through the Crown as parens patriae. As Viscount Haldane L.C. has commented:

Finding its subjects exercising this right as from immemorial antiquity the Crown as parens patriae no doubt regarded itself bound to protect the subject in exercising it, and the origin and extent of the right as legally cognizable are probably attributable to that protection, a protection which gradually came to be recognised as establishing a legal right enforceable in the Courts.

Both the House of Lords, and the Privy Council, have held that since Magna Carta the Crown could not grant exclusive fishing rights to private citizens, and it appears that the public right of fishing can only be abridged by statute.

The courts have recognised rights in the public to use the foreshore for purposes incidental to the right of fishing in tidal waters, to a greater extent than the rights

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22 In Attorney-General For The Province Of British Columbia v. Attorney-General For The Dominion Of Canada supra n. 17 at 169.
23 Malcomson v. O'Dea supra n. 18.
24 Attorney-General For The Province Of British Columbia v. Attorney-General For The Dominion Of Canada supra n. 17.
25 Ibid.; at 170.
recognised to use the foreshore incidental to the right of navigation. However, the scope of such incidental rights is unclear as conflicting decisions have been given by the courts.

In Bagott v. Orr,26 the defendant sought to justify trespassing on privately owned foreshore on the alleged existence of a common law right in every subject to take away shellfish, and shells which had been left on the foreshore by the reflux of the tide. The court noted that no authority had been cited to it showing a common law right to take away shells on the foreshore, and not wishing to establish a general right of this kind, the court allowed the defendant to amend his claim to seafish only.27 The effect of this case, appears to be that the public have as part of the general right of fishing in tidal waters a right to enter the foreshore when dry to fish, take fish left there by the reflux of the tide, and shellfish living on the foreshore, but are not entitled to take empty shells; these remaining the property of the owner of the foreshore.

The extent to which the public are entitled to use the foreshore for purposes incidental to the right of fishing in the sea and in tidal waters was considered by Holroyd J. in Blundell v. Catterall.28 It is again to be noted that Holroyd J. was of the view that the public were

26 (1301) 126 E.R. 1391.
27 Ibid., at 1395.
28 (1821) 106 E.R. 1190.
entitled to use ports, public places, or places established by usage or necessity to gain access to the sea to exercise the rights of navigation and fishing, and not a general right of embarking or disembarking from all parts of the foreshore. The right of fishing was also held by Holroyd J. to be a right exercisable upon the water and not upon the land, and he neither discussed the decision in Bagott's case, nor considered whether the public had any further rights to use the foreshore for fishing purposes. The effect of the judgment of Holroyd J., in the writer's opinion, is that fishermen do not have a general right to embark or disembark from their boats over every part of the foreshore, nor carry their fish over the foreshore, or leave their boats upon the foreshore for future use, except in the case of peril or necessity. If such restrictions are placed upon those members of the public who exercise the right of fishing in the sea and tidal waters, then the very livelihood of those members of the public would be threatened. It is therefore submitted, that Holroyd J.'s judgment is open to criticism because of the impractical and unreasonable consequences that would necessarily result if the restrictions upon fishermen using the foreshore contained in his judgment were enforced by either the Crown, or a private owner of the foreshore. As Hall states,

29 Ibid., at 1202.

30 Fishermen, further do not have a general right to use the land adjoining the foreshore for leaving their boats above high water mark except in the case of peril or necessity. See Earl of Ilchester v. Raishleigh (1859) 61 L.T. 477 per Kekewich J. at 478 - 479.
The right to land the fish upon the strand nearest where it is caught, would seem to be an essential adjunct of the fishery. To require the fish to be landed at a port perhaps twenty miles off with all the delays of winds, and tides, ... is utterly destructive of the fishery.

Hall further notes the impractical consequences that would result, if the right of fishing was to be regarded as a general right vested in the public, and the necessary way and passage for its exercise being regarded as a local and partial privilege only. It is further argued by Hall, that the public must have the right to use the dry land adjacent to the foreshore to embark and disembark, or at the time of highwater the public could only gain access to the land to disembark, or to the sea to embark, from a road which had its terminus at mean highwater mark. Such a situation concludes Hall, ... in regard to the fishery, and to all the boat and small craft navigation, would be very injurious to the common right, and prejudicial to the public.

Bayley J. in the Blundell decision did consider Bagott's case, and in referring to the claim set up by the defendant Orr, he stated.

32 Ibid., at 851.
33 Ibid., at 852.
34 Idem. See also Williams-Ellis v. Cobb (1935) 1 K.B. 310 where Wright L.J. at 320-321 also discussed whether a public right-of-way to the sea could extend over the foreshore as the tide receded to allow the public to fish, or load or embark goods, fish, or passengers, but pronounced no final opinion on the question.
35 (1821) 106 E.R. 1190 at 1204.
... it was a claim for something serving to the sustenance of man, not a matter of recreation only, a claim to take when left by the water, what every subject had an undoubted right to have taken whilst they remained in the water.

It appears from his judgment, that Bayley J. did envisage that the public had fishing rights on the foreshore when uncovered by the tide, such rights being justified as "serving to the sustenance of man", and not being a matter of recreation. Bayley J. however, did not specifically consider the extent to which the public were entitled to use the foreshore for the purpose of gaining access to and from the sea or tidal water, in order to exercise the right of fishing in such waters.

There appears to be little other specific authority governing the rights of the public to use the foreshore for purposes incidental to the right of fishing. In Brinckman v. Matley, Buckley J. commented;

For the purpose of exercising the right of fishing it may be that there is - I do not say that there is - a right to cross the foreshore in order to launch a boat.

The same judge in Behrens v. Richards, referred to Blundell's case, and noted Holroyd J.'s decision that access to the sea could only be gained for fishing through places

36 [79047] 2 Ch. 313.

37 Ibid., at 316. Cozens-Hardy L.J. at 327 stated he did not desire to attack the decision in Bagott v. Orr (supra), and noted that that case proceeded on the footing that the common law right of fishing included a right to get shellfish when the foreshore was dry.

38 [79057] 2 Ch. 614.
appropriated by necessity or usage. However, Buckley J., stated he did not wish to pronounce a final opinion on the question, and held that the defendants in the case had failed to establish any right-of-way over the disputed paths.\textsuperscript{39} In\textit{Crawford v. Lecren},\textsuperscript{40} Arney C.J. held the right of fishing included the right of,\textsuperscript{41}

... shrimping and gathering all shell or other fish whose natural habitat is between high and low-water mark ...

Similarly, Johnston J. in\textit{Attorney-General v. McIlwaine},\textsuperscript{42} held that the public had a right to enter upon the foreshore for the purpose of fishery and to take such fish as may have been deposited thereon by the sea.\textsuperscript{43}

The right of fishing on the foreshore is limited to the ordinary methods of fishing and would not include the placing of weirs or other permanent fixtures to catch fish in the soil of the shore.\textsuperscript{44} Such fixtures would exclude the equal rights of the public to fish on the foreshore, and could only be used by the owner of the foreshore.\textsuperscript{45}

In summary therefore, while the right to use the foreshore to gain access to and from the sea for the purposes

\begin{itemize}
\item 39 Ibid., at 620.
\item 40 (1868) 1 N.Z.C.A. 117.
\item 41 Ibid., at 127.
\item 42 [1937] I.R. 437.
\item 43 Ibid., at 440.
\end{itemize}
of fishing appears to be restricted at common law by the judgment of Holroyd J. in *Blundell's* case, the courts appear to have recognised more extensive rights in the public to use the foreshore for fishing purposes when uncovered by the tide.\(^4\) However, the extent of such rights conferred on the public to use the foreshore for purposes incidental to fishing in the sea or in tidal waters is unclear, having regard to the fact that there has been little recent authority discussing the issue. The matter may well be a technical argument anyway, having regard to the widespread public usage of foreshore areas both in England and in New Zealand for purposes incidental to the right of fishing. The Crown as prima facie owner, or its grantee (as is more often the case in England) have traditionally tolerated fishing activities on the foreshore in the same manner as other public activities have been tolerated. The Crown, would be most unlikely to attempt to restrain such public activities either in England or New Zealand. If a private owner of the foreshore attempted to prevent the public from using it for fishing purposes, the courts would probably

\(^4\) per Viscount Haldane L.C. in *Attorney-General For The Province Of Quebec v. Attorney-General For The Dominion Of Canada* (1921) 1 A.C. 413 at 422 referring to the earlier decision of the Judicial Committee in *Attorney-General For The Province Of British Columbia v. The Attorney-General For The Dominion Of Canada* (1917) A.C. 153.

\(^4\) Such modern activities as surfcasting from the beach or whitebaiting from the foreshore of a tidal river could presumably be justified as an incidental right of fishing in the sea or tidal waters.
be unsympathetic to such an action, unless some private interest or right was adversely affected by the public usage.

4. **Removal of Sand, Stone, and Soil:**

The common law conferred no rights upon the public to take sand, stone, or soil from the foreshore. In *Attorney-General v. Emerson*, Lord Herschell stated,

> The public do not possess any right thus to take the soil of the foreshore, even if it be vested in the Crown.

5. **Wildfowling:**

The public have no common law right to kill or hunt wildfowl on the foreshore, when covered by water or not. This was established in *Lord Fitzhardinge v. Purcell*, where Parker J. held that the public had no rights over the foreshore of a tidal navigable river except such as were ancillary to their rights of fishery and navigation in the sea.

Parker J. also rejected the defendant's contention that shooting wildfowl from a boat over the foreshore was justified under the public right of navigation; holding the

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47 *J917* s.C. 649.

48 Ibid., at 662. The principle is: "... that the owner of land is entitled to all the natural advantages belonging to that land, and therefore to all things which in the course of nature may be deposited thereon" per Lawson J. in *Brewhaus v. Haren* (1877) 11 Ir. C.L. 198 at 201.

49 *J9087* 2 Ch. 139.

50 Ibid., at 166. This decision was followed by J. Miller S.C. in *Burnley v. Flutey* (1940) 35 M.C.R. 142 when convicting defendants for shooting wildfowl on Crown land both above and below high water mark at Hapier Harbour.
right of navigation to be analogous to a right of passage, which could only be used for that particular purpose.51

6. Seaweed:

Similarly, the public have no right at common law to enter upon the foreshore for the purpose of gathering and carrying away seaweed, whether growing on rocks on the foreshore, or whether deposited thereon by the tide.52

The property in seaweed lies in the owner of the foreshore, and the public can assert no rights to it.53 Several Irish cases have held that the public have no right to enter the foreshore, to take seaweed, whether the soil is privately owned, or the property of the Crown, including Hamilton v. Attorney-General,54 Daly v. Murray,55 and recently by McLoughlin J. in Mahoney v. Neenan and Neenan.56

7. Deposit of Rubbish and Polluting the Foreshore:

At common law, the public had no right to deposit rubbish on the foreshore, nor to pollute it in any manner. In

51 Supra n. 59 at 167 - 168.
52 Howe v. Stawell \(753^2\) Alc. + Nap. 348, followed in Mulholland v. Killen (1874) 9 Ir. Eq. 471 per Lawson C.S. at 482.
54 (1880) 5 L.R. Ir. 555 per Chatterton V.C. at 573 - 575.
55 (1885) 17 L.R. Ir. 195 per Ashbourne C. at 199.
56 \(796^2\) I.R. 359 at 564 - 565.
Corporation of Hastings v. Ivall, 57 Malins V.C. held the defendant's contention that he had the uncontrolled liberty of depositing earth and rubbish on the foreshore to be unreasonable and unsustainable. 58 If rubbish or other polluting material is deposited upon the foreshore the person or body responsible shall be liable for any resulting damage. Thus in Foster v. Urban District Council of Warblington, 59 the defendant corporation was held responsible for damage caused to the plaintiff's oyster storage ponds on the foreshore, because sewage from the town polluted the shellfish. Vaughan Williams L.J. rejected the corporation's contention that the common law recognised a right in local authorities to discharge sewage into the sea. 60

57 (1874) L.R. 19 Eq. Cases 558.
58 Ibid., at 587.
60 Ibid., at 665. See also Buckley J. in Hobart v. Southend-On-Sea Corporation (1906) 75 L.J.K.B. 305 at 308.
CHAPTER III

COMMON LAW RIGHTS AND RESTRICTIONS OVER LAND ADJACENT TO NEW ZEALAND WATERWAYS

A. Private Rights:

The land adjacent to New Zealand's lakes, rivers, and the foreshore is generally held in private ownership, unless the Crown or some other public authority has retained or acquired that land pursuant to statutory powers such as section 58 of the Land Act 1948, or section 29(1) of the Counties Amendment Act 1961. The Crown has no prima facie interest in such land as compared with the foreshore, and accordingly at common law the private owner was entitled to the protection of the courts from encroachments onto his land by members of the public. The common law has always strongly protected private land from public trespass; such protection having been described as; 61

... one of the distinguishing characteristics of the law of England.

The Common Law recognised that the riparian owner 62 had certain rights by reason of his proprietary interest in land which was in contact with water. Amongst such rights recognised was that a riparian proprietor had a


62 Williams J. defined a riparian owner as; "... the owner of the 'ripa' who is the riparian proprietor," in Skey v. The Mayor Of Dunedin (1905) 25 N.Z.L.R. 304 at 307. The common law respecting riparian rights is applicable in New Zealand. See Borton v. Howe (1875) 3 N.Z.C.A. 5.
private right of access and regress from the water to and from his own land. No such right was recognised in the public at large to use riparian lands for that purpose. For such a riparian right to exist, the land in question must be in contact with the water, and the question whether a particular piece of land has the character of a riparian tenement is a question of fact to be determined according to the special circumstances.

It is now proposed to consider the specific common law rights and restrictions on private owners of land adjacent to New Zealand waterways.

(a) Land On The Margins Of Lakes:

The riparian proprietor's interest in land on the margin of a lake extends at least to water's edge, but the question as to the ownership of the bed of a lake has not as yet been conclusively determined. However, it seems to be accepted that the Crown has no prima facie claim to the bed of an inland lake, and it is submitted therefore, that there is no public interest in either the margins, or the

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63 Riparian rights are extinguished when the riparian tenement is acquired under statute. See Smale v. Takapuna Borough Council [1932] N.Z.L.R. 35 where riparian rights were lost when part of the riparian owner's land adjacent to highwater mark at Takapuna was acquired under The Public Works Act 1928.

64 Lyon v. The Fishmonger's Co. (1876) 1 App. Cas. 662 per Lord Selborne at 683, Hindson v. Ashby [1897] 2 Ch. 1.

65 Attwood v. Llay Main Collieries Ltd. [1926] Ch. 444 per Lawrence J. at 459. The further rights of a riparian proprietor to have water flow to him in its natural state, and to use it for ordinary or domestic purposes are discussed in 39 Halsbury's Laws of England (3rd ed. 1962), 516 - 522.
bed of a lake at common law.

The riparian proprietor of land on the margin of a lake is entitled to a right of access to and from that water. In *Marshall v. Ulleswater Steam Navigation Co.* Blackburn J. Commented;

... everyone having land upon any part of the lake's banks may embark and disembark from and to his own land.

The doctrine of accretion is not applicable to the land on the margin of a lake, as the doctrine applies only to land adjacent to the sea, streams or rivers.

(b) **Land Adjacent To The Foreshore:**

Land above mean high water mark of a beach, estuary, arm of the sea, or a tidal river is presumed to belong to the adjoining owner of that foreshore, and not to the Crown. The common law recognised that the proprietor of such land was entitled to a right of access and regress to that water, even though the land may not have been in contact with the water at all times because of the flux and reflux of the tide. It has been held that the fact that the land

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66 *Bristow v. Cormican* (1878) 3 App. Cas. 641 per Lord Blackburn at 667, *Johnston v. O'Neil* [1917] A.C. 552 per Lord Macnaughten at 577, *Toome Eel Fishery (Northern Ireland) Ltd. v. Cardwell* [1967] N.I. 1 per MacDermott L.C.J. at 12. Whilst the question of ownership may not have been determined, it is submitted that each riparian proprietor of the lake shore would have a right of fishing in the lake.


68 Ibid., at 314.


is in contact with the water for a great part of every day in the ordinary and regular course of things will be sufficient foundation to support a natural riparian right.\textsuperscript{71} Such contact of the land with the water may exist either laterally or vertically, provided that the contact exists daily in the ordinary and regular course of nature, though it may not continue during the whole of any day.\textsuperscript{72}

The House of Lords in Lyon \textit{v. The Fishmonger's Co.}\textsuperscript{73}, and the Privy Council in North Shore Rail Co. \textit{v. Pion},\textsuperscript{74} have both recognised that the owner of land on the margin of a tidal river had a private right of access and regress to and from those waters. Similarly, the right of a riparian proprietor of lands adjacent to beaches, estuaries or arms of the sea to have access to and from the water was recognised by the Privy Council in \textit{Attorney-General Of The Strait's Settlement v. Wemyss},\textsuperscript{75} and by Barton J. in Coppinger \textit{v. Sheehan}.

In Coppinger's case, Barton J. held that the right could be exercised by the riparian proprietor when the tide had receded leaving the fore-shore bare, and would include the pulling up, and pushing down of boats, and embarking and disembarking.\textsuperscript{77} In the

\begin{itemize}
\item 71 Lyon \textit{v. The Fishmonger's Co.} Supra n. 64 per Lord Selborne at 683.
\item 72 per Earl Selborne in North Shore Rail Co. \textit{v. Pion} (1839) 14 App. Cas. 612 at 621 - 622.
\item 73 Supra n. 64 per Lord Cairns L.C. at 672 and Lord Selborne at 683 - 684.
\item 74 Supra n. 72.
\item 75 13 App. Cas. 192 per Lord Hobhouse at 196. See also \textit{Attorney-General Of Southern Nigeria v. John Holt and Co. (Liverpool) Ltd.} 19157 A.C. 599 per Lord Shaw of Dunfermline.
\end{itemize}
referring to Lyon's case, held that a riparian proprietor adjacent to the foreshore had a right of access to and from the sea, even where the foreshore was left bare with the recession of the tide. 79

The boundaries of land determined by the sea or tidal waters may, as was outlined in Chapter I, alter from time to time by the operation of the doctrine of accretion.

