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ACCESS TO AND ALONG WATER MARGINS:

THE QUEEN'S CHAIN MYTH

Allan John Baldwin

A thesis submitted for the degree of Master of Surveying

University of Otago
Dunedin, New Zealand

April 1997
ABSTRACT

This study reviews the laws and practices for creating and locating water margin reserved land in New Zealand from 1840 Royal Instructions to proposed district plan rules. The study has reviewed statutes, parliamentary reports, proposed district plans, various other writings and reports. It has involved site visits, field observations and interviews.

Surveyors' instructions, regulations, then legislation required chain strips along the coast, major rivers and significant lakes to be reserved from subsequent Crown land sales. Access rights respected by Maori and European arrangements for travellers show accepted access arrangements. Land Acts required chain strips from Crown land sales along the coast, rivers and lake margins. Esplanade reserves on similar water margins of private land were required in counties from 1946, then all local authorities by the Local Government Act from 1978.

The term "Queen's chain", its extent and origins are considered. Surveying practices for water margins are reviewed. Debates from 1989 law proposals highlighted concerns about reduced public access as the proposals were linked to assets sales. New marginal strips by Conservation legislation are not surveyed, are ambulatory and remain next to the water. They can be leased or their use licenced. Examples of surveying practice, innovative design and planning of boundaries are provided. Rule from several proposed district plans for esplanade reserves and strips are discussed.

The study concludes that the extent of Queen's Chains is a myth. Shifting water margins and access rights are complex to define in legislation. The Queen's Chain gained popular support and protests may have prevented sales of water margin lands.
ACKNOWLEDGEMENTS

Angela, Jessica, Mark and Amanda for their support and tolerance.

Brian Ballantyne for much patience, guidance, ideas and keenness to see a final version.

To many people, especially surveyors who have offered thoughts and experience, particularly Mark Smith.

A COMMENT ON ACCESS

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PROLOGUE

This introduction serves three functions. It introduces the issues and the aim of this research. It explains the research perspective and it outlines the structure of the thesis by introducing the subjects addressed in each chapter.

Access to and along rivers, coastal beaches and lake margins for recreation is something New Zealanders take for granted. Swimming, boating, fishing, walking or tramping, or merely playing or lying on the beaches are common inexpensive activities and pastimes - part of the Kiwi way of life. There are no entry fees or time restrictions on visits. Usually it is only the weather or the tide that affect activities. However, there are tensions between recreational access, land ownership for productive farming and the protection of water margin environments.

This thesis considers these conflicts and aims to explain the existence or absence of public access to and along water margins. The research does this by examining the evolution of laws since 1840 and by examining the public debates before and after the laws were passed.

The Research Perspective
The research perspective is from surveying. Surveyors are mindful of the conflicting tensions for land use. Prominent is the concern for the rights of individual land owners to privately occupy their land within properly defined boundaries. By law surveyors are the experts responsible for marking boundary locations on the ground. Recent controversial law changes, the lack of surveys, the migratory nature of water margins, the various types of water margin land, tensions between access, protection and production, and the public's perceptions of their rights to visit water margins make this area of study topical and relevant.¹

Background to Issues being addressed
New Zealanders do not have legal rights and access to all margins of rivers lakes and the coast. There are many waterways that can only be reached by crossing private land. If the visitor does not seek permission to cross land they can be trespassing. The issues of trespass/access are canvassed in chapter one. New Zealand has strict trespass legislation that deals with rural lands. There are areas where access is restricted for safety reason such as busy wharves, dockyards, defence installations and power-stations. Those few exceptions aside, a common presumption is that water access exists as of right. New Zealand's present rights of access are compared both with those in contemporary Europe, and with the attitude of Maori before European colonisation

¹ The issue of access versus conservation/protection was identified by Ballantyne for further research. See Ballantyne, B. A., 1994, 'This must be the place': plumbing a land ethic for the built environment, Unpublished PhD thesis, Otago University p 169.
particularly in seeking greenstone in the South Island. The attitudes to access based on, cultural and country differences are investigated in chapter two.

There is a common belief that Queen Victoria conferred a universal right of access for all New Zealanders, to all the coasts, lakes and rivers soon after the Treaty of Waitangi in 1840. However, although the Instructions were given, the land to which they applied to was limited. Since 1840 there has been a great deal of legislation passed in New Zealand to improve public access along water margins; in Survey Instructions, Land Acts, local government legislation and in the past decade's Conservation and Resource Management legislation. Chapter three examines the Instructions, early Ordinances and subsequent Land and Conservation laws that have set requirements for reserving water margin strips from the Crown's alienation (sale or grant) of land.

The provisions of the Land Acts did not affect the water margins of land already in private ownership. Thus, separate laws were enacted to regain esplanade lands from private ownership back to public control. Significant was the Land Subdivision in Counties Act 1946, then subsequent Counties Amendment Acts which required esplanade reserves in urbanising parts of counties. The separate evolution of the esplanade reserves controlled by the territorial authorities is traced in chapter four. Controversies arose when owners objected about the potential loss of prime riparian land without compensation, if they subdivided their land.

Chapter five deals with the controversy which has surrounded recent law changes proposed for marginal strips. When the Crown, in keeping with the requirements of the Land Acts, withheld land from sale and created marginal strips, there was no protesting. However, in 1989, the government proposed legislation where it could decide to not create new strips, to reduce the size of new strips, to sell or transfer the management of existing strips. The widespread public anger over the Conservation Law Reform Bill 1989 led to an amended Act. The Conservation Amendment Bill 1993 which proposed leasing strips was hotly debated before the election. It was also amended to appease concerns for public access.

Significant recreational groups lobbied government about the potential threats to water access, owing to the actions of a future Minister of Conservation. The chain wide strip of land that can border water margins can be land in various classifications. Queen's Chain conveniently embraces them all. However, the origins, extent, and amount of Queen's Chain that exists is a myth perpetrated and expanded by the news media not fully explaining or not appreciating the legislation. The issue of what land is Queen's Chain and the controversies of the two Bills is explained and reviewed in chapter five.

Surveyors have had the roles of deciding in the field which water margins require reserved strips, if the boundaries are to be surveyed, shown on plans and used for titles. Aspects of survey
practice in recent decades for determining the water margin reserves, and guidance from Chief Surveyors' memoranda to practising surveyors are described in chapter six.

Also discussed as the surveyors' role are ways which surveyors have addressed problems for clients and the margins of hydro lakes. Inventive planning approaches for developments adjacent to water have been used at times because of the difficulties in gaining exemptions from the law's requirement. Examples of innovative planning are illustrated by case studies in chapter seven.

Water margin land is often used and administered for recreation by territorial local authorities. Within district plans, under the requirements of Pt X Resource Management Act 1991 and the 1993 Amendment, councils can now set their own rules as to if, where and how wide they require esplanade reserves. Councils can require esplanade strip easements and must compensate for land taken for access from lots over four hectares. How this new local system will work is discussed in chapter eight by reviewing the differing requirements of nine territorial authorities. This review illustrates the different interpretations, local rules and selection of streams considered in proposed district plans.

The study concludes with an epilogue of three brief parts. It summarises the chapters, suggests several areas of further research that have become apparent from this study and finally it draws some conclusions about water margin access and the myth of the Queen's Chain.
CHAPTER 1
ACCESS AND TRESPASS:
TWO SIDES OF THE SAME COIN?

If there were no laws against trespassing then access rights to land would not be an issue. Everybody could go wherever they wanted and the owners of the land would not have the backing of the law to stop them. However, the English common law has long accepted trespass as an offence.1 In New Zealand since 19682 it has been a crime to remain on land after the land owner, or someone authorised, has issued a warning to leave. The issue of trespass is particularly relevant to water margin lands. Water margins can often provide an identifiable access route through privately controlled countryside or to lands such as the conservation estate. Gaining access to public land along water frequently requires trespassing. A person can be trespassing if they are on the bank of a river that has eroded the river bank reserve.

There can be considerable uncertainty about which land on water margins is available for public access as road, marginal strip or esplanade reserve. The prudent, law-abiding citizen must consider the implications of inadvertently committing a criminal trespass if they do not seek permission and are not familiar with the area. Police do become involved with trespass issues. Where this has involved access across farmland on Otago Peninsula, a troublesome area for several years, the police have handled the problems without redress to the courts. There have also been ongoing disputes in various other parts of the country where the public claim access but the owners identify trespassing.

There are competing interests in rural land: ownership (farming), conservation and access. In the rural sector, the farmers' livelihood requires an income from the land. Environmental protection has in recent decades become increasingly important; sometimes its aims conflict with farming operations, at other times they conflict with public access desires.3 Restricting or curtailing farming or public access is occasionally necessary for areas that need protection so that fish or birds can breed.4 Many people have an interest in these countryside lands for

---

2. Trespass Act 1968.
3. The creation of the Ministry for the Environment, appointment of the Commissioner for the Environment (1987) and the establishment of the Department of Conservation (1987) have all occurred in the past decade in New Zealand.
4. Penguin Beach or parts of Sandfly Bay on Otago Peninsula, for example.
recreational opportunities. Environmentalists, at times, oppose public access that can lead to the damage of animal habitats and vegetation. They occasionally oppose farming operations that can damage waterways and riverbanks by pollution, stock access, removal of native riverbank vegetation, or deplete water-flows by taking water for irrigation. These conservation demands can conflict with the land owners' management and access demands from the public. The access lobby, which includes Public Access New Zealand (PANZ), Federated Mountain Clubs (FMC) and the Fish and Game Councils, at times disputes farmers' actions to restrict entry to land.

With the creation of the Ministry for the Environment and the Department of Conservation in 1987 came new legislation to promote environmental protection. Meanwhile there have been laws allowing or requiring the creation of State Owned Enterprises or the sale of Crown assets that include land. New owners of these assets have adopted stricter control of their land than the former departments. They want to run operations with few staff, minimise damage and vandalism of their assets and limit liability from members of the public hurting themselves on the SOE's property. Thus, Crown land, which was once available unchallenged to the public, can be lost for public access, because it is sold. Although Crown land is not open to the public, as of right, lessees have rarely enforced restrictions on public access. There has been the possibility that back country lands would at some time gain the status of public reserve. Access can be restricted to protect the land or flora and fauna on it. The land can be subject to a claim under the Treaty of Waitangi Act 1975 and its amendments. Then the land is unlikely to ever become available as a public park or reserve. The public debate over the fate of the Greenstone Valley land amid the Ngai Tahu Treaty settlement is one current Otago issue.

5 In May 1994, PANZ claimed to have the support of 250,000 New Zealanders. The grouping includes trampers, climbers, hunters and fishers. Public Access, No. 4 May 1994.

6 Anstey, Clive, 1993, Department of conservation: advocacy position under the RMA: esplanade areas. 11 Nov. 1993, NZIS seminar on RMAA-93, 4 pp.


8 Examples are, the increased security fencing around the Roxburgh and Clyde dams and fewer staff. Also fewer foresters work in pine plantations providing casual surveillance.

9 Examples are the black stilts in the Upper Waitaki, royal albatross at Taiaroa Head. To protect flora Q.E. II National Trust Act covenants can be registered on titles.


When reviewing access rights or trespass over rural properties, it is not possible to consider only the chain wide water margin strips. River flows sometimes alter course dramatically. Even if a legal water margin strip is plainly depicted on a map, its location on the ground to within a few metres can be impossible to judge. To begin we can discuss the question of access versus trespass for all types of land. Then we can review the debates over trespass legislation and its effects on access to water and consider the operation of these laws using Otago Peninsula situations as examples. Finally this chapter considers access restrictions caused by applying Occupational Health and Safety laws.

The laws of trespass are broad and cover a diversity of situations. In dealing with access to and along water margins, however, I have restricted the discussion to trespass to land. I have contrasted the rights of entry, generally for recreation, with trespass. To begin we should briefly review what trespass is, and then consider how New Zealand trespass laws may restrict access to water ways and water margins.

**What is Trespass?**

In this discussion, to trespass is to make an unlawful or unwarranted intrusion on or upon land. Its legal meaning is however, broad. Originally, trespass provided a remedy for a breach of the King's peace. Later property owners used trespass law for settling boundary disputes and preventing the acquisition of easements by prescription. At common law, trespass is an unlawful interference with one's person, property or rights. It was a form of action by which a person could bring an action for damages for an injury to person or property.

A continuing trespass can occur with the permanent invasion of the rights of another. Dumping rubbish on land or having a building encroaching on neighbouring land may be trespass of this sort. Continuing trespass can occur when a chattel is left on land after consent for it to remain has been withdrawn.

Trespass to land, according to *Black's Law Dictionary* could occur with every unauthorised entry onto the land of another and was actionable as trespass at common law. A deliberate intention to trespass was not required and no actual damage to property needed to occur. The common law greatly favoured the land owners. Trespass such as this was a civil matter and justified only nominal damages to the plaintiff.

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12 Options for settling the Ngai Tahu land claims, public meeting, Dunedin Sept.1996.
Criminal trespass is entering or remaining on land or in any other place when one is aware one should not be there. It is also a trespass to remain on land in defiance of a request to leave from an authorised person (the owner, occupier or their agent). If a person has the privilege, or is innocently on land but then abuses the privilege, the land owner can accuse them of trespassing from the time they first entered the land.  

Under the common law, a person, while trespassing, is liable for damage done to property belonging to those people rightly on the land. The visitor might dispute that liability if no trespass occurred. An innocent trespasser is, as the term suggests, a person who, believing they were acting within their right, unintentionally but unlawfully enters the land of another. On unfenced land near water margin lands, people could easily misunderstand their rights and trespass. For example they may have a mistaken belief that public access exists along all water margins at all times.

Trespass Legislation
New Zealand has various legislation that specifically denies public access rights, despite assertions of long established rights of access to the countryside. Unlike England where the public can gain a prescriptive easement or right of way, by using a pathway for many years, the Land Transfer Act 1870 and its successors through 1952 prohibit this. Also, the Land Act 1948 specifically makes it an offence to enter onto occupied Crown land and onto land reserved from sale by the Crown. Section 167 of the Land Act was primarily written to deal with people who let animals loose, removed timber and minerals or caused damage by fire on Crown land. Section 167(2) states:

(2) Every person commits an offence against this Act who, without right, title or licence;-

(a) Trespasses on or uses, or occupies lands of the Crown . . .

There is no formal Right of Common Access such as exists in Sweden or Norway and which has been suggested as a model for New Zealand.  

Trespass Act 1968
The Trespass Act does not define "trespass". Before 1968, New Zealand, like Britain, had no Trespass Act. There are various Acts that contain laws allowing the prosecution of people who

---

16 Land Act 1948, s 176 Trespass on or damage to Crown land.
enter property and then damage equipment and disturb or kill domestic stock. However, activities akin to trespassing - such as rustling or killing farm stock - could be handled under the Police Offences Act 1927. Under the Police Offences Act, s 6(c) the police could arrest a person found in an enclosed yard, whether urban or rural. It stated that a person "... wilfully trespasses in any place [if he] neglects or refuses to leave such place after being warned to do so by the owner or person authorised ..."

Also, the Animals Act 1967 could be used against anyone interfering with domestic stock. About that time, deer culling operations were common and hunters could use recreational access as the pretext for shooting or rustling farm animals. Section 63 warned of the offence of unauthorised removal of animals from land of which the person was not the owner. In addition, s 103 dealt with the offence of disturbing domesticated animals by trespass with dog or firearm. The Trespass Act 1968 incorporated this and included the use of vehicles as offensive.

Trespass Act 1968
The Trespass Act 1968 (and its successor in 1980) dealt with trespass acts on both on urban and rural properties. A person warned off a property had to stay off for six months or risk prosecution. The legislation made what had been a difficult-to-enforce tort (civil action by the landowner) into a crime enforced by the police. Conviction under the Trespass Act now carries a maximum fine of $1,000 or imprisonment for up to three months.

In the debates on trespass legislation (1968 and 1980), politicians from both sides of the House pointed to the need for recreational access to water. Both Trespass Acts were introduced by farmer-backed, National governments. Introducing the Criminal Trespass Bill 1968, Hanan claimed the law was "badly needed" to give farmers and other land owners a greater degree of protection from irresponsible trespass. However, he argued:

It is a common law right of all citizens. A man and his wife can take their children to the river for a swim, walking across private property. This has long been recognised as one of the most valued rights of a free and open country like New Zealand.

This was not strictly correct because under the common law they would have to leave if asked. By the Trespass Bill Hanan was introducing legislation that would remove common law rights for those people although they might not be often enforced. At that time, the Crown was itself a major farmer as represented by the Lands & Survey Department, and thus had a particular interest in more effective trespass laws. Walsh, a government MP, observed that trespass laws

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18 The Police Offences Act was repealed in parts by the Crimes Act 1961.
19 Animals Act 1967, s 63 and s 103.
20 Hansard, 1968 p 426, Mr Hanan.
were over 500 years old and were so watered down as to be ineffective. He claimed that rustlers had stolen over 20,000 sheep from Crown land.

The Labour Party, who were in opposition, strongly opposed the Bill as unnecessary because it could make any person a criminal, if they crossed private land without permission. Labour's Kirk did concede that there was need for concern about the "damage done by larrikins on private property". He also expressed concern that counties, by formally closing a number of paper roads, might unduly restrict access.

Coleman expressed concern about moves to allow foreign ownership of rural land. He commented that the Bill might allow "an alien" to refuse New Zealand citizens their permission to reach the back-country. Finlay considered that the public had "a legitimate demand for free and unimpeded access to the countryside . . .". This he described as "a typically British heritage . . .[and] also a typically New Zealand attitude".

Hanan had asserted in the Bill's introduction that:

The ordinary decent citizen who does no harm to stock or property, who wants merely to picnic by the river, to roam across the hills or to catch fish is not likely to be affected in any way.

Several groups with recreational interests made critical submissions on the Bill. The government argued that a law allowing a land owner to call the police would be more effective, as the police could do a much better job than a farmer at gathering the necessary information for any court action. An opposition MP commented that allowing more people of good intent

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21 Hansard, 1968 p 3414, Mr Walsh.
22 Paper roads are unformed roads, sometimes their boundaries have never been surveyed. They might exist only on cadastral maps and plans. They can be indistinguishable from the rest of a farmer's paddock. Farmers can graze them but pay no local authority rates.
23 Hansard, 1968 p 426, Mr Kirk.
24 Hansard, 1968 p 3380 Mr Coleman. This sentiment prevails in 1996 with the influx of Asian investment and land purchases. The New Zealand First political party campaigned in 1996 against Asian investment.
26 Hansard, 1968 p 426, Mr Hanan.
27 Deer Stalkers, Civil Liberties, Federated Mountain Clubs, Law Society, Scenery Preservation Society, Royal New Zealand Forest and Bird Society, the Wellington Acclimatisation Society and Federated Farmers.
onto properties would provide good casual surveillance. With no help, the farmer would have to do all his own policing, and was not very effective at it.

Connelly, from the Opposition, gave a more enlightened interpretation of the difficulties like ly for the law-abiding public and commented:

\[ \text{... the public is not always aware of the legal access to Crown lands, reserves, rivers, lakes or waterways. They know the reserves and waterways are there and they are entitled to go there but they do not always know how to get there ... Some definite and positive action should be taken ... to indicate where legal accessways are.} \text{28} \]

Responding to criticisms, Hanan claimed that ordinary citizens could still roam the countryside and commit no offence unless they failed to leave a property when told. He declared that: "The rights of the fisherman to fish will be unaffected, " and that, "... the rights of the children to bathe in the river" would remain. \text{29} The problem was, and still is, one of getting to the river legally, without trespassing.

Despite the spirited opposition, Parliament passed the \text{Trespass Act 1968.} Its effectiveness in preventing rural trespass is unclear. Only seven cases were reported under that Act.\text{30} However, land owners may have issued many threats and warnings, and people may have sought permission more often or refrained from enjoying the countryside from fear of breaking the law. One can only speculate on the effectiveness of the law for preventing criminal activity.

\text{Trespass Act 1980}

That 1968 Act prevailed until 1980 when it was replaced by a new, hotly debated Act. These debates illustrated, and probably unduly accentuated, the pro-farmer attitude of the National Party and the pro-public access attitude of the Labour Party. Increased warning off periods, to two years, and increased maximum penalties of three months imprisonment or a fine of \$1,000 were part of the 1980 Act. Land owners became able to warn-off, by prior notice, any potential or suspected trespassers. Since only one of the reported cases in the previous twelve

\[ \text{28 Hansard, 1968, p 2341, Mr Connelly.} \]
\[ \text{29 Hansard, 1968, p , Mr Hanan.} \]
\[ \text{30 Hansard, 1980, p 1208, Sir Basil Arthur.} \]
years related to urban properties,\textsuperscript{31} opponents of the Bill suggested that dealing with protesters at rugby venues during any future Springbok tour was the actual agenda.\textsuperscript{32}

In leading Labour's criticism of the Bill, Palmer noted that a person can become "a trespasser and then a criminal at the option of the occupier of the land." \textsuperscript{33} He also observed that although it was illegal to sell fishing and hunting rights, farmers had been "selling access rights for very large sums indeed." \textsuperscript{34} The landowner could arrange a lease of land or a right of way for a fee. Palmer went on to suggest that the public needed:

\ldots access rights to the countryside because recreational facilities are not particularly well developed and most National Parks are well away from main centres of population. \textsuperscript{35}

Townsend, a government member, speaking in favour of the legislation, believed that Parliament should be more concerned about protecting the agricultural export sector than respecting the desires of hunters and fishermen. \textsuperscript{36} The uncertainty of boundaries and clear indications of where access was available was of concern to hunting, tramping and fishing groups that had made submissions. They complained of inadequate information, observing that maps were "\ldots the only legal documents reasonably available to outdoor New Zealanders to show them where they may legally go or not go." \textsuperscript{37}

Wall, from Labour, described the problems in the back country "\ldots where the definition of what is Crown land, river-bed or boundary [private] is almost impossible." He noted that responsible hunters, trampers and climbers who made entries in hut books could then be sent trespass notices telling them not to return to the property. The landowner [or lessee] was the only person able to give an opinion that private boundaries had been infringed, said Wall.\textsuperscript{38}

\begin{itemize}
\item[31] Hansard, 1980, p 1208 Sir Basil Arthur.
\item[32] Hansard, 1980, p 1217, Mr Maxwell. When one recalls the disrupted games and arrests of the 1981 tour, this was a prophetic comment.
\item[33] Hansard, 1980 p 508, Mr Palmer.
\item[34] Hansard, 1980 p 1172, Mr Palmer.
\item[35] Hansard, 1980 p 1172, Mr Palmer.
\item[36] Hansard, 1980 p 1220, Mr Townsend.
\item[37] Hansard, 1980 p 1218, Maxwell quoting New Zealand Federation of Rifle, Rod and Gun Sportsmen.
\item[38] Hansard, 1980 p 1221-22. Dr Wall.
\end{itemize}
The Act was passed, and like its predecessor, according to the New Zealand Law Report (NZLR) index, has not led to reported cases of rural trespass. However, in urban situations, such as in licensed premises, the amended Act is frequently used. In March 1996 the Otago Daily Times reported that a man had been prosecuted for trespassing on a Wenita forestry block. Having been warned off the man had returned within a few months.

Even without the *Trespass Acts*, the courts had established that there is a restriction on public entry onto Crown land. This was pointed out by Crutchley S M in discussing s 176 *Land Act*:

> However, in New Zealand, the Land Act expressly makes it an offence to trespass on lands of the Crown, and if a 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. 39

### Payments for Access

Public Access New Zealand has in recent years highlighted situations, like those mentioned by Mr Palmer, where land owners have sought payment from the public to cross their land to reach the coast. The two photographs in figure 1.1 illustrate the sorts of situation which have concerned PANZ.