(c) Land On The Margins Of Non-Tidal Rivers:

At common law there is a presumption that the bed of a non-tidal river is presumed to belong to the opposing riparian proprietors, each taking half the bed of the stream with their respective interests extending usque ad medium filum acuæ. 80 The owner of land on the margin of such a non-tidal river, was held entitled by Lindley L.J. in Hindson v. Ashby 81 to have a private right of access and regress to and from that water. 82

As the right of fishing is a right of property, there is a presumption of law that each owner of land abutting onto a non-tidal river, has the right of fishing to the


77 Ibid., at 525. See also R v. Rynd (1863) 16 Ir. C.L. 29 where both Hayes and Fitzgerald J.J. appear to have assumed such riparian owners could cross the foreshore for the purpose of bathing.


79 Ibid., at 489. The same judge recognised a similar right of access over the foreshore in Smale v. The Takapuna Borough Council [1932] N.Z.L.R. 35 at 37.

80 Wright v. Howard (1823) 57 E.R. 76 per Leach V. C. at 82, Orr Ewing v. Colquhoun (1877) 2 App. Cas. 839 per Lord Gordon at 868. This rule is in force in New Zealand; see The King v. Joyce (1905) 25 N.Z.L.R. 78.
middle thread of the river. If one riparian owner owned both sides of the river, then that owner had, at common law, the sole right of fishing in that part of the river between his lands. The leading authority is Murphy v. Ryan where O'Hagan J. held that beyond the point of a river in which the tide ebbed and flowed, the soil of the river was prima facie in the riparian owners, and the right of fishing private even if the river was used by the public for navigation.

Land on the margin of a non-tidal river is subject to the doctrine of accretion in the same manner as land adjacent to the sea, or to a tidal river. However, where the boundary of the land is in a fixed and defined line, then it appears that the doctrine of accretion does not apply. As Adams has noted, this exception to the general rule, has important consequences in New Zealand where fixed and defined "reserves" may be set aside along mean high water mark of the sea, or the margins of lakes and rivers.

81 (1906) 26 N.Z.L.R. 348.
83 (1868) Ir. 2. C.L. 143.
84 Ibid., at 9.
85 per Bowen L.J. in Blount v. Layard (1891) 2 Ch. 681 at 689.
86 Adams, "Acquisition Of Title To Land By Accretion" (1948) 24 N.Z.L.J. 110.
pursuant to section 58 of the Land Act 1948. Thus, for example, where land is set aside between a river and the land disposed of by the Crown, the boundaries of that land withheld from sale will remain the same, even if the river over a period of time changes its course. This principle was applied by Cooper J. in Attorney-General and Southland County Council v. Miller,\textsuperscript{87} where the Mataura River had changed course over a period of years, and washed away an area of land reserved from the original Crown grant on the margin of the river. The reserved land was previously a road under the control of the plaintiff county, which contended on the authority of Pipi Te Ngahuru v. The Mercer Road Board,\textsuperscript{88} that the boundaries of the reserved land had correspondingly altered with the change in the rivers course. Cooper J. however, declined to follow the decision in Pipi's case and commented:\textsuperscript{89}

\ldots in this colony it is clear that the owner of land abutting onto a public road is under no liability to give up to the public use, if the road adjoining his land is destroyed or washed away, any part of his land to take the place of the road so destroyed.

Cooper J. further held that if there was a public necessity for a road to replace the one destroyed then the new road would have to be taken under the Public Works Act, and compensation paid to the private owner.

\textsuperscript{88} (1887) 6 N.Z.L.R. 19. Ward J. had held in this decision that where the Waikato River washed away a road adjacent to one of its banks, the public were entitled to a road over a corresponding portion of the plaintiff's land in lieu of the washed away portion.

\textsuperscript{89} Supra n. 87 at 354. Adams, loc. cit., 39, states that Pipi's case "according to professional opinion, was wrongly decided".
As will be outlined in Chapter V public recreation on the lands adjacent to our waterways is to a large extent dependent on fixed and defined "reserves" on the margins of those waterways. This decision therefore, is of importance in that it clarifies that the boundaries of such "reserves" are fixed, and do not follow the waterway should it for some reason change course. Thus it would seem that in the event of either a river encroaching onto land and washing away part of any reserved land, or retreating and leaving the reserved land away from the actual water, that the "reserve" could only be reinstated to its former physical proximity to the water by the acquisition of private land under the Public Works Act.

B. Public Rights:

As the land on the margins of lakes and non-tidal rivers, and that adjacent to the foreshore is usually held in private ownership in New Zealand, the public are prima facie prohibited from entering such land by the law of trespass. The common law recognised no rights in the public to use the lands adjacent to such waters for recreational purposes, and whilst limited rights may have been conferred on the public to use certain waterways for fishing or navigation; such rights to use a waterway for specific purposes conferred no right of public entry onto the private land adjacent to that particular waterway. It is proposed to consider the restrictions placed upon the public by considering the circumstances at common law where the public were entitled to use waterways for fishing or navigation.
1. **Fishing:**

(a) **Tidal waters:**

As was outlined in Chapter II, the public have a prima facie right to fish in tidal waters, and also to use the foreshore of a beach, estuary, or tidal river for fishing purposes, even where the tide has receded leaving the foreshore bare. Such a right however, confers no right on the public to use any privately owned land above mean high-water mark for purposes such as gaining access and regress to and from the foreshore, or leaving boats above mean high-water mark, without the permission of the private owner.90

(b) **Lakes:**

It has recently been held that the public have no right at common law to fish in lakes,91 and it would appear therefore, that public fishing in lakes must occur through the licence or sufferance of the owner or owners of the bed of the lake.

It would further appear that any public usage of the land on the margin of a lake for fishing purposes must similarly occur through the licence or toleration of the riparian owner, and not under a claim of right recognised by the common law.

(c) **Non-Tidal Rivers:**

As the right of fishing in a non-tidal river is prima facie in the riparian proprietor as an incidental right to the ownership of the bed of the river, the public were

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90 *Earl of Ilchester v. Raisbleigh* (1839) 61 L.T. 477.

accorded no right to fish in such waters by the common law. Thus, the public may only fish in the waters of a non-tidal river, or use the banks for fishing purposes, through the licence or indulgence of the riparian owner. Bowen L.J. in referring to public fishing in a non-tidal part of the river Thames stated:92

... they may fish by the licence of the lord, or the owner of a particular part of the bed of the river, or they may fish by the indulgence, or owing to the carelessness or good nature, of the person who is entitled to the soil, but right to fish themselves as the public they have none ...

2. **Navigation:**

   (a) **Tidal Waters:**

   Whilst the public have the right to navigate over the foreshore when covered by the tide, and are entitled to use the foreshore for the limited purposes outlined in Chapter II, there is no right conferred by the common law allowing the public to use the land above mean high-water mark for purposes incidental to navigation, except in the case of peril or necessity.93

   Such lands are presumed to belong to the owner of the land adjoining the foreshore and not the Crown,94 and accordingly, the common law conferred no general rights in the public to use such lands for purposes incidental to navigation in tidal waters.

   (b) **Non-Tidal Waters:**

   At common law, the public have no general right of

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92 In Blount v. Laverd 1791 2 Ch. 681 at 690.
93 See again Earl of Ilchester v. Haishleigh Supra n. 50.
navigation in non-tidal waters, though such a right may arise through immemorial user, by express dedication from the owner of the "solum" beneath the water, or by an Act of Parliament. The common law rule however appears to have been modified in New Zealand by the decision of the Court of Appeal in Meuller v. Taupiri Coalmines Ltd. It was held by a majority of the Court that because non-tidal parts of the Waikato River had been used by the public for navigation, the Crown as trustee for the public, had an interest in the bed of the river, and the presumption that the bed passed to the grantee "ad medium filum aquae" was rebutted.

The existence of a public right of navigation on non-tidal waters does not however confer on the public any right to land on the banks or shores that adjoin the waterway without the consent of the riparian owner. Further, if

95 39 Halsbury's Laws of England (3rd ed. 1962), 540-541. See for example Orr Ewing v. Colquhoun (1877) 2 App. Cas, 836 where Lord Blackburn at 847 noted that the public right to navigate on a non-tidal river was not the same as in the sea or a tidal estuary, but held that a public right to navigate the Leven, a non-tidal river in Dumbartonshire, was proved to exist by user since living memory.

96 (1900) 20 N.Z.L.R. 89.

97 Section 14 of the Coalmines Amendment Act 1903 declared that the bed of a navigable river, except where it had been expressly granted, remained vested in the Crown. The section thus had the effect of allowing public navigation over all "navigable" rivers in New Zealand through the Crown retaining ownership of the river bed. This section is now in Section 206 of the Coalmines Act 1925 and is discussed further in Chapter VI post.
a right of navigation exists in certain non-tidal waters, the public gain no right to use the waterway or banks thereof for other purposes such as for fishing or recreation, since the right of navigation is a right of way only conferring no rights of property in the public. Thus in Smith v. Andrews, North J. held that the public when navigating a non-tidal river, did not acquire thereby the right to fish in the water.

96 Marshall v. Ulleswater Steam Navigation Co. (1861-73) 1311. See also Hall v. Herbert (1775-1802) 472 where it was held that the public had no common law right to use privately owned banks of a tidal river incidental to the right of navigation. There appears to be no reason why this principle should not extend to non-tidal waters where a right of navigation is proved to exist.

99 Orr Ewing v. Colquhoun (1877) 2 App. Cas. 839 per Lord Gordon at 874.

1 (1847) 2 Ch. 678.

2 Ibid., at 695 - 696.
CHAPTER IV

CUSTOM, PRESCRIPTION, AND NECESSITY:

Whilst the courts in England have accepted that rights may be created through custom, prescription, and necessity which allow the public, or certain individuals to use land adjacent to waterways, such rights cannot arise in New Zealand through custom, and would only arise in rare instances through the operation of the principles of prescription and necessity.

1. Custom:

Holroyd J. in Blundell v. Catterall,³ recognised that rights could arise by either custom or prescription which allowed usage of the foreshore by the permanent or temporary inhabitants of any village, parish, or district.⁴ However, as a custom must be proved to have existed from time immemorial, rights arising by custom cannot be established in New Zealand.⁵

2. Prescription:

It is submitted that prescriptive claims that affect public or private recreation or usage of land adjacent to our waterways would not be common, as such claims may only

³ (1821) 106 E.R. 1190.
⁴ Ibid., at 1198.
⁵ See Adams, Garrow's Law of Real Property (5th ed. 1961), 417 and Crawford v. Lecren (1968) 1 N.Z.C.A. 117 where Arney C.J. at 130 after commenting that, "There may appear to be a certain incongruity in testing the rights of the subject over the shores of New Zealand by reference to the rights of the public on the coasts of England ...", noted that titles acquired by usage could not arise in the colony.
be made in respect of land subject to the Land Transfer Act 1952 by the claimant proving twenty years possession of that land. In respect of land not subject to the Land Transfer Act 1952, prescriptive rights may be claimed, but as most land is today subject to the Land Transfer Act 1952, the instance of such claims arising would be rare.

A further restriction is placed upon the acquisition of prescriptive rights in New Zealand by section 172 of the Land Act 1948 which provides that no dedication, or grant of a right of way shall be reason only of user be presumed, or allowed to be asserted or established as against the Crown.

3. Necessity

The right of the public to use the foreshore in the case of emergency or necessity was recognised by both Holroyd J. and Abbott C.J. in Blundell v. Catterall, and recently by Harman L.J. in Alfred F. Beckett Ltd. v. Lyons, but there appears to be little further authority on the extent of such rights. Fishermen have the right to use the land above mean high-water mark in the case of peril or

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6 The Land Transfer Amendment Act 1963, S.3. Section 21 (a) also provides that no application shall be made under S.3. with respect to any land owned by the Crown.

7 Supra n. 3 at 1202 and 1206. See also Brinckman v. Matley 19047 2 Ch. 313 where Buckley J. held at 316 that for the purposes of navigation, a common law right existed to cross the foreshore in the case of peril or necessity. Romer L.J. at 325 similarly recognised that the public have "certain rights of necessity over the foreshore."

8 19677 1 Ch. 449 at 469.
necessity,¹⁰ and it is the writer's view that the public would equally have the right to use private lands adjacent to all New Zealand waterways in the case of genuine emergency or necessity.

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9 In Attorney-General and Southland County Council v. Keller (1906) 26 N.Z.L.R. 348 Cooper J. at 359-360 considered American and Canadian authorities as to the right of the public to deviate from a highway in the case of emergency or unexpected or unforeseen circumstances, but held it was unnecessary for him to decide the question.

10 Earl of Ilchester v. Raishleigh (1889) 61 L.T. 477 per Kekewich J. at 478 - 479.
CHAPTER V

THE DEVELOPMENT OF RESERVES ADJACENT TO NEW ZEALAND WATERWAYS

Since the beginnings of colonisation in New Zealand, attempts have been made to provide public access to the lands adjacent to our waterways.\(^{11}\) As a result of the enlightened views of the early administrators and central government in the nineteenth century, considerable parts of the lands adjacent to our waterways are today available for public usage, through reserves specifically created for public purposes, or through the Crown after 1892, retaining land adjacent to waterways, on the disposal of Crown land. In the twentieth century, further legislation has been enacted to ensure the preservation of lands adjacent to our waterways for public purposes.

1. Initial Legislative Attempts:

The Royal Charter under the New Zealand Act 1840, authorised the Governor to dispose of lands in New Zealand to;\(^{12}\)

\[\ldots\text{any persons, bodies politic or corporate, in trust for the public uses of our subjects there resident, or any of them.}\]

Instructions attached to the Charter to Governor Hobson required lands in the colony to be reserved and surveyed for (inter alia) the following purposes:\(^{13}\)

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11 For a general background to early land settlement and land legislation see Jourdain, Land Legislation and Settlement in New Zealand (1925).

12 Royal Charter 1840.

13 The Royal Instructions 1840, S. 40.
... places fit to be set apart for the recreation and amusement of the inhabitants of any Town or Village, or for promoting the health of such inhabitants, or as the sites of Quays or landing places which it may at any future time be expedient to erect, form or establish on the sea coast or in the neighbourhood or navigable streams, or which it may be desirable to reserve for any other purpose of public convenience, utility, health, or enjoyment ... 

It was further provided in that instruction that such places were not to be granted or conveyed to any private person, nor to be occupied by any private person for any private purposes. The instructions of 1840 formed the basis upon which legislation was enacted to create reserves, thus ensuring the preservation of public access to land adjacent to New Zealand's waterways. Legislative action was immediately seen in the Land Claims Ordinance 1841; section 2 of which provided that the sole and absolute right of pre-emption over lands in the colony was vested in the Crown, and that all existing, or claimed titles, were null and void unless allowed by the Crown. Section 6 of the Ordinance specifically recognised the public interest in the foreshore, as it was provided that no grant of land could be made by Commissioners appointed under the Ordinance, within one hundred feet of high water mark. Section 7 of the Ordinance provided that grants

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14 Idem.

15 This section would seem to be of considerable importance, but the writer has been unable to establish how long it remained in force, or whether it was incorporated into further legislation. Whether the provision was strictly followed by the Commissioners appointed is also uncertain. Presumably the ordinance would have been repealed with the advent of Provincial Government from 1852.
were not to be made of any land suitable for purposes of public utility, thus fulfilling the earlier requirement of section 43 of the Royal Charter.

Finally, the instructions attached to the charter of 1846 required areas to be marked out for (inter alia) the following purposes: 17

... places fit to be reserved for the embellishment or health of Towns, or for the recreation of the inhabitants thereof, or otherwise for any purposes of public utility, convenience or enjoyment ...

2. The Development Of Reserves By Central Government:

The first general legislation providing for the administration of public reserves was the Public Reserves Act 1854. By section 1, the Governor was empowered to grant to the superintendent of a province Crown lands within that province for purposes of public utility. The Governor was also empowered under section 2 of the Act to grant or dispose of any land below high water mark in any harbour, arm, or creek, of the sea, or in any navigable river or on the seacoast within the colony. 18 Section 5 of the Act provided that the superintendent of the province was required to hold the land for the purposes specified in the grant.

16 The importance of section 6 was noted by T.A. Gresson J. in Re An Application For Investigation Of Title To The Ninety-Mile Beach [1963] N.Z.L.R. 461 at 477.

17 The Royal Instructions 1846, S. 17.

18 Such a grant was the subject of dispute in Crawford v. Leppen (1869) 1 N.Z.C.A. 117.
The first legislation providing for the administration of domains was in the Public Domains Act 1860. By section 3 of the Act, the lands described in the First Schedule to the Act, together with other lands to be set aside in the future as domains, were declared to be Crown lands subject to the administration of that Act. The Governor was also empowered by section 5 (4) of the Act to treat and agree for the purchase or for the lease of lands for the purposes of the Act.

Section 2 of the Municipal Reserves Act 1874, provided that where under any Act or Regulation power existed to make reserves for purposes of public utility, such power would authorise the making of municipal reserves.

By the Abolition Of The Province Act 1875, all lands previously granted to the superintendents of provinces re-vested in the Crown. In respect of municipalities however, section 352 of the Municipal Corporations Act 1876 provided that lands previously granted to a superintendent could be re-granted to the corporation of a borough.

Section 5 of the Public Reserves Act 1877 provided that public reserves could be granted to, or vested in, any governing body, trustees or other persons for specific purposes. Section 11 (1) of the Act further provided that recreation or health reserves could be similarly vested in, or granted to any governing body, trustees, or other persons, provided that the public right of access thereto was not excluded by such disposition. Section 11 (2) of the Act authorised recreation or health reserves to be brought under the operation of, and be subject to, The Public Domains Act 1860.
The enactment of the Land Act 1877 was a significant development by central government in creating reserves for public purposes within New Zealand. By section 144 of the Act, the Governor was empowered to reserve from sale temporarily Crown land where he was of the opinion that such land was required for the purposes (inter alia) of docks, quays, landing places, parks or domains, or for the health, recreation, convenience or amusement of the people, or for any purpose of public advantage or enjoyment. Section 145 of the Act provided that after publication of the notice of reservation in the Gazette, and the lapse of one month after such publication, the land could be permanently reserved. Once permanently reserved, such reserves, by section 146 of the Act, were expressed to be dedicated for the purposes for which they were specifically reserved, and could be granted or disposed of on the condition that they were held in trust for the purposes for which they were originally reserved.