![Access charge sign](image)

**Figure 1.1** Signs on properties where payments are sought from the public for access through properties: PANZ photographs.

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The Department of Conservation (DOC) introduced a fee and pass system in 1992 to meet some costs of providing washing and toilet facilities on the heavily used "premier tracks". This was criticised as "effectively introducing a fee for access".40

Some commentators speculated that DOC could gradually extend the payment system to other reserves because of inadequate funding from government. Beaches and river areas could be the most viable source of revenue.41 For instance, the beaches of the Abel Tasman National Park are now effectively only available to those walkers who pay the track (hut) fees.

Other commentators have suggested that DOC has a conflict of interest in revenue generation and conservation.42 They suggest DOC should allow private enterprise to promote and manage the recreational benefits of the Conservation estate. However, a business attempting to make a profit from access rights and use of facilities would need the ability to prosecute for trespass any freeloading freedom walkers.

Operating with the current law
One high country farmer, John Aspinall, commented that access to (high country) farm land is seldom refused without good reason. He noted that when pressed for details of problems, the recreation group leaders could only point to "2 or 3 properties". In the tenure restructuring43 process, he noted that access currently provided courtesy of the farmers would be formalised and marginal strips would be created along significant rivers and streams. Proposals for freeholding these lands were discussed in a 1995 paper by Ballantyne and Hoogsteden.44

The new marginal strips, together with clearly marked, covenanted, access routes would, claimed Aspinall, provide improved access to the high-country DOC estate. Aspinall suggested that rather than charge for the access, the farmers would expect a reduction in the

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41 Public Access, No. 2 Mar 1993 shows an example on p 5.
42 e.g. Mr McIntyre, M P. (1993) "Very concerned about DOC as a commercial entrepreneur" in Public Access No. 3 Oct 1993 p 9.
freeholding price. They would also consider developing and charging for activities, accommodation and meals, but not "for simple foot access ...".\textsuperscript{45}

Barr, in providing the Federated Mountain Clubs' perspective, agreed that:

"... in 95% of the cases they [high country farmers] don't deny requests for access by responsible users, although legally they have the right to."

But he expressed a concern that "foreign absentee landlords", such as the Indonesian buyers of the Lilybank pastoral lease, appear not to be as accommodating of the trampers, climbers and skiers. Barr argued that marginal strips can be created within existing pastoral leases as the action of freeholding is not a pre-requisite to providing improved access along streams or river banks.\textsuperscript{46} \textsuperscript{47}

In coastal areas, farmers have threatened surf board riders (who have persistently crossed their land) with police action. Sometimes the police have been called.\textsuperscript{48} The South Coast Board Riders have negotiated access to the beach with farmers at locations such as Taieri Mouth and Warrington. This followed problems with gates and dogs. On a subdivision at Taieri Mouth, the Dunedin City Council required the developers to provide an access strip along a boundary line to provide beach access for the public.\textsuperscript{49} Other concerns have been expressed about the attitudes of a few, sometimes new, foreign or absentee owners who seem unwilling to permit recreational access across their land which informally existed. Access groups express the fear that as New Zealand adopts a more users-pay philosophy, and with tourists from overseas who are willing to pay, then free public access will become restricted.\textsuperscript{50}

Problems on the Otago Peninsula

Otago Peninsula contains several areas where access and ownership rights have been tested. The following outlines some of the issues discussed with Senior Constable Lox Kellas of

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\textsuperscript{47} The sale of high country lands was reviewed in a July 1994 \textit{Listener} article. See Ansley, Bruce, 1994, High country sell-out, \textit{Listener}, July 16 1994, pp 18-25.


\textsuperscript{50} Cartoon, \textit{Public Access}, No. 5 Nov. 1994, p 16.
Portobello. The Public Lands Coalition, now part of Public Access New Zealand, made a stand on public rights of access along paper roads on the Otago Peninsula from around 1992. Debates had been going on for some years previously about unformed roads and practical access to various sites. Taking a pro-active, at times confrontational approach, access groups signposted unsurveyed paper road locations on the Peninsula. In instances, stiles were built and fences cut without consultation with the farmers. Some of these farms have limited titles where boundary pegs had never been placed. Unsurveyed, unformed paper roads were often only half a chain (10 metres) wide. In many instances it was impossible for their precise location to be determined without extensive surveys. Old dray tracks in some locations suggested a road alignment that had been used but this is often a practical route and not necessarily the legal location for the road.

In one instance, access across private land to Cape Saunders was restricted when the recent land owners ordered fishers off the land. Another farmer has placed a notice warning the public off Penguin Beach after 4:00 p.m. The farmer does not own the beach but access to it is through his property. By restricting public access through the farm he allows the penguins to come ashore without being disturbed.

The police presence, or its threat, works quickly to persuade unwelcome visitors to leave. Mostly, the police just attend and explain the law and take no further action. On the Otago Peninsula, the police have found farmers normally very tolerant of recreationalists who do no damage. The principal reasons for farmers anywhere to limit access has been vandalism and disturbance or killing of stock. There have been occasional problems with trail bike riders in the Department of Conservation reserves, such as at Sandfly Bay. The Police avoid involvement with Crown lands, some of which might be roads or reserves and thus do not involve the Trespass Act.

Case Law Under the Trespass Act
Legal advisers to Otago Police had been unable to cite any recent case law on rural trespass. From the NZLR Index I have not found any reported High Court cases of trespass against recreational access. When a trespass has been complained of and boundaries pointed out, the


53 Smith, Mark, 1995, former Chief Surveyor, Otago Land District, pers. comm.

visitor has little option but to accept the law and leave. Few visitors would ever have the information and site knowledge to challenge the interpretation of a person living near a site. Those trespassers (or occasionally the land owner) can start conflicts because they are unaware of their rights and obligations. Causing damage, disturbing stock, carrying guns, taking a dog onto land, or having to be forcibly removed from a site are reasons for prosecutions.

There have, however, been trespass cases reported. They include some unusual elements. In Police v O'Neill,\textsuperscript{55} Ms O'Neill, was deliberately trespassing to draw attention to her protest. She had to be forcibly removed from Dunedin's public hospital but returned to be again removed and arrested. In Cousins v Wilson,\textsuperscript{56} a civil trespass action was brought. Large trees were cut down on neighbour's land that was being sold. The case was noteworthy because there was uncertainty about who suffered loss, the vendor or purchaser. These cases serve to illustrate the sorts of persistent activity or damage required for court action.

### Health and Safety in Employment Act 1992

Some farmers have been denying public access through their land because they fear prosecution if these visitors are injured. The conviction in the District Court, of farmer Keith Berryman, under the Health and Safety in Employment Act 1992, whose bridge collapsed and killed a bee-keeper, led many farmers to close their land to the public.\textsuperscript{57} Under this Act, owners of unsafe work place can be heavily fined if accidents occur there. If a farm generally could be defined as a workplace then farmers risk conviction if any users of farm tracks or bridges are injured or killed. The Berrymans subsequently won the case, but at high personal cost and under threat of an appeal by the Occupational Safety and Health Service (OSH). That appeal was withdrawn and Parliament has undertaken to review the law. However, several farmers decided to denying recreational access through their properties, by locking gates, until they are completely assured that they are not liable for accidents.

For instance, access through the 22,000 ha Dingleburn station at the head of Lake Hawea was closed in May 1996.\textsuperscript{58} Dingleburn station is a popular area for fishermen, hunters and bike riders. Another example, unresolved for several months, was the refusal of Maori land owners to allow the public access to the Cathedral Caves on the South Otago coast. The owners were

\textsuperscript{55} Police v O'Neill AP 31/92 Dunedin.

\textsuperscript{56} Cousins v Wilson [1994] 1 NZLR 643.


\textsuperscript{58} Thomas, Mark, 1996, Dingleburn station closed to the public, Otago Daily Times, 29 May 1996 p 1.
concerned that trees had made the track unsafe and that by allowing access the owners may become liable for injuries. After the Council fixed the problem the access was reopened.

**Conclusion**

The threat of a trespass conviction after being warned-off a property may deter some recreationalists. The authority of the *Trespass Act* has provided rural land occupiers with rights, enforceable by the police. Legislative backing appears to have encouraged some land owners to exploit their control over access to some public water areas and to profit from this. However, the commercial advantage has been, or in future will come, from other activities for the public associated with the water areas. Commercial activities are likely to increase as more tourists are attracted, people have more leisure time and rural land owners diversify their income streams. Since no private citizen has the right to sell licences to fish or hunt, the land owners who can control access need to provide and charge for other facilities and services on their land.

The threat of absentee land owners requiring the New Zealand police to pursue recreational users of the countryside worries some recreation groups. So far, most problems for recreational access across private land have been resolved by consultation on appropriate arrangements for routes or times. A small minority of land owners have not been cooperative.

The exact location of many boundaries near waterways is often uncertain, as is the existence of a water margin strip. So people might inadvertently trespass. People have often trespassed on Crown leased land, without being challenged. Most lessees have been willing to accept or negotiate logical access routes for recreation within or through their properties. These routes provide access to the conservation estate where the water margins strips do not provide logical or practical routes.

The issue of trespass versus the freedom to roam anywhere in the countryside is likely to remain an ideological difference among politicians; recreational users and owners. The traditional, socialist supporters of the Labour Party have advocated more liberal access laws, while the conservative rural land owners who support the National Party have wanted stricter trespass laws. Issues of access and trespass are sides of the same coin.

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CHAPTER 2
ATTITUDES TO ACCESS:
SIMILARITIES and DIFFERENCES
in TIME, CULTURE and SPACE.

When you walk along the path in someone else's vineyard, you may eat all the grapes you want, but you must not carry away any in a container. When you walk along a path in someone else's cornfield, you may eat all the corn you can pull off with your hands but you must not cut any corn with a sickle.

There are no ancient rights that specifically require public title to land along water margins or that allow unchallenged access to lands of others. Rather, the water's edge, or the middle line of a river was frequently the private title boundary. It carried the valuable riparian rights of use of the water, direct access to the water for travel, and the benefits of accretion. However, there exist in many parts of the world, particularly in Europe, a general freedom to travel through open country. Some of these public rights of access have existed for centuries, and even allow taking small quantities of food for sustenance along the way. Much of this access for travel was for trade and the subsistence of the travellers.

In Europe, the birthplace of many 19th century settlers to New Zealand, rights of access existed in many areas from longstanding tradition. In the same way, Maori accepted or tolerated the use of paths through their lands by others seeking or trading food, exchanging skills, or collecting and trading greenstone or obsidian. Frequently the routes that they used followed the coast rivers and lakes. To illustrate these longstanding access attitudes, this chapter reviews historical access arrangements, attitudes in Europe and some traditions of pre-Pakeha Maori.

In the Bible, Old Testament writers describe various rules and attitudes for land and resource use. In the time of Moses, not only were people entitled to walk through the fields of others, they were allowed to take grapes and pick corn along the way. Trading between towns and villages was desirable and so access was available to bring the traders together and goods to the farmers and villagers. In northern Sweden, travellers could graze their horses on other

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1 Deuteronomy 23:24, Good News Bible.
2 Deuteronomy 23.24, Exodus 23.
people's land. There, in medieval times, a traveller could gather as many hazel nuts as to fill his hat. Those travellers who took more could be fined.

**Attitudes from English Feudal Tenure**
Dealing with the evolution of the doctrine of tenure in English law, Hinde et al. describe how men came to organise themselves for protection when the Roman peace collapsed and Europe was reduced to a state of anarchy. Those who were left without defence, the vassals, placed themselves under the protection of more powerful neighbours - their lords. If the vassal had owned land, he would probably surrender it to the lord who granted it back, making the vassal a tenant: "In this and other ways, much of the land in western Europe, which village communities had owned, became owned by local magnates." 3

Feudalism was a medieval form of government and social structure based on the relation of vassal (tenant) and landlord arising from holding land of a superior lord. The system required families working the land to pay dues to a higher lord and also provide for their own sustenance. The system functioned initially, but over time the manor lords lost control of income from the tenancies or received poor income from them. Difficulties with the feudal tenures may provide reasons why the land owners became possessive of rights such as hunting game and fishing and attempted to restrict access unless there was payment. 4 In the 17 and 18th centuries the English landowners began to enclose and claim the land of the commons by gradually extending their grazing and restricting general access.

In New Zealand extensive sheep runs allowed land owners to prove occupation to huge farms. Gorse hedges and "number 8" fencing wire allowed land to be effectively enclosed. Settlers carried to and applied in New Zealand acquisitive traits, military technology and English laws. Many early lawmakers were more interested in acquiring large personal estates rather than ensuring recreational access for all citizens. 5 New Zealand contains significant areas which, like England can be intensively farmed and are more productive than the mountainous terrain of much of Norway, Sweden, Switzerland or Scotland. In these counties access attitudes are

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4 McRae et al., 1983, *The surveyor and the law*. Ch. 3 Title to land, pp 3-2 - 3-4, New Zealand Institute of Surveyors, Wellington.

5 Jourdain, W.R., 1925, *Land legislation and settlement in New Zealand*, details on p 9 pre-Treaty claims. Jourdain later describes various systems that were later adopted such as small grazing runs and homesteads to encourage productive land settlement.
more relaxed. MP Jim Sutton, suggested "freedom of the land [is] our common heritage" and observed:

In general, the more densely settled and intensively farmed a nation is, the more likely that access to its countryside has become restricted.\(^6\)

The English common law has tended to support the rights of land owners, such as the king, the barons, the manor lords rather than the rights of itinerant travellers or tenants.\(^7\) At common law, the presumption was that where land had a road boundary, the boundary is the centre line of the highway ("\textit{usque ad medium filum via}). In New Zealand this has been abrogated by statutes, e.g. \textit{Public Works Act} 1981 or \textit{Local Government Act} 1974.\(^8\) Ownership of the land of the roads is vested in the Crown (local or central government).

Since the 18th century, English land owners were increasingly possessive of their hunting and fishing rights.\(^9\) The harsh treatment of poachers in England was a factor that caused people to leave for colonies like New Zealand. In many parts of Europe during the past century, however, there has been an increasing amount of legislation to provide formal public access to the countryside.\(^10\)

The "freedom to roam" is an important access device in Scotland today. Although described as a traditional right; "... it appears to have developed over this century and it has taken a strong hold."\(^11\) One reason suggested for this was the livestock subsidy that the Highland farmers received. The farmers felt obliged to tolerate the urban trampers who se taxes paid the subsidies that allowed them to continue farming.\(^12\)


\(^7\) McRae, J. A. 1983, Ch 3.

\(^8\) Hinde et al. 1986, p 200.


European Countryside Access Rights
In Europe, the extent of public rights varies with the tenure of the land, the population of the country and the importance of the land for agricultural purposes. Thus, mountainous lands as in Switzerland or Norway, or forests as in Germany have been more freely available to the public for recreational access. One reason for this is an historical lack of demand for access in these colder northern parts of continental Europe.

Peter Scott Planning Services' *Countryside Access in Europe: a review of access rights, legislation and provisions in selected European countries*, prepared for the (then) Countryside Commission for Scotland in 1991, provides a very useful insight into European access arrangements. This review looked at eight countries: France, Germany, Austria, Switzerland, Holland, Denmark, Norway and Sweden.

In Holland, which lacks land, or France where there are more farmers and farming than in Northern Europe, there are more restrictions on access. Throughout Europe there are hundreds of thousands of kilometres of pathways so walkers can travel through private land without damaging crops. Free access to all rural areas in Norway has been a long historical and cultural tradition. The concept, *Allemannsretten* has a literal meaning in English "all-man-right".

Water Margins
Any notion that water margin reserves, and public rights of access to water margins, were unique to New Zealand is unlikely. Ogle Thorpe's 1733 plan for Savannah, Georgia, included a substantial river bank reserve. Also, Wakefield's settlement company instructions to Col. Light in 1836 for the layout of Adelaide contained this requirement:

> In all your surveys you will reserve as a public road all land on the coast within not less than 100 feet of highwater mark, and you will also reserve as a road, at least 66 feet wide, along each side of every navigable river, and

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The former West Germany contains over 271,300 km of way marked trails - Scott P 1993 p 46.


around every lake or other sheet of water whose surface is not included in the estimated area of the adjoining section or sections.\textsuperscript{17} Light was under tremendous pressure to survey out the colony but was allowed only a two month start before settlers arrived. Light was "expected to have examined all the good harbours on 1500 miles of coast, founded the first town and as many secondary ones as he had leisure for . . .".\textsuperscript{18} In Adelaide, along the River Torrens in the original city there are abundant reserves, but they are not chain wide strips.\textsuperscript{19}

River and Coastal Trails of Maori
Access to and through land controlled by other tribes was important to pre-European Maori in search of food, or for gathering and trading \textit{tawahua} (obsidian/volcanic glass), \textit{kiripaka} (flint) or \textit{pounamu} (greenstone), or merely for venturing and discovering. Many trails that Maori used had existed for centuries before Europeans settled in New Zealand. Because Maori did not use the wheel or have animals in harness such as horses they had no requirement for formed bridle paths and highways as were common in Europe. Aotearoa was generally densely forested but not heavily populated, so simple walking tracks along shorelines, rivers and streams were common overland routes. When Maori undertook major journeys, or large quantities of goods required transport, they travelled by canoe (waka). Much of the early exploration and discovery was by the sea or river.

As Maori settled more regions, they established more land routes and overland travel became more common because of the relative ease with which a land journey could be prepared and undertaken. Brailsford records how Maori were very adept at living off the land, catching birds (e.g., kereru), fish, and gathering berries and fern-roots while European explorers, like Heaphy and Brunner in 1846, had started their West Coast exploring laden down with supplies.\textsuperscript{20}

Maori shared the use of tracks and facilities along the \textit{Poutini} (West) Coast. Travellers shared ladders to climb cliffs, canoes to cross rivers and shelter at overnighting places on the routes. Heaphy and Brunner on their travels in the Northwest of the South Island gratefully used

\begin{itemize}
  \item \textsuperscript{17} Wakefield's instructions to Col. Light provided by J R Dart's "Esplanade Reserves Legislation" - personal research, July 1996.
  \item \textsuperscript{19} Porter, 1986, shows a copy of Light's plan for Adelaide, p 9.
  \item \textsuperscript{20} Brailsford, Barry, 1984, \textit{Greenstone trails: the Maori search for pounamu}, Reed, Wellington. p 45.
\end{itemize}
various facilities. The tracks followed the seacoast or rivers as closely as practicable and were important trade routes. These can be seen in figures 2.1 and 2.2. Use of the tracks allowed taonga (treasures) such as tools or raw materials, skills and food to be exchanged throughout the country. Skills could be passed on by traders. The travellers would observe how obstacles had been dealt with, like the construction of cliff-ladders:

The spread of cutting technology and the widespread use of greenstone tools presupposes the development of greenstone trails for the distribution of the raw stone and finished items. It may well be that the development of a network of such trails out of the greenstone country was the key to this [wood cutting and carving] Maori technological revolution. 21

Greenstone from the West Coast reached the Ngapuhi people in the far north. Obsidian was also widely distributed from Mayor Island. So, there was mutual benefit for land owners and travellers from the use of the routes.

There was no division of "general" public land and private customary Maori land. However, tribes did reserve certain rights to themselves generally near their village by placing rahui: "The rahui, a warning mark against trespass, would show by its shape, position, or material which particular set of food resources were covered by title."22

Maori could be very harsh on any wrongdoers and trespassers. Retribution by muru taua was common within tribes. Some remedies would not be sufficient punishment and a poacher might be killed on the spot23. Kawharu also details aspects of Maori definitions of title. These relate to mostly to settled land around villages where garden plots and land for family homes were marked out.24 Paul Temm, writing about early Waitangi Tribunal decisions, observed:

Tribal boundaries were definite and established, and there was no part of New Zealand that could be described as 'waste land' in the sense that nobody owned it or cared about it. Boundaries changed from time to time, according to law, by marriage, or by conquest and occupation, ... 25

Access rights thus carried with them the responsibilities to understand and respect limits imposed by those controlling the land. To an extent, land occupiers regulated with seasonal closures.

24 Kawharu, 1977, p 60.
Maori Place Names and Legends of Discovery

Throughout the country, Maori place names often describe stages of famous journeys that ancestors made. These names are remembered in the legends as the logical sequence of these journeys. The names can relate to mythical journeys later followed by generations of travellers suggesting the importance of the routes and the trails. Because Maori had no written communication, the route maps of these journeys were memorised by describing the exciting treks of ancestors.26 To Maori, rivers were important for travel routes, as sources of food, or for boulders for hangi stones, e.g. the Mohaka River27 and greenstone from the West Coast. The river and lake waters were used for cleansing, drinking and had spiritual significance.28

To illustrate similarities between European and Maori attitudes to access, we can look at some journeys of Maori, noting the creation of an oral atlas that recorded details of journeys and land marks on the trails. For Maori:

The names in the landscape were like survey pegs of memory, marking the events that happened in a particular place ... the name ... could release whole parcels of history to a tribal narrator and those listening ... living and travelling reinforced the histories of the people.29

Maori legends of epic journeys give some background of their use of waterways and the near coastal lands. The naming of many places related to stages of the journeys. Often the names make little sense unless we relate them to events or the purposes of journeys, such as discoveries, fleeing from danger of pursuit of foe. The first major journey was the discovery of Aotearoa by Kupe and his exploits encouraged Turi to bring his followers. Safe harbours and coastal and river routes were among the earliest places described.30

The Taniwha

Many rivers and lakes as well as parts of the oceans were guarded by taniwha (mythical water monsters) so at times travel was considered less perilous along the water margins. Legends describing encounters with taniwha provide graphically memorable details of routes throughout the country. Very important were the journeys for the North Island tribes to find pounamu. Two particularly important taniwha lived in the oceans. One was Whatipu, the guardian for Hinehoaka, the atua (deity) of hoaka (sandstone). The other was Poutini, a giant

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26 Brailsford, 1984, shows a sketch depicting the memory map of Te Warekorari from Lake Pukaki down the Waitaki River, p37.
27 Waitangi Tribunal, Mohaka River Report, ch 2.6.2.
28 Waitangi Tribunal, Kaituna River Report: Issues, 9.3.3
29 NZ Geographic Board, 1990, He Korero purakau mo nga taunahanahatanga nga tūpuna Place names of the ancestors: a Maori oral history atlas. p xiii
30 NZ Geographic Board 1990, p 59-60.
water-being, who was the guardian for Kahue, the atua of pounamu. Sandstone knives were the only means Maori had to cut the tough pounamu. Thus, these taniwha enjoyed an intense rivalry.

The way place names are linked throughout the country is illustrated in the tale of one Poutini escape. Tuhua, (Mayor Island) in the Bay of Plenty is linked to two hills near the Arahura River in Westland, an important source of pounamu. Poutini, who guarded the Poutini (West) Coast of the South Island, evaded Whatipu and while hiding in a quiet bay of Mayor Island kidnapped Waitaiki when she was bathing. The route that Poutini took back to the South Island where he hid Waitaiki, is the route Maori used when they travelled south to gather pounamu. Poutini's escape journey followed several waterways. He eventually hid his captive in the upper reaches of the Arahura River where he turned her to pounamu to disguise her.

The tale tells of how Waitaiki's husband, Tamaahua, pursued Poutini, noting the places he stopped to check directions, by hurling his tekateka (a small dart-like spear), into the air. This story of a warrior's pursuit is far more fascinating than a plain route explanation or a drawn map.

Poutini had stopped at Tahanga on the Coromandel Peninsula ... Then he fled across the land to Whangamata on the western shore of Lake Taupo ... to Rangitoto or D'Urville Island to Whakaitu (Nelson) and to Onetahua or Farewell Spit. Then down the western coast of the South Island to Pahua near Punakaiki and on past Taramakau and Arahura, right to Mahitahi where the tupuna when travelling south left the land and took to the sea in canoes... The oral map guided generations of travellers from the Bay of Plenty, across the North Island then down the West Coast to the supplies of pounamu. The map in Figure 2.1 shows important stopping places along the route.

Surveyors, such as Skinner, respected the cautions of their Maori guides that taniwha guarded many parts of the oceans, and also many rivers and lakes. The surveyors took precautions not to disturb any taniwha while on river journeys. Archie Bogle, a renowned surveyor, in early decades of the twentieth century travelled a lot on the Wanganui River. He recognised "dozens of them, all possessing great supernatural powers with which they harassed their human victims."
Lake Moana (Lake Brunner) was famous for its eels and was thus a source of food as were the other lakes in the area. Stories were told of the taniwha of Lake Moana being as long as a canoe. At times it would escort travellers across the lake. However, if the taniwha had accompanied travellers on the outwards journey then the custom was to return by walking around the lake shore, rather than crossing back by canoe. The surveyor Charlton Howitt and his men Henry Mullis and Robert Little vanished without trace while attempting a lake crossing.\textsuperscript{33} The Maruia area of the north west of the South Island was important for food gathering at certain seasons but rights in that area were disputed.

**Greenstone Trails**

The Maori name for the South Island is \textit{Te Wai Pounamu} - "the place of greenstone".\textsuperscript{34} To Maori, pounamu was a gift of the gods - a treasure of great spiritual significance and material value. It was excellent for making tools for carving wood as it could be ground to a fine sharp edge. Pounamu was won at great cost because it was locked away behind mountains and the wild seas of the South Island Poutini Coast. Captain Cook, in the later part of the eighteenth century had noted the trade of pounamu carried on throughout the North Island.\textsuperscript{35} The Mayor Island volcanic glass was used as knives and was also traded throughout the country.

The search for pounamu was an important reason for North Island Maori to explore the South Island. There are only six places in New Zealand where pounamu is found. These are in scattered, remote parts of the South Island but were all known to Maori. They are: Nelson, Westland (Arahura Taramakau), Jackson River, Wanaka and Anita Bay at the entrance to Milford Sound.\textsuperscript{36} The outcrops of this nephrite are not large. In the Arahura Taramakau field, for example, the beds are only 30 metres wide and 2-3 km long. To reach the sources Maori would have had to battle snow and blizzards if they were caught in unseasonal storms when crossing the Southern Alps. Sealy Pass at the head of the Godley Glacier was a fast route available between Temuka on the east Coast and Okarito Lagoon on the west.\textsuperscript{37} In 1846, Taramakau Pa had been established near the field as a wintering over site.\textsuperscript{38}

\begin{thebibliography}{9}
\bibitem{33} Brailsford, B., 1984, p 108.
\bibitem{34} Brailsford, B., 1984, p 7.
\bibitem{35} Brailsford, B., 1984, p 38.
\bibitem{36} Brailsford, B., 1984, p 23.
\bibitem{37} Brailsford, B., 1984, p 162.
\bibitem{38} Brailsford, B., 1984, p 23.
\end{thebibliography}
Figure 2.1 The places along the route from the Bay of Plenty to the South Island greenstone. From *Place names of the ancestors*, 1990, p. 78.
The Kawatiri trail (see route C in Figure 2.2) led from the West Coast through to Nelson and made use of the navigable portions of the rivers, then the trail followed the river valley. On this trail, at the junction of the Matakitaki and Kawatiri (Buller) Rivers, near Murchison, there was an important trading post where West Coast Maori could exchange their stone for food.

The Mawhera (Grey) River provided an important route for Maori travelling between Arahura River and Nelson. Resting places along the way were known with some affection: those in forest clearings were called taumata, (a resting place on a hill) those in open country were called okiokinga (a place to take a breath). Figure 2.2 below, from Brailsford’s book, shows the extent of trails across the South Island.

Without maps, Maori had to remember all the details of the routes. Kehu, who guided Heaphy and Brunner, amazed them with his detailed knowledge of the route ahead of them. He was aware of hazards, river crossings, resting places and distances to travel. It is likely that the trail followed by Heaphy and Brunner had been in use for centuries by Maori. Exploring south down the West Coast in 1846, Heaphy and Brunner, were surprised by the number of Maori travellers they encountered. Brailsford commented that the coastal trails were important routes for Maori travelling the trails of their ancestors. Brunner and Heaphy were taught by the Poutini coast Maori how to safely cross rivers. Brunner later attempted travelling in the Buller region without canoes but his progress was very slow. Many Europeans, without the river crossing skills, drowned trying to cross West Coast rivers.

When John Rochford further explored and mapped the coast, in 1857, he used canoes wherever possible. In Kairuri, Nola Easdale notes that Arthur Dudley Dobson used canoes on his west coast surveys.

Dobson, however, had had in his coastal survey, a boat on the Grey, a canoe on the Hokitika, and knew where to find small canoes at every river and lagoon and also knew their owners . . ."41

While exploring and mapping the Mawheraiti River, Brunner noted the need to travel "keeping to the river bed and banks of the river . . ."42 Other early European explorers like Whitcombe travelled considerable distances, rock-hopping in the rivers. Whitcombe was eventually drowned when his makeshift canoe was swamped.

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40 Brailsford, B., 1984, p 41.
41 Easdale, Nola, 1988, Kairuri: the measurer of land, New Zealand Institute of Surveyors p 86.
42 Brailsford, B., 1984, p 90.

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Figure 2.2. The greenstone trails throughout the South Island. From the frontpieces of Brailsford's book.
The Southern Trails

Kai Tahu are the kaitiaki (guardians) of southern Māori tribal lore and history in Otago. Ngai Tahu are the principal iwi of the South Island who first settled in the Kaikoura area initially coexisting with the Ngati Mamoe. Over the decades they established their dominance on the east coast of the South Island. The map of the greenstone trails, Figure 2.3, shows the routes travelled by the people from the east coast to search for and gathering greenstone, in the Wakatipu and Wanaka areas, or on the West Coast. The Greenstone Valley, one route to the west coast, was named not because it was a source of pounamu but because it was the route from the east to the west coast sources.

Figure 2.3. The trails from Lake Wakatipu in the Otago region. From Brailsford, p 163.

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43 Dunedin City, 1995, Proposed district plan, p 2.5
45 Brailsford, B., 1984, p 163.
Prof. James Park recorded that the journey from Kotuku/Martins Bay to Wakatipu and then on to Riverton was easy going and travelled rather leisurely. The journey could last four months with the entire family (men, women, children and slaves) going along. Being able to live off food gathered along the way was an important consideration for these journeys.

Waitangi Tribunal Decisions
Several claims heard so far by the Waitangi Tribunal have contained evidence that details the longstanding relationship between Maori and particular waterways. Two cases illustrate the general significance of rivers and their banks - the Kaituna River47 and the Mohaka River48. The first case appealed to the Tribunal, the Motonui case from Taranaki, also involved water issues: the foreshore where the Te Atiawa people had gathered shellfish for generations.49

In the Kaituna River claim the Ngati Pikiao people of the Rotorua district were seeking to gain control of the Kaituna River to prevent it being used as an effluent discharge channel for Rotorua's treated sewage waste. If the river was polluted with human waste, a tapu would be placed not only on the river but also on any land that the waters of the river might then touch. The tapu would warn people against using the river and its banks for access. The tapu would also extend to any plants, e.g. flax or watercress, which grew along the banks. Provided the river remained uncontaminated, it and its banks were otherwise available for respectful uses of various kinds such as access for fishing, swimming or food gathering.

The Ngati Pahauwera people of Hawkes Bay brought the Mohaka River case to the Tribunal. They claimed title to the river and sought acceptance of their role as Kaitiaki (guardians) of the river. They asked the Tribunal to investigate the taking of shingle, the granting of access to the river, the failure to protect taonga - particularly hangi stones, and the disturbance of adjacent land cover that impacted on the river.50 Periodic flooding of the river would erode the banks, dislodging hangi stones, making them accessible. Access to the banks and the river was therefore an important part of the resource for the Ngati Pahauwera.51

46 Brailsford, B, 1984, p 165.
49 Waitangi Tribunal, 1983, The Motonui Case
51 Mohaka River Report p 12.
Also relevant to this discussion on early access provisions, the Tribunal concluded that the sale of land on the south bank, to Pakeha settlers, did not carry with it title *ad medium filum aquae*. Title to the river remained with the tribe. "[B]y the sale and by their conduct [they did] implicitly confer on Pakeha non-exclusive use rights to the river . . .". The tribe also did not relinquish title to the river when land on the north bank was sold either.\(^{52}\) Thus a communal use of the river and its banks existed.

The Mohaka River was an important part of the network of tracks and waterways used by Maori. It was used for both transport and communication from Hawkes Bay, inland to places as distant as Taupo. With permission, and respect, the river was available for all to use. However, as eel weirs could be constructed across the river, problems arose when Europeans began using the river for floating logs: "Eels were an important and highly esteemed food and *pa tuma* were particularly prized possessions".\(^{53}\) Floating logs destroyed any eel weirs and fish traps. For Maori, rights to use the river, or have access to or along it, were either inherited or gained through enterprise.\(^{54}\)

**Conclusion**

Since biblical times, travelling traders have been permitted to journey through private land and gathered food along the way. These rights of access to land, or along rivers, their banks and the foreshore have continued in Europe today where legislation affords rights of access for recreation. Highways and railways provide the access routes for traders. Access for recreation is now a particularly important use of the water margins and paths through the countryside.

Maori also shared access routes which allowed traders to move about the land. Many of the routes closely followed the coastline or used rivers where they were navigable, or the banks or river beds where navigation was not possible. Use of the routes was shared to the extent that canoes, shelter and ladders were left for other travellers to use. These included early explorer-surveyors who had initially tried to be self-sufficient. Wider use of routes was accepted by the tribes that controlled the land because the travellers often traded goods and skills. Maori travellers, like the Europeans, lived off the land in the vicinity of the trails. If places were reserved to particular *iwi*, or were tapu, *rahui* were imposed which restricted access. These conditions for access and occasional seasonal restrictions imposed by the land's occupiers were respected by travellers and visitors.

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52 *Mohaka River Report* p 78.
54 *Mohaka River Report* p 15.
CHAPTER 3:

MARGINAL STRIPS (CROWN LAND):

THE EVOLUTION OF LEGISLATION FROM 1840 TO 1996

Marginal strips are the lands along the coast, river banks and lake margins that the Crown has retained when it granted or sold land. They have had various names in the past. This chapter traces the evolution of the laws in New Zealand relating to the reservation by the Crown, of these strips of land. This review shows how the amount of water margin land that the Crown can retain has changed with successive legislative changes. The chapter provides a chronological review of the Crown land laws, from the Royal Instructions of 1840 to the Conservation Amendment Act 1996. A chronological list of legislation dealing with the Crown's reservation of water margin land is included as Appendix 1.

The Royal Instructions 1840

Many statements made in recent years about public access rights to land along water margins, claim that reserve strips originated from the Instructions that Queen Victoria gave to Governor Hobson in 1840 when the colony of New Zealand was first established. The full text of the relevant Instructions is included as Appendix 3.

Nowhere do the Instructions refer to a strip of water margin land. However, sections 37, 43, 44, 49 & 56 of the Instructions are relevant. Section 37 provided for the granting of waste lands "to private persons for their own use and benefit ..." It gave instructions of how the country was to be surveyed: into administrative units of counties, hundreds and parishes. Rivers, streams and highlands could be used to obtain clear and well-defined natural boundaries.

Section 43 is the most relevant to this discussion on reserving lands along water margins. It has been liberally interpreted to imply that some specific public right to the margins of all water ways was "enshrined" and "... a Kiwi version of the commons took shape ...". Instruction 43 required the Surveyor-General appointed by Hobson to report: "particular lands ... to reserve ... to be surveyed ... for public roads or other internal communications, whether by land or water.

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The *Instructions* then listed other sites that might be selected. These included places for recreation and amusement, places for promoting health, sites for quays or landing places "... on the seacoast or in the neighbourhood of navigable streams ...". Subsequent actions suggest, as one modern commentator observed, that only specific sites were selected; there was no general reservation of lands. Evans further suggests that all governments from 1840 failed to honour the Queen’s wishes, perhaps, he speculated, because for 150 years they might not have been aware of them.\(^3\) Chapple\(^4\) and Evans appear to consider that these words from s 43 define the Queen’s wishes to create water margin strips:

> ... and we do strictly enjoy and require you, that you do not on any account or on any pretence whatsoever, grant, convert or demise ... any of the lands so specified ... to be occupied by any private person for any private purposes.

Governments probably considered they had followed the *Instructions* when they reserved the various sorts of sites specified earlier in s 43. It is not possible to interpret a requirement to reserve chain wide strips from these words. The administrators never did. Even today when the law is much more specific there is uncertainty about which streams require strips and reserves.

Section 44 instructed that land not reserved as required in s 43 should be sold at one uniform price per acre. Possession of land could occur after payment to the Treasurer (s 49). Section 56 instructed that no land "shall be sold ... which the said Surveyor-General may report to you as proper to be reserved." The Surveyor-General opted not to reserve all water margin land.

**Land Claims Ordinances**

Much land had been purchased directly from Maori prior to the Treaty of Waitangi. However, by the Treaty, all land was held from the Crown, so Commissioners were appointed to hear and to validate claims of direct purchase.\(^5\) *Ordinance No. 2*, s 6 required that there should be no grant of:

> ... any headland, promontory bay or island that may hereafter be required for any purpose of defence ... nor any land situate on the sea-shore within one hundred feet of high water-mark.

The following year, *Ordinance No. 14* 1842 gave specific details for grants.\(^6\),\(^7\) Section 5 allowed grantees to select only one block and when a rectangle of land was "... bounded by the sea or a

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\(^4\) Chapple, 1996, p 7.


\(^7\) Hughes, P. V., 1994, *Reserves along water boundaries: a summary of legislation*. Monograph. NZIS, Wellington, p 5. This is a particularly useful reference for legislation.
river, . . . the narrow side shall be bounded by the sea or any such river . . . " . There was no requirement to create a 100 foot wide strip along the high water-mark. So the requirement for a universal 100 foot strip was law for only eight months.

The first specific requirements for chain wide strips of land reserved on banks of navigable rivers and possibly around lakes is attributed to Thomas Cass, Chief Surveyor for the Canterbury Provincial Government in 1851.9 These were followed n 1862 by instructions from John Turnbull Thomson, the Otago Chief surveyor. He required his surveyors, to create: "... reserves 100 links frontage to navigable rivers. Reserve also centres of bushes, stone quarries, and sand pits for road making . . .".9

Public Reserves Act 1854
The General Government passed this Act shortly after the start of the provincial era. It shows that the government did not want to retain water margin land. The General Government granted all Crown land within a province to the Provincial Superintendent, except lands reserved for military purposes, for the needs of the General Government or for the benefit of the native inhabitants. The Public Reserves Act even allowed the Governor to:

... grant and dispose of any land reclaimed from the sea, and any land below high water-mark in any harbour, arm, or creek of the sea, or in any navigable river or on the sea coast 10

The only proviso was that these new grants would not "... prejudice the rights of persons claiming water frontage."11 Thus existing private water frontages were to be respected and new ones allowed. Hughes observed that this actually reversed instruction 43 given to Governor Hobson, that water frontage should not be occupied by any private person.12

The Post Provincial Era: after 1876
When the provinces were abolished in 1876, all lands that had been granted to the provincial governments re-vested in the Crown13. This included all forms of reserves. The Instructions for Settlement Surveyors on Demesne Lands of the Crown required reserves of 100 links frontage on all navigable rivers for surveys under the Land Act 1877 s 169. Under the Land Act 1877, on


Thomson, J. T., 1862, Block and Section Surveys, s 13.

Public Reserves Act 1854 s 2.

Public Reserves Act 1854 s 2.

Hughes, 1994, p 7.

Abolition of the Provinces Act 1875 s 9.
water margins, a range of sites similar to that in the *Royal Instructions*, could be reserved from sale. Docks, quays, improvement of harbours and landing places were included.\(^{14}\)

The *Public Reserves Act* 1881, included three classifications for reserves. Reserves for harbours, navigation and miscellaneous purposes were Class III reserves and included foreshore reserves, landing places and quays. Any reserves, except those held for public health or recreation could be leased for up to 21 years.\(^{15}\) It would appear that leasing of water front reserves was possible but of no great significance because much waterfront land was being granted in fee simple (freehold) anyway.

A national requirement for a chain frontage was included in regulations for surveys under the *Land Act* 1885. Surveyors were instructed to reserve:

\[ \ldots \text{at least 100 links frontage to all navigable rivers and coast, making the traverseline if possible the boundary of such reservation.} \]\(^{16}\)

There was no explanation of the term "navigable" or any special classification of the land "reserved". These *Land Act* reserves were from rural (Survey District and Block) settlement surveys. Rural land was land outside towns, boroughs and cities. The regulations were not written in a way that they would apply to "Town Surveys"- urban areas or proposed towns. Nor did they apply to "Surveys of Native Land". These had their own separate parts in the instructions.

**Land Act 1892**

Five decades after the *Royal Instructions*, the *Land Act* 1892, s 110, set requirements for a 66 foot (one chain) wide strip of land to be reserved from sale:

\[ \ldots \text{along high-water lines of the sea and of its bays, inlets and creeks, and along the margins of all lakes exceeding fifty acres in area, and along the banks of all rivers and streams of an average width exceeding thirty three feet and in the discretion of the commissioner, along the bank of any river or stream of less width than thirty three feet.} \]\(^{17}\)

Here, for the first time, legislation required strips along all the coast and specified the widths of rivers and the area lakes which should be considered.

The requirement that special sites be reserved, dating from the *Royal Instructions* was continued in s 15. Section 110, however, was new law. It introduced the requirement for lake margin chain strips. Section 15 noted that the special sites might be "on the seashore, margin of lakes, or on riverbanks".

\(^{14}\) *Land Act* 1877 s 144.

\(^{15}\) *Public Reserves Act* 1881, s 20.

\(^{16}\) *New Zealand Gazette* 1886, p 636.

\(^{17}\) *Land Act* 1892 s. 110.
The main thrust of the *Land Act* 1892 was to get settler farmers onto the land quickly. The Act promoted a "one man one farm" policy allowing tenure on a 999 year lease-in-perpetuity (LIP). John McKenzie described its purpose as to assist men without means to bring land into profitable occupation. Selection before survey was to be allowed. This was because government wanted farmers on the land quickly. However, to protect possible Crown requirements for certain parts of the land, temporary reservations could be applied. Land temporarily reserved in this way could by s 236 be permanently reserved later. In several hundred pages of debate on this *Land Bill*, there are only three brief mentions of reserving land on water margins. Without discussion, Parliament accepted that no compensation would be paid for lands on the seashore or the margins of lakes and rivers subsequently excluded from grants. Buckley, commenting on clause 15, agreed that to exclude from sale land on the seashore and on the margins of lakes and rivers was a good idea. He observed:

... in the past we have parted with rights to the foreshore - a proceeding which has given rise, I am satisfied, to more litigation in this colony than any one could possibly have been contemplated.\(^{19}\)

McGuire objected to the 33 foot width criteria for rivers and particularly to the additional discretion given to the commissioner to reserve land on rivers of lesser width. He expressed his preference for "navigable rivers which did not seem to interfere so much with peoples' rights." His concerns were not heeded.\(^{20}\) Thus only from 1892 has there been national legislation requiring water margin land to be reserved with lake size and river widths included.

Around this time, the Lands and Survey Department and the courts confronted some of the uncertainties of title to land on water margins. Keams and Kerr,\(^{21}\) and Hughes\(^{22}\) refer to the confusion that existed from 1890 to 1914 as to the status and purposes of the water margin land reserved from sale. Chief Surveyors were uncertain how to describe and depict this land on plans and Land Districts had different practices. A memo from Surveyor-General S Percy Smith in 1890 explained:

... in all cases where reservations are made along River Banks, Sea Coast, Lakes etc, that they are called Roads, that the official plans showing them be coloured Burnt Sienna...\(^{23}\)

However, in 1904, Circular 620, from the Surveyor-General, on the advice of the Crown Law Office advised that:

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18 Hansard 1891, Vol 74, p 113.
19 Hansard 1891, Vol 74. p 236 Mr Buckley.
20 Hansard 1892, p 524, Vol. 77. Mr McGuire.
23 Lands and Survey Dept. Circular 130 Jan. 1890 quoted by Hughes.
...reservations made along riverbanks under Section 110 of the Land Act 1892 are not roads but Public Reserves.

This circular went on to explain that the chief purpose of such reservations was not as roads but to "... prevent the acquisition of riparian rights by land owners".24

A further circular in July 1904 advised that any roads delineated on public maps were "roads in terms of Section 100, sub-section 1 of the Public Works Act 1894."25 In 1914 a circular from E H Wilmot (Surveyor General) introduced the modern concepts. He noted that by showing the strips as road, "the legal status and control of these reserves" had been altered from what had been intended. The counties controlled country roads. Wilmot required the strips to be shown red or pink and if possible, labelled "River-bank Reserve".

The requirement did not apply when the land was for an actual road, nor did it apply to reservations made by the Native Land Court.26 Different legislation, the Native Lands Act, dealt with Maori land and its partitioning. Thus the public's ''right of access'' to even significant water margins was hardly certain because a particular river or lake margin, or stretch of coast might remain in Maori ownership.

The status of riverbank land required for road was addressed in Pipi Te Ngahuru v The Mercer Road Board (1887)27. The court allowed the Road Board to take part of the plaintiff's land, without compensation, to replace land washed away by the Waikato River. This principle did not prevail following the decision of Cooper J in Attorney General and Southland County v Miller (1906)28. Cooper J held that the position of any road cannot move with any meandering of the river or alteration (erosion or accretion) of the sea coast. The rule applies to any water margin strip. Judge Cooper's decision still prevails and has been far-reaching in protecting private ownership rights in land separated from a waterbody by a road, reserve or some other land reserved to the Crown.

In the Regulations for conducting the survey of land in New Zealand 1897,29 the surveyor had the discretion of whether to reserve the one hundred links frontage on rivers less than 50 links wide. The Crown Grants Act 1908 s 35, confirmed mean high water mark as the boundary for grants if the sea or ocean was the boundary. The legislation relating to reserved land on water margins

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26 Lands and Survey Dept. Circular 1001, April 1914.
27 Pipi Te Ngahuru v The Mercer Road Board (1887) 6 NZLR 19.
28 Attorney General and Southland County v Miller (1906) 26 NZLR 348.
29 Regulations made under the Land Act 1892.
from Crown alienations changed little in the *Land Act* 1924 (s 129) and not substantially until 1948.