Section 5 of the Public Reserves Amendment Act 1878 classified types of public reserves in New Zealand; such reserves including landing places upon rivers and lakes, river frontage reserves, foreshore reserves, recreation reserves, and any other reserve not defined for any purpose of public safety, utility, advantage or enjoyment.

The Public Domains Act 1881 consolidated the law relating to public domains, whilst the Public Reserves Act 1881 similarly consolidated the law controlling the vesting and administration of public reserves.

Both the Lands Acts of 1835 and 1892 contained
provisions empowering the Governor to reserve Crown land from sale for reserves similar to the earlier provision in section 144 of the Land Act 1877. However in section 15 of the Land Act 1892, the Governor-General was also empowered where unsurveyed rural or pastoral land had been sold or disposed of at any time prior to the approval of a survey plan, to reserve any lands situate on the seashore, the margins of lakes, or on riverbanks where such lands were required for reserve purposes as outlined in section 235 of the Act. 21

The reserve provisions of such Land Acts related however, only to Crown land, and as private lands were also endowed with land of scenic or recreational qualities, the government in 1902 initiated action to deal with all land that it considered suitable for scenery preservation on a uniform basis. Consequently, the Scenery Preservation Act 1903 established a commission which was empowered under section 3 of the Act to inspect any land possessing scenic or historic interest, and to report and recommend to the Governor what lands whether Crown, private, or native, should be permanently reserved as scenic, thermal, or historic reserves. By proclamation under section 4 of the Act, the lands so recommended could be reserved by the Governor-General, and the section recited also that such reserved lands could be fenced, preserved, and conserved intact as and for, an inalienable patrimony of the people.

19 The Land Act 1886, ss. 227 - 229.
20 The Land Act 1892, ss. 230 - 237.
21 This provision is currently in The Land Act 1948, s. 58 (3).
of New Zealand. Section 5 of the Act prescribed that any land required to be taken for the purposes of the Act could be taken as a public work under the Public Works Act 1894.22

In 1908, both the Public Reserves and Public Domains Acts of 1881 were consolidated into the Public Reserves and Domains Act 1908. This Act controlled both the administration and development of public reserves and domains until its repeal by the Public Reserves, Domains and National Parks Act 1923.23

The provisions empowering the reservation of Crown land for public purposes were enacted in both the Land Acts of 190824 and 1924,25 and the current section empowering the reservation of Crown land for public purposes is section 167 (1) of the Land Act 1948. That section provides that:

The Minister may from time to time, by notice in the Gazette, set apart as a reserve any Crown land and with the prior consent in writing of The Minister of Transport any foreshore ... adjacent thereto and vested in the Crown, for any purpose which in his opinion is desirable in the public interest, or, with the like consent, any foreshore ... vested in the Crown for addition to any reserve set apart under this section or the corresponding provisions of any former enactment.

Section 167 (2) provides that the land so reserved is deemed to be dedicated to the purpose for which it was reserved upon notification in the Gazette, and thereafter it may be granted for that purpose in fee simple, subject

22 For further information on the operation of the Scenery Preservation Commission see McCaskill, A History Of Scenic Reserves In New Zealand, 5.
23 This Act repealed The Scenery Preservation Act.
24 The Land Act 1908, SS. 321 - 323.
to the condition that it shall be held in trust for that purpose.

The current legislation controlling public reserves and domains in New Zealand is The Reserves and Domains Act 1953. The Act retains the spirit of the previous Reserves and Domains Acts, but provides simpler procedures for the creation and administration of reserves and domains. Two options are open to the Minister of Lands by virtue of section 15 of the Act, if he is of the opinion that any private land should be acquired, or a right of way or other easement established over that land for the purposes of a public reserve. Firstly, by section 15 (1) (a), the Minister is empowered to treat and agree for the purchase or lease of the land or right of way or easement, or alternatively, by section 15 (1) (b) of the Act, the Minister may acquire the land or right of way or easement under The Public Works Act 1928. Section 15 (2) of the Act provides that all such lands either purchased, gifted or taken, are to vest in the Crown for the purposes of the Act as a public reserve.

Section 19 of the Act provides that the Minister may by notice in the Gazette, for the better carrying out of the purposes of any public reserve, not being a domain vested in the Crown, vest the reserve in any local authority or trustees to hold and administer the lands. Such lands vested are to be held, by virtue of section 19 (2) of the Act, in trust by the local authority or trustees for the purposes of the particular reserve. Section 27 of the Act provides for the leasing of public reserves and domains to an administering body, (as defined by section 2 of the Act), and where a recreation reserve has been vested in, or leased to an administering body, the public, by section 33 of the
Act are declared to have the right of free access to that reserve. 26

In respect of public domains, the Act specifies by section 42 (2) that the Minister of Lands is empowered to give notice in the Gazette declaring any public reserve to be a public domain, where that reserve is vested in the Crown for health or recreational purposes.

Part IV of the Act prescribes the mode of creation, and administration, of scenic reserves. The Minister by section 55 (2) of the Act is empowered to declare any public reserve or part thereof to be a scenic reserve by notification in the Gazette. Section 56 of the Act outlines the general purposes of scenic reserves, and it is specifically declared that Part IV of the Act shall have effect for the purpose of preserving as scenic reserves for the benefit and enjoyment of the public, suitable areas throughout New Zealand, possessing such qualities of scenic interest that their preservation is desirable, and in the national interest. The right of the public to have free entry and access to scenic reserves is protected under section 56 (2) (c) of the Act. Such areas of land which possess scenic value and are recommended to be acquired as scenic reserves, may be acquired in the same manner as the compulsory acquisition of public reserves from private lands under section 15 (1) (b) of the Act. 27

Finally, section 3 of the Reserves and Domains

26 The administering body of a recreation reserve is empowered to make bylaws controlling that reserve by section 32 (1) (k) of the Act.
Amendment Act 1960 had the effect of placing scenic reserves under the general supervision of the National Parks Authority, with the practical administration of such reserves being placed in the control of the Department of Lands and Survey.28

Numerous scenic reserves have been set aside adjacent to rivers and coasts in the Otago region, and such reserves provide the public with opportunities for recreation and leisure in some of the more famed Otago scenic areas. Scenic reserves adjacent to rivers are to be found for example at the Waipori Falls Scenic Reserve, being the largest scenic reserve in Otago, and at the Purakanui Falls Scenic Reserve in South Otago. Scenic reserves have also been established at Wilsher Bay on the coast south of Kaka Point, Tautuku Bay South-west of Owaka, and at Moeraki, the site of the famed Moeraki Boulders.29

Looking beyond Otago, scenic reserves giving the public access to waterways have been established for example at the Wanganui River, the Buller River and Lake Kainere in Westland, and the Tangarakau Scenic Reserve adjacent to the Tangarakau River in Taranaki.30

27 The Reserves and Domains Act 1953, S. 57 (2).
28 As at the 31st March 1974, 963 scenic reserves existed in New Zealand comprising a total area of 277,480 hectares. See McCaskill, Scenic Reserves Of Otago (1975), 3.
29 For further examples of scenic reserves in Otago see McCaskill, op. cit. 27.
30 See Scenic Reserves Information Department of Lands and Survey (1973).
3. **The Development Of Reserves From The Disposal of Crown Land:**

Section 72 of the Constitution Act 1852 empowered the General Assembly to make laws regulating the sale, letting, disposal, and occupation of the waste lands of the Crown in New Zealand. The Waste Lands Act 1858 was then enacted by the General Assembly; and it was declared that the Act was to:

... Regulate the Disposal and Administration of the Waste Lands of the Crown in New Zealand.

Section 12 of the Act specifically empowered the Governor to except Crown land from sale, or reserve it to Her Majesty, or dispose of it in such other manner as for the public interest may seem best for the purposes of (inter alia) public utility and convenience.

Section 163 of the Land Act 1877 empowered the Governor to make regulations for the care, protection, and management of all reserves and public domains not vested in, or under the control of any local authority, but it appears that regulations covering such reserves were not enacted.

The first positive legislative step to providing public access to New Zealand's water frontages was in Survey Regulations issued under the Land Act 1885. It was provided in Regulation 27 that a 100 link frontage was to be surveyed to all navigable rivers, and coasts.32

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31 Preamble to Act.

32 \[T8367\] 1 New Zealand Gazette, 636.
There was however no statutory requirement for the retention of Crown lands adjacent to New Zealand's waterways until the passing of the Land Act 1892. Section 110 of that Act prescribed:

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

This section was of considerable importance in that it established the principle of the one chain "reserve" adjacent to waterways in New Zealand, and thus provided land adjacent to our waterways not in private ownership. Section 110 was repeated in corresponding sections of the Land Act 1908,33 and the Land Act 1924,34 and is currently embodied in section 58 of the Land Act 1948. It is now provided that upon the sale or other disposition of Crown land, a strip of land not less than 20 metres in width is to be reserved along the mean high-water mark of the sea, and of its bays, inlets and creeks, along the margins of all lakes with an area in excess of 3 hectares, and unless the Minister of Lands considers it unnecessary, along the banks of all rivers and streams which have an average width of not less than 3 metres. A proviso has been added

33 The Land Act 1908, S. 122.
34 The Land Act 1924, S. 129.
to section 58 in that the width of the strip of land to
be reserved may be reduced to not less than 3 metres if
the Minister of Lands is of the opinion that such reduced
width will be sufficient for reasonable access to the sea,
lake, river, or stream.

It is to be noted however that land withheld from
sale under section 59 of the Land Act 1948 does not come
within the definition of a public reserve under section 2
of the Reserves and Domains Act 1953, though in common usage,
such lands are referred to as "river-bank reserves",
"foreshore reserves", or "lakeshore reserves". It is to be
further noted, that the public are given no rights of entry
to, or general recreation over, such lands withheld from
sale, and prima facie therefore, public entry onto such
lands is a trespass on Crown land, and thus an offence
against Section 176 of the Land Act 1948.

4. The Development of Reserves From The Subdivision Of
Private Land:

A. Counties:

The first legislative action taken to ensure the
creation of reserves adjacent to our waterways upon sub-
division of private land in counties was the Land Subdivision
In Counties Act 1946. Section 3 of the Act required a
scheme plan of subdivision to be submitted to the Minister
of Lands for approval, and section 11 of the Act provided:

On every scheme plan submitted ... there shall
be set aside as reserved for public purposes
a strip of land not less than sixty-six feet
in width along the mean high water mark of the
sea and of its bays, inlets, or creeks, and
along the margin of every lake with an area in
excess of twenty acres, and unless the Minister
considers it unnecessary so to do, along the banks
of all rivers and streams which have an average
width of not less than ten feet ...
Section 12 of the Act provided that where the Minister was of the opinion that the subdivision was for building purposes, provision was to be made in the subdivision for further reserves for public purposes.\(^3\) This section was of considerable importance in that it enabled a greater area of land to be taken for public reserve, and for the width of the specified reserve under section 11 to be increased, where in the opinion of a council, a greater width was necessary to ensure reasonable public access was provided to the particular waterway. Any land set aside as a reserve pursuant to section 11 of the Act, was not to be taken into account in assessing the reserve contribution under section 11 of the Act.\(^3\)

Subdivision of land in counties is now controlled under the Counties Amendment Act 1961. Section 23 of that Act requires that a scheme plan of subdivision is required to be prepared, showing the proposed reserves, and to be approved by the county before the subdivision is made. Section 28 (1) of the Act provides that where a council is of the opinion that the subdivision shown on a scheme plan is for residential, commercial, or industrial purposes, provision is to be made within the subdivision for reserves for public purposes within the meaning of the Reserves and Domains Act 1953. The section then prescribes the areas of land to be set aside as reserves for public purposes.

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35 Amended by The Land Subdivision In Counties Amendment Act 1953, S. 13 to include subdivisions for residential, commercial, or industrial purposes.

36 The Land Subdivision In Counties Act 1946, S. 11 (3).
By section 29 (1) of the Act, provision is to be made for a reserve for public purposes within the area proposed to be subdivided of a minimum width of not less than 20 metres along the mean high water mark of the sea, its bays, inlets, or creeks. Provision is also required to be made for a similar reserve along the margin of every lake with an area in excess of 3 hectares and along the banks of every river or stream with an average width of not less than 3 metres, unless the council, acting with the consent of the Minister of Lands, considers it unnecessary to provide such a reserve. Section 29 (3) of the Act provides that no land set aside as a reserve under that section shall be taken into account for the purposes of assessing the reserve contribution under section 28 of the Act, except to the extent that the council allows. The Minister of Lands, by section 29 (4) is empowered to declare that section 29 (1) shall not apply to the banks, or any specified bank, of any specified river or stream, or part of any specified river or stream.

The powers of a county under section 29 of the Act were recently considered by the Number One Town and Country Planning Appeal Board in Smith v. Tauranga County Council.37 The appeal concerned a proposed subdivision of land adjacent to Tauranga Harbour, and the Board initially noted, in considering the Counties Amendment Act, that land set aside pursuant to section 29 of the Act, became, by virtue of section 33 (4) of the Act, subject to the Reserves and Domains Act 1953.

38 Ibid., at 100.
The Chairman, Turner S.M., then commented:

... the purpose of the setting aside of the strip of land concerned is to secure and allow adequate public access to and along the waterfront, to allow the waterfront to be enjoyed by the public for recreational purposes, and to allow for the possibility that some erosion of the coast-line may occur in future through natural action.

The Board also held that the council, before approving a plan of subdivision, could require a greater area than 66 feet to be set aside as reserve pursuant to section 29 of the Act, if it was of the opinion that an area of 66 feet in width was insufficient to satisfy public purposes. The area of land to be set aside pursuant to section 29 of the Act was also held to be a matter to be determined by the council, and not by the subdividing owner. The Board concluded, that because section 29 (3) of the Act provided that reserves set aside under Section 29 (1) were not to be taken into account in assessing the area of reserve under section 28, a subdividing owner could be required to satisfy the requirements of section 29 of the Act, as well as providing a greater esplanade reserve than 66 feet pursuant to section 29 (1). The Board therefore commented, that section 29 (3) recognised that in cases where a strip of land more than 66 feet in width was vested pursuant to section 29 (1);
... justice may require that in some of those cases the width over 66 ft be taken into account and offset (wholly or partly) against the obligation imposed on the owner by S. 28.

Subdivision of land in counties, may also be subject to the Maori Affairs Act 1953. Section 432 A of that Act provides that where the Maori Land Court partitions land in such a manner, that if the partition were a subdivision for the purposes of sale or building purposes for which consent would be required under Part II of the Counties Amendment Act 1961, then no such partition shall be made by the Court, without the approval of the council concerned being given to a preliminary plan of the partition. The council is empowered by section 432 A (4) to deal with the plan as if it were a scheme plan of subdivision under Part II of the Counties Amendment Act 1961. Accordingly, on the partition of Maori Land in these circumstances, reserves are required to be set aside in the same manner as scheme plans submitted for approval pursuant to section 23 of the Counties Amendment Act 1961.

2. Municipalities:

The first legislative attempt to create reserves within municipalities was in the Plans of Towns Regulations Act 1875. Section 3 provided that in towns laid off after the coming into force of the Act, open spaces were to be set apart for recreation grounds of an area not less than one-tenth of the superficial area of the town, and each reserve to be not less than twelve and a half square chains in area. The provisions of section 3 of that Act were then included in Section 15 of The Land Act 1885, and section 16 of that Act provided that where town allotments or sections were to be sold, a plan of the area showing the reserves
contemplated was required to be approved by the Governor prior to sale. Sections 17 and 18 of the Land Act 1692, and sections 15 and 16 of the Land Act 1908 repeated this requirement.

In 1912, an amendment to the Land Act repealed section 16 of the 1908 Act, and section 3 of the amending Act provided that where any land was subdivided for sale, lease or other disposition as a town, a plan of the subdivision showing the reserves proposed to be made was required to be approved by the Governor prior to sale. A further amendment in 1920 provided that on the deposit of a plan of subdivision under the Land Transfer Act 1915, the reserves shown on the plan vested in the Crown to be held subject to The Public Reserves and Domains Act 1908.41

Municipal councils were first given power to require reserves upon the subdivision of land in municipalities under section 335 of the Municipal Corporations Act 1920. A plan of subdivision was required to be submitted under section 335 (1) for the council's approval, and the council was specifically empowered under section 335 (2) to require the subdivider to make further provision for reserves before approving the plan of subdivision. Similar requirements and powers were prescribed by section 332 of the Municipal Corporations Act 1933, and the current power of a municipal council to control subdivision of land and require reserves is in sections 351 and 351A of the Municipal Corporations Act 1954. By section 351 of the Act, any person proposing to subdivide land in a municipality is required to submit a plan of subdivision showing the proposed reserves to the

41 The Land Laws Amendment Act 1920, S. 17. (A similar provision was enacted in The Land Act 1924, S. 16.)
Council for its approval before the subdivision is made. Section 351A (1) (c) (i) of the Act empowers the council, before approving the plan, to require further provision to be made for reserves. Such reserves are to be held by the borough subject to the provisions of the Reserves and Domains Act 1953.

The council's powers under section 351 of the Act were examined by the Town and Country Planning Appeal Board in Group Engineers Ltd. v. Rotorua City Council. The council had designated land adjacent to the Utuhina and Mangakakahi streams in the city as esplanade reserve, and the plaintiff company submitted a plan of subdivision to the council for approval, incorporating the esplanade reserve as a reserve lot. The council, whilst approving the scheme, also required a further area of land equal to 10% of the fair value of the proposed section to be set aside as reserves.