**Land Act 1948**

This legislation prevailed for several decades until the Lands and Survey Department was divided and the Department of Conservation was created in 1986. If the Crown had alienated land before 1948, the rivers needed to be at least 33 feet wide for the surveyor to reserve chain strips. The *Land Act* 1948, never applied to private subdivisions where the *Land Subdivision in Counties Act* 1946 existed. The *Land Act* 1948 was the law under which government farm settlement surveys were carried out, particularly in the 1950s and 1960s. It is the law relating to water margins in the countryside that present generations grew up with. Section 58 required that surveyors should create chain wide strips along the coast, rivers and streams more than 10 feet wide (down from 33 feet) and on the margins of lakes more than 20 acres in area (down from 50 acres). Section 58(1) stated:

58. Land reserved from sale - (1) There shall be reserved from sale or other disposition of Crown land under this Act a strip of land not less than 20 metres in width -
(a) Along the mean high-water mark of the sea and of its bays, inlets and creeks:
(b) Along the margin of every lake with an area in excess of 8 hectares:
(c) Unless the Minister considers it unnecessary to do so, along the banks of all rivers and streams which have an average width of not less than 3 metres.

The *Hansard* report of the debate on the *Land Act* provides no reasons for including narrower rivers and smaller lakes. Surveyors have commonly referred to these water margin access strips as "section 58 strips" because they were described on documents as being reserved under s 58. Before the formation of the Department of Conservation, these strips were administered by the Department of Lands and Survey. Section 58 allowed the Minister of Lands to approve the reduction of the strip width to 3 metres "... if in his opinion the reduced width will be sufficient for reasonable access to the sea, lake, river or stream." The requirement to reserve the strips also related to unsurveyed farm land, and to pastoral land being disposed of under any tenure, e.g. freehold, long-term or renewable leases. Thus strips were required on any leased land and might be created on lease renewal. No compensation would be paid when the strips were surveyed off.

As well as reserving from sale chain strips along water margins by s 58, the Minister of Lands (now Conservation) could under s 167 of the *Land Act*, by Gazette notice, set apart Crown land on any foreshore for public purposes.

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30 Reprinted statutes with metric amendments 1 January 1973.
31 *Land Act* 1948 s 58(1).
32 *Land Act* 1948 s 58(3)
The Conservation Acts

The Department of Conservation (DOC) was formed in 1987 by the Conservation Act 1986. By the Conservation Law Reform Act 1990, DOC assumed control of the marginal strip land. From 1987, the Minister of Conservation became responsible for water margin strips reserved under the Land Acts and for new "marginal strips". The Conservation Act in s 2, defined "marginal strips" as land "being held under this Act for conservation purposes" along any foreshore of the sea, along the normal level of any lake over 8 ha in area and along the bank of any river or stream with an average width greater than 3 metres. These are the same dimensions used in the Land Act, but expressed in metric units.

By s 24(1) no interest in a marginal strip could be granted or disposed of and the strips had to be managed for "the conservation of its natural and physical resources and those of the adjacent water". Public access to the adjacent water would be subject to the conservation of those resources. For previous decades these strips had been reserved for and used for access, and even depicted as roads on record plans. The new conservation legislation made access subordinate to protecting conservation values.

Before central government restructuring began following the 1984 general election, land occupied by various Crown agencies was held as "Crown land". This land included many potential marginal strips and existing chain strips. As the Crown sold land assets and State Owned Enterprises (SOEs) were created, their land had to be separated from Crown land remaining with the Department of Conservation. Landcorp, Electricorp and Forestcorp, particularly, were SOEs that acquired significant land assets from which marginal strips along water margins had to be reserved. However, for satisfactory operation and asset management, the SOEs and other organisations such as port companies sought control of the marginal strips butting their land.

The government wanted the SOEs quickly established and concluded that the cost and time needed to identify, survey, prepare and lodge plans showing all the water courses and their marginal strips was unwarranted. Therefore, undefined, ambulatory marginal strips were devised. Other new legislative proposals in 1989 would have allowed the Minister of Conservation to not create some new strips, and to sell some existing strips. However, these did not become law.

The Conservation Law Reform Act 1990 in Pt IVA however, considerably elaborated the laws relating to marginal strips. Six purposes for the strips were noted in s 24c, and s24H described their management. However, of particular interest to surveyors, was s 24o(7). This section also concerned the wandering public. It stated:

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33 Conservation Law Reform Act 1990 s 24(3).
34 Conservation Act 1987 s 24.
35 State Owned Enterprises Act 1986
Notwithstanding anything in the Land Transfer Act 1952, land reserved as marginal strip under section 24 of this Act shall not be required to be surveyed for the purposes of this Act.\(^{36}\)

All that is required is for the title of the land to record a statement that the land is subject to Pt IVA of the Conservation Law Reform Act 1990. The Chief Surveyor then endorses the record plans with a note that marginal strips exist on the appropriate water margins. This was not particularly helpful for any person seeking access information, as notes on titles and plans do not show the location of the marginal strips. However, s 24G allows these newly created marginal strips to remain on the ground and not to be lost by erosion. It states that the marginal strips created under the Conservation Law Reform Act shifts with every alteration of the water margin. Thus, a person who is within 20 metres of the water (or the edge of the river bed or lake bed) is probably on the marginal strip, provided the land is subject to a post-1990 marginal strip.

This concept theoretically makes the strip easier for the public to identify but the occupier of adjacent land has uncertain rights. It also means that the Act's provisions will always protect the genuine riparian areas. On many watercourses, the line of the bank or edge of the bed can be very indistinct. The area near the river margin can be shingle, boulders or heavily vegetated. The width of the flow can vary even from hour to hour with storms in the headwaters of small catchments or where high tides back up river flows.

The Conservation Law Reform Act, s 2 gave a new definition for the bed of a river or a lake. For a river this is "... the space of land which the waters of the river cover at its fullest flow without overtopping its banks". For a lake it is "... the space of land which the waters of the lake cover at its highest level without exceeding its physical margin:". These definitions can be interpreted so that if a "watercourse" ever will flow three metres wide but stay within its banks, or a lake ever spreads to 8 hectares, then they should have marginal strips. Compared with what needed to be considered under the Land Acts, by this definition many more watercourses could be expected to include marginal strips when the Crown alienated or leased the surrounding land. In practice, where surveying fieldwork is carried out, DOC staff suggest on which water courses they require marginal strips.\(^{37}\)

Where ambulatory strips are simply created on modern sales without field surveys, the public could presume that any watercourse through a property has marginal strips along its banks. How conservation values on specific watercourses are safeguarded from the public is unclear. These rules relating to ambulatory marginal strips and stream bed width do not apply to water bodies where the landward boundaries of marginal strips have already been decided by field survey.

\(^{36}\) This does not appear to preclude surveys required for other Acts such as for a subdivision or building consent under the Resource Management Act 1991 or Building Act 1991.

There is a mistaken public perception as exemplified by Pennell's article in the Otago Daily Times in 1989. This is, that s 58 or its repealing legislation, s 24, applies to streams through land already sold before 1948 or for s 24, since 1990. Section 58 is not a commentary on the status of land or a retrospective decree. It was an instruction for future surveys of land held by the Crown. Proposals were omitted in the Conservation Law Reform Act that would have allowed the Minister to exempt parts of the coast and lake margins from having strips created. Proposals to allow the sale of any marginal strips were also dropped.

The Conservation Amendment Act 1996.
In 1993 the government moved to allow the leasing and licensing of marginal strips as an alternative to the sale proposals abandoned in 1990. By leasing land or licensing any structure or activity on a marginal strip, the activity could legitimately continue and the Minister of Conservation could control it. The arrangement could apply to holiday baches, boat-sheds and jetties and also hydro dams and lakes, wharves at ports, farm or forest blocks. These proposals were widely criticised by citizens who again feared that popular beaches and riverbanks would be privately controlled and the public excluded from them. Parliament passed the Conservation Amendment Act in 1996. It deals with leasing and licensing of marginal strips in Part IIIb "Concessions". The new amendment contains an array of restrictions of activities (such as planting trees) by a lessee that would interfere with public access. Any leasing or licensing arrangements must be publicly notified. No structure can be built on a marginal strip that can be built elsewhere. The public can make submissions on any proposals for leases or licences.

Conclusion
Since 1840 the Crown has withheld land along water margins from sale for a variety of reasons. These have ranged from providing landing places or sites for quays, to limiting riparian rights, to creating roads, to providing recreational access and now for purposes of conservation and environmental protection. For the critical first half century after the Treaty of Waitangi, until 1892, a vast amount of the country was alienated to private ownership when there had been no general requirements for reserving strips for access along the coastline or along riverbank or lake margins. The requirements for these strip reserves were formulated as surveying instructions from South Island provinces, to facilitate fair land settlement. With the abolition of the provinces they were adopted as national requirements into survey regulations under Land Acts for the coast and navigable rivers.

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39 Conservation Amendment Act 1996 Part IIIb Concessions, ss 170 - 17ZII.
After the *Land Act* 1892 was passed, requiring chain strips along rivers, lakes and the coast, there were no further dramatic changes to the law dealing with chain strips for over five decades.

The reserving was first only along the coast and navigable rivers, then along rivers over 33 feet wide and currently on streams with beds 3 metres wide. These reservations have been mostly from rural Crown land, and regardless of the lot areas created. The scope for land to be reserved from sale has increased as more and smaller streams had to be considered. The public has no legal right of entry to unalienated Crown land but as the Crown alienates land, it must create marginal strips. The principal function of the strips in the present law is environmental protection.

Section 58 *Land Act* applies only to surveys of Crown land since 1948. Similarly, s 24 *Conservation Law Reform Act*, for ambulatory strips, applies only to rivers, lakes and coastal margins of Crown alienations since 1990. Unfortunately there is no certainty for the public about where they might go without trespassing. The strips' existence and boundaries are uncertain, especially for these post-1990 ambulatory strips that are not depicted on maps.

More marginal strips are possible, because more Crown land is being alienated, and also because of the CLRAct definition of stream-bed. Not all strips will provide public access. Some strips may function to protect the riparian environment. In the future, the amount of water margin land available for public access will depend on the policies of the Department of Conservation. Public access may be restricted over lands held for conservation. Some strips might be leased, or their use licensed to adjacent land owners and managed privately. Aspects of access on these strips could be regulated by the lessee. However, restrictions for the public are likely to apply only to a small portion of the coast or rivers. It is ironic that more legal access to and along waterways is created for the public as more Crown land is sold or leased to private enterprise.
CHAPTER 4

ORIGINS AND EVOLUTION OF

ESPLANADE RESERVES & STRIPS

FROM PRIVATE LAND

Esplanade reserves are the water margin strips created when private land is subdivided. On the ground, esplanade reserves are indistinguishable from marginal strips created by Crown land alienation, but their origins and administration are different in many respects. This chapter looks at the evolution of the law regarding requirements for private land owners to relinquish land to provide public access along the sea coast and along the margins of lakes, rivers and streams. Initially the private land owners had bought land directly from Maori, or were granted blocks of land by the Crown. The title boundary was often to some tide line (a seaward water mark), to the bank of a lake or river or to the middle line of a river. This reviews the requirements for water margin reserves from private land from the Land Act 1886¹, through Land Acts, the Land Subdivision in Counties Act 1946, Counties Amendment Acts 1961-74, the Local Government Act to the Resource Management Amendment Act 1993.

Esplanade reserves, from private land subdivisions, are not as common as marginal strips. There are several reasons for this. They can only be created on water margins where the Crown alienated (granted or sold) land without reserving chain wide strips. Except for two brief periods, 1975-1979 and 1991-1993 they have been required on 3 metre wide streams, only from allotments smaller than 10 acres (4 ha). Before 1978² it was not mandatory for cities and boroughs to acquire esplanade reserves. Only from 1946 were reserves mandatory along water margins in counties. Modern esplanade strips and access strips can fulfill the purposes of esplanade reserves without the land being taken from private title. General provisions of the Resource Management Act can now be invoked to require environmental protection without requiring public ownership to achieve this. The complexity of present esplanade reserve law is shown by the Resource Management Amendment Act 1993 that devotes 40% of the pages in Pt X, "Subdivision and Reclamation", to the subject.

¹ Land Act 1886 s 112 is the earliest legislation reference found.
² Local Government Amendment Act 1978, s 239.
Esplanade reserves are "local purpose reserves" administered by local authorities under the *Reserves Act* 1977. They are legally different from marginal strips which the Department of Conservation (DOC) administers under the *Conservation Act* 1987 and its amendments. As local purpose reserves, administered under the *Reserves Act* 1977, they can be leased. 3

**Nineteenth Century**

Land subdivision laws initially related only to work done by the Crown. Had the Crown withheld from sale all the water margin land now required to be in public ownership, there would be no need for any esplanade reserves to be created. However, because much water margin land is privately owned, legislation has been used to gradually regain title to it. Under the Land Transfer system, since 1870, land owners have enjoyed indefeasible - guaranteed - titles that the Crown could not readily resume.

It is possible for central government or local government to resume title to land that the Crown granted to private citizens. This is because land is held from the Crown in some tenure: either freehold or leasehold. The highest tenure for private land is freehold - an estate in fee simple. 4 Local authorities and central government can use the *Public Works Act* 1981 Part II to acquire private land. However, this Act can only be used to compulsorily take land for essential works, not reserves. 5

The 1886 *Land Transfer Survey Regulations* 6 contained the first requirements for private subdivisions to provide water margin strips. There, s 112 noted that regulations 1-85, made under the *Land Act* 1885, would apply equally to surveys made under the *Land Transfer Act* 1885 where they were not inconsistent. This was the first statutory requirement for reserving land from private subdivision. The reserved land would have included subdivided land that fronted navigable rivers and the coast. Like land reserved under the *Land Act*, it would have vested in the Crown. The actual functions for this water margin land (for reserve or road or merely Crown land again) were as unclear as it was for *Land Act* reserved Crown land. 7 It is not clear how this law was applied to private subdivisions.

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6 New Zealand *Gazette* 1886 p 641.
7 Refer to Lands and Survey Dept. circulars 130, 1890; 620,1904: 640,1904; & 1001, 1914 mentioned in chapter 3.
The government had realised that a great deal of potentially productive land, in large blocks, was in private ownership. This needed to be brought into production to lift the country out of the depression of the 1880s. Requiring land along riverbanks and the coast to be Crown land would have allowed improved access as private land was subdivided after 1885 because roads were uncommon in many areas being opened up. The government of the time had signalled that it would force the land owners to cooperate with its settlement programmes.

Following the Land Act 1892, which introduced specific river widths (over 33 feet wide) and lake areas (over 50 acres), new Survey Regulations were produced. These regulations (1-91) also applied equally to Land Transfer Act surveys. Land could be reserved along rivers less than 33 feet wide at the discretion of the surveyor. Hughes commented that it is likely that many rivers did not have reserves created along their banks.

**Early Twentieth Century Subdivision**

The Land Laws Amendment Act 1912 amended the Land Act 1908 and was the first Land Act to specifically address reserving land in towns from private subdivisions. Earlier Land Acts and their regulations addressed reserving water margin land under Block and Section (rural) surveys. Land type to be reserved (in 1912) was not specified. But as Hughes commented, when the 1912 Act is related to the Land Act 1908, reserves along water boundaries would still have been within the scope of the law.

Under the Regulations for conducting surveys of land in New Zealand - 1922, reg. 159, an esplanade of suitable width was required along the coast or river frontage of any new town. The Land Acts under which the regulations were made defined town as "... any parcel of land outside a borough or town district divided in areas for building purposes ...".

The Lands and Survey Department continued to control subdivisions of private rural land (in counties) under the Land Acts until 1946. Control was then continued under the Land Subdivision in Counties Act until 1961 when the Counties Amendment Act was passed. Until 1979, municipal local authorities had controlled private urban subdivisions under the Municipal Corporations (MC) Act. For example, when the executors of the 85,361 acre Cheviot Estate objected to the government valuation, the Government bought the land, subdivided it.

Regulations for Conducting the Survey of Land in New Zealand, New Zealand Gazette 1897 p 227.


Hughes, 1994, p 16.
1922, then the 1954 MC Act, where the requirement to provide reserves was at the discretion of the local authority.

Land Subdivisions in Counties Act 1946.
In 1946, government passed specific legislation that dealt with private rural subdivision. Section 11 of the Land Subdivision in Counties Act (LS in CAct 46) replaced s 16 Land Act 1924 that had dealt with private subdivisions on water margins. The principal change was to require reserved land on streams only 10 feet wide and lakes only 20 acres in area (down from 33 feet and 50 acres respectively). This Act required a scheme plan, prepared by a registered surveyor, to be approved by the Minister of Lands if land was divided into residential allotments smaller than 10 acres. Division to lots larger than 10 acres could be made as of right with no criteria set by the Minister or the county.12 No scheme plan meant that no water margin strip, as was required by s 11(1), had to be reserved.

This Act, dealing with private land, predated the similar Land Act 1948 changes for Crown land. Effectively the LS in CAct 46 introduced the rules for river widths and lake areas, that were to be applied to all subdivision: rural private, Crown and eventually private urban development. It is not clear from the report in Hansard on the Bill's debate why the change was considered necessary. It applied only to the urbanising areas of the counties. The principal objection in Parliament came from Mr Holland whose electorate was Christchurch North.13 There, the subdivisible grounds and gardens of stately homes just outside the city, backing onto streams, could have been required to vest as reserves. This was seen as unfair compared with similar properties on the same river but within the city boundary. Any subdivision within the city would not require reserves because the Act did not apply there. The waterways concerned were the Avon, the Heathcote and the Waipara Rivers. A compromise was reached. For a particular stretch of a river, the county council could seek a ministerial waiver of the one chain "public purposes" strip. This permanent waiver had an ironic twist when s 289 Local Government Amendment Act 1978 was passed. The law then required the cities to provide esplanade reserves but any waivers, which counties had acquired, remained effective.

The unfairness of the 1946 provisions troubled several MPs. Different rules applied to the subdivision of Maori land under the Native Land Act 1931 which allowed Maori subdividers to retain water margin land - and riparian rights. Skinner pointed out that some specific contracts had been made with Maori people that had to be adhered to:

12 Land Subdivision in Counties Act 1946 s 3(1).

13 Hansard, 1946, vol. 275 p 482-83, Mr Holland.
For instance there were contracts with the Arawa tribe in the Rotorua District. Because the Maori owners ceded the beds of the lakes to the Crown, it was felt that, if there were further restrictions in connection with subdivisions [e.g., esplanade reserves denying riparian rights] the Maori owners would feel that the government had not kept faith with them.\textsuperscript{14}

Langstone reported that a large number of people had purchased land from Maori because of the riparian rights that went with it.\textsuperscript{15} Having acquired a valuable private waterside property, probably at a premium price, it is understandable that purchasers would not want to vest it in the council.

\textbf{Municipal Corporations Act 1954 Pt XXV}

Legislative requirements for subdivision in cities and boroughs were brief. Part XXV - subdivision - of the \textit{MC} Act 1954 contained only four sections and set no rules for esplanade reserves, but required the local authority to refuse approval of a scheme plan of subdivision if the land was in danger of erosion or inundation by the sea, a river or lake. Public access, recreation or conservation was not a concern.

\textbf{Counties Amendment Acts 1961-1974}

Individual counties were given more autonomy for control of subdivision in 1961. Section 29(1) \textit{Counties Amendment Act} 1961 replaced the water margin reserves requirement of the \textit{L S in C Act} 46. Before the \textit{Local Government Amendment Act} 1978 was passed, there were further changes to the \textit{Counties Amendment Act}. The most significant were in 1968 and 1974. The 1974 amendment significantly affected esplanade reserves.

In 1974 the Labour government decided to omit the 4 hectare minimum lot size limit from the \textit{Counties Amendment Act} 1974 to speed up the process of providing better countryside access. They had already prepared legislation that was to become the \textit{Walkways Act} 1975\textsuperscript{16} which allowed negotiations with land owners for access.

The removal of the 4 hectare limit, combined with the definition of subdivision (which included minor boundary adjustments) caused considerable consternation: from Members of Parliament representing rural electorates, from surveyors, and from their rural clients. The Bill also tried a new approach for river widths. If a river was over 5 metres wide, then no matter where it was on the property (i.e. in the balance title possibly well removed from the survey), esplanade reserves

\textsuperscript{14} Hansard, 1946, Vol. 275, p 482, Major Skinrner.

\textsuperscript{15} Hansard, 1946, Vol 275, p 483, Mr Langstone.

\textsuperscript{16} The theory was "to establish a series of public walkways throughout the country, especially from North Cape to Bluff." New Zealand Walkways Commission \textit{Policy statement 1980}, p 5.
would be required on any subdivision. However, if the river was over three but less than five metres wide, esplanade reserves would be required only if the new allotment abutted the stream.17

The Bill was harshly criticised. Gandar described it as creating a "ludicrous situation" for a simple farm subdivision, because "at least 576,000 acres of land would be in danger of confiscation". 18 This figure was arrived at from Official Yearbook data which estimated 36,000 miles of river over 25 feet wide: Talbot, also in the National opposition, claimed that

This incredible piece of legislation will have the effect of mutilating valuable farm land by having public reserves running through farm land causing serious economic loss to farmers.19

Birch, from the opposition, reported that the bill had been "...described by farmers as the biggest land grab in the history of the country." 20 A boundary adjustment or cutting off a small house-lot could trigger the requirement for esplanade reserve strips to be created (without compensation) on all streams within a farm. The subdivider was required to pay all costs. Birch went on to advocate the use of the Town and Country Planning Act and the district scheme to plan where esplanade reserves were required. The National Party caucus lacked the members to effect major change to the Bill before it was passed. Comparatively few voters were adversely affected. Most would have been farmers, in rural electorates, who did any subdividing or boundary adjustment. A single farm of several hundred hectares could contain tens of kilometres of stream or riverbank. The claim that a land grab might occur was quite valid.

Local Government Amendment Act 1978

From 1974 Parliament continued to combine the legislation of counties and municipal corporations. Subdivision criteria were addressed in Part XX of the Local Government Amendment Act 1978 (LGAA-78). There had been no statutory requirement for private subdividers in cities and boroughs to provide esplanade reserves until the LGAA-78 came into effect in 1979. In that Act, counties, cities and boroughs were given identical subdivision legislation. However, rather than providing more autonomy for counties, the legislators introduced more central government control of the municipalities. 21

The New Zealand Institute of Surveyors in submissions on legislation dealing with esplanade reserves has always supported the concept of public access to rivers, lakes and the coast.22

17 Counties Amendment Act 1974 s28.
18 Hansard, 1974 p 5079, Mr Gandar.
19 Hansard 1974 p 5084, Mr Talbot as reported in the Timaru Herald.
20 Hansard 1974 p 5085-86, Mr Birch.
21 Repeal of Municipal Corporations Act 1954
However, it has also strongly supported the land owners' entitlement to compensation for any land required to vest.23

The exemption for lots over 4 hectare was reinstated when Pt XX LG Amendment Act 1978 (LGAA-78) repealed the Counties Amendment Act subdivision criteria. A concession there allowed compensation payment for land required as esplanade reserve from lots over 4 hectares. A condition was that the land remained in rural use for more than 5 years following the deposit of the survey plan of subdivision.24

Through the 1980s, these aspects of subdivision were not contentious. However, the requirements of the LGAA-78 for esplanade reserves on all small lot subdivisions did cause problems. One involved the definition of subdivision where a balance area might not be a new "lot". Also, a unit title or cross lease division was not a "subdivision" that triggered the esplanade reserve requirement.25 Thus, esplanade reserves could be avoided by the style of subdivision. Another way of avoiding the need for esplanade reserves has been by continuing to lay out water margin lots larger than 4 hectares.