The council sought to justify its requirement for a double contribution by analogy with section 29 (3) of the Counties Amendment Act 1961, which provided that statutory reserves set aside pursuant to section 29 (1) of that Act were not to be credited to the area of land set aside as reserve under section 28 of that Act. The Board however, rejected the claim of the council, and held that the council should be required to give the plaintiff company credit for

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43 See again Turner S.M. in Mercantile Group Ltd. v. Manukau City Council (1972) 4 N.Z.T.P.A. 166 at 171.
the value of the esplanade reserve specified in the plan of subdivision. 45

In *Lewis v. Mt. Roskill Borough Council*, 46 the Appeal Board held that a subdividing owner's obligation to set aside land for public purposes under the Municipal Corporations Act should be considered qualitatively rather than quantitatively, and taking into account the purpose for which the land must serve, topography and physical features, the environment which will be created, and all other relevant factors. 47

In respect of the partition of Maori land in a municipality, section 432 (1) of the Maori Affairs Act 1953 deems such a partition to be a subdivision of the land, and by section 432 (2) of the Act, the Maori Land Court is prohibited from making a partition order before the council has approved a plan of subdivision under section 351A (1) of the Municipal Corporations Act 1954.

In conclusion, it is to be noted that municipalities, unlike counties under Part II of the Counties Amendment Act 1961, are not required by statute to reserve specific areas of land adjacent to waterways from the proposed subdivision, and the determination of what land to be set aside as reserve is largely a matter under the control of each individual council. Thus, varying requirements and standards could

45 Idem.
47 Ibid., at 251.
arise between different councils, as to the extent to which reserves are required to be set aside adjacent to waterways in a subdivision within a municipality.\textsuperscript{48}

5. \textit{The Town and Country Planning Act 1953}:

\textbf{A \ Regional Planning Schemes:}

Section 3 of the Act provides that every regional planning scheme shall have for its general purpose the conservation and economic development of the region to which it relates by classifying lands for the purposes which they are best suited by nature or can best be adapted, and the co-ordination of all public improvements, utilities, services, and amenities. By section 10 of the Act, the Regional Planning Authority is required to provide in the regional planning scheme matters specified in the First Schedule to the Act, including provision for public parks and reserves and recreational facilities. The Minister of Works is empowered under section 10 (3) of the Act to require reserves to be included in a regional planning scheme.

\textbf{B \ District Planning Schemes:}

Section 18 of the Town and Country Planning Act 1953 provides that a district scheme shall have for its general purpose the development of the area to which it relates to promote and safeguard the health, safety and convenience of its inhabitants, and the amenities of every part of the area. Section 21 of the Act requires provision to be made in district schemes for those matters specified in the Second Schedule to the Act. Amongst such matters, are that the council is obliged to designate areas of land for reserves
or for proposed reserves for national, civic, or cultural or community purposes, or for recreation grounds, parks and open spaces. The Minister of Works, and local authorities as specified under section 21 (5) of the Act, are entitled to require reserves to be included in the scheme, before the scheme is publicly notified pursuant to section 22 of the Act.

(a) The Designation Of Foreshore Reserves

The Town and Country Planning Appeal Boards have emphasised, on a number of occasions, that councils in preparing district schemes, should make every effort to preserve beaches and the coastline from residential or commercial subdivision and occupancy to ensure that public usage of, and access to, such areas is preserved. It has been stated:

As a general town planning principle, the Board is satisfied that wherever possible the coastline should be kept free of residential or commercial occupancy so as to allow of the public having road access to beaches and bays .... This is an amenity which should be provided wherever possible for the general welfare of the inhabitants, not only for those living in close proximity to the beaches but also those who may wish to visit them day by day.

48 See Coastal Development - Policy Issues and Planning Techniques Ministry of Works (1972), 54 where it is recommended that municipalities be given the same powers of control as counties.

49 The Town and Country Planning Act 1953, Second Schedule cl. 3. The Council is also empowered by cl. 10 in this Schedule to make provision for the control of subdivision within the district scheme, including restraint upon unnecessary encroachment of urban development upon land of high actual, or potential value for production of food.
The Appeal Board has also held that the designation as "proposed public reserve for recreation and open spaces" of the strip of land along the mean high-water mark of the sea, its bays, inlets and creeks, and along the margins of lakes, rivers, and streams which would be required to be set aside for public purposes pursuant to section 29 of the Counties Amendment Act 1961 is a proper planning practice.52

In Whangaparaoa Horticultural Society v. Waitemata County Council,53 the Board held that the designation of reserves and proposed reserves pursuant to section 21 of the Act was a matter to be left to the decision of the council on behalf of the inhabitants of the district, as questions of public policy and cost were implicit in the selection of the lands to be designated. The Board however added that coastal land selected itself as suitable for such designation, and held after considering evidence of beach capacity, and car parking requirements, that for the public to be able to make proper use of Stanmore Bay on the Whangaparaoa Peninsula, an area of 300 ft of land from mean high-water mark was to be designated as proposed public recreation reserve.54

50 The Town and Country Planning Act 1953, S. 21 (6). The Minister or the council concerned accepts financial responsibility for such reserves - S. 44 (4).


(b) **The Designation of Lakeshore and River Bank Reserves:**

In *Minister of Works v. Taupo County Commissioner*, the Board was of the view that the zoning of land between a main highway and Lake Taupo as "proposed reserve" was an appropriate zoning and commented:

Ready access to the shores of the lake should be available to residents, holiday-makers, and visitors; and there should not be any residential subdivision of land between the highway and the lake margin except where the area is extensive in width.

The Board in *Mangamatu Lodge Ltd. v. Taupo County*, was required to consider the appropriateness of a designation of "proposed lakeshore reserve" which affected a stream flowing into Lake Taupo. The Board, after noting that the stream was an important spawning ground for trout, and a place where trout could be seen and fed, was of the view that the character of the stream:

... adds to the desirability of making the land a reserve to which the public will have access.

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54 Ibid., at 334. The same Appeal Board however in *Lewis v. Mt. Roskill Borough Council* (1972) 4 N.Z.T.P.A. 247 held at 250 that on, "... the proper interpretation of the provisions of the Act relating to the designation of land in district schemes ... land should not be designated for a proposed public work except on the request of some public body." No public body having requested such a designation, the Board refused to designate land adjacent to Manukau Harbour as "proposed public open space".


56 Idem.

57 (1970) 3 N.Z.T.C.P.A. 266.

58 Ibid., at 267.
The Board therefore concluded that the land in the vicinity of the stream was eminently suited for reserve and not for residential purposes, and accordingly the designation was upheld.

(c) The Adjustment of Designated Reserves:

Section 33 (5) of the Act provides that the council may with the agreement of owners directly affected, vary the location or shape of any proposed reserve, so long as the intention of the scheme in respect of that reserve is secured. In Hadley v. Opotiki County Council,\(^59\) the county consented to a conditional use application to establish a camping ground on land designated as proposed reserve adjacent to the foreshore at Oruaiti Beach, and invoked the provisions of section 33 (5) to vary the shape of the proposed reserve to make its decision consistent with the district scheme. The Board however held that the intention of the scheme to reserve the land adjacent to the foreshore in its natural setting, and to ensure the preservation of public access was defeated by the granting of consent to the application, and therefore section 33 (5) had been improperly invoked.\(^60\)

6. National Parks:

The ten National Parks of New Zealand comprise a total area of 5,071,399 acres,\(^61\) and thus provide a very significant recreational resource for the New Zealand public. All National Parks are endowed with lakes and rivers to

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\(^59\) (1973) 4 N.Z.T.P.J. 443.

\(^60\) Ibid., at 448.
which the public right of access is protected under statute, whilst both the Fiordland and Abel Tasman National Parks have the sea as part of their boundaries, and opportunities are thereby created for public access to coastal areas.

The first National Park in New Zealand was Tongariro, which was proclaimed under The Tongariro National Park Act 1894. The Egmont National Park was similarly constituted under the Egmont National Park Act 1900. However, it was not until the enactment of the Public Reserves, Domains and National Parks Act 1928 that government attempted to specify particular requirements for the creation and control of National Parks. Section 71 of that Act provided that the Governor-General was empowered to declare that any Crown land subject to the Land Act 1924, or land subject to the Forests Act 1921, or any public reserve or domain or land under the Scenery Preservation Act 1908, to be a National Park. Under this section both the Arthur's Pass and Abel Tasman National Parks were established.

The National Parks Act 1952 consolidated the previous enactments, and provides the present basis for the creation and management of National Parks. By section 3 of the Act, it is expressly declared that the provisions of the Act

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61 National Parks And Reserves In The New Zealand Environment, Department of Lands and Survey.

62 29th July 1929. LT9297 2 New Zealand Gazette 1932.

63 9th December 1942. LT9427 3 New Zealand Gazette 2365.
are to have effect for the purpose of preserving in perpetuity as National Parks, areas of New Zealand that contain scenery of such distinctive quality or natural features so beautiful or unique that their preservation is in the national interest. Section 3 (2) (d) of the Act provides that subject to conditions or restrictions as may be necessary to protect flora or fauna or for the welfare in general of the Park, the public are granted freedom of entry and access to the Parks, so they may receive in full measure the inspiration, enjoyment, recreation and other benefits that may be derived from mountains, forests, sounds, lakes, and rivers. By section 9 (5) of the Act, the Fiordland National Park, (which was previously a reserve subject to the Public Reserves, Domains, and National Parks Act 1923), is declared to be a National Park subject to the provisions of the Act. Any Crown lands subject to the Land Act 1948, or State forest land subject to the Forests Act 1949, or land subject to the Tourist and Health Resorts Control Act 1908, or public reserves or domains subject to the Reserves and Domains Act 1953, or any land acquired by the Crown for National Park purposes, may be declared by the Governor-General pursuant to section 10 (1) of the Act to be a National Park subject to the Act. The Mount Cook, 64 Urewera, 65 Nelson Lakes, 66 Westland 67

64 14th October 1953. 1953/3 New Zealand Gazette 1662.
66 12th December 1956. 1956/3 New Zealand Gazette 1774.
and Mount Aspiring National Parks have all been created pursuant to section 10 (1) of The National Parks Act 1952.

Thus through the establishment of the National Parks system, the New Zealand public is offered a wide variety of recreational and scenic pursuits, including access to rivers and streams in National Parks, and in two Parks, are enabled to gain access to the coast. Public usage of National Parks however, whilst preserved under the Act can nevertheless be controlled on terms or conditions specified by Park Boards under section 28 (1) (a) of the Act, or through bylaws enacted under section 38 of the Act.

7. The Development Of Reserves And Public Rights Of Way Through Other Statutes:

Both municipalities,69 and counties70 are empowered to take, purchase, or otherwise provide and maintain land to provide for the health, amusement and instruction of the public. Local authorities are also empowered to create and maintain reserves under the Reserves And Domains Act 1953, and The Land Act 1948. Section 13 (1) of the Reserves And Domains Act 1953 provides that a local authority is empowered to declare that any land vested in it to be a public reserve within the meaning of the Reserves And Domains Act 1953, and section 168 of The Land Act 1948 empowers local authorities to apply moneys from their ordinary funds towards the maintenance or embellishment

68 9th December 1964. AT9647 3 New Zealand Gazette 2305.
70 The Counties Act 1956, S. 319.
of any reserve made for the public recreation or health of the residents of the district under its jurisdiction.

The Maori Land Court in partitioning Maori Land in either municipalities,\textsuperscript{71} or counties,\textsuperscript{72} is empowered to order that lands set aside on the plan of subdivision as reserves vest in the municipality or county subject to the Reserves and Domains Act 1953.

Finally, it is to be noted that by section 60 (1) of The Land Act 1948, the Land Settlement Board is empowered to grant or reserve any right of way or other easement over Crown Land.

\textsuperscript{71} The Maori Affairs Act 1933, S. 432 (3).
\textsuperscript{72} The Maori Affairs Act 1933, S. 432A (7).
CHAPTER VI

STATUTORY MODIFICATION OF COMMON LAW RIGHTS

A  THE FORESHORE:

1. Extent:

Section 12 of the Crown Grants Act 1866 provided that;\(^{73}\)

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

This section thus followed the common law rule laid down in *Attorney-General v. Chambers*,\(^ {74}\) that the foreshore was that part of the shore between high and low water marks of ordinary tides, such tides being limited landwards by the medium line of high tide between the spring and neap tides. In *Re An Application For Investigation Of Title To The Ninety Mile Beach (Wharo Oneroa A Tohe)*,\(^ {75}\) Turner J. held that the section prevented a Crown grant from being construed as extending title from the landward side past high water mark.\(^ {76}\) An extended definition of the foreshore is however specified for the purposes of *The Harbours Act 1950*. Section 2 of that Act defines the foreshore to be such parts of the bed, shore, or banks of a tidal water as are covered and uncovered by the flow and ebb of the tides.

\(^{73}\) Now in *The Crown Grants Act 1908*, S. 35.

\(^{74}\) (1854) 43 E.R. 486.

\(^{75}\) [7967] N.Z.L.R. 678.

\(^{76}\) Ibid., at 678. See also *Attorney-General v. Findlay* [7917] N.Z.L.R. 513 where Cooper J. at 517 reviews the history of the Crown Grants Act.
tide at ordinary spring tides.\textsuperscript{77}

Whilst at common law, land above mean high water mark is presumed to belong to the adjoining owner of the foreshore,\textsuperscript{78} it is submitted that with the extended definition of the foreshore in The Harbours Act, and the operation of three sections under the Act, that parts of such privately owned land may be acquired from the private owner, or alternatively may become subject to a licence or foreshore control order which may authorise public use over such land. Further, it appears that such deprivation of the private interest in such lands above mean high water mark may be effected without compensation to the private owner.

Section 150 of The Harbours Act 1950 provides:\textsuperscript{79}

Except as hereinafter provided, no part of the shore of the sea, or of any creek, bay, arm of the sea, or navigable river communication; therewith, where and so far up as the tide flows and reflows, nor any land under the sea or under any navigable river, except as may already have been authorised by or under any Act or Ordinance, shall be granted, conveyed, leased, or disposed of to any Harbour Board, or any other body (whether incorporated or not), or to any person without the authority of a special Act.\textsuperscript{80}

If however, a special Act is enacted, disposing of the foreshore in the manner prescribed by section 150, to the point of high water at ordinary spring tides, then the area of land between high water mark at that point, and high

\textsuperscript{77} The Harbours Act definition of the foreshore is also contained in The Fisheries Act 1908, S. 2 and The Police Offences Act 1927, S. 3 (aa).

\textsuperscript{78} Lowe v. Govett (1832) 110 E.R. 317.

\textsuperscript{79} First enacted in The Harbours Act 1878, S. 147.
water mark at ordinary tides, could pass without compensation from private ownership to the Harbour Board, body, or person specified in the special Act. 81 Section 162 of the Act provides that the Governor-General or the Minister is empowered to issue a licence for all or any of the purposes specified in section 156 of the Act, where the foreshore is not vested in a harbour board or local authority. As there is limitation in the section relating to the area of foreshore that can be subject to such a licence, it appears that a licence could be issued which would be applicable to land to the point of high water at ordinary spring tides. Similarly, section 165 of the Act provides that the Governor-General may issue a foreshore control order over a defined part of the foreshore to a public body, and again it is submitted that as the foreshore which can be subject to such an order is not limited in the section to the common law extent of the foreshore, that land to the point of high water at ordinary spring

80 T.A.Gresson J. in referring to this section in Re An Application For Investigation Of Title To The Ninety Mile Beach (Where Oneroa A Tohe) ∕1963∕ N.Z.L.R. 461 commented at 480. "In my opinion the clear purpose of this section was to ensure that the foreshore should not be disposed of except under the authority of a special Act of Parliament." For examples of special Acts see The Gisborne Harbour Board Act 1882 where defined parts of the foreshore were granted to the Gisborne Harbour Board. See also The Lyttleton Borough Council Foreshore Vesting Act 1905 and The Takapuna Borough Foreshore Vesting Act 1914 where defined areas of the foreshore were vested in those local authorities.

81 See King, "The Foreshore" ∕1963∕ N.Z.L.J. 254 where that writer notes at 255 that owners of land adjacent to Manukau Harbour lost areas of land above mean high water mark to the Auckland Harbour Board as a result of The Manukau Harbour Control Act 1911.
tides could become subject to the issue of such an order.

In the writer's view, the question is then confused when sections 152 and 164 of the Act are considered. Section 152 provides that mudflats, the property of the Crown, the depth of water on which is not sufficient for navigation at high water, during spring tides, may be leased and reclaimed for farming purposes. Thus the extent of the Crown's interest is such mudflats is unclear, having regard firstly to the fact that such mudflats are defined as the property of the Crown; thus suggesting the area of foreshore vested in the Crown at common law. The section then however, refers to navigation over that land being limited at high water, spring tides; thus suggesting, to the writer, the statutory definition of the foreshore as defined in section 2 of the Act. Section 164 of the Act restricts the Minister to granting an occupation permit to "... any part of the foreshore ... vested in the Crown ...", suggesting also, in the writer's view, that the foreshore can only be occupied pursuant to section 164 of the Act, to the extent of the Crown's prima facie interest at common law, limited landwards to mean high water mark, and not to high water mark at ordinary spring tides.

It is acknowledged, that unless the extended definition of the foreshore was included in the Act enacted pursuant to section 150, or in the licence or control order issued pursuant to section 162 or section 165, that privately owned land above mean high water mark would not be affected. Nevertheless, the opportunity exists for privately owned land above mean high water mark to be acquired pursuant to section 150, or to be adversely affected by the issue of
a licence pursuant to section 162, or an occupation control order pursuant to section 165 of the Act.

It is the writer's view, that it is difficult to see that Parliament could have intended the operation of these sections to adversely affect privately owned land above mean high water mark in the manner outlined, without providing in the Act provisions relating either to objection by the private owner, or for compensation to be paid. It appears also, that valuable private riparian rights could be lost by the operation of section 150, because if the foreshore was disposed of to high water mark at ordinary spring tides, then the riparian tenement, in the writer's opinion, would no longer be in sufficient contact with the water at that point to support the existence of a private riparian right. The extended definition of the foreshore contained in the Harbours Act, could therefore conceivably have drastic consequences for the private owner whose title extends to mean high water mark. This situation could be rectified by providing in section 150 that where the foreshore was to be disposed of pursuant to that section to high water mark at ordinary spring tides, the owner of land to mean high water should have rights of objection, and also providing for compensation to be paid if the objection was not upheld. The objections outlined in sections 162 and 165 of the Act could be met, by limiting the Crown to granting a licence or occupation order only over that area

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82 See 36 Halsbury's Laws of England (3rd ed. 1961), 413 where it is stated that statutes should not be construed so as to interfere with or prejudice title to property, or so as to deprive a man of his property without his having an opportunity of being heard.
of the foreshore vested in it, at common law, or alternatively providing for compensation to be paid to the private owner in the event of a licence or occupation order being issued which affected the land to high water mark of ordinary spring tides.

2. Ownership:

As there has been no specific statutory provision enacted vesting the ownership of the foreshore in the Crown in New Zealand, it is the writer's view that the common law authorities giving the Crown ownership of the foreshore to mean high water mark are in force in New Zealand. There is however, some doubt as to whether the foreshore is Crown land for the purposes of the Land Act 1948.

The present definition of Crown land as contained in section 2 of the Land Act 1958, could well include the foreshore. Crown land is defined as: 83

... land vested in Her Majesty which is not for the time being set aside for any public purpose or held by any person in fee simple ...

However, section 167 of the Act provides that the Minister, for the purpose of setting land apart as reserve, may declare any Crown land, and with the consent of the Minister of Transport, any foreshore to be set apart; thus suggesting that the foreshore is not to be construed as Crown land for the purposes of the Land Act. 84 The provision relating to setting aside foreshore areas as reserves was not included in the Land Act until 1965, 85 and it is

83 The Land Act 1948, S. 2.
thus arguable that up to this date the Minister did not have the power to set aside foreshore areas as reserves, because the foreshore was not regarded as Crown land for the purposes of the Act. If however the foreshore can be regarded as Crown land for the purposes of the Land Act, despite the departmental view, and section 167 of the Act, then it is submitted an interesting complication could arise by virtue of section 176 of the Land Act 1948. That section provides that an offence is committed against the Act by persons who without right title or licence, trespass or use or occupy any lands of the Crown. In *Police v. Mackie*, 36 Crutchley S.M., in discussing section 176, referred to the decision in *Blundell's* case and the restriction upon public entry onto Crown land and commented; 37

However, in New Zealand, the Land Act expressly makes it an offence to trespass on lands of the Crown, and if right title or licence cannot be shown then I do not think it can be said that there is room for any implied authority to enter such land.

The problem then is, that if the foreshore does fall within the definition of Crown Land in the Land Act 1948, whether each individual member of the public who wishes to use the foreshore for any purpose is required to seek the licence to do so from the representative of the Crown, or

84 The writer has been informed that the Dunedin Office of the Department of Lands and Survey does not regard the foreshore to be Crown land for the purposes of the Land Act 1948.


86 (1965) 11 M.C.D. 443.

87 Idem.
whether sufficient licence to use the foreshore is implied generally to all members of the public from the Crown's traditionally tolerating and permitting public usage of the foreshore.

It is acknowledged that the question is a technical one, and not likely to be of any practical consequence or bother to the Courts, having regard to the departmental view that the foreshore does not constitute Crown land for the purposes of the Land Act 1948, and also having regard to both the past and present attitude of the Crown to public usage of the foreshore, and to the strong tradition of coastal recreation that has developed in New Zealand.

3. Public And Private Recreation And Usage:

The Harbours Act 1950 contains important provisions affecting public and private recreation and usage of the foreshore in New Zealand, and it is proposed to consider the circumstances where the foreshore may be leased, licensed or occupied for purposes of public utility. The powers conferred on local authorities to control public activities on the foreshore through other statutes will also be discussed.

Section 154 of the Harbours Act 1950 provides that a harbour board is empowered, with the consent of the Governor-General, to lease any piece of land vested in it being on the shore of the sea, or of any creek, bay or arm of the sea. By subsection (2), it is provided that no such lease is to be made or consented to if the Governor-General is advised that the granting of the lease will
impede or disturb navigation in the harbour, or the public convenience. By section 156 (e) of the Act, a harbour board, or local authority, with the consent of the Governor-General is empowered to licence foreshore areas vested in it for any purpose relating to the convenience of shipping, or of the public, or for any local enterprise or object. Such licences are to be granted for a maximum term of 14 years, and may be granted on general or particular conditions to be performed by the licensee.\textsuperscript{88}

The Governor-General is required not to approve the issue of a licence under section 156 (e) if he is satisfied that the grant would unduly interfere with or restrict any public right of navigation, or the public convenience, and that any licence issued affecting wharves or landing places should be issued subject to the right of the public to use those facilities at all reasonable times.\textsuperscript{89} The Governor-General or The Minister of Transport is empowered to grant licences in the same manner as boards or local authorities under section 156 of the Act in respect of foreshore areas not vested in a harbour board or local authority.\textsuperscript{90}

The Minister is also empowered to issue occupational permits to any person to occupy any part of the foreshore vested in the Crown to erect a boatshed, landing place, or slipway or wharf, provided that the Minister is satisfied that no public right of navigation will be unduly interfered with

\textsuperscript{88} The Harbours Act 1950, s. 153.

\textsuperscript{89} The Harbours Act 1950, s. 159.

\textsuperscript{90} The Harbours Act 1950, s. 162 (1).
or restricted, and that no public inconvenience will result.\footnote{91}{The Harbours Act 1950, S. 164 (1).} Once such an occupation permit is however issued by the Minister, no person may use the boatshed, landing place, slipway or wharf, without the consent of the licence holder.\footnote{92}{The Harbours Act 1950, S. 164 (5).}

Section 165 of the Harbours Act empowers the Governor-General to grant to any public body, (as defined in subsection (10)), the control of any part or parts of the foreshore for a period not exceeding 21 years, upon such conditions as may be specified in the occupation order.\footnote{93}{For an example of such a grant see The Waitemata County Foreshores and Waters Control Order \cite{1967NZG1195} where the foreshore in the Waitemata County was granted to the Waitemata County Council for 21 years.}

Such public bodies, by virtue of section 165 (2) are empowered to make bylaws for the preservation and control of the foreshore, the conduct and dress of persons using the foreshore, the control of animals and vehicles, and generally regulating the use of the foreshore by the public, and preventing any nuisance arising thereon.\footnote{94}{This power to control human activities on the foreshore by bylaw was inserted by section 9 of the Harbours Amendment Act 1964 following the decision of Barrowclough C.J. in \cite{1967NZL575} where his Honour in referring to the previous subsection (2) which empowered the making of bylaws to control the foreshore commented at 757: "The Board seems to have little more ability to control it than King Canute had to control the incoming tide."}

\begin{thebibliography}{1}
\bibitem{91} The Harbours Act 1950, S. 164 (1).
\bibitem{92} The Harbours Act 1950, S. 164 (5).
\bibitem{93} For an example of such a grant see The Waitemata County Foreshores and Waters Control Order \cite{1967NZG1195} where the foreshore in the Waitemata County was granted to the Waitemata County Council for 21 years.
\bibitem{94} This power to control human activities on the foreshore by bylaw was inserted by section 9 of the Harbours Amendment Act 1964 following the decision of Barrowclough C.J. in \cite{1967NZL575} where his Honour in referring to the previous subsection (2) which empowered the making of bylaws to control the foreshore commented at 757: "The Board seems to have little more ability to control it than King Canute had to control the incoming tide."
\end{thebibliography}
v. Painton, 95 Coates S.P. held that the driving of horses on Orewa Beach could produce a real danger to all citizens who had the right to use the beach for recreational purposes, and accordingly a bylaw made by the local authority that prohibited such activities was not ultra vires or unreasonable. 96 Further power to control human activities on the foreshore, is conferred on the public body granted control of the foreshore, by section 165 (2A), where such a public body is specifically empowered to make bylaws regulating and controlling the use of surfboards on the foreshore and in the sea, and to reserve specific areas of the foreshore and the sea for the use of surfboards. The public body is also empowered by section 165 (3) (a) of the Act to permit the erection, or continuance on the foreshore of baths, boatsheds, boat building sheds, jetties and slipways, and with the consent of the Minister, any structure relating to the convenience of the public or local enterprise or object. Similar powers exist under section 165 (3) (b) for the public body to licence or permit the use of the foreshore, with the consent of the Minister, for any purpose relating to the convenience of the public or local enterprise or object. Any bylaws made by a public body under the authority of section 165 of the Act, do not come into force until approved by the Minister of Transport by notice in the Gazette. 97

Where harbour works or other structures are to be

96 Ibid., at 437 - 438.
97 The Harbours Act 1930, S. 165 (9).
constructed by a harbour board, local authority, or other body or person, the Minister is empowered under section 178 (b) of the Act to determine whether the proposed work will be injurious to navigation. If the Minister is satisfied that no injury will result, he may approve the works plan subject to any condition necessary for the preservation of any public right. Skerrett C.J., in referring to this discretionary power (then vested in the Governor-General pursuant to section 171 (b) of the Harbours Act 1923) commented:\(^{98}\)

To the Governor in Council is delegated the duty of determining whether the proposed bridge would be or would tend to the injury of navigation .... He is thus appointed the guardian of public rights, and his determination within the ambit of his statutory authority cannot be questioned in a Court of law.

Power to control human activities on the foreshore is also conferred on Harbour Boards by section 232 (34) of the Act, which empowers the Board with respect to any foreshore vested in it, or under its control, to make bylaws for the proper conduct of persons using the foreshore, regulating traffic, and for limiting the parts of the foreshore that may be utilised for bathing, and for regulating the dress to be worn by bathers.

Whilst various provisions in the Harbours Act 1950 provide for the leasing, licensing, or occupation of foreshore areas to public authorities or private persons,\(^{98}\)

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98 In Attorney-General Ex. Rel. Owen v. New Brighton Borough \(/1927/ N.Z.L.R. 393 at 606. See also Mayor of City of Auckland v. Dixieland Ltd. \(/1927/ C.L.R. 435 where Herdman J. at 438 similarly discusses the duty of the Executive to protect the public right of navigation.
it is submitted that the Act nevertheless does not create specific statutory rights in the public to use the foreshore for general or recreational purposes, but merely recognises the existence of public recreation and usage of the foreshore, and provides the machinery to regulate such activities. As King\textsuperscript{99} has noted, there is a clear distinction to be made between making provision in a statute regulating a practice that has been traditionally tolerated, and a statute which specifically creates or defines rights. No where, however, does the Harbours Act clearly and unequivocally attempt to create specific rights in the public to use the foreshore for recreational or general purposes. It is to be noted that in sections 154 (2) and 159 of the Act, the Governor-General is required to ensure that "the public convenience" will not be impeded, disturbed, interfered with, or restricted, before authorising the leasing or licensing of foreshore areas.

In the writer's view however, the term "convenience" does not confer on the public any legal and enforceable rights as it is used in the Harbours Act, and may be interpreted as matters of public enjoyment or advantage only. Section 178 (b) of the Act provides that the Minister of Transport is required to approve any plan for harbour works, subject; if he thinks fit, to any condition necessary for the preservation of any public right. Section 267 of the Act also declares that nothing in the Act shall be deemed to affect any right belonging to or enjoyed by the

\textsuperscript{99} "The Foreshore" \textit{1968} N.Z.L.J. 254 at 257.
public over tidal water or tidal lands. It is however submitted that such "rights" referred to in the preceding sections refer to the public rights of fishing and navigation in tidal waters, and that neither section creates any rights in the public to use the foreshore for recreational or general purposes. It is the writer's view, that had the legislature intended to give the New Zealand public specific statutory rights to use the foreshore for recreational or general purposes, then such rights would have been clearly and unambiguously outlined in the Harbours Act. In Halsbury it is stated: ¹

Statutes which limit or extend common law rights must be expressed in clear unambiguous language ... Except in so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law ... or to change any established principle of law ...

Even having due regard to section 5 (j) of the Acts Interpretation Act 1924, it is submitted that if this principle of statutory interpretation is applied to the provisions of the Harbours Act relating to "public convenience" or "public rights," such provisions should be interpreted as not creating any specific recreational or general rights in the public to use the foreshore, but are rather a recognition by government of the existence of such activities. The main effect of the act therefore, in the writer's view, is so far as it relates to human activities

on the foreshore, is that it recognises both a public interest in, and public activities on the foreshore, and the empowering of public bodies to control through bylaws, public activities on the foreshore. The need for public bodies to be able to control such activities was recognised by Barrowclough C.J. in *Titiahi Bay Domain Board v. Brider* where he stated;²

> It would appear to be very desirable that the public body which under section 165 (1) of the Harbours Act is given control of any of New Zealand's crowded foreshores should, for the safety of young children, be authorised to make bylaws controlling the manner in which vehicles, horses and other animals may be brought on to the foreshore.

> It is concluded therefore, that the common law principle that the public have no right to use the foreshore for recreational or general purposes, has not been altered by the Harbours Act 1950.

Local authorities have also been given statutory powers to control and regulate public activities on the foreshore through other statutes. Since the Municipal Corporations Act 1867, municipal authorities have been empowered to control public activities on the foreshore. It was provided in the Act:³

> Where any part of the sea-shore or strand of any river or creek used as a public bathing place is within the borough or within three hundred yards of the boundary thereof ... the council may make regulations for and with respect to the time and place of bathing at or within such part and

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² LT9647 N.Z.L.R. 756 at 757.

³ Regulations as to bathing in the Thirteenth Schedule to the Municipal Corporations Act 1867.
according to the sex of persons bathing or otherwise... and for the stands of bathing machines and otherwise for securing reasonable privacy for bathers and the observance of decency.

Such a provision is today contained very briefly in section 386 (22) of the Municipal Corporations Act 1954 as the council being empowered simply to make bylaws regulating bathing. Section 386 (11) of the same Act also empowers the council to make bylaws regulating the use of any reserve, recreation ground or public place vested in the corporation or under its control. Similar powers exist under the Counties Act 1956.5

4. The Leasing Of Foreshore Areas For Agricultural Or Farming Purposes:

Section 152 (2) of the Harbours Act 1950 provides that where the Minister of Transport is of the opinion that mud-flat areas vested in the Crown could be used for farming purposes if reclaimed from the sea, such areas may be leased subject to the condition that the lessee will reclaim the mudflat areas. Where mudflat areas are vested in a harbour board, section 153 (2) of the Act empowers the board, acting with the consent of the Minister of Transport, similarly to lease such lands on the condition that they will be reclaimed from the sea to be made available for farming purposes.

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4 Bathing machines appear to have been contrivances for the transport of people, or in which persons transported themselves, to the water to enable them to bathe with decency and modesty in conformity with the standards of the nineteenth century.

5 The Counties Act 1956, S. 401 (12) and (23).
5. **Removal Of Sand And Stone From The Foreshore:**

The common law principle that the public have no right to remove sand and stone from the foreshore has been embodied in the Harbours Act 1950. Section 244 of the Act, provides that every person commits an offence against the Act who removes any stone, shingle, sand, boulder, silt, mud or other material from any part of the foreshore unless pursuant to a licence issued under section 146A of the Act. Section 3 (aa) of the Police Offences Act 1927 similarly prescribes that the removal of any sand, stone or boulders from any foreshore to the damage of any road, land, harbour works, or public works to be an offence against that Act.

6. **Deposit Of Rubbish And Other Material Upon The Foreshore:**

Section 242 of the Harbours Act 1950 provides that the deposit of (inter alia) ballast, rock, stone, shingle, earth, rubbish or other substance or thing onto tidal lands or into tidal waters to be an offence against the Act, thus affirming the common law principle that the public have no right to deposit rubbish on, or pollute the foreshore.

7. **The Saving Of Existing Rights Recognised At Common Law:**

Section 267 of the Harbours Act 1950 provides that nothing in that Act shall be deemed to take away, supersede, or abridge any right or remedy existing independently of the Act for the abatement of, or imposition of punishment for any nuisance affecting tidal water or tidal lands. It is therefore submitted, that the right of a riparian proprietor to seek the relief of the Court when his right of access to water is interfered with or adversely affected,
is still available, even if the interference to the private riparian right has arisen through the operation of the Harbours Act. In *Mayor Of City Of Auckland v. Dixieland Ltd.*, 6 Herdman J., in referring to the power of local authorities and the Governor-General to issue occupation licences of the foreshore pursuant to the Harbours Act 1923, held that the statute gave the Crown no right to interfere with, or destroy private rights, nor empowered the Crown to create a private nuisance. Accordingly, it was held by Herdman J. that the erection of baths on the foreshore of the Waitemata harbour pursuant to a licence issued by the Crown under the Harbours Act 1923 would interfere with the private right of access that the plaintiff corporation as riparian proprietor had to the sea across the foreshore, 7 and an injunction was issued restraining the defendant from building the baths.

B. Private Riparian Lands:

The common law principle that the public had no right to enter private riparian lands has been affirmed in New Zealand by trespass laws, initially contained in section 6 (3) of the Police Offences Act 1884, and currently in the Trespass Act 1968. Such riparian lands would come within the definition of "private land" in section 2 of the Trespass Act 1968, and section 3 of the Act prescribes that an offence is committed against the Act if a person wilfully trespasses on any place and neglects or refuses

6 79277 G.L.R. 486.
7 Ibid., at 490 - 491.
to leave after being warned to do so by the owner, or a person in lawful occupation, or a person acting under the authority of such persons. Section 4 of the Act provides that if after being warned to stay off a private place, a person wilfully trespasses on that place within six months of such warning, an offence is committed against the Act. Finally, section 6 of the Act provides that an offence is committed against the Act if a firearm is discharged on private land.

C. Restrictions Under The Fisheries Act 1908 and The Wildlife Act 1953:

Section 89 of the Fisheries Act 1908 deems the letting or sale of fishing rights in freshwater fisheries to be an offence against the Act, thus altering the common law rule that the right to take freshwater fish was a recognised profit à prendre.

The issue of licences to persons under the authority of the Wildlife Act 1953, or the Fisheries Act 1908 does not confer on the licence holder any right of entry onto private land. Thus members of the public who desire to use riparian lands adjacent to New Zealand's waterways for fishing or shooting are required to seek the permission of the riparian owner, or a trespass will be committed. Section 21 of the Wildlife Act 1953 provides:

... nothing in any licence or other authority under this Act shall entitle the holder to enter upon any land without the consent of the occupier of the land.