Despite the debates and law repeals of the 1970s, experience was not heeded. So the exemptions for lots over 4 hectares was omitted from Part X of the Resource Management Act 1991 (RMA-91) when it replaced Part XX LGAA-78. However, its reinstatement was again realised as necessary in s 230(3) of the Resource Management Amendment Act 1993 (RMAA-93). This followed further submissions from groups such as the Institute of Surveyors.26 Within weeks of the RMA-91 coming into force, the government embarked on creating an amendment Bill dealing particularly with esplanade reserves. Kinnear in a letter to Institute of Surveyors members, informed them that:

The changes to the esplanade reserves are seen as necessary because the existing provisions for rural areas are simply not working.

Kinnear then outlined the position of surveyors and their first experiences of the esplanade reserve provisions of the newly passed Resource Management Act 1991.

Experience over the last four months has borne out these concerns and has resulted in considerable uncertainty, anxiety and disbelief in the rural community.

24 Local Government Amendment Act 1978 s 290.
Rural subdivision has become a costly and frustrating exercise which if proceeded with in the present circumstances results in loss of farm access, stock watering and productive land.  

The RMA-91, however, introduced laws to make the creation of esplanade reserves a matter to be addressed at the local government level - in the rules of the District Plan - as Birch had advocated seventeen years earlier.

Water Boundaries lines: high water spring mark
Since last century, the seaward boundary has been the mean high water mark of the sea. The boundary for post-1991 subdivisions is the mean high water spring tide mark, a higher level. Surveyors have accepted some discretion in deciding where to actually locate the high water mark boundary. Several options have been available: 

1. The contour line of the mean high water level derived from a tide gauge;
2. The line of vegetation;
3. The top of a bank or cliff (the edge of usable land);
4. The toe of a dune or bank, foot of a cliff;
5. The line of driftwood or other flotsam on the beach
6. The wet sand line on the beach after high tide.
7. The crest of beach ridge or fore dune.

Some definitions locate mean high water mark, and thus some or all the esplanade reserves, on beaches regularly covered by the sea, and definitely by every spring tide. The Resource Management Act in 1991 introduced the mean high water spring tides as a new seaward boundary. Except at cliffs, this boundary is further inland than mean high water mark. Thus, when esplanade reserves are surveyed in the future, they may commonly include more dry land than existing reserves do. This extra land will provide better environmental protection, public access or recreation.

Beds of Rivers in Private Subdivisions
In s 218, the Resource Management Act, brought together all forms of land division as "subdivision". This has meant that esplanade reserves could not be avoided by the form of development such as cross leasing, unit titles or long term leases.
Deciding which rivers and streams might require esplanade reserves, depended upon when and how their width was decided. Section 289(1) L G Amendment Act 1979 had continued the imprecise requirement similar to LS in CA-46 "... along the banks of all rivers and streams which have an average width of not less than 3 metres ...". This width has been generally taken as referring to the average winter-fresh flow width within the title being subdivided. The surveyor has had the discretion to decide the width, and then in consultation with the council and subdivider, the need for and extent of any esplanade reserves.

The RMA-91, contained more detail about water margins and effectively included far more watercourses that might require esplanade reserves. It is unclear whether the new wording was intended merely to clarify the law, i.e. to better define the water boundary, or to require reserves on more streams. Perhaps it is a little of both. There are some small streams that require careful management of the riparian environment.

The 1991 law is not readily followed. It addressed the situation like this. "River" and "bed" were given definitions in s 2, separate from Part X, that dealt with esplanade reserves. So, although s 230 had wording not unlike s 289 LGA-74, ("along the bank of any river, and along the margin of any lake ..."), in s 2 there was a special definition of "River" and another for "Bed". These read:

""River" means a continually or intermittently flowing body of fresh water, and includes a stream; but does not include any artificial watercourse; and for the purposes of Part X only means a river or stream whose bed has an average width of 3 metres or more:". (italics and bold added).

Section 2 defined "bed".

"Bed" means - (a) In relation to any river, the space of land which the waters of the river cover at its fullest flow without overtopping its banks;

These initial requirements of the RMA-91 were unacceptable because the definition was too broad. Any creek that intermittently flowed at any time 3 metres wide would be classified as a river and could require esplanade reserves along both banks. Amendments were effected in 1993. Section 230(4) now states:

a river means a river whose bed has an average width of 3 metres or more and where the river flows through or adjoins an allotment.

More importantly, in s 2 "bed" has been redefined more closely as "the space which the waters of the river cover at its annual fullest flow". This offers the surveyor a more realistic question to answer. Is there evidence that this stream flows over 3 m wide every year? Similar changes were made to the definition of "lake bed", accepting its "annual highest level" as the extent of its bed.
It seems probable that even this law would require many more stretches of stream and creek to be considered for esplanade reserves than the less definite wording of earlier Acts.

Improved public access, along the river or lake bed, or along the coast, might be achieved in an area even if no esplanade reserve has vested. This riverbed access by boulder hopping, may be easier travel, and less damaging to river bank vegetation. On a sandy beach, a walker near the water's edge at all but a full spring tide would likely be in the coastal marine area. Figure 4.1 illustrates large boulders in a stream bed that provide an easier foot access route than that through the bush along the river banks. Boulder hopping in the stream bed would generally be less damaging than forcing a path through the bush.

Figure 4.1. Foot access can often be easier and less damaging to vegetation, along the stream bed, than trying to walk along the banks.

**Esplanade Strips and Access Strips**

A difficulty for the public has been gaining access to the water margin reserves (beaches, lake margins or riverbanks). This legally has been only from the water, from places where public land such as a road or reserve meets the esplanade reserve, or across private land with the permission of the land owner. PANZ has reported incidents of fishers, swimmers, surfers or coast visitors
being in conflict with land owners. 30 The Resource Management Amendment Act 1993 provided for the creation of "access strips" which can allow access across private land to any water margin.

The mechanism for creating esplanade strips allows councils to negotiate a form of easement with the land owner. 31 The requirements for instruments creating esplanade strips and access strips are set out in Part X RMAA-93. 32 Land affected remains in the title of the land owner. Its use can be subject to conditions satisfactory to the land owner, such as being closed at certain times of the year. The strip can be created for any of the seven purposes in s 229 for reserves. Like the marginal strips created under the Conservation Law Reform Act 1990, the esplanade strips are also ambulatory and shift with the river, lake margin or coast. 33

Compensation
Compensation must be paid under the Resource Management Act for the extra width of esplanade reserves or esplanade strips beyond 20 metres from a subdivision with lots smaller than 4 hectares. 34 Where the lots are larger than 4 hectares, the council must negotiate compensation with the registered proprietor if it wants reserves or strips of any width. 35 These provisions, greatly enhance the possibilities for the local authority to secure improved and continuous practical access for the public. The territorial authority, may choose to obtain water margin land for any of the purpose listed in s 229 such as protecting conservation values.

Conclusion
Specific esplanade reserve legislation to provide public foot access has only existed for urban style subdivisions in counties since 1946 and has only been mandatory in all local government areas since 1979. There have been unsuccessful attempts to apply esplanade reserves to all private subdivisions but those laws have been repealed, allowing water margin land to remain as private land in larger lots. The 1993 amendment to the Resource Management Act appears to provide the most satisfactory compromises for ownership, environmental protection and public access. The

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30 An example is Stony Batter, John Spencer's property on Waiheke Island.
31 Resource Management Amendment Act, 1993, s 232, Creation of Esplanade strips.
33 Resource Management Amendment Act, 1993 s 233(1).
34 Resource Management Amendment Act 1993, s 237E.
35 Resource Management Amendment Act 1993,s 237F.
local authorities can decide which rivers they want to obtain reserves on, and can pay fair compensation for appropriate access or environmental protection for additional areas. Councils can alternatively negotiate esplanade and access strips, to provide access to and along the water margins where demand exists, without awaiting subdivision.

With esplanade provisions, the protests voiced have not been of the public losing "rights", but for the comparatively few land owners who own subdivisible land on water margins. They had been threatened with uncompensated loss by general legislation.

More reserves are now possible than under earlier legislation, but local discretion on their creation is allowed. Compensation can be paid to obtain esplanade reserves, esplanade and access strips, river and lake beds, and foreshore without authorities having to await the accident of subdivision. Land owners can learn from the district plan if their water margin land will be subject to reserves and may gain a waiver with the resource consent. Environmental protection and conservation requirements may in some places, however, restrict public access. District plans and the way local authorities deal with the competing interests and rights will decide how successfully the present laws will work to provide appropriate access.

"Well, wouldn't you know it - we've come all this way to our favourite beach and someone's strung chicken wire around it."
CHAPTER 5

THE QUEEN’S CHAIN CONTROVERSY

The introduction of the Conservation Law Reform Bill in August 1989 (CLRB-89) heralded the first significant changes to water margin strips through Crown land in over four decades. It drew extensive public criticism for a variety of reasons. Innovative provisions which it contained for marginal strips were abandoned or modified. This chapter reviews the Bills, Parliamentary debates, newspaper and bulletin articles and reports from when the Labour Government tabled this Bill to the passing of the National Government's Conservation Amendment Act in March 1996. Labour was severely criticised for its marginal strip proposals in 1989. But when marginal strip laws were promoted by the National Government in 1993, Labour made them an election issue and proposed a Queen's Chain Protection Bill.

Before reviewing the reasons for, and reactions to the Bills, the chapter examines some fundamental factors. These are: what lands can actually be called "Queen's Chain"? How much land might be considered? What are the origins of the term "Queen's Chain"? Then, armed with that information, the chapter critiques debates, reports and articles about the Bills.

So, what is the "Queens Chain"?
Following are three explanations that show the different interpretations the public have had to consider. Writing in the Federated Mountain Clubs' FMC Bulletin, Barr offered a simple, commonly accepted explanation:

... a publicly owned strip of land around most of our coasts, rivers and lakes. The strip is created whenever Crown land, that is, land owned by the government, is sold or leased. Today, we take this public access and ownership for granted. It is part of the New Zealand way of life.1 (Bold added.)

Pennell, writing in the Otago Daily Times explained in a little more detail a common perception:

The main right of access to our waterways is contained in Section 58 Land Act 1948 which provides for a twenty metre strip of public land along the mean high water mark of the sea, its bays, inlets and creeks. This strip of land also runs along the shores of every lake larger than 8 ha and along the banks of all rivers and streams which have an average width of not less than 3 metres.

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These strips of public land have come to be known as Queen's chain. When reviewing progress on the Resource Management Bill in 1990, Environment Update explained briefly:

The Queen's chain is the name commonly given to esplanade reserves and marginal strips. These are areas of public land that are reserved around lakes, rivers or the coast when the land is subdivided or Crown land is sold to provide for protection and public access to the water areas.

But it is not that simple. Esplanade reserves (created from private land) are not marginal or s 58 strips (created from Crown land). The rules that apply for one group do not apply to the other. The New Zealand Official Yearbook 1996 provided a broader definition:

The Queen's Chain is a 20 metre strip at the edge of rivers, lakes and the sea owned by the Crown or a local authority and usually available to the public for recreational purposes. Since Victoria's time other legislation has peppered New Zealand with different types of reserve land. 'Marginal strip', 'road reserve', 'esplanade reserve' and other such terms are all used to describe land that is now colloquially known as the Queen's Chain.

The Official Yearbook accepts commonly quoted figures for the extent of the "Queen's Chain" and further explains:

Only about 70 percent of the borders of major waterways are governed by a Queen's Chain. Different measures have been used to establish where the chain runs and there are various rules about what it can be used for. Even where the chain itself is easy to identify, the law does not give the public the right to cross private land to reach it.

An unquantified but significant majority of land along the margins of minor waterways is in private ownership because the Crown had sold or granted it before 1948. There are also unalienated Crown land blocks and blocks of Maori land without strips of any sort because they are still with the original owners. Where strips exist, their fate is not necessarily the responsibility of the Minister of Conservation.

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3 Section 58 only applies to land sold by the Crown since 1948, not "every" or "all" land.
5 Local authorities administer their reserves under the requirements of the Reserves Act 1977.
The following lists the types of land that make up the "Queen's Chain" along 70% of the coast and major waterways.\textsuperscript{8}

- **Places** reserved for recreation, amenity etc. as required by the Royal Instructions 1840 from Queen Victoria. Many of these might now be covered by re claimations.\textsuperscript{9}
- Strips of Crown land reserved from sale under survey regulations 1851-1892 (on navigable rivers)
- Strips of Crown land reserved from sale under the *Land Act* 1892-1948 (on rivers wider than 33 feet)
- Section 58 strips, from the *Land Act* 1948, 1948-1986 (on rivers wider than 10 feet)
- Marginal strips created under the *Conservation Act* 1986
- Marginal strips created under the *Conservation Law Reform Act* 1990 (ambulatory)
- Reserves that abut water margins (administered by former domain boards and bigger than mere strips)
- Roads along water margins (administered by local government or Transit NZ)
- Road reserves (administered by local government)
- Esplanades created from the survey of town lands (administered by local government)
- Esplanade reserves from the subdivision of private land (created since 1946, administered by local government)
- Esplanade strips from private subdivisions (created since 1993, administered by local government)

The river bank reserves, s 58 strips, or roads (now collectively defined in the *Conservation Law Reform Act* 1990 as marginal strips) from Crown land are the most common (total length and area) as they came from the subdivision of large tracts of land for over a century of Crown subdivisions. Esplanade reserves, although important because they are created near urban areas, have come from small-lot private urban subdivisions in the past 50 years.

Some indication of the proportion of roads or reserves has been indicated by PANZ. They pointed out that "half the Queen's chain along water margins consists of public roads." \textsuperscript{10} Half the Queen's Chain as road could be a realistic assessment. However, road is land which the Minister of Conservation does not control and is thus not affected by Conservation legislation.

\textsuperscript{8} Mason, Bruce, 1990, "The Queen's chain", letter to editor Dominion Sunday Times, 25 Feb. 1990. Mason was the researcher for the Public Lands Coalition.

\textsuperscript{9} Many of the early European settlers' landing places such as near the present John Wickliffe House in Dunedin, Shortland Street in Auckland or Lampton Quay in Wellington no longer offer access to the water because of reclamations carried out.

\textsuperscript{10} *Public Access*, No. 7, June 1996, p 11. This was in a press release criticising a suggestion by the Business Round Table that suggested roads could be privatised (Otago Daily Times, 17 Feb. 1996).
Figure 5.1 shows an example stream through a farm property. Its usual flow is around 3-5 metres wide. If the adjoining land was subdivided, modern legislation or district plan rules could require 20 metre wide reserve strips along both banks.

![Figure 5.1](image1.png)

**Figure 5.1** A typical rural stream where modern legislation could require reserved strips.

In figure 5.2 the edge of the vegetation is readily visible and clearly indicates the esplanade reserve's seaward boundary. Often on sandy beaches, the boundary is not readily apparent.

![Figure 5.2](image2.png)

**Figure 5.2** shows a readily discernible seaward boundary of the esplanade reserve. (Manganese Pt. Whangarei. DP 100551, North Auckland.)
The sketch in figure 5.3 demonstrates the different sorts of water margin strips which can occur along any stretch of river or coast. Various agencies can hold the title to the river bank. The four parts of figure 5.4 illustrate how with changing legislation, surveyors have dealt with different river "widths". They range from "navigable" to "3 metres fullest flow". The existence of a water margin strip is dependent on the date when the adjoining land was subdivided.

Figure 5.3. Theoretical water margins and various sorts of land tenure that might exist for land abutting the water.
Navigable rivers: 1852 (Canterbury) to 1892
33 feet (10 m) wide, 1892 to 1948 or 1946

10 feet (3 m) wide, winter freshettes, 1948 to 1990 or 1991
3 m within banks fullest flow ever: 1990 to present

Figure 5.4 Different river cross sections that surveyors in different era have considered for reserving land along the banks.

The different explanations of Queen's Chain above may show why the public, land owners and visitors have differing perceptions of their rights. Much riverbank land is not Queen's Chain of any sort. For the seacoast, rights are not that certain, because even if plans show a surveyed strip, it might not be practical to use it:

On the coast a one chain reserve was set aside over a great portion of beach frontage but as over fifty percent of New Zealand coastline is eroding this has been lost to all practical purposes as it is lying out in the breakers and well below mean high water mark.\footnote{Evans, Alan, 1993, The queen's chain, \textit{FMC Bulletin} No. 114, October 1993, p 37.}

In addition, the Queen's Chain includes many sorts of and that the Minister of Conservation has no jurisdiction over. These include well-known places like Oriental Parade in Wellington, Tamaki Drive in Auckland or Portobello Road in Dunedin that are strips of publicly held land providing access to and along the coast.
How much relevant water margin is there?
The length of the coastline is at least 8,000 km but if islands, inlets and small indentations are included it could be double this.\textsuperscript{12} For 8,000 km of coast there would be about 16,000 hectares of marginal strip land (20 m x 8,000 km). Finding the length of rivers and streams that might ever flow 3 metres wide (Crown land) or annually flow 3 metres wide (private land) is not practicably possible. Any determinations made before the 1990, 1991 and 1993 legislation changes would not provide adequate results. Occasionally, registered surveyors need to measure cross sections of a stream to decide whether its average width is over 3 metres. The NZOYB 1973 was quoted by Gandar, in Parliament, as stating there were 36,000 miles (54,000 km) of rivers over 25 feet wide. That length is far too low for modern legislation which deals with rivers and streams only 3 metres wide.

One indication of the extent of smaller rivers and streams is given by Collier.\textsuperscript{13} From the 1:250,000 scale maps, he found the lengths of rivers and streams in fourteen regions. He concluded that there were 186,347 kilometres of rivers and streams. His table of river lengths is reproduced in figure 5.5 below.

<table>
<thead>
<tr>
<th>REGION</th>
<th>km of river</th>
<th>SOUTH ISLAND</th>
</tr>
</thead>
<tbody>
<tr>
<td>NORTH ISLAND</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Northland</td>
<td>6,341</td>
<td>Nelson/Marlborough</td>
</tr>
<tr>
<td>Auckland</td>
<td>3,013</td>
<td>Canterbury</td>
</tr>
<tr>
<td>Waikato</td>
<td>15,374</td>
<td>Westland</td>
</tr>
<tr>
<td>Bay of Plenty</td>
<td>8,244</td>
<td>Otago</td>
</tr>
<tr>
<td>Gisborne</td>
<td>6,448</td>
<td>Southland</td>
</tr>
<tr>
<td>Hawke's Bay</td>
<td>11,397</td>
<td></td>
</tr>
<tr>
<td>Taranaki</td>
<td>6,094</td>
<td></td>
</tr>
<tr>
<td>Manawatu/Wanganui</td>
<td>17,215</td>
<td></td>
</tr>
<tr>
<td>Wellington</td>
<td>6,327</td>
<td></td>
</tr>
<tr>
<td>North Island</td>
<td>80,453</td>
<td>South Island Total</td>
</tr>
<tr>
<td>NEW ZEALAND TOTAL</td>
<td>186,347</td>
<td></td>
</tr>
</tbody>
</table>

Figure 5.5  Showing by region the lengths of rivers and streams plotted on the 1:250,000 scale topographical sheets. From Collier 1992.

\textsuperscript{12} Easdale, F, 1969, \textit{The development of coastal land}, New Zealand Institute of Surveyors symposium on coastal development, Auckland, p 125.


62
The lengths include multiple channels on braided rivers and rivers within national parks. From spot checks in the field of streams shown in parts of Otago, I consider that these figures give a guide to the potential extent of water courses fitting the three-metre bed width definition of the Resource Management and Conservation Acts. These figures then suggest some 372,000 kilometres or 744,000 hectares of existing or potential river and stream marginal strips. Lake margins would be additional to these inland margins.

The portion of the map sheet in figure 5.6 is from the 1:250,000 topographical sheet of an area of Otago. Figure 5.7, from a 1:50,000 cadastral map, shows how few streams in that area have land reserved along their banks. Probably there would be very little demand for any public access or recreation on most of these watercourses. However, if subdivision was carried out in the area, reserve strips might be required.

Figure 5.6. A portion of a 1:250,000 topographical map showing the vast number of watercourses which might at some time flow over 3 metres wide and thus might provide marginal strips.
Figure 5.7. This is part of a 1:150,000 NZMS 260 cadastral sheet. It shows part of the land covered by the 1:250,000 map in figure 5.6. Few chain strips have been created. Scale here is approx. 1:150,000.
In criticising as inadequate the RMAA-93 definition of 3 metre stream bed - "... annual fullest flow without overtopping its banks" - Evans observed:

This still excludes thousands of kilometres of arterial streams less than an average width of three metres which are the sources of waterways and need protection just as much as the main rivers.

It also poses a problem for the hydrologist and surveyor to identify the limits of an "annual fullest flow".

No hydrologist can possibly identify this area on braided shingle rivers. In fact most rivers do not have confined gauging sites where, even there, it is somewhat difficult to identify the area described.14

While reserving this land might protect the land from degradation by farm use, it would add maintenance and administration demands for ratepayers and many farms would fragment.

Mason commented that the amount of reserved land on significant water margins varied from very little in areas of Crown and Maori land to around 90 percent in parts of the central North Island where post-1948 farm settlement surveys had been made.15 While the Queen's Chain strips may be 70 percent complete along worthwhile water margins, when one now considers the post-1990 definitions for beds of rivers and lakes, it is probable that less than half of all potential chain strips have been reserved. So a coarse estimation of the potential and actual water margin strips might be:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Coastline:</td>
<td>8,000 km</td>
</tr>
<tr>
<td>Rivers:</td>
<td>372,000 km</td>
</tr>
<tr>
<td><strong>Potential TOTAL:</strong></td>
<td><strong>380,000 km</strong></td>
</tr>
</tbody>
</table>

Amount of Water margin strips which might exist: up to 190,000 km (50%)

This would include eroded and reclaimed land.

**Possible Origins of the Term "Queen's Chain"

Given that the term Queen's Chain has gained popular recognition in the past decade, what are its origins? The term Queen's Chain is not mentioned in the 1989 edition of the *Oxford English Dictionary*, nor is the term recorded in law dictionaries such as Hinde's *New Zealand Law Dictionary*, *Black's Law Dictionary* or *Jowett's Law Dictionary*.

Queen Victoria's Instructions only mentioned places, not strips or chains. The early surveyors' instructions did not label the land withheld from sale. Ackroyd is correct in suggesting that:

The origin of marginal strips is therefore quite separate from the "reserves for the purpose of public convenience, utility, health, or enjoyment" as allowed under the first Royal Instructions. The reservation of marginal strips as road-lines was one
mechanism that ensured *bona fide* settlers had access to settlement lands with the standard width of one chain (sixty six feet), being the standard width for "all necessary through-roads to give access to back or adjoining country." It is therefore incorrect to imply that the setting apart of marginal strips was an early recognition of "[t]he need to set aside areas of the coastal zone for relaxation and recreation." Reserves for relaxation and recreation had been specifically provided for in the first Royal Instructions, long before any Land Acts, and quite separate from provisions for marginal strips. 

Early Survey Regulations generally required roads to be a chain wide. The term chain (as part of Queen's Chain) certainly appears to have its origins with the requirements of a road. In *Castlepoint (County of) v Barton* (1916), because the survey plans had been lost, the judge was required to decide if any land had been dedicated. The judge concluded that because it was a surveyed road it would be a chain wide. In Otago, roads and reserves along water margins were also laid out at narrower widths. Plan S.O. 4111 (1883), part of which is reproduced in figure 5.8, shows the Silverstream in North Taieri and on a tributary creek notes that a reserve 30 links (6m) wide has been made on both sides of the creek.