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8 As to the meaning of "wilful trespass" see Police v. Shadbolt [1976] NZLR 409 per Wilson J. at 410 - 411.

Section 2 of the Wildlife Act 1953 provides that "occupier" in respect of unoccupied land of the Crown is the Minister for the time being charged with the administration of the Department of State that has control of the land. It appears therefore, that persons wishing to shoot wildlife, pursuant to a licence issued under the Wildlife Act, and who wish to enter unoccupied Crown lands such as lands reserved from sale under section 58 of the Land Act 1948 for shooting purposes, are prima facie required to seek the permission of the relevant Minister. It is acknowledged that such permission is unlikely to be sought by members of the public, as such activities either on occupied or unoccupied lands of the Crown have traditionally been pursued without opposition from the Crown.10

In respect of entry onto private riparian lands for the purposes of freshwater fishing, regulation 38 of the Freshwater Fisheries Regulation 1951 recites;11

No licence shall confer any right of entry upon the land of any person without his consent.

Both Maori and pakeha were held to have equal rights to fish in the sea and in tidal rivers in Waipapakura v.  

10 See however Burnley v. Flutey (1940) 35 N.C.R. 142 where J. Hiller S.H. convicted the defendants of wilful trespass under the Police Offence Act 1927 after they had been apprehended duckshooting on land both above and below high water mark at Napier Harbour where the land at the time was under the control of the Department of Lands and Survey.

11 Similar provisions are enacted in The Southern Lakes Fishing Regulations 1971, reg. 11, and The Rotorua Trout Fishing Regulations 1971, reg. 10.
Such fishing was however, subject to the restrictions prescribed in the Fisheries Act 1908 and regulations made thereunder, and Stout C.J. in delivering the judgment of the Full Court stated; 13

All have the right to fish in the sea and in tidal rivers who obey the regulations and restrictions of the statute.... All that the Fisheries Act does is to regulate all fisheries so as to preserve the fish for all.

The right of both Maori and pakeha to fish in freshwater fisheries in New Zealand is also subject to regulations that may be issued pursuant to section 83 of the Fisheries Act 1908.

D. The Effect of Section 206 of The Coal Mines Act 1925:

Whilst this paper has been principally concerned with public and private rights over land adjacent to waterways, it is proposed briefly to consider section 206 of the Coal Mines Act 1925. That section provides that the bed of all "navigable" rivers shall remain, and shall be deemed to have always been vested in the Crown. As a "navigable" 14 river would include many non-tidal rivers in New Zealand, the public are permitted to fish in, or navigate over such rivers through the toleration of the Crown as the owner of the bed of the river. To this extent, it may be argued that the common law rule that the public have no right to

12 (1914) 33 N.Z.L.R. 1065.
14 Perhaps with the development of jetboats and other modern types of boats it may be argued that more rivers are today navigable than what was contemplated when the section was originally enacted.
fish in, or navigate over non-tidal rivers has been modified in New Zealand. The section however makes no provision declaring any rights in the Crown or the public to use the land on the margin of such rivers, whether pursuant to navigation, fishing, or otherwise in the waters of the river. In the writer's view therefore, the private riparian owner, whose land on the margin of the river would be unaffected by the operation of section 206, could still prevent encroachments by either the Crown, or the public, onto his land.
CHAPTER VII

RECENT LEGISLATIVE AND ADMINISTRATIVE INITIATIVES AFFECTING PUBLIC AND PRIVATE RIGHTS AND RESTRICTIONS OVER LAND ADJACENT TO NEW ZEALAND WATERWAYS

The large scale development and subdivision since the 1950 period of land adjacent to beaches, rivers and lakes in New Zealand has resulted in considerable areas of waterfronts passing into private ownership, without reservation to the public of any rights over such lands. This situation arose firstly, because of inadequacies in the Land Subdivision in Counties Act 1946 and the Counties Amendment Act 1961, and secondly because various governments had failed to formulate adequate national policies to ensure the preservation of public access to, and usage of lands adjacent to our waterways. As one recent writer has commented regarding the large scale subdivision of coastal lands; 15

... in recent years, our attitude to the coast has been dominated more by greed rather than any love for its bounties. The coastline has become a hedge against inflation and beach after beach has moved into private hands.

Over the last decade, various governments have finally recognised the rapid development of coastline, river, and lake frontages into subdivision and private ownership to the exclusion of the public, by both local and overseas interests. Consequently, both legislative and administrative initiatives have been formulated by central government to

15 Parkin, "Conserving Our Coastline" The N.Z. Listener (12.2.77), 18. See also Taylor, "Playground By The Sea", The N.Z. Listener (12.2.77), 24 where that writer examines both developer's and conservationist's views to large scale tourist development of coastal areas in North Auckland by the National Airways Corporation and Mount Cook Airlines.
attempt to protect both the present and the future public interest in New Zealand water frontages.

A. The Coastal Reserves Survey and The Coastal Development Report 1972:

1. The Coastal Reserves Survey:

In 1966, the Department of Lands and Survey initiated a nationwide review of the lands adjacent to New Zealand waterways to establish what lands were publicly owned, and what lands in private ownership could be considered for preservation as reserves. The Department itself describes the survey as;¹⁶

... a New Zealand-wide resource inventory of the land alongside the sea coast, its bays and inlets, and of lakeshores, riverbanks, and offshore islands ...

The survey seeks to plan the best use of these lands in the national interest striving to ensure that a reasonable balance is kept between subdivision for private residential occupancy, and ensuring the preservation of land for public recreation and usage. The Department of Lands and Survey is implementing the survey by preparing a report for each county in the country in written and map form, recommending specific proposals for reserves, and for the preservation of the character of each region. Each report also includes the locality, legal and physical description, tenure, ownership and area of the lands under examination, and also contains recommendations as to priority of action. Proposed reserves are classified of

¹⁶ Department of Lands and Survey, Coastal Reserves Survey (1976).
national, regional or local importance, with central
government accepting financial responsibility for reserves
of national importance. Each local council is notified
of the results of the survey, and may act upon the recom-
mandations of the report and include in its district
scheme the reserves classified for that district.

Whilst the survey has not been completed, a trust
fund was established by government in 1972 to provide
finance for the purchase, as a first priority, of lands
of national or regional importance where such lands were
in danger of being lost to private subdivision. The fund
was also established, as a second priority, to purchase
land in advance of development pressures. The trust fund
is financed by annual government appropriations of $1,000,000,
and expenditure on the acquisition of reserves since 1972
has been as set out hereunder.

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<th>Expenditure</th>
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<td>1974/75</td>
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<td>1975/76</td>
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<tr>
<td>1977/78</td>
<td>$334,089</td>
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</tbody>
</table>

The coastal reserves survey, whilst not completed, has

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17 Coastal Planning and Development Statement By The
Minister of Works and Development, August 1974, 3.

18 As at 13.9.77 reports on 47 counties in New Zealand
had been approved, surveys in 6 North Island counties
remained to be completed, and approximately half the
counties in the South Island remained to be completed.
(Information supplied by Minister of Lands by letter
dated 13.9.77).

19 Idem.
resulted in the designation of approximately 7000 hectares of land as proposed public reserve adjacent to our waterways, thus ensuring the preservation of these lands from private development. Lands designated as of national or regional importance are being acquired by central government from finance from the established trust fund, and local councils, acting on the advice of departmental officers involved in the survey, are also providing for reserves within their district schemes.

The coastal reserves survey therefore has already played a very valuable role in classifying lands adjacent to New Zealand waterways that are suitable for public recreation, and preservation in the national interest. The survey can also be considered as an important government initiative to ensure the preservation, for public purposes, of significant areas of land adjacent to our waterways.

2. The Coastal Development Report 1972:

In 1972, the Town and Country Planning Division of the Ministry of Works prepared a report entitled Coastal Development Policy Issues and Planning Techniques. The report has been described as,

... the best document on our coasts yet produced ... the recommendations are sensible and constructive.

The report initially specifies two of the critical planning issues of coastal areas to be;

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20 Idem.

21 For a local example of the survey see the Waikouaiti County Coastal Reserves Investigation May annexed in the appendix post.

(1) obtaining a desirable pattern of rural and urban land use,
(2) safeguarding the land that will be needed as public reserve in the future.

Four chapters of the report call for examination in relation to the topic under consideration, and it is proposed to briefly consider some of the recommendations in each chapter.

(a) The Basis For Action (Chapter 1):
Perhaps the most important recommendation to emerge from the report is contained in this chapter, where it is noted that what happens to New Zealand's shoreline areas is a matter of national interest. The report then notes that development in coastal areas affects a national resource of high quality, and only of limited quantity, and thus decisions taken affecting local coastal areas should also have regard to the national interest.

(b) The Extent Of The Coastline Being Subdivided (Chapter 2):
The report in this chapter, notes the increasing trend towards subdivision of coastal lands, resulting in pressure being put on local and central government to acquire reserves for public purposes. It is also noted that the demand for subdivision has inflated land values upon the coast from rural to urban values, resulting in the cost of possible acquisition of lands for reserve purposes being too high, and suitable land being therefore lost to private subdivision. The overprovision of coastal subdivision is also

23 op. cit., vii and viii.
24 Ibid., at 2.
noted, and the report then comments:\(^{25}\)

Curbing the investor is difficult, but coastal land is too valuable a resource to be treated as an investor's commodity.

(c) Reserves (Chapter 6):

In this important chapter of the report, consideration is given to esplanade reserves, coastal reserves for general purposes, development and maintenance of reserves, and responsibility for the acquisition of reserves. The inadequacies of the chain reserve formed by virtue of section 29 of the Counties Amendment Act 1961 are noted, in that the reserve may be covered by spring tides, or comprise inaccessible land that is unsuitable for public usage. It is noted also that the one chain esplanade reserve does not provide reliable and continuous access along the coast. Recommendations are therefore made that the width of the esplanade reserve to be dedicated upon subdivision should be increased to three chains, the width of the esplanade reserve should be averaged to suit particular parts of the coast, councils should be able to stipulate that the reserve dedicated should provide reasonable access, and that councils should have the option of taking esplanade reserve without compensation when private land adjacent to the coast changes ownership.

The report also comments in this chapter, that the area of land that can be dedicated as reserve pursuant to section 28 of the Counties Amendment Act 1961 is inadequate, and councils that may wish to require more land for reserve than that prescribed may be prohibited from doing so because

\(^{25}\) Ibid., at 13.
of inadequate financial resources. The report accordingly recommends that the reserve contribution to be set aside pursuant to section 28 of the Act be increased and that councils negotiate with landowners to set aside lands adjacent to the waterway before actual subdivision. The report also recommends that greater consideration be given to acquiring access easements over private land, encouraging private owners to donate lands for reserves, and making publicly owned lands available for recreation.

The report, in this chapter, finally considers the responsibility of local and regional authorities, and central government to acquire coastal reserves, noting the ever present problem of the lack of sufficient finance in the case of local authorities and government, and the problem also of which public body is to bear responsibility for the acquisition of regional reserves.

(d) The Responsibility For Coastal Planning Control:

In the concluding chapter of the report, recommendations are made that both financial and technical assistance should be given to councils to facilitate the formulation of decisions that will have regard to the national interest. The report also concludes, as alternatives to local government control of coastal planning and development, the possible formation of a Coastal Commission, or a transfer of the power of control to existing Regional Authorities, and Regional Planning Authorities. The possibility of central government assuming control of all coastal planning is also noted, as is the fact that such a course would remove any element of control by local councils over developments occurring within their particular districts. The
... appears to offer the best combination of financial independence, technical expertise, and expression of both the national and the local viewpoint.

B. The Role Of Counties And Amendments To The Counties Amendment Act 1961:

1. The Role Of Counties:

As the great majority of sub-divisions of land adjacent to New Zealand waterways occur in counties and not municipalities, counties have a very vital role to play in the control of subdivision of such land. Counties are also responsible for the planning or designation of reserves in their respective areas, and to prevent the exploitation of land adjacent to New Zealand waterways, thus safeguarding the public interest in such lands. It has been stated:

In a sense local councils have been entrusted by Parliament with planning responsibilities which, for example, in the case of coastal and lakeshore areas or highly productive soils makes them the guardians of assets that are of concern to all New Zealanders.

Councils therefore, whilst having regard to the requirements prescribed by section 19 of the Town And Country Planning Act 1953 to provide for the health, convenience, economic and general welfare of its inhabitants and the

26 Ibid., at 90.

27 Coastal Planning And Development Statement By The Minister Of Works And Development, August 1974, 5.
amenities in its area, are also required to have regard to matters of a wider national interest in formulating planning decisions at a local level. It is questionable, in the writer's opinion, whether such an important role should be left in the hands of some counties, having regard to the lack of expertise and technical skills in planning matters that may be present, especially in the case of smaller counties. It is possible that planning decisions affecting land adjacent to our waterways are more likely to be made having regard to local advantage, rather than to what is best in the national interest, because of pressure that will be forced on the council by its local inhabitants, and the desire of a county to act in the best interests of the local community. The county is therefore caught, in the writer's view, in the somewhat invidious position of having to act in the best interest of its ratepayers, and also having to give due regard to national considerations on a wider level. The problem is, that considerable areas of the lands adjacent to New Zealand's waterways which are in need of preservation for public purposes, are under the control of councils which do not have the expertise, or finance, to resist pressure from private development to allow subdivision of such lands for private purposes.

Counties are also often initially attracted to subdivision because of the increase in rating income that may be realized, and whilst it may be to the initial financial

28 Since the 1973 Amendment to the principal Act, councils are also obliged to have regard to those matters specified in S. 2 B. The Amendment, and its effect will be discussed post.
benefit of a county to allow development adjacent to a waterway, such development can be argued to be not in the overall national interest.

The problem was compounded until 1974 by inadequacies in the Counties Amendment Act 1961. This Act, broadly designed to control fringe development of rural areas adjacent to towns and cities, was inappropriate to control the extent of coastal and lakeshore subdivision that had occurred since the 1950 period. Up to 1974, 29 counties had no control over subdivisions which contained allotments of ten acres or more, and whilst such a provision was not intended to be a means by which the planning process could be avoided, many allotments in subdivisions were surveyed fractionally larger than ten acres, and therefore the subdivision was not under the control of the relevant county. Further, because such subdivisions did not require the county's consent, no reserves pursuant to sections 28 and 29 of the Act were set aside for public purposes. As a further consequence of the subdivision of rural land into ten acre blocks local councils were often forced to allow such lands to be used for residential purposes, because the purchaser of such an allotment had little difficulty in establishing that the allotment was an uneconomic unit.

In summary therefore, this loophole to the Counties Amendment Act 1961, now remedied by the 1974 amendment, greatly hindered responsible planning control of lands.

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29 The Counties Amendment Act 1974, s. 25 (1) had the effect of placing all subdivisions under the control of counties regardless of the size of the allotments.
adjacent to New Zealand waterways, contributed to increased property values of land adjacent to our waterways beyond the means of the average New Zealander, and generally thwarted local councils that were endeavouring to plan their districts having regard to both their obligation to the local inhabitants, and to the country as a whole.

Counties also have an obligation under section 21 of the Town and Country Planning Act 1953 to designate lands for reserve and open space, but an owner of such land must at some future time be compensated for his land so designated. The county may also be ordered by the Appeal Board to purchase the land pursuant to section 47A of the Act. That section provides that where land subject to a designation or requirement cannot be sold, by reason of that designation or requirement, the owner of that land is entitled to apply to the Town and Country Planning Appeal Board for relief. If the Board is satisfied that the land has been offered for sale for longer than six months, and that the designation or requirement is the principal reason for the land not being sold, and that the owner has suffered or will suffer a financial loss or serious financial hardship, it may give the designating authority the option of either removing the designation or requirement, or of taking the land under the Public Works Act 1928. Therefore, because of this contingent liability to be faced by the council, counties have probably been reluctant to designate potentially valuable rural land as reserve or proposed reserve, when the county may through lack of finance be unable immediately, or in the future, to satisfy its obligation under the Town and
Country Planning Act 1953. The council is also subject to the provisions of section 21 (5) and (6) of the Town and Country Planning Act 1953 which empower the Minister of Works, and specific local authorities to require reserves to be included in the district scheme prior to it being publicly notified. The Minister, and those local councils are also empowered to require reserves to be included in a district scheme after the scheme becomes operative, and are also given wide rights of objecting and appeal against planning decisions made by the council.

2. *Amendments To The Counties Amendment Act 1961:*

Having regard to the problems that faced counties exercising their statutory powers of control over subdivisions, central government in recent years, has initiated several amendments to the Counties Amendment Act 1961.

(a) *Counties Amendment Act 1972:*

Section 18 (1) of the Counties Amendment Act 1972, (amending section 23 (4) of the principal Act), provided that where no operative district scheme was in force, plans of subdivisions which required the consent of the council, were to be submitted prior to approval by the council to the District Commissioner of Works. By this amendment, section 23 (4) (b) of the 1961 Act had the effect of providing that if the Council approved the plan

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31 The Town and Country Planning Act 1953, S. 24 in respect of council's decisions pursuant to S. 21, and S. 30 a of the Act in respect of changes and reviews proposed by the council to an operative district scheme.

32 The Town and Country Planning Act 1953, SS. 24 (2) and 26.
contrary to the comments of the District Commissioner, the county was required to notify the Commissioner of its approval in writing. The Minister of Works and Development pursuant to section 33 of the Act then had a right of appeal to the Town and County Appeal Board. This amendment thus gave the Minister the power to put matters of a wider national interest before the Appeal Board, if he considered that the comments of the District Commissioner should have been implemented by the council.  

(b) Counties Amendment Act 1974:

This amendment was important in two respects. Firstly, by section 25 (1) of the amendment, the previous restriction placed upon counties by section 22 (1) of the principal Act that counties were only empowered to control subdivisions where an allotment in the scheme plan was less than 10 acres was removed, and counties were accordingly given full power to control subdivisions regardless of the size of the proposed allotments in the scheme plan. Counties were thus finally accorded the same power of control that had for many years been vested in municipalities pursuant to the Municipal Corporations Act 1954.

Secondly, section 28 (1) of the 1974 amendment, (amending section 29 (1A) and (1C) of the principal Act), provided that where a river or stream had an average width of three metres or more but less than five metres, the strip of land required to be set aside pursuant to section 29 of the Act was to be reserved only in respect of so

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See the comments of the Minister in Coastal Planning and Development Statement By The Minister Of Works and Development, August 1974, 6.
much of the land in the scheme plan as abutted on the river or stream, and where that land adjoined an allotment of an average area of less than four hectares. Where the river or stream had an average width of five metres or more, the effect of the amendment was that the limitation in respect of streams between three and five metres did not apply, and the strip of land would be required to be reserved within the property being subdivided whenever any form of subdivision occurred.

(c) Counties Amendment Act 1975:

The 1974 amendment provoked strong opposition from farmers and associated groups, and in the face of such opposition a further amendment to the principal Act was enacted in 1975. Section 9 (3) and (4) of the amending Act repealed the controversial subsections of the 1974 amendment, and section 9 (4) of the 1975 amendment inserted a new provision to the Act which had the effect of providing that reserves would not be required along the banks of rivers and streams where the adjoining allotment had an area of four hectares or more, and in the opinion of the council, would continue to be used wholly or principally for farming purposes.

C Recent Legislative and Administrative Initiatives By Central Government:

1. Te Paki Coastal Park:

In 1964, Te Paki Station in North Auckland was purchased by the Crown with the intention of creating a coastal farm park. The station comprised 42000 acres, including parts of the Ninety-Mile Beach, and Capes Maria Van Dieman
and Reinga, and proposals have been formulated for facilities to be provided at beaches, and tracks to be formed for public use. The establishment of this park by the government may be seen as one of the first positive steps towards acquiring coastal lands with the intention of preserving public recreation and usage in such areas, in response to the subdivision "boom" that occurred in coastal lands, particularly in the north of New Zealand, since the 1950 period.

2. The Water And Soil Conservation Act 1967:

The preamble to this Act declares that the Act is:

An act to promote a national policy in respect of natural water ... and for ensuring that adequate account is taken of the needs of ... fisheries, wildlife habitats, and all recreational uses of natural water.

By section 2 of the Act, "recreational" is defined in relation to the use of natural water as including the use thereof for fisheries and wildlife purposes. Section 14 (3) (a) (v) of the Act provides that the Water and Soil Conservation Authority is to examine problems concerning, and make plans in respect of the needs of fisheries and wildlife and all other recreational uses of natural water. The Authority is also required by section 14 (4) (1) of the Act to take into account all forms of recreation, and to have due regard to scenic and natural features, and to fisheries and wildlife habitats when planning and advising on the allocation of natural water. Regional Water Boards, 34

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34 See generally in respect of this coastal park National Parks And Reserves In The New Zealand Environment, Department of Lands and Survey.
by section 20 (6) of the Act, are also required to have
due regard to the same factors as in section 14 (4) (1)
in exercising their powers conferred under the Act.

Whilst therefore, the Water and Soil Conservation Act
1967 was designed primarily to control the consumption of
natural water, and to regulate the discharge of wastes
into it, Parliament has also enacted provisions in the Act
requiring both the Water and Soil Conservation Authority,
and Regional Water Boards to have due regard to public
recreation, wildlife habitats, and fisheries, before
exercising their respective powers conferred by the Act.

In North Canterbury Acclimatisation Society v. The
North Canterbury Catchment Board,\(^{35}\) the acclimatisation
society appealed against a grant allowed by the respondent
Board to allow the Ellesmere County the right to discharge
waste into a creek which flowed into Lake Ellesmere. One
of the grounds of the appeal was that the discharge would
result in further nutrient enrichment or eutrophication
of the lake which could prove fatal to acclimatised fish,
game birds, and wildlife of the lake. The Appeal Board
held that the lake was an important acclimatised fish, game
bird, and wildlife area - these factors being matters to
which the Regional Water Board was required to have due
regard pursuant to section 20 (6) of the Act. The Appeal
Board further held that it was in the public interest
that de-oxygenation of the water of the lake should if
possible be prevented;\(^ {36}\) and whilst the appeal was dismissed,


\(^{36}\) Ibid., at 330.
restrictive conditions were imposed by the Board on the discharge of wastes into the lake by the county.

Section 20 (6) of the Act was also considered by the Appeal Board in E.H. Greensill v. Northland Catchment Commission. The appellant appealed against the refusal of the respondent Commission to allow the appellant to take 1.3 million gallons of water annually from Lake Kai-iwi, a lake in the Hobson County, which was used by the public for recreation and fishing. The margin of the lake was reserved for public use, and held by the Hobson County Council in its capacity as a domain board. The Board noted the public use of the lake for recreation and fishing, and held that such public usage required that the lake level should be maintained within a certain range. After considering the obligation on the Regional Water Board to have due regard to recreational needs, and the safe-guarding of scenic and natural features, fisheries and wildlife habitats under section 20 (6) of the Act, the Board held that the subsection did not create a priority in favour of these factors, but held that they were required to be given specific consideration in every case, as the conservation of water for those purposes was one of the specific objects of the Act.

38 Ibid., 61. See also Mettingi v. Rangitikei-Wanganui Regional Water Board (1975) 3 N.Z.T.P.A. 330, where Cooke J. examined section 20 (6) at 339, and considered the possible benefit to the public by the creation of recreational opportunities and establishment of wildlife habitats from a proposed dam in the Wanganui District.
3. The Hauraki Gulf Maritime Park:

In 1966, the Government gave approval to the formation of the Hauraki Gulf Maritime Park, and the Park was established under the provisions of the Hauraki Gulf Maritime Park Act 1967. The object of government in establishing the park was to acquire and preserve in public ownership islands and mainland areas in the Hauraki Gulf, to ensure that the public would be able to fully use and enjoy the recreational facilities that would be created by the formation of such a park complex. The Act is deemed to be part of the Reserves and Domains Act 1953, and by section 8 (1) of the Act, the Hauraki Gulf Maritime Park Board is empowered to administer, manage, and control the Park in accordance with the provisions of the Reserves and Domains Act 1953 in such a manner as to ensure to the public the maximum proper use and enjoyment of the Park consistent with the preservation of its natural features, and the protection and well-being of its flora and fauna.

Initially of 12500 acres, the park now comprises over 30000 acres, and offers a most valuable coastal recreational resource for all New Zealanders within close proximity to New Zealand's largest city.39

4. The Control Over The Acquisition Of Land By Overseas Interests:

Acting in response to the increase in the areas of land being transferred to overseas interests in the 1960 period,

39 For further information on the Park, and a map of the Park area see Norton, Thom; Locker, Seacoast In The Seventies (1973), 57.
government in 196740 and 196841 initiated amendments to the Land Settlement Promotion and Land Acquisition Act 1952. The principal area of concern had been the acquisition of beach frontages in the northern half of the North Island, and the amendments were intended to ensure that land which possessed valuable recreational, sporting, or scenic opportunities or characteristics for the public would be retained in New Zealand ownership.

The amendments are now incorporated in section 35 B of the principal Act, and the section provides that the consent of the Administrative Division of the Supreme Court is required to the disposition of certain types of land to overseas interests. Consent will be required where the land in question is designated or zoned as a reserve or public park, or for recreational purposes or private open space, or for preservation as a place of, or containing an object of historic or scientific interest or natural beauty. The consent of the Court is also required to any proposed disposition of farmland over five acres or more to any overseas interest, and also to any proposed disposition of any island or part of an island within 100 miles from the coast of the North Island or South Island, or forming part of the Chatham Islands.

5. The Marine Reserves Act 1971:

The preamble to this Act declares the Act to be:

40 The Land Settlement Promotion and Land Acquisition Amendment Act 1967, S. 5.

41 The Land Settlement Promotion and Land Acquisition Amendment Act 1968, S. 3.
An Act to provide for the setting up and management of areas of the sea and foreshore as marine reserves for the purpose of preserving them in their natural state as the habitat of marine life for scientific study.

Section 3 (2) (d) of the Act declares that subject to the imposition of such conditions and restrictions as may be necessary for the preservation of marine life or for the welfare in general of the reserves, the public are to be entitled to freedom of access and entry to the reserves to enable them to enjoy in full measure the opportunity to study, observe, and record marine life in its natural habitat. By section 4 of the Act, the Governor-General is empowered to declare an area to be a marine reserve subject to the Act, and by section 2 (b) of the Act such "area" may include the foreshore of the coast of New Zealand, and any water at any material time upon or vertically above it. The Minister of Marine, by section 5 (6) of the Act, in considering objections to a proposed marine reserve, is required to uphold the objection if he is satisfied the establishment of a marine reserve would unduly interfere with any right of navigation, or commercial fishing, or unduly interfere with or adversely affect any existing usage of the area for recreational purposes.

Finally, section 23 of the Act preserves, subject to any bylaws made under the Act, any existing right of access to or upon the foreshore part of a marine reserve, or any right of navigation apart from anchorage.

6. The Marine Farming Act 1971:

This Act authorises leases or licences of the seabed, internal waters, or foreshore of New Zealand to be granted
by a controlling authority (as defined by section 2 of the Act) for purposes of farming seafish, shellfish, oysters, and marine vegetation. Applications made by members of the public for a lease or licence are required to be publicly notified, and the controlling authority is required by section 7 (1) of the Act to uphold any objection made if satisfied that the granting of the lease or licence would interfere unduly with any existing right of navigation, commercial fishing, or any existing or proposed usage for recreational or scientific purposes of the foreshore or the sea in the vicinity, or otherwise be contrary to the public interest.

A leasehold estate is conferred upon the lessee of a marine farm by section 11 (1) (a) of the Act. The lessee is also granted the exclusive right, pursuant to section 11 (1) (b), to farm within the leased area the species of fish or marine vegetation specified in the lease. A licensee by section 11 (3) of the Act is similarly given the exclusive right to farm within the licensed area the species of fish or marine vegetation specified in the licence.

Section 26 (1) provides that on the application of a Borough, Town or County Council whose district adjoins a leased area, or on its own motion, the controlling authority may determine that any specified part of a leased area shall be an access strip for the purpose of enabling members of the public by boats, vehicles, or otherwise to pass and repass along that strip. By section 26 (4) of the Act, the lessee of a marine farm is required to permit members of the public to pass and repass along the
access strip in accordance with the determination of the controlling authority. Section 28 (1) of the Act provides that a licensee may apply to the controlling authority for the prohibition of anchoring, mooring, or navigation of boats within the licensed area. The application is required to be publicly notified, and if objections are received the controlling authority is required by section 29 to follow a similar procedure to that outlined previously in section 7 (1) of the Act.

7. The Town And Country Planning Amendment Act 1973:

The Labour government in 1973, recognising the very important role that local councils performed in providing for the planning and development of land adjacent to New Zealand waterways, enacted an amendment to the Town and Country Planning Act 1953, to give that recognition statutory emphasis. The amendment provided for the insertion of the following new section in the principal Act:

The following matters are declared to be of national importance and shall be recognised and provided for in the preparation, implementation, and administration of regional and district schemes:

(a) The preservation of the natural character of the coastal environment and of the margins of lakes and rivers and the protection of them from unnecessary subdivision and development:

42 This Amendment was initiated by The Town and Country Planning Act Review Committee, Report to Government (September 1973); see Report, 10.

(b) The avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food;

(c) The prevention of sporadic urban subdivision and development in rural areas.

This amendment was therefore of considerable importance, in that the statutory powers and responsibilities conferred on councils by the Town and Country Planning Act were more specifically defined. The amendment may also be seen as a positive Parliamentary attempt to preserve the public interest in the lands adjacent to our waterways.

8. The Local Government Act 1974:

Section 75 of the Local Government Act 1974 provides that Regional Councils formed under the Act are deemed to be the Regional Planning Authority for its region under the Town and Country Planning Act 1953, and to have all powers, duties, and responsibilities vested in a Regional Planning Authority by that Act. The Regional Council is also empowered under section 80 of the Act, if it is of the opinion that any land, not vested in a public body, is required for a public reserve, domain, sports ground, camping ground or place of public recreation or enjoyment for the benefit of the inhabitants of two or more constituent districts within the region, to purchase or otherwise acquire or take the land for a public work under the Public Works Act 1928 as a regional reserve for any such purpose. Section 80 (2) of the Act provides that any such land taken, purchased or otherwise acquired shall be deemed to be a public reserve subject to the Reserves and Domains Act 1953. The Regional Council is also empowered by section 80 (4) to declare that any land vested in it may be set aside as
a regional reserve; such lands set aside being deemed also to be public reserves under the Reserves and Domains Act 1953.

9. **Coastal Moratorium and Management Bill 1975:**

The ill-fated Coastal Moratorium and Management Bill 1975, introduced by Labour Member of Parliament Mr M. Moore, was perhaps doomed to failure from the outset, principally because of the very wide-sweeping provisions and implications contained in the Bill, and also because Mr Moore received little support from his own party. The preamble to the Bill recited that the Act was to provide for:

> ... the better use and conservation of the coastal zone of New Zealand and the preparation of a New Zealand Coastal Plan.

The Bill defined the coastal zone as being that area of New Zealand extending one kilometre inland from mean high water mark, and from the shore of any lake in New Zealand having an area not less than 8 hectares. The Bill also established a coastal planning commission which was to have sole jurisdiction and planning over the coastal zone, and also provided by clause 31, that until a coastal plan was formulated by the commission, all applications relating to the planning and development of the coastal zone were to be made to the commission.

Needless to say, the Bill provided great controversy within Parliament and throughout the country, and Mr Moore, after being assured that legislation would be introduced relating to the matters in the Bill, moved its withdrawal.44

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10. **Party Political Initiatives:**

Over the last five years, both the major political parties in New Zealand have formulated principles designed to give the New Zealand public access to the land adjacent to our waterways.

The Labour Manifesto 1975, provided that a Labour government would increase the allocation of government funds for the purchase of land for scenic and recreational reserves, for access to rivers, lakes and the seashore, and for the appropriate development for public enjoyment of reserves and other Crown lands.\(^{45}\) It was also stated in the Manifesto:\(^{46}\)

> The Labour Government believes that the public should have reasonable right of access to all New Zealand coastal and lake foreshores and defined rivers and streams at all times.\(^{47}\)

Perhaps predictably, the National Party in its 1975 general election policy statement did not place the right of the public to resort to land adjacent to our waterways as extending to all water frontages at all times. The policy statement recognised the role recreation played in the lives of many New Zealanders, and it was stated that maritime and marine parks would be expanded, and the

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\(^{45}\) Labour Party Manifesto 1975, 14.

\(^{46}\) Labour Party Manifesto 1975, 32.

\(^{47}\) For a review of coastal planning and development principles of the Labour Government 1972-1975, see Coastal Planning and Development Statement By The Minister of Works and Development, August 1974, 2.
New Zealand walkway system extended to include a coastal walkway.\textsuperscript{48} Probably the most important principle contained in the policy statement was that a National Government would form a National Trust which would have the responsibility for ensuring sufficient open space was provided for the needs of New Zealanders.\textsuperscript{49}

11. \textit{New Zealand Walkways Act 1975:}

This Act is of considerable importance in that it provides for the establishment of public walkways throughout New Zealand for the enjoyment of the public. Section 3 of the Act declares that the provisions of the Act are to have the aim of establishing walking tracks over public and private land so the people of New Zealand shall have safe, unimpeded foot access to the countryside for the benefit of physical recreation as well as the enjoyment of the outdoor environment.

A Commission is established under section 4 of the Act, which is required under section 10 to initiate, prepare, investigate, and consider proposals for the establishment, administration, control, maintenance, and improvement of a system of walkways throughout New Zealand for the enjoyment of the public. Section 20 of the Act provides that walkways may be established over public land, if the Commission, after consulting with the administering authority of the public land, considers that part of the land should

\textsuperscript{48} \textit{National Party general election policy statement}, "Environment Policy, Parks (2)."

\textsuperscript{49} \textit{National Party general election policy statement}, "Environment Policy National Trust (2)."
be made available for use by the public as a walkway for recreational purposes, and recommends to the Minister of Lands, that such land should be declared a walkway. The Minister of Lands, upon receiving the recommendation of the Commission, may pursuant to section 20 (2) of the Act, declare, by notice in the Gazette, the land to be a walkway. The procedure for establishing walkways over private land is contained in section 22 of the Act. That section provides that if the Commission considers, after consultation with the owner or occupier of any private land, that any part of the land should be made available for public use as a walkway for recreational purposes, the Commission may request that the Commissioner of Crown Lands in that district to treat and agree on behalf of the Crown for the purchase or gift of an easement over that land, or for the leasing of the land. Once a lease or easement has been obtained, the Minister, pursuant to section 22 (5), may declare by notice in the Gazette, that a walkway has been established over that land.

The public are given full right to pass and repass over a walkway without charge by section 23 of the Act. Some restrictions are however placed on the public using walkways by section 39 of the Act, including a prohibition against carrying or discharging a firearm within 100 metres of a walkway, or disturbing any wildlife on or adjacent to a walkway. In the writer's opinion therefore, recreational pursuits such as duck shooting from a walkway adjacent to a waterway would be an offence against the Act, unless such actions were authorised by section 39 (2) or (3) of the Act.
It is to be noted that the Act largely relies on the cooperation of public authorities having control of public lands, and of private owners to allow walkways to be established over land under their control. Private land can only be declared a walkway with the full consent of the owner, who may stipulate conditions and restrictions upon the use of the walkway.

D. Current Bills Before Parliament Affecting Public And Private Recreation and Usage Of Lands Adjacent To New Zealand Waterways:

1. Marine Reserves Amendment Bill:

Clause 2 of this Bill provides that fishing for recreational purposes in a marine reserve, can only be authorised by the Minister of Fisheries, after consultation with the management committee of the relevant reserve.