Memoranda from Surveyor-Generals between 1890 and 1912 indicated that officials throughout the country did not know what actual status or function this land had, nor did they refer to "Queen's Chain." Authors such as Jourdain (1925), O'Keefe (1968) and Kelly (1971) did not use the term. O'Keefe used the term "chain strips" and suggested that they were "sacrosanct".

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17. Ackroyd referred to the Parliamentary Debates, 1885; NZ Gazette 1886 p 635. He rightly challenged the suggestion of Tortell that relaxation and recreation were reasons for chain strips to be developed.

18. *Castlepoint (County of) v Barton* (1916) GLR 826.


20. S.O. 4111, 1883, Otago Registry, secs 52,53,54 Blk IV.


Gordon (1978) did not use the term in his thesis.\textsuperscript{24} None of the papers, nor any reported discussion in the proceedings of the NZIS "Coastal Development Symposium" in 1969 referred to a Queen's Chain.

\textbf{Figure 5.8 Shows the 30 link wide reserve shown on the 1883 plan S 0 4111}

Politicians in their parliamentary debates over the \textit{Land Subdivisions in Counties Act} 1946 and the \textit{Land Act} 1948 did not use the term. In the 1974 \textit{Counties Amendment Act} debates over the controversial provisions for esplanade reserves affecting rural areas, politicians did not refer to Queen's Chains. This omission is significant if politicians are perceived to quickly adopt recognised catch-phrases.

Williams (a retired Chief Surveyor) and Friel (a retired senior lecturer in surveying and former chief draughtsman with Lands and Survey) were not familiar with the term from their work.\textsuperscript{25} Mason suggests that it is part of the "common lore" and suspected that it originated with Queen

\begin{itemize}
\item \textsuperscript{25} S. M., Williams and E. S. Friel, pers. comm. 1996
\end{itemize}
Victoria's Instructions to Hobson in 1840. This is now a commonly accepted view because of recent publicity, but no evidence for this assertion has been found. Graham Anderson's 1977 paper, "Queen's Chain: not a limp wrist ornament," in The Landscape is the earliest written reference which I have discovered. Anderson qualified his paper's title by noting that the chain was not a limp wrist ornament which suggests his readers were not expected to recognise the term. Anderson was unable to suggest any earlier written reference.

It is likely that the term Queen's Chain, like the term "paper" (unformed) road may have had limited colloquial uses in parts of the country for some decades, but was never used or described in any published work. Harrison, now a consultant surveyor, who worked in the Wellington Land Titles Office in the 1960s recalls the use of the term there. If the chains being referred to were "section 58 strips", then Queen Elizabeth II would have been the Queen referred to.

The label "Queen's" may have been revived in the 1970s in association with walkways created under the Queen Elizabeth II National Trust Act 1977. A call for information in the New Zealand Institute of Surveyors "Newslink" (July 1996) for surveyors' recollections did not unearth "Queen's Chain" references. Sissons, a former Otago surveyor, now 82 and resident in England, wrote that he was unfamiliar with the term. His own research of colonial records in Britain had not discovered any information on the origins of marginal strips.

The publicity surrounding the Conservation Law Reform Bill allowed the catch-phrase "Queen's Chain" to gain wide public understanding as one of earliest British settlers' fundamental rights: "something our fore-fathers fought for". This is the myth which the public wants to believe: "a fundamental birthright".

Conclusions about Queen's Chain Origins
My conclusion is that the term did not originate with any early governor. The early strips were roads, as a remedy for access problems that were arising, not for recreation as they can be used today. The Instructions were obeyed by places being reserved - often much wider than strips.

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26 B R Patterson, 1994, Stout Research Centre, Victoria University, pers. comm. also, Iain Wards (ex Government Chief Historian).
30 Hansard, 1996, p 11,427, Mr Blincoe.
Considering the promoters of the Land Act 1892, a fair term might be "John McKenzie strips" or "John Balance strips". Sir John McKenzie was Minister of Lands when the Land Act 1892 was passed. Ballance had been Minister of Lands, 1884-87 and was Premier when the Land Act was passed. Linking modern strips to Queen Victoria's Instructions implies a history which does not exist.

"Queen's Chain", although a useful and convenient term today, is a myth - a widely held but incorrect view. Queen Victoria's Instructions did not require water margin strips. It is also a myth that chain strips exist on all water margins. Thirty percent of the coast, and significant lengths of rivers, streams and lake margins lack strips. It is also a myth that the Minister of Conservation could ever decide the fate of strips such as roads or esplanade reserves. However, the New Zealand public expects access along water margins as a customary right and no one has been prosecuted merely for enjoying recreation.

THE PUBLIC CONTROVERSIES ABOUT THE CONSERVATION BILLS

There have been several controversial law changes affecting water margin land in the past 25 years. The first concerned esplanade reserves in the Counties Amendment Act 1974. The second concerned innovative proposals for marginal strips in the Conservation Law Reform Bill. The latter intended to repeal or amend existing legislation (s 58 Land Act and s 24 Conservation Act 1986). Two other interesting debates dealt with esplanade reserves, esplanade strips and access strips. The most public debate from 1993 to 1996 was about a detail of the legislation: The discretion of the Minister of Conservation regarding leasing or licensing marginal strips. Why did the controversies occur? How well informed were the public? The following discussion deals principally with the marginal strip legislation.

Changes in the Counties Amendment Act 1974, although controversial, did not adversely affect the public directly. On the contrary, it was intended to provide greater public access because it required every form of rural subdivision which contained or abutted water margins to provide esplanade reserves. The subdividing land owner was expected to meet all costs. Objectors envisaged farms being made unworkable owing to forty metre wide reserve tracts if a simple...
boundary adjustment was carried out hundreds of metres from any water. However, until the 4 hectare limit was reintroduced, surveys of affected properties were simply postponed.

Debate on the Conservation Law Reform Bill 1989:

The political backdrop
A little political background of the time is important to put this Bill into context. The Labour Government was midway through its second term and in the midst of major restructuring on various fronts. The Resource Management Law reform process was moving rapidly ahead and local government reorganisation resulting from the Local Government Commission plan was well advanced. Regional councils were to be created. Several new central government departments (e.g. Conservation, Survey and Land Information) had been created and were establishing their identities. Many government functions had been or were being devolved to State Owned Enterprises (SOEs), such as Landcorp, Forestcorp, Coalcorp, Electricorp and Telecom. These SOEs required that their assets, including their share of Crown land, be defined expeditiously and economically. Many traditional Labour supporters had opposed the reorganising and the sale of state assets.

The Waitangi Tribunal had been given the legislative authority and improved resources to investigate claims back to 1840. Settling claims of iwi also involved the transfer of Crown land. The share market had crashed in October 1987 but had not recovered. Small and large investors had lost important savings. The public, along with David Lange who had resigned as Prime Minister, were tiring of the free-market reforms. Labour was no longer a united and focused party. It was against this background that the Bill which suggested selling existing strips, and avoiding creating new marginal strips, was introduced. It was apparent in the public debates and modifications to the Bill that followed, that the government had not considered all the ramifications of the legislation. 32

Problems with Water Margins
Defining and locating the water margin strips so that owners, river control authorities and the public knew their rights had been a problem confronting law reformers during the early 1980s. Papers presented at the National Water and Soil Conservation Association (NWASCA) sponsored

seminar on watercourses in 1985 revealed many problems. During that period also, a water and soils law reform commission had grappled with limited success for ways to resolve the complex rights in water margin land. Problems included rivers migrating from their surveyed course and any roads or reserves on their banks. Roads or reserves might have been washed away (entirely or partly) and such that the actual flow of the river was through paddocks. Figure 5.9 shows part of the Oreti River that McMillian used to illustrate a not uncommon situation of reserved land no longer providing sensible access along the river. McMillian commented that the river width as surveyed was clearly too narrow for the floods-flows that resulted from the cleared country upstream.

Through the 1970s and early 1980s tensions were apparent for land use: recreation, production and conservation. A more mobile public required improved access for recreation. From 1984, farmers without subsidised incomes and SOEs, sought more production from the land. The Department of Conservation established its role as the advocate for the environment and promoted legislation to achieve this. The SOEs proposed to the government the assets they wanted to acquire so that they could function effectively.

Evans reported the sort of proposal from Electricorp that generated opposition to government plans:

In March 1988 a few of us were allowed ... to inspect the planned allocation [of land] and found to our amazement that Electricorp somehow had plans marked on which they could lay claim to the beds and banks of Lakes Tekapo, McGregor, Pukaki, Ruataniwha and Hawea and the beds and banks of the Tekapo, Pukaki and Ohau rivers.
All this land is well above any possible lake level and well out from the banks to Max Smith's rabbit-proof fences.
The next day we met Philip Woollaston Minister of Conservation and promised another Manapouri battle if Government agreed to transfer this land to Electricorp. Shortly after Cabinet apparently decided not to do so. A close one.

Even before the more general legislation for marginal strips, recreation and conservation groups had seen the need to prepare themselves to seriously lobby.

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Figure 5.9. Showing an aerial photograph of the Oreti River with the cadastral information plotted on it. Only occasionally do the river or its banks actually coincide with their originally surveyed position. From McMillan’s 1985 paper.
Contentious issues in the 1989 Bill

The Bill proposed to include future marginal strip land in the transfer of title to the land owner with public access maintained as an easement. The Crown would still own the strip with a right to regain possession. This would have given the land owner the management responsibilities for the land - to protect it, pay rates on it and generally use it like the rest of the block. The farmer could have temporarily closed the strip to the public, for example at lambing, during logging operations or at times of high fire danger. Objectors suggested that owners could restrict public access during fishing or duck-shooting season and allow access only to those willing to pay. The Minister would have had the discretion to decide if a particular river, lake or sea front should have a marginal strip at all. Under the *Land Act* the Crown was bound to reserve land along the seashore and lake margins. Discretion only existed for strips along streams.

Most controversially though, the Bill proposed allowing the Minister the right to declare any land not to be a marginal strip if:

a. it had little or no value in terms of conservation or public access, or
b. the Minister was satisfied that the current productive value of the strip was greater than its conservation value.

This in effect meant that the Minister could sell any existing strips created under the *Land Acts*. The first offer of sale would be made to the adjacent land owner or Electricorp. The law drafters may have envisaged only sales of strips on minor streams or strips abandoned by shifting water. However, the objectors suggested that prime lake, river or seacoast sites could be sold, with the undisclosed function of the Bill being to allow Crown assets to be transferred to SOEs intact and with minimal survey costs and delays. Selling land including strips would provide an income for DOC and reduce the amount of land which it had responsibility to manage.

The Bill was to establish a new procedure for creating future marginal strips and the management of all existing marginal strips (not esplanade reserves or roads). The Public Lands Coalition, a newly formed lobby group, was quick to criticise aspects of the *Conservation Law Reform Bill*. In *Public Land News* it claimed with some justification:

> The primary reasons for this [amended law] are to avoid survey costs for marginal strips on Crown land that are soon to be transferred to the State Owned Enterprises (SOEs) - Landcorp, Forestcorp and Electricorp. It is the SOEs, and the Treasury's single-minded push for getting the state out of any involvement in land management, that is shaping the legislation. The Government also wants to get maximum dollar value for the lands it is selling to the SOEs by removing possible impediments to commercial management.

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37 The PANZ Monograph series, Nos. 1, 2, and 3, 1990, include commentary on these concerns.

Jim Anderton, New-Labour leader, expressed a similar view, that the main concern with the Conservation Law Reform was over the massive assets sales programme.\(^3\) Lower sale prices for forests and farms would result if the lands were traversed by permanent public walkways along all the rivers. The time and cost of the surveys would have been significant. Surveyors would have had to locate, survey off strips and lodge plans of every stream within the million hectares\(^4\) of intended SOE land. The government was also anxious to complete sales before the 1990 election and was seeking expeditious ways of achieving this.

The effect of creating formal strips throughout forests and farms under the conditions of s 24 of the Conservation Act could also have markedly devalued the land. Existing Land Act strips would affect some saleable properties. The government was caught between providing attractive titles for sale, maintaining existing access, and providing new access, and protecting the water margin environment. Access provision was a traditional Labour role but that conflicted with its 1989 agenda to sell Crown lands as commercial enterprises.

The existing law required the government to retain and create marginal strips, with width as the overriding criteria. The law drafters thus had to devise some suitable mechanism for expeditiously and economically creating new strips. The strips had to remain usable when the water margin shifted and had to be identified by the public without being surveyed and plotted on plans and maps. Ambulatory marginal strips were promoted. With these, a person within 20 metres of the water's edge could expect to be on the marginal strip.

The debate in Parliament showed the complex issues involved that affected land beyond any 20-metre strip. Labour's Minister of Conservation, Philip Woollaston, was subject to a great deal of criticism in Parliament when he introduced the ambulatory strip concept. Opposing the proposals to declare strips ambulatory, and so to avoid surveys, Birch argued that any unsurveyed boundaries would cause absolute confusion. He criticised the government for doing work on the cheap. Uncertain boundaries, he claimed, threatened the indefeasibility of the titles.\(^4\) This was a correct assessment. The law as passed can have marked effect on titles to small parcels of land, particularly in subsequent subdivisions if the river has altered course or the sea has eroded the coast. The law became applicable to all future marginal strips but not to existing strips. The possible existence of streams would have to be noted on any titles surveyed from the parent block.

This legislation was being enacted primarily to address the problems of large farm and forest blocks where the streams were wholly within a single title. A further unsatisfactory aspect is that

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3. Hansard, 1990, Mr Anderton, p 518.
41. Hansard, 1990, p 507, W F Birch (who is a regd. surveyor).
the public has another class of "reserve" to understand. Only marginal strips created since 1990 are ambulatory. Since the strips were unsurveyed they could not be plotted on record maps.

Arguing the need for ambulatory/migratory reserves, Labour's Simpson pointed out that at times when the river moved, the surveyed marginal strips were left stranded and useless in the middle of paddocks. However, he held to the Labour decision not to trade marginal strips and declared that land "once a marginal strip, [was] always a marginal strip". This, the Opposition had quickly retorted, meant that Labour would not exchange the useless, stranded strips for land that was abutting the actual, present position of the water.

One can see that the law change would then not improve the situation because a river could have some marginal strips in fixed locations away from the water and others, newly created, that remained in contact with the water. It is possible for a stretch of river to have two sets of strips. The first ones would have been surveyed along the watercourse then, if the river moved far enough, new ambulatory strips would be automatically created. No transfer of land is required to effect this: the water just has to move far enough. Where a surveyed strip was completely eroded, a new 20 metre ambulatory strip would automatically come into existence on the affected titles. Until the water completely erodes the surveyed strip, it just gets narrower. Because of the small scale of old survey plans and their imprecise survey of the rivers, at times Chief Surveyors have had to note that marginal strips "might exist" on the title.

Figure 5.10 illustrates what might happen to a title with subject to marginal strip provisions as well as abutting a s 58 strip.

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42 Hansard, 1990, p 510, Dr P Simpson.

43 Hansard, 1990, p 511, Mr Cooper.

44 Discussions with Mark Smith, Senior Teaching Fellow, former Otago Land District Chief Surveyor, 1996.
Reporting

Reporters and staff writers of various newspapers stated the public's perception of their existing rights. Under the headline "Queen's Chain plan shocks coalition: public's birthright being given away", Pennell's article in the *Otago Daily Times* reported the Public Lands Coalition view that the new law would allow new land holders to build on, graze and plant crops on marginal strips. Pennell had introduced his article:

> Since this nation’s beginnings New Zealanders have **taken for granted** rights of access to the nation's rivers, streams, lakes and seashores.\(^{45}\)

Christine Dann of Environment Access Inc. claimed of the proposed law changes:

> It **will mean a basic loss** to recreation which New Zealanders have **taken for granted** for over a century. \(^{46}\) (Bold added)

Criticism such as this, reported in Pennell’s interview with Mason are not entirely correct:

> State enterprises, particularly Landcorp are claiming that having marginal strips would unduly affect the management of the SOE land and would also diminish its value, he says.

> "What they are ignoring is that the private sector has learnt to live for 100 years with these strips and there have rarely been any complaints."

The claim is not accurate because land sold to private ownership before 1948 only had chain strips created on rivers over 33 feet wide. Farm size private lots - over 4 hectares - were seldom affected. When the 4 ha limit was omitted in *Counties Amendment Act* 1974, the private sector strongly opposed the move. The law changed back in 1978. The same omission in the *RMA-1991* resulted in its reinstatement in 1993.

Landcorp chief executive George McMillan claimed that the Bill was unworkable, citing "... a hypothetical situation of eight parallel streams flowing through farm land. Under the Bill, a sizeable chunk of farm land would be open to the public and would hinder farm operations". \(^{47}\) Similar arguments against esplanade reserves had been used by the private sector against omitting the 4 ha limit. The 4 ha limit makes private subdivision quite different from Crown block sales. Transferring ownership of private land does not trigger the creation of esplanade reserves; selling Crown land does trigger the creation of marginal strips.

Marginal strips would be created on all water margins regardless of what values they might have. No strips were to be sold; title to the newly created ones would remain with the Crown. With those highly contentious sections changed, the *Conservation Law Reform Act* became law in 1990. However, the law was still not satisfactory. Labour's poor handling of this issue was

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\(^{45}\) *Otago Daily Times*, 8 Sept 1989.

\(^{46}\) *Dunedin Star Weekender*, 21 October 1989.


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probably not a major election factor on its own, but Labour had lost credibility in several areas and lost the election. This meant that the incoming National government had to make the law workable.

**The Conservation Amendment No. 2 Bill 1993**

Laws for the management of marginal strips remained unsatisfactory because the *Conservation Law Reform Act* 1990 had abandoned proposals for selling or including marginal strips in adjacent titles. The new National government which had continued to promote the free market approach and asset sales therefore proposed some amendments. These were contained in the *Conservation Amendment No. 2 Bill* that took two and a half years to resolve.

Objectors specifically targeted three clauses, 12, 13 and 14 in the Bill, because they could allow the Minister of Conservation too much discretion with public water margin lands. Clause 12 would allow the minister, by Gazette notice, to reduce the width of marginal strips to 3 metres if that was adequate for conservation, recreation or access. More contentious was clause 13 that would allow some margins to be exempt from marginal strips. This could be done if:

> The exemption is in the public interest by reason of the need to restrict public access to the reserve in order to better protect the natural, historical, or other values of the reserve.\(^{48}\)

Most contentious was clause 14. Instead of sales, or including strips in the adjacent titles, it proposed allowing the Minister to "... grant a lease, licence, or permit in respect of any land that is a marginal strip." The clause carried the proviso that the grant could not conflict with s 24C - the purposes, such as protecting natural values, enhancing aquatic habitats, providing public access or enabling public recreational use, for which strips were established. Grants could also formalise rights which had existed before 1990.

Objections on similar grounds to those raised about the sale of strips were quickly, publicly aired, on radio, on TV, at rallies and at public meetings.\(^{49}\) "I don't think the Minister (of Conservation) in introducing the Conservation Amendment Bill ever had any idea of the horns' nest he was blindly stepping into," said Hugh Perkins, a National Party election candidate.\(^{50}\)

Labour exploited the public concern over possible leases of marginal strips as an election issue.

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\(^{48}\) *Conservation Amendment Bill No. 2, cl 13(b)*  


\(^{50}\) *Otago Daily Times* 22 October 1993.
Fish and Game Councils, Federated Mountain Clubs and the Royal Forest and Bird Society had combined their lobbying as Public Access New Zealand (PANZ) which claimed to represent 250,000 New Zealanders. They condemned the proposed legislation by claiming that leases and licences for 30 (occasionally 60) years could give lessees rights to exclude the public as effectively as if they held a freehold title. Members of the public were cautioned that they could be warned off visiting favourite beaches or fishing spots, or prosecuted under the Trespass Act.

Following the introduction of the Amendment Bill, PANZ launched a publicity campaign complete with the Garrick Tremain cartoon, reproduced in Fig. 5.11, urging members of the public to lobby politicians. The advertisements suggested that 'no entry', 'keep out', 'private beach' and 'no admission' signs could become common at favourite fishing spots, bathing beaches, hunting or tramping areas. The advertisements did not mention that many significant water margins and most minor ones were already in private ownerships. Few owners had asserted their right to privacy, nor erected signs, and problems with existing private land were rare.

Figure 5.11. PANZ used this Garrick Tremain's cartoon to widely publicise the possible effects of allowing the Minister of Conservation to lease the Queen's Chain.

Under the headline, "Public access to waterways may end", Soury of the Otago Fish and Game Council protested that under the legislation "the Minister will be able to issue licences over all areas of the Queen's Chain." Yet that ignored the provisos of the Bill and the different administration of other forms of the Queen's Chain. However, environmental policies as much

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as private closures could lead to restricted public use of rivers. Simons\(^2\) and Collier\(^3\) point to the need to retain and protect the bio-diversity of rivers which native fish species provide. Collier suggested a nine-point charter for rivers which to be effective could require restrictions on fishing. Restricting public access generally could be an effective way of providing this protection. People have accepted restricted access to various sanctuaries that protect nesting areas, such as for gannets at Cape Kidnappers, albatross and shags at Taiaroa Heads, and penguins at Sandfly Bay.

During the 1993 election campaign, the four major morning newspapers: *The New Zealand Herald, The Dominion, The Press* and the *Otago Daily Times* each carried editorial comment on the Queen's Chain. They related the view that the Conservation legislation would reduce the land available to the public. The editorials and some articles, often without apparent further research for evidence, have reported parliamentary debates which merely reinforced popular views about long-established public rights of access to and along rivers and the seacoast. The *Sunday Times* editorial of 29 August 1993 "Tarnished gold in Eldorado" was followed by a *New Zealand Herald* editorial on 31 August, entitled "Queen's Chain Tarnished". Both asserted that access had been guaranteed from 1840. The *Sunday Times* was concerned about possible restrictions for fishing which could result. These editorials tended to build and reinforce the myth that chain strips for public recreation have existed along every water margin since 1840.

**The Queen's Chain Protection Bill**

A short, private member's Bill, from Labour's John Blincoe, was introduced in September 1993 to put the government in a "catch-22" situation. Either supporting or objecting to it would leave the government open to criticism. Supporting the Bill would be an acceptance that leasing and licensing would restrict public access. Rejecting the Bill would be to deny that a problem existed when there was widespread publicity of problems. The Bill would have authorised the appointment of Guardians of the Queen's Chain, but in not defining the chain, might have involved the guardians in monitoring all forms of water margin strips. Tom Scott's cartoon, shown in figure 5.12, took an irreverent view of how we often treat the (apparently sacred) Queen's Chain.

During debate on the *Protection Bill*, Warren Cooper, National MP for Otago said that in 20 years of being involved with central and local government he had never received any complaints about access, nor did he have evidence that farmers and others were disputing the rights of the public to go to the rivers, lakes or coast.\(^4\) Labour MP, Jack Elder, argued that if public access to lakes, rivers and the coast was such a strongly held belief then the courts would not support any

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\(^4\) Hansard, 1993, p 18,017, Mr Cooper.
prosecutions brought against persons seeking access.\textsuperscript{55} This suggested that tradition or long standing practices would make a protection Bill unnecessary. Considering the lack of prosecutions, it seems a quite realistic assessment.

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{figure.png}
\caption{Mr Blincoe beholding the lack of respect New Zealanders often display for the Queen's Chain. Tom Scott, \textit{Listener}, May 6 1995.}
\end{figure}

Nick Smith, the government MP for Tasman commented that is was a myth that the Queen's Chain had always been taken but noted that public access remained available. Countering the notion that the Bill would introduce new commercialisation of water access, Smith offered the example of Moonlight Lodge in Nelson that had already negotiated preferential access with farmers.\textsuperscript{56} Commenting on the extent of rivers without any marginal strips or reserves, Smith observed that he could "... bore the House stupid with examples ..." from his Tasman electorate of instances where no marginal strips existed.

Bill English, the government MP for Wallace cautioned that a high profile campaign about legal rights could cause a farmer backlash. He suggested that farmers might check their titles and not finding any access requirements, might enforce their legal right to privacy. English also expressed concerns for settling Treaty claims because access lobby groups were inciting fears of reduced access if land was controlled by Maori.\textsuperscript{57} Assertions of that nature can, given sufficient publicity, be self-fulfilling prophecies.

\textsuperscript{55} Hansard, 1993, p 18,019, Mr Elder.

\textsuperscript{56} Hansard, 1993, p 18,021 Dr N Smith.

\textsuperscript{57} Hansard, 1993, p 18023 - 24, Mr English.
Commentators, including cartoonist Tremain, suggested that as well as seeking to appease SOEs, leases or licences could be a source of revenue for the under-funded Conservation Department. Figure 5.13 shows the close relationship which Tremain depicted between water margin access and Conservation funding.

**Figure 5.13:** Tremain's depiction of the effects of user pays on rights of access

PANZ suggested that some of its concerns over maintaining public access could be met by: better funding for DOC so that user charges and leases were not needed, not allocating to Maori conservation lands to settle Treaty grievances, abandoning the idea of leasing and licensing the Queen's Chain, and investigating the possibility of extending the Queen's Chain around New Zealand.

Before the 1993 election, Denis Marshall, Minister of Conservation established a working party to review the *Conservation Amendment Bill* - particularly the leasing provisions for marginal strips. That Bill and the *Protection Bill* went to a select committee for further consideration after the election. Papers kept the public informed of submissions to the planning and development select committee during 1994 and 1995.

The select committee reported to Parliament in April 1995 that leasing and licensing of some marginal strips with some safeguards would be acceptable. The *Otago Daily Times* greeted this with the front page headline, "Queen's Chain 'renege deplored", placed conveniently next to a
photograph of the Queen, albeit for an unrelated news item. Hundreds of people, the paper reported, had made phone calls or sent faxes to Otago MPs protesting at the effects of continued inclusion of the leasing provision in the Bill. The Otago Daily Times (ODT) provided a special phone-in line that enhanced the profile of the protests.

In its editorial: "Chain under threat", the ODT cynically complained that the select committee had come to the conclusion that the Minister of Conservation had always wanted: allowing leases and licences. It continued its objection, claiming no-one had satisfactorily explained why the legislation was necessary and who was promoting it. However, the ODT overlooked the argument that some formal arrangements were necessary to give port companies with wharves and storage facilities, and hydro power-stations particularly, legal rights of occupation. Similarly, private structures on strips needed rules governing their existence.

Paradoxically, the paper gave front page space to announce that the Royal Forest and Bird Protection Society supported the modified Bill. It quoted the conservation director as saying that the changes to the "... controversial provisions for the issuing of leases and licences over marginal strips was a practical compromise on what was a very complex issue." The Otago regional conservator, Jeff Connell, explained that by allowing leases or licences for any structures on the marginal strips, DOC would actually have better control: "We need to be able to legitimise them [structures] to be able to have control over them. If we do not licence the structure then the licence cannot expire."

The New Zealand Herald editorial, 28 August 1995, promoted the notion of an "Access charter". It suggested that land owners who can make money from "public" fish on their properties could allow free public access where no other forms of public access existed. It suggested that this request was quite modest because:

Except in a few celebrated cases of property-owners' contrariness, what the [New Zealand Fish and Game] council seeks is basically what people of goodwill already provide to people of good manners.

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59 Otago Daily Times, Calls flood in over Queen's Chain, and MPs swamped by protests, 6 April 1995, p 1.

60 Otago Daily Times, Chain under threat, 6 April 1995, p 8.


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In a February 1996 article, published by the *Otago Daily Times*, Jim Sutton, Labour spokesperson on land matters, accepted that the notion of unimpeded access was a "... cultural edifice ... constructed on legal foundations of sand." He observed that since only 70% of water margins had some legal public access right, "... New Zealanders rely upon rights that exist for the other 30% only in their imagination, [and this] has done little harm." Sutton suggested the way to deal with the access muddle was to introduce:

... a comprehensive, legislatively-backed code of public access to the countryside, embracing both rights and responsibilities. I propose that there be initiated a major public enquiry and consultation to that end.

Briefly reviewing the approaches taken in Europe, Sutton suggested that rules and restrictions relevant to New Zealand circumstances would be required. He suggested that where access was required it could be negotiated and reasonable costs of the land owners compensated.64 In his 1991 booklet, *Public Roads: a guide to rights of access to the countryside*, Mason had made similar suggestions for New Zealand to devise some form of rights of common access.65

When the select committee finally reported the *Conservation Amendment Bill* to Parliament for its third reading debate, committee members were reasonably pleased with the results. Blincoe maintained that the marginal strips were at least as important as national parks and New Zealanders considered their rights of access to be a fundamental birthright.66 For any new leases or licences, public submissions and a hearing process would be necessary. Jill White, a Labour committee member regretted that most of the discussion had focused on leases and licences for marginal strips which overshadowed other important issues. She noted that for two and a half years, some officials had made the Bill their life's work. White also suggested that further consideration should be given to the "right to roam" concept, and not just along waterways.67

Recreation lobby groups were not completely happy with the legislation but had accepted it as a reasonable compromise. There was support from the Fish and Game Council and Forest and Bird. Nick Smith remarked that he had never heard a complaint about boat sheds in the Marlborough Sounds affecting access. However, people who would have to remove their boat sheds because of the law changes were "pretty grumpy about it".68 Smith also observed that reaching the Queen's Chain to gain access to the water remained a problem:

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66 Hansard, 1996, p 11,427, Mr Blincoe.
[1]n a whole number of areas we could have a perfect Queen’s chain around all sorts of coastlines and amongst all sorts of rivers and lakes but unless we have access from, for example, the public road to the river area, it is all pretty irrelevant.

Conclusions

The term Queen’s Chain probably has only recent origins. Perhaps it was coined to provide more meaning to the public than "section 58 strips". Until recreational access became an issue, the strips functioned as roads. Queen’s Chain is a convenient term which can embrace all water margin strips of land created under various laws, including Royal Instructions. However, chain strips still do not exist on 30% of the significant water margins. Access there relies on the grace and favour of land owners, as does access to actually get to other chains. The land within many of the chains has been eroded, so again the land abutting the water may be private.

Modern legislation makes marginal strips or esplanade reserves theoretically possible on hundreds of thousands of kilometres of creek and stream margins, if the law is interpreted literally and not pragmatically. The strips on minor waterways probably make more water margins available to the public than any early administrators ever contemplated. These might not compensate the loss to the public if well-used areas were sold or leased for restricted use.

The two Conservation Law Bills were in part making laws for marginal strips comparable with those for esplanade reserves, which allowed waivers, leases and width reductions possible. However, they were introduced in the atmosphere of assets sales, with the State Owned Enterprises keenly acquiring as much as they could on the best possible terms. It is possible that these reforms, for the more sensible management of riparian lands, might not have been rejected if land sales and privatisation had not been a government priority - a hidden agenda to sell many more assets.

The debates and publicity about the Conservation Amendment Bill had really been only about not trusting the Minister of Conservation to compromise public interest in any lease or licence that might be issued for private use of a marginal strip. Nick Smith's contention that "the two and a half years of debate on this legislation rates as the biggest storm in a teacup in my five years in the House", might be close to the truth. However, the public were distrustful of what political agenda lay behind the moves to combine alterations to the laws governing marginal strips with its agenda of corporatisation and privatisation. The well-informed access lobby groups played

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Hansard, 1996, p 1253, Dr N Smith.
important roles in articulating, and also fueling, public anxiety over possible loss of access rights. Debates gained the public some reassurance that their rights to visit beaches and rivers were not going to be leased or sold like other Crown assets such as forests and farms. The "Queen's Chain" was a valid concept to which the public could relate and protest about threatening loss of rights.

The comments of Jim Sutton, Jill White and Nick Smith may indicate that the politicians would consider supporting a New Zealand code for a **right to roam**. At the present time there are many water areas that we could not visit if informal rights to roam (land-owners' tolerance) did not currently exist.

At times extreme views of the consequences of greater private management of marginal strips have been cited. Balancing this, however, has been the long tradition of the vast majority of private owners generally being very tolerant of public seeking access where legally it has not existed. Only the exceptional situations of conflict make news. With corporate owners, tolerance would be uncertain.
IDEIOLOGICAL ASPECTS OF ACCESS:

THE ROLE OF SURVEYORS

Surveyors have roles of advising and deciding if particular streams are sufficiently wide or lakes sufficiently large to require a water margin reserve. They gather and evaluate the evidence to decide the location of the water's edge from which they measure out that reserved strip. It can be the bank of a river, stream or lake. In offering advice or making these decisions about natural boundaries the surveyor is exercising important professional judgement. This chapter examines aspects of survey practice, and guidance from Chief Surveyors' memoranda, to determine natural boundary locations and the extent of water margin reserve land. The public may not easily identify these boundaries on the ground, but if they have been surveyed and plotted on official plans, they become part of the accessible survey record. The chapter has three parts. These are: aspects of field work; guidelines or requirements set by Chief Surveyors; surveyors' submissions on Bills, papers and practice updates.

Aspects of Field Work

The criteria used to judge the position of a natural boundary can vary depending on who owns the land. If the land being surveyed is Crown land, the surveyors were generally from Lands & Survey (then DOSLI 1986-1996 and now the SOE, Terralink). If the land is privately owned, then the surveyors subdividing it, and carrying out the natural boundary survey, come from private practice. As a rule, esplanade reserves have arisen from private land subdivisions that created lots under four hectares. The marginal strips have mostly been reserved from subdividing Crown land into farms or rural blocks.

For Crown land, the owner (the Crown) was not having land taken away for public use, the owner was retaining any marginal strips created. Thus, the emphasis might have been on maximising the size or the importance of the strip. When private land is subdivided into lots less than four hectares, taking esplanade reserve land becomes an issue, with an emphasis on minimising the size or need for such reserves. Possibly prime waterfront land must vest in public ownership. In urban situations, esplanade reserves can mean fewer saleable lots.

Few developers of private land gladly vest esplanade reserves. Simpson, at a conference in 1986, noted the dilemma of the consultant:
The Consulting Surveyor as a true professional, has a difficult and unique position in the subdivision scene. He is the bridge between the client and the controlling officers of both Government and Local Government. Through his experienced assessment of the particular problems associated with his client's property he will endeavour to arrive at a practical solution which satisfies the interests of all concerned.¹

As subdivisions create more esplanade reserves, those properties with water margin boundaries become more scarce and thus more valuable. The owners/developers expect the private surveyors to provide inventive subdivision solutions to reduce the loss of land and water frontages.

Crown Surveys

From the 1940s through to the 1960s the Lands & Survey Department subdivided thousands of acres of Crown land, particularly into soldier rehabilitation farms.² Many of these farms are in the central North Island, an area that Mason noted is well served with marginal strips along stream boundaries.³ These strips were commonly referred to as "section 58 strips". They were set apart at the discretion of the surveyor in the field. When the streams were close to ten feet wide, surveyors used a staff or cloth tape to check the width at intervals. A more pragmatic assessment of streams width was that "If you could jump across it," then it did not need marginal strips.⁴ Williams commented that at times the instructions for subdividing the blocks in South Canterbury included requirements to provide s 58 strips along particular streams if the surveyor determined that they were over ten feet wide. The surveyor usually considered the average width of the stream over its length through the entire parent block. Being farm blocks, much of the land being subdivided was pasture. The surveyor might need to decide the location where the stream became less than three metres wide and upstream from there no further reserved strips would be necessary.⁵

In reconnoitring the perimeter of the block, to decide final farm boundary locations and traverse stations, the surveyor would cross any stream entering or leaving the block. However, upon subsequent subdivisions such as cutting a single house site from a farm property, the surveyor might be unaware of a significant (over 3 metres wide) stream flowing through the balance of the title, well away from the small surveyed lot. The surveyors further investigated any stream

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² To 31 Mar. 1959, 1.5 million acres had been disposed of in 3,648 units, 830,000 acres remained to be developed into 1729 further units. *New Zealand Official Year Book* 1960, p 466.
³ Bruce Mason (PANZ) suggested that in those areas, from his research, it appears that there are strips on about 90% of the water margins. Pers. comm. 1996.
⁴ G R Locke, (former District Surveyor, Rotorua) also, S M Williams, former Chief Surveyor, Otago, personal communications 1996.
⁵ S M Williams, 1996. pers. comm.
appearing wide enough for reserved strips to be considered. As well as width, the surveyors would consider access along, access to, and the usefulness of the stream for the public - mainly for fishing. One surveyor on the West Coast described this as the stream's "piscatorial" value.\(^6\)

Since this land was all Crown land, there was no loss of land to the developer by retaining marginal strips in Crown ownership. There was no need to procrastinate over evaluating stream widths. If the surveyor was uncertain if a stream had sufficient public use value, he could discuss it with other Lands Department staff. Generally under the Land Act, the surveyor would right-line (straight lines with bearings and distances) the landward boundary of a strip. This then became a fixed boundary location. Any subsequent accretion or erosion affected the strips, not the private land. If practicable, these strip boundaries were fixed at some logical, readily recognised position \textit{at least} a chain (20 metres) from the river bank. This line could be, for example, the edge of an old river terrace or the edge of a bank. The surveyor might provide extra width to allow easier access along the river or include within a widened reserved strip land that would have minimal productive value. As the land was mostly rural the value of a few metres of extra width was small.\(^7\)

The farmer who took over the block would assume responsibly for weed control as a trade-off for grazing the marginal strip land. However, the farmer did not pay rates for this land. Because these farmers acquired title after the survey, they had not lost any land.

Surveys for marginal (s 58) strips commonly accepted logical visible lines when surveying along natural boundaries of the coast or river margins. When private land was subdivided (into lots less than four hectares) there has been a tendency to keep boundaries (high water mark, high water springs or riverbank) close to the water if that could be done without subjecting allotments to possible erosion. For example, to guard the foredune from development, the surveyor may mark the boundary of the esplanade reserve behind the dune. This can require the reserve being over 20 metres.\(^8\) Under the Counties Amendment Act 1961, the county could require a reserve wider than 66 feet (20 metres).

Frequently, neither the line of the bank used nor MHWM/MHWS has been apparent on the ground. Where cliffs bound the sea, the low, mean high or mean high water spring level contour lines are all close to collinear. Examples near Dunedin are Lawyers Head, Cape Saunders and the ocean side of Taiaroa Head. Frequently though, the high water contour is on some form of beach and its location is not obvious.

\(^6\) S M Williams, 1996, pers. comm.
\(^7\) S M Williams, 1996, pers. comm.
The change of boundary definition from mean high water to mean high water springs in the Conservation Law Reform Act 1990 and the Resource Management Act 1991 drew some criticism from the New Zealand Institute of Surveyors. In their detailed initial submission on the Resource Management Bill which deals with private land, they observed:

This [new boundary line] means that there will be a strip of land (of considerable dimensions in some cases) between the two water boundaries. The Bill provides a mandatory requirement for this strip to be transferred to the Crown. No compensation is payable. This appears inequitable if compensation is payable for the esplanade reserve.\(^9\)

This criticism about compensation for private owners, was not initially accepted by Parliament. However, s 237G "Compensation for taking of land below mean high water spring or bed of lake or river" was added to the Resource Management Act by the 1993 amendment.

Considerable research\(^10\) has gone into methods to locate the internationally used mean high water mark boundary. Since 1854, it has been settled law that the boundary is the location of the mean high water contour.\(^11\) A detailed paper by Watkins and Baker contains the most recent instructions. They discuss various methods including modified formulae to find the mean spring high level.\(^12\) Survey Regulations such as those of 1925 went to some detail to explain how the level of the mean high water mark contour could be established using the "range ratio" method for simultaneously observing project site levels with those at a nearby established tide gauge.\(^13\)

**Fresh Water Margins**

Often, but not always, rivers flow in well-defined channels with distinct banks near the edge of the permanent flow. However, just as there are indistinct coastal high water marks on sandy beaches, the margins of rivers, streams and lakes can be obscured by vegetation or they exist on readily eroded and ever-changing shingle channels. Survey Regulations such as those of 1897 or 1925 offered no suggestion of how a surveyor might decide the width of a river, or the acceptable location for its banks. Presumably the surveyor in the field had total discretion.

Even today there are only limited guidelines, in Chief Surveyor's memoranda, to help the surveyor decide the position of river banks or bed-edges that they might survey. There may be

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equally valuable property as on the coast that might be subject to accretion and erosion. Commenting on the surveyed location of a river bank from where the surveyor measured off an esplanade reserve, the present Chief Surveyor for Otago noted that he has respected the surveyor's judgement for the location of the bank.\(^\text{14}\) I am unaware of any Chief Surveyor (or inspecting surveyor) who requisitioned a surveyor to resurvey the location of a river bank to a different alignment.

**CHIEF SURVEYORS MEMORANDA**

Various Chief Surveyors have in recent years provided Memoranda to surveyors on a variety of matters regarding cadastral surveys. In earlier years, the Department had produced occasional circulars from the Wellington Head Office. Included in these is advice on natural boundary surveys. I have reviewed six current memoranda manuals to display the range of guidance and requirements set. These Manuals, in order of publication apply to Wellington, Auckland, South Auckland, Otago, Westland and Hawkes Bay. They would represent a reasonable cross section of the memoranda. The range of requirements is described here.

**Wellington Land District**

These memoranda, dated January 1990, pre-date the *Resource Management Act* 1991. They give example guidelines for the 1980s. The surveyor is reminded that it is at the scheme plan (now application plan) stage that the water boundary needs to be established and the width reduction (or waiving of a reserve) applied for to Department of Conservation by the local authority. The general requirement in Wellington is that the surveyor should right-line (bearings and distances) and peg the landward limits of the reserve.\(^\text{15}\) Except in exceptional circumstances, where a river or stream bounds the land, the boundary should be accepted as the near bank. To prove that no titles overlap, the surveyor should also fix, by survey, the opposite banks and show the legal opposite bank on the plan.

The boundary line position suggested has been used for many years:

> The boundary of a natural stream is determined by the flow at the time of a normal winter fresh and without flooding or overflowing its banks and this often coincides with the edge of vegetation. However, the nature of the boundary must be described on the survey plan, e.g., "top of bank 2-3 metres high, edge of vegetation, etc.".\(^\text{16}\) (Bold added).

This memorandum notes that riparian boundaries should not be right-lined because that might deprive the owner of common law rights. However, creating a reserve or strip actually severs

\(^{14}\) M. Warburton, Chief Surveyor, Otago Land District, pers. comm., Nov. 1996.

\(^{15}\) Wellington memorandum, 1990, p 17.

\(^{16}\) Wellington memorandum, 1990, p 17.
the adjacent land from these rights. The point is made that even on modern subdivision, strips/reserves are not created on every stream, lake or coast because of the stream width, lake area or allotment size.

For the seaward boundaries the memorandum suggests that the surveyor use more practical methods than observations over an entire lunar year to establish a mean high water mark. The more practical lines are "the established vegetation" or "close to consolidated country". In addition, the Wellington Chief Surveyor has requested that:

- the nearest permanent physical feature - retaining wall, bank, edge of consolidated ground covered with vegetation, toe of fore-dune etc. - must be fixed so that it may be plotted on the survey sheet in relation to the MHWM boundary. 17

This would certainly help the public to find the extent of private property and public land available for their use.

**Auckland Land District**

This memorandum has been used as the basis for other land districts since 1992. Auckland's memorandum, August 1992 -September 1993, deals with some river matters in a similar or briefer fashion to that of Wellington. There is no suggestion of where the surveyor might locate the bank of a river. Probably because of the high value of coastal land, there is more detail about fixing the location of MHWM. The memorandum cautions surveyors from assuming that an existing coastal boundary is the current position of Mean High Water:

> The date of the original Crown Grant and the wording used to describe the seaward boundary could be of crucial importance 18.

This indicates the difficulties for members of the public who might assume that they can readily identify where they have access along the coast. If a marginal strip had been originally surveyed from a grant made decades ago, it could have been completely eroded. The memorandum suggested that even a surveyor with all the survey plans may need to refer to the original Grant to decide the limits of private ownership.

Having noted the need to ideally observe tide levels for a lunar year to gain an accurate determination of MHW level, the memorandum notes:

> Caution is necessary in the case of exposed sandy beaches where the beach profile is constantly changing and careful monitoring of up to a year may be required for a reliable determination of Mean High Water Mark to be made. This process can be avoided by fixing the edge of the consolidated ground or a similar physical feature.

This presumes that the sea erodes and replenishes the sand budget of the beaches on some annual cycle. That need not be so. It presumes also that the boundary location would be found when


the beach had an average amount of sand on it. Judging fluctuations of the sand budget on a stretch of beach like St. Kilda/St Clair in Dunedin would not be as simple as establishing a local tide level from a gauge or tide pole. Simpson noted an instance where a single storm had changed the level of the sand by up to a metre. Possibly surveys carried out in summer might best locate the boundary at a season when the public would mostly use the beach.

Noting the changes in the RMA to adopt MHWS as the boundary of the Coastal Marine Area, the memorandum suggests that:

> Whenever possible, physical evidence should be used to determine the position of this line. Information in the NZ Nautical Almanac must be used with caution as the full range of tides is not used in the predictions or the tables.

Thus if surveys in the past have accepted some physical feature such as the toe of a cliff or edge of vegetation as MHWM, then there may be no difference for MHWS. This choice of physical features as the boundary can be less confusing for members of the public. The Auckland memorandum provides some discussion about the surveyors' duties regarding esplanade reserves, esplanade strips and marginal strips. Esplanade strips are not required to be surveyed because their course alters as the bank of the river or margin of the lake shifts. However, their existence needs to be shown and clearly labelled on the survey plan. For marginal strips, the plan should contain the following note: "Subject to the provision of Marginal Strips pursuant to Section 24(1) Conservation Act 1987." Public Access New Zealand (PANZ) has complained that a mere note is insufficient guide for public who seek recreation to find where they can lawfully go. This is a reasonable criticism. Private owners and subsequent purchasers have a right to know with certainty the accurate extent of the title they hold. The uncertainty not only affects the casual public visitors but also the value of any titles to which the caution is attached because, for example, the title-holder might not be able to build in a location to enjoy a view or to readily access the water.

**South Auckland Land District**

This memorandum deals only briefly with natural boundaries or reserves. If the surveyor does not re-survey the natural boundary then s/he must certify on the plan or in the report that there has been no material change in the boundary location.

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19 My observations of the beach profile, 1995-96.
22 Auckland memorandum, 1993 amend., pp 1-22(a) - 1-22(b).
23 South Auckland memorandum, 1992, 4.3.
For rural areas, the Chief Surveyor indicates that he would accept an irregular landward boundary of a reserve not being pegged. However, in urban areas, the surveyor is required to right line and peg that boundary. This would allow clear identification for the public of the location of the reserve and allow fencing.

**Hawkes Bay, Westland and Otago Land Districts**

The Hawkes Bay memorandum is also based on the Auckland model and reminds the surveyor:

"Notwithstanding that areas and measurements are shown to the bank of a river, under Common Law there is a presumed right of ownership to the centre-line unless the river is tidal, navigable or otherwise vested in the Crown."