2. Counties Amendment Bill:

Clause 3 of this Bill proposes several amendments to section 29 of the Counties Amendment Act 1961. Clause 3 (1) has the effect of providing that the Minister of Lands, may grant consent to the council to waive the reserve requirements in respect of land adjacent to mean high water mark of the sea, and of its bays, inlets and creeks, and along the margins of lakes with an area in excess of eight hectares, and rivers or streams which have an average width of not less than three metres. Under the present Act, consent can only be given to dispense with the requirement of reserves in respect of land along the margins of lakes, rivers, and streams; the requirement for the setting aside of the reserve adjacent to mean high water mark of the sea, and of its bays, inlets and creeks being mandatory.
It is to be noted also that by clause 3 (1) and (2) of the Bill, reserves are created specifically for "recreation purposes" as compared with "public purposes" in the present legislation. It is submitted that this proposed change in terminology is a recognition by Government of the public interest in the land adjacent to New Zealand's waterways for recreational purposes.

Clause 3 (3) of the Bill affirms the position established by section 9 (4) of the Counties Amendment Act 1975, that land will not be required to be set aside for recreation purposes where the land being subdivided adjoins any allotment of four hectares or more, and that allotment will, in the opinion of the council, be used or will continue to be used for farming or agricultural purposes.

Clause 3 (5) of the Bill provides for a new subsection (5) to be inserted in section 29 of the Counties Amendment Act 1961. The effect of this new subsection is that where land is set aside pursuant to section 29 (1) or (2) of the Bill adjacent to mean high water mark of the sea or any of its bays, inlets or creeks or along the margin of any lake, and the Minister is satisfied that an adjoining allotment will be held for five years from the deposit of the survey plan for farming purposes and the land is not zoned residential, commercial or industrial, then compensation shall be paid to the subdividing owner for the loss of the land set aside on a valuation to be determined by the Valuer-General. Presumably, the proposed clause is an attempt to compensate farmers for loss of land set aside as reserves, who intend to hold the balance of their lands for agricultural purposes and not dispose of it within a
five year period. Should compensation be paid, and the subdividing owner or his successor in title further subdivides, or sells, or agrees to sell the allotment within the five year period, provision is also made in clause 3 (5) of the Bill for the compensation previously awarded to be repaid to the Crown.

The effects of these proposed amendments to the Counties Amendment Act will no doubt cause considerable interest in the farming community, especially the amendment providing for compensation for land taken as reserve for recreational purposes.

3. Queen Elizabeth The Second National Trust Bill:

In pursuance of its general election policy statement of 1975, this Bill has been introduced to parliament by the National Government. The preamble to the Bill recites that the Bill is to establish a National Trust;

...to encourage and promote the provision, protection, and enhancement of open space for the benefit and enjoyment of the people of New Zealand.

"Open space" is defined by clause 2 of the Bill as being an area of land or body of water that serves to preserve or facilitate the preservation of any landscape of aesthetic, cultural, recreational, scenic, scientific, or social interest or value.

The general function of the Trust is defined in clause 20 (1) of the Bill as being to encourage and promote for the benefit of the present and future generations of the people of New Zealand the provision, preservation, and enhancement of open space. The Trust, by clause 20 (2) (a) and (d) is required to advise the Minister of Lands on the
provision, protection, preservation, enhancement and use of open space, and to undertake the identification and classification of potential reserves and recreation areas as being of national, regional, local, or special significance. Clause 21 (a) of the Bill provides that the Trust is empowered to acquire by purchase, lease, exchange, bailment, gift or otherwise any interest in land or any other form of property. The Board of the Trust is also empowered by clause 22 (1) of the Bill, where it is satisfied that any private land, or land held under Crown lease should be established or maintained as open space without the Trust acquiring the land, to treat and agree with the owner or lessee of the land for the execution of an open space covenant on such terms as the Trust Board or the owner or lessee may agree.

Clause 33 of the Bill provides that subject to any bylaws made under the Act and any conditions that the Trust Board thinks necessary, or in respect of land subject to an open space covenant the terms as may be provided for or limited by the covenant, the public shall have freedom of entry and access to all Trust land, and to all land subject to an open space covenant.

4. Reserves Bill:

The preamble to this Bill specifically provides that one of the provisions of the new Act is to make provision for public access to the coastline and the countryside. This important initial statement is defined in clause 3 of the Bill, where by clause 3 (a) it is declared that the purpose of the Act is to provide, for the preservation and management for the benefit and enjoyment of the public,
areas of New Zealand possessing recreational use or potential. More significantly, in the writer's view, it is specified in clause 3 (c) of the Bill that the purpose of the Act is also to provide for;

Ensuring, as far as possible, the preservation of access for the public to and along the sea coast, its bays and inlets and offshore islands, lakeshores, and river banks, and fostering and promoting the preservation of the natural character of the coastal environment and of the margins of lakes and rivers and the protection of them from unnecessary subdivision and development.

Another important clause of the Bill relating to the preservation of public access to New Zealand's waterways is in clause 53 of the Bill which outlines the powers of an administering body (as defined by clause 2 of the Bill) in respect of recreation reserves. Clause 53 (1) (i) provides that the administering authority shall have the following power;

With the prior consent of the Minister and subject to the Harbour Act 1950, and having regard to the need to conserve the natural beauty of any sea, lake, river, or stream bounding the reserve or of any lake, river, or stream within the reserve, do all such things on the reserve as it considers necessary, including the erection of buildings and structures on the reserve, to enable the public to obtain the maximum recreational use and enjoyment of that sea, lake, river, or stream.

A similar power is given to the administering authority of scenic reserves by clause 55 (2) (f) of the Bill.

The Bill also contains other important clauses that affect public and private rights over lands adjacent to New Zealand's waterways. The continuance and completion of the coastal reserves survey is assured by clause 4 (3) of the Bill, which provides that every New Zealand wide
survey of the seacoast, its bays, inlets, and creeks and offshore islands that has been commenced, but not completed before the coming into force of the Act shall be continued, completed, and from time to time kept under review. The Minister's powers of acquisition of land for public reserves by purchase, lease, or acquisition under the Public Works Act 1923 are prescribed under clause 12 of the Bill. Recreation reserves are defined by clause 17 of the Bill as reserves for the purpose of providing areas for the recreation and sporting activities and the physical welfare and enjoyment of the public, and the public right of access to recreation reserves is preserved by clause 17 2 (a) of the Bill. Scenic reserves are defined by clause 19 of the Bill as reserves for the purpose of protecting and preserving in perpetuity for the benefit, enjoyment and use of the public suitable areas possessing such qualities of scenic interest, beauty or natural features or landscape that their protection and preservation are desirable in the public interest. The public right of access to scenic reserves is also protected under clause 19 (2) (b) and 19 (3) (b) of the Bill.

5. **Town And Country Planning Bill:**

This Bill also contains several important provisions affecting public and private recreation and usage of lands adjacent to New Zealand waterways.

A maritime planning section has been included under Part V of the Bill. The Governor-General is empowered by clause 89 to constitute a maritime planning area, and by clause 39 (3) such an area may have its landward boundary
above or below mean high water mark. A Maritime Planning Authority may be constituted by clause 91 of the Bill, and that Authority is required by clause 93 to prepare a maritime planning scheme for its area, and to ensure that effect is given to it, and that the scheme remains adequate and appropriate for its purpose. The Authority, by clause 95 of the Bill, is required to prepare a draft maritime planning scheme, and make provision in that scheme for such of the matters specified in the Third Schedule to the Act as it considers necessary or desirable. Amongst matters that may be included in the scheme are general recreation, recreational boating and waterskiing, boat ramps, jetties, moorings and similar facilities for public, clubs, or private use, non-commercial fishing, and public access to the foreshore and water of a maritime planning area.

Parliament has thus empowered the proposed Maritime Planning Authorities to provide for general public recreation and usage of the foreshore within specified maritime planning areas, and it appears, therefore, that by this Bill, Government, for the first time, is giving actual statutory authorisation to public activities that have probably existed in those specified areas since the initial colonisation of the country.

The Maritime Planning Authority is also obliged by clause 3 of the Bill, (as are Regional and District Planning Authorities), to recognise and provide for the same matters of national importance as are presently embodied in section 2 B of The Town and Country Planning Act 1953, including the preservation of the natural character of the
coastal environment, and the margins of lakes and rivers, and the protection of them from unnecessary sub-division and development.

The Authority is also obliged by clause 4 of the Bill (as are Regional and District Planning Authorities) to have for its general purpose the conservation and wise use of the resources, and the direction and control of the development of a region, district or area in such a way as will most effectively tend to promote and safeguard health, safety, and convenience, and the economic and general welfare, and the amenities of every part of the region, district, or area.

The Bill also empowers both Regional and District Planning Authorities to make provision in their respective schemes for matters that could affect public or private recreation and usage of land adjacent to our waterways. Clause 11 (2) provides that Regional Planning Authorities are empowered to make provision in its regional scheme for such matters in the First Schedule to the Act as are appropriate to the circumstances. Amongst such matters that may be included are recreational needs, including regional parks, reserves, and walkways. Local authorities are empowered by clause 32 (3) to make provision in district schemes for such of the matters in the second schedule to the Act as are appropriate to the circumstances. That schedule authorises provisions to be included in a district scheme dealing with the amenities appropriate to the needs of the present and future inhabitants of the district, and land uses or activities of a recreational, sporting, or community nature.
6. The Harbours Amendment Bill:

This Bill proposes several amendments to the Harbours Act 1950 affecting public and private recreation and usage of lands adjacent to water. By clause 27 of the Bill, sections 152 and 153 of the principal Act which relate to utilisation of mudflat areas for agricultural purposes are repealed. Presumably this repeal has arisen with the enactment of the Marine Farming Act 1971.

Clause 29 of the Bill amends section 159 of the Act, and provides that unless a Board or local authority is satisfied that special circumstances otherwise require, any licence issued pursuant to section 156 of the Act is to secure the right of the public access to that part of the foreshore the subject of the licence. There is currently no provision in section 159 of the Act which allows the Board or local authority to exclude the public right of access from the foreshore when such a licence is issued.

Section 162 of the principal Act which empowers the Minister of Transport to issue licences for use of the foreshore where the foreshore is not vested in a Harbour Board or local authority is repealed by clause 31 of the Bill. A new section is proposed in the clause which would allow the Minister to licence use of the foreshore, the bed of a navigable lake or river, and the bed of a harbour or the sea, where those lands are not under the control of some public body. Such lands may be licensed for the purposes specified in section 156 of the Act, or for the erection or use of structures on the land. A new subsection (1A) to the proposed section 162 is also included in clause 31 of the Bill. This subsection would authorise the Minister where
he was satisfied that special circumstances make it desirable in the public interest to do so, to licence the lands specified for a term exceeding 14 years but not exceeding 50 years. Clause 31 of the Bill also repeals section 164 of the principal Act relating to the power of the Minister to permit occupation of the foreshore for certain purposes. The powers conferred on the Minister pursuant to section 162 as proposed in the Bill would appear to be wide enough to include the present powers of the Minister under section 164.

Section 165 of the principal Act which relates to grants of the foreshore or bed of a lake to a public body is amended by clause 32 of the Bill. The principal amendment to the section is in clause 32 (10) where a new subsection 10 is added to the present section extending the types of lands which may be subject to such a grant. Section 165 is deemed to apply to the foreshore, the bed of the sea whether or not a harbour, and the bed of any navigable lake or river. The previous restriction relating to the grant of the control of lake beds to only sixty-six feet from the margin of the lake is removed by this amendment.
CONCLUSIONS:

As no statute has as yet been enacted giving the public specific rights to use the foreshore, it is concluded the common law principle that the public have no right to resort to the foreshore for recreational or general purposes applies in New Zealand.

It is however emphasised, that since the first days of colonisation in New Zealand, the early administrators, and later central government, recognised the public interest in the foreshore, and the important role it could provide in serving public recreation. The administrators, acting on the Royal Instructions to reserve land for public purposes, initiated steps to preserve land adjacent to New Zealand's waterways for such purposes, and the public today is greatly indebted to the foresight and planning by those administrators and later by central government, in ensuring the creation of reserves adjacent to our waterways for specific public purposes. Government action continued through the latter half of the nineteenth century with the enactment of a general reserve legislation which enabled the creation of reserves for specific public purposes, and provisions being enacted in the Land Act 1892, ensuring the reservation of land on the disposal of Crown land adjacent to a waterway. The twentieth century saw a continual growth in the number of reserves set aside for public purposes, and emphasis being placed on the creation of reserves in rural areas through the Land Subdivision in Counties Act 1946, and through statutory obligations being
placed on local councils to provide reserves pursuant to The Town and Country Planning Act 1953. Over the last decade, central government, acknowledging the growing pressures being placed on land adjacent to our waterways, has initiated a variety of both administrative and legislative steps to ensure the preservation of lands for purposes of public recreation and general utility.

As the Crown has traditionally tolerated public recreation and usage of foreshore areas and of Crown lands adjacent to waterways in New Zealand, Parliament has not deemed it necessary to enact legislation giving the public specific rights to use the foreshore, or the lands, for example, set aside from sale pursuant to section 53 of the Land Act 1943. The public interest in the foreshore has been acknowledged in the Harbours Act 1950, where provision is made for the leasing or licensing of foreshore areas for purposes of public recreation, utility, and convenience. Parliament has however deemed it necessary to enact legislation to control public activities on the foreshore to enable it to be utilised in the best interests of the majority of the members of the public resorting to it. Such control is provided through bylaws made by public bodies controlling particular parts of the foreshore, or through the general law where actions constituting public disorder, disturbing the peace, or offensive behaviour or language, or more serious offences, are controlled by the Police Offences Act 1927 or the Crimes Act 1961.

In respect of riparian lands adjacent to the foreshore, lakes and rivers, it appears that the public may only resort to such lands for recreational or general purposes,
if those lands are not privately owned, and are either Crown land reserved from sale pursuant to section 58 of the Land Act 1948 (or through previous equivalent sections in prior Land Acts), land reserved from subdivision under either the Counties Amendment Act 1961, or Municipal Corporations Act 1954 (or through previous equivalent provisions in earlier enactments), land set aside as a reserve or domain under the Reserves and Domains Act 1953, a National Park, or land set aside as a reserve under some other statute. It is to be noted that entry onto Crown land is an offence under section 176 of the Land Act 1948, and the land reserved from sale by section 58 of the Land Act 1948 does not constitute a reserve for the purposes of the Reserves and Domains Act 1953, and such land is also not reserved for any public purpose as compared with land set aside adjacent to the foreshore, or the margins of a lake, river, or stream pursuant to section 29 of the Counties Amendment Act 1961. However, it appears that whilst public entry onto such reserved lands would technically be a trespass on Crown land, those lands are held for the benefit of the New Zealand public, and where such "reserves" exist, the public are enabled to gain access to waterways for

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50 Whether a prosecution shall be instituted against members of the public for trespass on Crown land is probably a matter for the discretion of the Commissioner of Crown lands. See *Police v. Jackic* (1965) 11 N.Z.L.R. 443 where Crutchley S.J. noted this discretionary power and commented: "This would be most desirable if any distinction is to be made between the technical trespasser and the trespasser who has a sinister purpose."

51 Department of Lands and Survey *Public Access To Foreshore Areas* (1971).
recreational and general purposes. Where the riparian lands adjacent to the foreshore, river, or lake remain in private ownership, it is submitted that the public have been given no statutory rights of entry onto such land, and accordingly, encroachments onto such privately owned land by members of the public without the consent of the owner will constitute a trespass under either section 5 or 6 of the Trespass Act 1968.

The Marine Reserves, Counties, Queen Elizabeth The Second National Trust, Reserves, Town and Country Planning, and Harbours Bills presently before Parliament each contain important provisions affecting both public and private recreation and usage of lands adjacent to New Zealand's waterways. In particular, there are provisions in both the Reserves Bill and Town and Country Planning Bill specifically orientated towards preserving public access to, and usage of such lands.

It appears also that the Coastal Reserves Survey shall prove to be of significant importance in classifying lands suitable for reserve adjacent to our waterways. In the writer's view, the responsibility for planning development and control of land adjacent to waterways should remain vested in local councils, despite the acknowledged disadvantages of such control, and the present difficulties that local councils face which were referred to in Chapter VII. In respect of foreshore areas of a regional or national significance, it is concluded that the Maritime Planning Authorities envisaged under the Town and Country Planning Bill are a more viable proposition for the development and control of particular foreshore areas, than the establishment
of a further national commission, or through the estab-
ishment of a National Park of New Zealand coastal areas.52

Leaving aside the foreshore, where public activities have been traditionally tolerated by the Crown, it is the writer's view that the greatest problem facing public and private recreation and usage of the lands adjacent to New Zealand's waterways is reconciling the private interest of the owner of the riparian lands, with the increasing demand and pressure being placed on such lands by a growing population that is becoming more aware of the advantages and pleasure of resort that may be obtained from such lands.

New Zealand is predominantly a rural country with a large proportion of the lands adjacent to its waterways privately owned by farmers, some of whom, have been traditionally loathe to allow the public entry onto their private land for any purposes. The problem was similarly recognised in England in 1891 by Bowen L.J. in Blount v. Layard,53 when in referring to resort to, and usage of private lands by the public, commented:54

Nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others beside the owners, under the fear that their good nature may be misunderstood.

52 See Norton, Thom, Locker, Seacoast in the Seventies (1973), 77.
53 L.T.917 & Ch. 651.
54 Ibid., at 691.
It is submitted that the provisions of the New Zealand Walkways Act 1975 can be used to great advantage in providing public access to waterways without depriving the private owner of those lands adjacent to the waterway, and at the same time ensuring the protection of the private property through any reasonable conditions that the owner may wish to impose. Greater efforts should be made, it is submitted, by the Department of Lands and Survey, perhaps financially assisted by the Ministry of Recreation and Sport, to negotiate access agreements with private owners to ensure the creation of controlled public access over private land adjacent to our waterways. With the mutual cooperation of the private owner, and the representative of the Crown, it is concluded that sufficient public access could be created to New Zealand's waterways, thus enabling a reasonable balance to be met between the private interest of the landowner, and the wider interest of the public as a whole.55

55 This Thesis dealt with legislation in force or proposed as at 10 December 1977.
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