This memorandum was published shortly after Parliament passed the *Resource Management Amendment Act 1993* which introduced the phrase "annual fullest flow". The memorandum advises:

"The boundary of a natural river is determined as the space of land which the waters of the river cover at its fullest flow without overtopping the banks. It will often coincide with the edge of the vegetation."

It requires the surveyor to describe the nature of the boundary on the survey sheet, e.g. "top of bank 1-2 m high, edge of vegetation, etc.". That would allow the public to see, by searching the deposited plan, where they were entitled to go. Although some earlier surveys established natural boundaries along the centreline of rivers (*ad medium filum aquae*), that line is not acceptable for modern subdivisions. The surveyor must create the new boundary along the nearer bank.

The Westland Land District has adopted the Auckland memorandum with some modifications. Otago's memorandum is generally briefer than the others. It provides no specific guidelines for deciding river width or high water mark.

**SURVEYORS' INPUT TO LAW MAKING**

The New Zealand Institute of Surveyors (NZIS) has campaigned over many decades for the rights of individual land owners to be respected and protected. Institute branches have made submissions on district schemes and plans in their region. The Institute Council makes submission to select committees when Parliament is considering land related Bills. One relevant example of the latter which deal with esplanade reserves illustrates the standpoint of surveyors.

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This was the detailed NZIS submission on the *Local Government Amendment Bill* in 1978 that strongly criticised the proposed law for esplanade reserves:

The idea that those land owners whose land extends to the Mean High Water Mark are in occupation of something to which they are not entitled and have a consequent responsibility to return it free of cost to the community is untenable. Whilst the Institute agrees that it is desirable that water frontages should be returned to public ownership and control when and if possible it does not support a policy in which by accident of subdivision valuable land is taken without compensation. In almost every case waterfront land had been paid for at full market value, has been rated and taxed, and in many cases forms the most valuable part of an owner's land.  

These same comments apply equally to land which abuts lakes, rivers and streams. The Institute went on to criticise the definition proposed for the shoreline of lakes and suggested that the water boundary "should be defined as the limits of permanent non-aquatic vegetation." In some situations such as barren, rocky shorelines a larger lake might have to be defined. That advice was not heeded.

Unsatisfactory and impracticable definitions for "bed" of a lake persisted in the *Conservation Law Reform Act* 1990 and then in the *Resource Management Act* 1991. However, the NZIS suggested that a more satisfactory reserve width than merely "not less than 20 metres" should be one that comprised "stable permanent ground usable at all times for public access or recreation". This may have resulted in reserves in excess of 20 metres, but the suggestion was ignored. Other NZIS suggestions have eventually been accepted. For example, local authorities are required to pay compensation, for esplanade land abutting lots over four hectares. Local authorities could not readily acquire these before the *Resource Management Act*.

The NZIS has made submissions on the *Conservation, Conservation Law Reform, Conservation Amendment No. 2, Resource Management,* and *Resource Management Amendment Bills* when the select committees have been sitting. Surveyors have been kept up-to-date regarding water margin issues via the monthly *News & Views* (1990-95) or its replacement *Survey Quarterly* (since 1995).

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30 Articles in NZIS publications include:
The NZIS maintained a careful watch on Resource Management Act effects and even maintained a "hotline" service for members. Surveyors were among the first to encounter the difficulties of the transition arrangements. Parliament passed the Resource Management Act in July 1991 and it came into force in October that year. However, by early December, transitional provision regulations had changed the initial transitional arrangements. In April 1992, the Minister for the Environment announced that significant changes would be made in an amendment Act. That amendment was passed in 1993. In November 1993, the Institute then ran a series of seminars on the amendment Act which focused on matters relating to esplanade reserves, esplanade and access strips.31

Coastal policy statements could make exceptions from the law for esplanade reserves more difficult to obtain, the editor of News & Views advised surveyors. He also warned that Mean High Water Mark cannot be accepted as the mean high water springs as there may be metres of difference in plan position.32 "New skills are required to do justice to the Esplanade Reserve requirements ...". The editor noted that for an application plan, the surveyor should be showing considerable topographic detail for the first 30 metres back from MHWS. This detail should include contours or levels, trees, buildings and might use photographs for illustrating the application. As one purpose of the esplanade reserve is to protect the neighbouring marine habitat, some comment on that from the surveyor was advised. Further education in assessing the conservation values of these reserves, and the most practical way of locating MHWS could be of value, he suggested. Although this requires more work and will cost the client more, "it is believed the Act requires this input".33 To date however, surveyors have not provided workshops or seminars as guidance to members on these topics. These might not occur until district plans created under the Resource Management Act become fully operative.

To protect the value of the subdividing client's land, the consultant surveyor is under some obligation to avoid unnecessarily vesting water margin land in public ownership. Subdividers can expect the surveyor to advise them of lawful ways to avoid or minimise financial or land area loss. These can include survey costs or loss of value from diminished privacy or land area loss. There have been Planning Tribunal decisions through the years where land owners or developers have challenged the amount and extent of esplanade reserves.34 The surveyor may

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34 For example, Planning Tribunal decisions e.g. Rodney CC v AGH Holdings, HC; Johnston & Brown v DCC that will be discussed in chapter 7.
not have instigated the action but surveyors’ scheme plans and field determinations of position have been used as evidence.

Where reserves have been necessary, but depending on the nature of the subdivision, the private subdivider would want to keep the reserve to the minimum acceptable width. This is reasonable when the requirement is pedestrian access. A nominal one chain width as for a road reserve for this access can be excessive. For environment protection and as a buffer to trap nutrient run-off, extra width might have merit.

When the subdivision creates land use changes from rural to urban, the area of land within an esplanade reserve may represent several valuable allotments. Every 30 metres of stream frontage reserve can be the equivalent area of a lot. However, there are situations where generously dimensioned esplanade reserves can provide a significant amenity for residents of the entire development, including lots not immediately adjacent to the water. The surveyors can enhance the total development in these situations by providing liberal amounts of esplanade reserves in the scheme design.

Delays are costly for developers and frustrating for surveyors. Seeking reductions or waivers for esplanade reserves have frustrated developers because they can cause costly delays in the whole subdivision process. Delays remain an issue in 1996.35 They were an issue fifty years ago when surveyors hoped that delegating authority for subdivision approval, from the Minister of Lands under the Land Subdivision in Counties Act 1946, would hasten approvals.36

... subject to certain conditions, powers exercisable by the Minister may be delegated to the Surveyor-General and through him to the Chief Surveyors ...

This should overcome much of the delay ... with subdivision routine. 37

Similar concerns were expressed in 1961 in a brief editor's report in New Zealand Surveyor. Delays in dealing with esplanade reserves were among the problems noted.38

A particular aspect that required approval was any reduction or waiver of esplanade reserves. The local authority, not the developer, was required to seek the waiver for exemption or reduced reserve width from the Minister. If the developer could not persuade the local authority to actively seek a waiver or exemption, then the requirement remained. Many esplanade reserve requirements have been accepted to allow projects to proceed without costly delays. Authority for approvals of plans of subdivision has gradually been delegated, and with each law change

35 Otago Branch remit on delays to development, 1996 NZIS conference handbook.
36 Land subdivision in Counties Act 1946, s 18 allowed the Minister of Lands to delegate to the Surveyor-General who could in turn, delegate to the Chief Surveyors.
37 Land Subdivisions in Counties - New Zealand Surveyor, editor's comment, Vol XIX No. 3, Dec 1946 p 244.
38 "Scheme plan delays", editor's comment, item 4, New Zealand Surveyor, 1961 p 437.
surveyors expressed hope that approvals would be more expeditious. Such hope was expressed in 1961 when the Counties Amendment Act delegated the subdivision decision making to the individual counties. However, for esplanade reserve exemptions, the counties still had to apply to the Minister of Lands. Reduced time delays have not always occurred, because the scope of matters to be considered has increased.

Although the RMA has allowed authority to waive or exempt the creation of esplanade reserves, the general consent process of assessing effects causes new forms of delay. Frustration occurs because subdividers abandon appeals that might have succeeded. The general rules have been followed because of the holding cost likely to be incurred.

With the proposals for the Local Government Act, some anticipated that counties would gain the same level of autonomy with respect to subdivisions as enjoyed by the municipalities. However, the 1978 amendment to the Local Government Act reduced the autonomy of the municipalities. In the cities and boroughs, decisions for any waivers or width reductions of esplanade reserves became subject to ministerial approval.

In 1991 the RMA eventually did provide that the 74 enlarged, reorganised districts or cities could set their own district plan rules to nominate streams along which esplanade reserves would vest. The resource consent applications to subdivide are subject to approvals with each district authority can set its own rules. The regional council or Department of Conservation can make submissions when the district plan is being drafted and request reserves or strips not depicted on a notified application to subdivide.

As under the earlier laws, the surveyor and client, if they disagree with the reserve requirement, must either acquiesce or face the delays inherent in the appeal process. In practical terms the RMA requires that more streams be considered. Also, the environmental effects of ownership and access resulting from the development must be fully assessed. The surveyor may require more time to consult, gather and present this information with the application.

39 Counties Amendment Act 1961 s 29(1).
40 Under the Land Act 1924 (s 129), only rivers over 33 feet wide had to be considered. When, in 1946, the Surveyor General, and from him the Chief Surveyors had authority to approve plans, rivers over 10 feet wide had also to be considered.
41 Local Government Amendment Act 1978 Pt XX. s 289(7).
42 Local Government Amendment Act No.2 1989. Pt. 1A.
Conclusion

On site decisions about the need for and location of water margin strip boundaries rests with the surveyors. They have readily created these strips along streams along which the public were likely to require access. Surveyors working for the government dividing Crown lands have had a different agenda from the private consultants subdividing private land. When creating s 58 (marginal) strips the government surveyors, usually working on rural developments, were merely retaining their client's saleable land.

The surveyors in private practice have been working on private land, subdividing it often to small urban allotments. Frequently, the water margins are prime sites for which the owner had paid a premium price. Thus it is not surprising that the surveyor, in the interests of the client, should seek to minimise the losses. Strips wider than the nominal chain widths were created to provide access, an identifiable boundary or to exclude from a title land of little value for farming. Marginal strips created in rural areas are likely to be of more generous dimensions than esplanade reserve created in urban subdivisions.

Although advice has been provided in survey regulations since 1925 on surveying coastal boundaries, there has been only limited advice about stream and lake boundary determination. The recent Chief Surveyors' memoranda give varying amounts of advice on defining natural boundaries and any reserves or strips along the water. That advice, particularly about freshwater margins is brief. None of the memoranda attempt to advise on how to check or measure if a stream was over three metres wide. This is not unreasonable because of the widely varying nature of stream margins and flows. Surveyors are rarely requisitioned to amend their natural boundary surveys. Despite the wording defining "bed" in the Resource Management Amendment Act 1993, private surveyors may still define the natural boundary as a definite bank escarpment, the regular high flow, the flow of a winter freshet, and the edge of non-aquatic vegetation, not the annual fullest flow. Once a district council has given its resource consent to lot dimensions on the application plan there is limited scope for the Chief Surveyor to question the boundary location definition.
CHAPTER 7
APPROACHES TO
WATER MARGIN STRIP REQUIREMENTS

CASE STUDIES

Water margins lands are affected by development of the adjacent land and also the development of the water areas. This chapter looks first at the surveying of marginal strips around South Island lakes created for hydroelectricity development. In the second part it reviews instances of land development projects or situations where innovative planning ideas have been invoked, or where esplanade reserves/marginal strips have been contentious issues.

Hydro Lakes

Hydro lakes do not just provide storage and head of water for electricity generation. They can also provide an important recreational resource on their margins or on the lake waters. There are two types of hydro lakes in the context considered: natural lakes and specifically created artificial lakes. The question here is what sort of provision has been made for public access around these lakes?

Conservationists and recreational users of rivers such as white water rafter, canoeists, and jet boat operators who prefer the retention of wild and scenic rivers argue that dammed rivers are less acceptable than the rivers in their original state. Petitioners have also sought to have natural lakes that are used for storage lakes maintained at their natural levels. The "Save Manapouri" campaign of the 1960s which successfully opposed raising the level of Lake Manapouri is a famous example. Campaigners were fearful that the ugly destruction of forest land as occurred on the margins of Lake Monowai would be repeated. The Upper Clutha Development that eventually resulted in the construction of a single dam at Clyde, also ran the gamut of protests for drowning spectacular sections of the Clutha, and the Kawerau Rivers. A special empowering Act was required to allow the Clyde Dam's completion. On the lower Clutha, below Roxburgh, a dam at Tuapeka has been opposed by land owners and the public although it would provide different scenic and recreational opportunities as well as electricity. Bumper stickers exhort electricity

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2. *Clutha Development (Clyde Dam) Empowering Act 1982*
planners to "Keep the Lower Clutha River". Figure 7.1 is a map of the southern South Island showing some significant rivers and lakes.

![Map of the southern South Island showing some significant rivers and lakes.](image)

Figure 7.1 Showing the location of significant rivers and lakes. From "Clutha Power" Works Property Services (1988).

As the former Crown electricity generating assets are transferred to Electricorp and Contact Energy power companies, title to the lake beds and marginal strips has to be separated from the surrounding titles. Some of these surveys were carried out in 1995-1996. The normal requirement for the hydro lakes has been to create a marginal strip 20 m wide above either the maximum control level or the flood level. The latter level is the lake's "highest level without exceeding its physical margins". Section 24(2) of the Conservation Law Reform Act 1990, deals with marginal strips around hydro-electricity lakes:

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Conservation Law Reform Act 1989 s 3 definition of "bed"and "lake"also meaning of "bed" in s 2(1)(c), Resource Management Amendment Act 1993.
There shall be deemed to be reserved from sale or other disposition by the Crown of any land extending along and abutting the landward margin of any lake controlled by artificial means a strip of land that:

(a) is 20 metres wide; or
(b) has a width extending from the maximum operating water level to the maximum flood level of the lake,—
whichever is the greater.

Lake Hawea is a special situation. It is a natural lake but its level has been raised to enhance its storage. Its level is controlled by an outlet structure. Much of the country which surrounds this lake is run country and could move to private ownership in a tenure review. During 1996, Terralink surveyors completed a perimeter cadastral survey of Lake Hawea. The surveyors were required to mark out a one chain strip (20.12 m) beyond the maximum control level of the lake. This level is 346.92 metres above mean sea level (amsl). The maximum flood level for the lake is 349.05 m amsl. Provided the slope of the land in the chain strip is steeper than 6 degrees, then the strip will contain the maximum flood level. If the land is flatter than 6 degrees the boundary pegged is at the 349.05 contour. See figure 7.2. Thus for Lake Hawea, the land being transferred from the Crown is the area covered by the water at maximum control level. Landward of that is a marginal strip one chain wide. This width is increased in the flatter areas such as beaches.

Where slope is less than 6 degrees, the boundary was pegged along the maximum flood level contour (349.05 m amsl)

\[ \tan 6^\circ = \frac{349.05 - 346.92}{20.12} \]


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4 From simple trig., \( \tan 6^\circ = \frac{349.05 - 346.92}{20.12} \).

For Lake Dunstan behind the Clyde dam, surveyors had established the maximum control level contour before lake filling. Land taken with the lake bed included space for a marginal strip beyond the maximum control level of the lake. This landward boundary of the lake-taking has been completely right-lined (bearings and distances) forming an extremely large closed traverse loop. Special beaches, parking lots and boat launching ramps have been provided at suitable place around the lake as part of the project development.

Lake Roxburgh has not presented the same sorts of problems as Hawea for determining maximum control or flood levels. Roxburgh is a steep sided lake with little opportunity for pedestrian access. The locations of the flood or control levels are close together. Lake Wanaka is a tourist area with many attractive beaches. Special legislation has protected its control level. The basic information for the planimetric survey control for the boundary of Lake Wanaka has been based on a 30 inch x 30 inch print from a 1959 aerial photograph. This was the primary evidence available in 1995 for surveyors to set out the water margin. This is rather inadequate information but no other records exist.

On the Waitaki Dams - Benmore, Aviemore and Waitaki - the land transferred to Electricorp was limited (to reduce costs) to the land originally taken for hydro electricity generation. The beds of these lakes are not being extended to include the land covered by the maximum flood level as might be required by the Conservation Law Reform Act 1990 (CLRA-90).

Some Current Problems

Current requirements for marginal strips are set out in the CLRA-90. The Department of Conservation does not have the funds to pay for proper surveys. The CLRA-90 provides a minimal cost way of ensuring marginal strips are legally created. However, without the surveys and survey marks in the ground there can be uncertainties that may lead to problems in the future. Possible flood levels can only be predicted so contour can be difficult to determine and set out on a lake margin. The control level is known so the contour position is easier to establish. The location of both the flood and control level contours can be readily established at steep sides/cliffs shorelines. The contour is not so easy to locate on beaches where for public use of the strips it is more

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important. In these areas, erosion or accretion may have occurred. However, on hydro-electricity
lake beaches in New Zealand the action of water is less than on the open sea-coast.

Difficulties have occurred in Otago for separating lake bed and adjacent farm land because all the
land has been Crown owned so very little underlying survey work existed. The lakes were
managed by the Electricity Department and the adjacent Crown farm lease land was controlled by
Lands and Survey. A further problem has been that the CLRA-90 has presumed that water courses
run in well-defined channels and that their size and relevance are readily apparent. Similar
problems have existed with the presumption that lakes have easily located margins. Frequently
swamp vegetation can obscure lake and stream margins or flood levels.

Access is a separate issue. ECNZ has wanted to avoid any danger to the public from altering lake
levels or access near its installations. The Department of Conservation does not want access when
protection of the area or fish habitats in adjacent areas is a prime concern. The Conservation Law
Reform Act 1990 states that the function of Departments includes: "To preserve as far as is
practicable all indigenous fisheries, and protect recreational freshwater fisheries and freshwater
fish habitats." The sentiment is clearly stated in Section 229(c) Resource Management
Amendment Act which notes in the purposes of esplanade reserves and strips that they can be for
public recreational use of the reserve, strip, adjacent sea river or lake "... where the use is
compatible with conservation values." Recreationalists often want freedom to roam the
countryside unrestricted. Access to the water is not such a concern (as it would be to the Fish and
Game Council).

Warburton, Chief Surveyor for Otago, suggested that the administration of marginal strips could
be rationalised with greater involvement of the local authority. The councils could set out what
areas they would be prepared to administer and maintain in order to provide access. He suggested
that blanket availability of all rivers over 3 m is not good sense. The public may have an
expectation to be able to wander to any river and if it is a few paces wide, then go gold-panning
or fishing there.

It is possible that there has already been a generous interpretation of the extent of hydro-lake beds
and any erosion that has occurred has been in this freeboard of the lake margin and not the
marginal strip land. The freeboard is the extra area for the lake to cover in times of flood. The 20
m strip may still be intact as dry land but a survey will be needed to determine its location. Those
concerned with the issues relating to the extent of these lakes include the Commissioner of Crown


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Land, the Department of Conservation, DOSLI, the District Land Registrars, local authorities and public recreation groups such as Fish and Game Councils, tramping clubs, and deerstalkers. For the hydro-electricity storage lakes that existed within Crown lands, the sale of Crown lands meant the formal surveying and creation of marginal strips and definite access around the lakes.

Innovative Approaches for Esplanade Reserves

Developers and surveyors have created many subdivisions where the esplanade reserves have been made a feature of the development. However, there have been innovative approaches to avoid or reduce esplanade reserves. The simplest rural approach was to create lots slightly larger than 10 acres (four ha) because these did not require esplanade reserves.

Developers often act in haste to avoid the consequences of new legislation. For example, immediately prior to the introduction of Pt XX, Local Government Amend Act in 1979, there was an influx of plans for subdivisions within municipalities. There were various new requirements to be recognised and these included esplanade reserves (s 289) from municipal subdivisions.

Early Pauanui Development: Coromandel

Pauanui, on the Coromandel coast, is one example where land could have been simply developed to make use of the existing unformed coastal road for direct property access and legal frontage. The designers could have created many highly-desirable beach-front sections but then provided only limited access for the public generally to use the beach. Instead of taking that option, the coastal road was closed. Properties were given their legal access and frontage from interior roads with access to the beach across a wide esplanade reserve. Overall, a much more attractive development was achieved with the beach area more readily available to all residents in the development and the visiting public. This layout can be seen in figure 7.3. The width of the esplanade reserves can be compared with the roads through the area. The reserve is considerably wider than the 20 metres. All the lots that front this reserve have driveways to the streets such as Easdale Place or Claim Place.

Prior to the RMA 1991, only registered surveyors could submit scheme plans for proposed subdivisions. Thus surveyors, combining their skills and training in planning together with their cadastral knowledge with others involved in the land development were able to present innovative solutions.


Figure 7.3: The generous esplanade reserve at Pauanui well in excess of the mandatory chain strip. From a sales brochure for the development.
Pauanui Canal Development

In developments at Pauanui completed in 1993, the proposals envisaged lots with water frontage to artificial waterways linked to the sea. This form of development on the coast would normally have required esplanade reserves. There was no mechanism for an esplanade reserve waiver being granted for subdivision lots abutting the coast. The solution was to build a cofferdam to keep the sea from the development site while the waterways were developed.

Only after the developers had completed the lots was the sea allowed in. Public rights were not diminished because the new development was additional "coast". Enhanced public walkway access was provided around the development. Because the development was new, there was no "natural character" environment to be protected. The photograph, figure 7.4 shows the waterways involved.

Figure 7.4 An aerial view of the completed canal development at Pauanui with lots abutting the sea, not an esplanade reserve. (Photo. News & Views, NZIS, Nov/Dec 1993).
Rodney County v AGH Holdings

What is the maximum reserve width that the local authority can require without compensating the developer? There are various coastal and river locations where the road or reserve has provided a useful erosion buffer strip. Private titles may remain intact but the sea can erode or accrete to the water margin strips. In Rodney County v AGH Holdings\(^\text{12}\) the county sought an esplanade reserve wider than twenty metres without paying compensation for the extra width. The subdivision planned to create one lot of 1.91 ha, one of 19.519 ha and the esplanade reserve. Under s 289 Local Government Act the council had requested an esplanade reserve that had to ensure "...a satisfactory continuous walkway of not less than 10 m wide above the coastal banks/cliffs along the entire sea frontage of the property." (bold added) To provide the ten metre width for the walkway at the top of the cliff the developer would have had to vest a strip wider than 20 metres wide above mean high water mark. This was because much of the mandatory reserve width was contained within the coastal banks/cliffs and thus did not provide satisfactory access.

The developers successfully appealed to the Planning Tribunal against the amount of land required by the county. The Tribunal limited the width to 20 metres. The county appealed this decision to the High Court where Justice Chilwell confirmed the findings of the Tribunal. He held that when s 289(1) stated "not less than twenty metres" in width for an esplanade reserve, it actually meant not more than twenty metres. The width was not a nominal amount. This meant s 289 was different from the County's authority under s 23(2) of the Coumies Amendment Act 1961. This had allowed reserves of greater width than 66 feet (20 m) to be required. On the particular site a wider than the nominal width had merit. Chilwell J held:

> The words "not less than" cannot confer a power where none exists. In my judgement the phrase is not surplusage... So long as the width is at all points not less than 20 m [the surveyor] can comply with s 289(1) and with good survey practice.\(^\text{13}\)

This judgement has been recognised by legislation now requiring local authorities to compensate developers for width greater than 20 metres for esplanade reserves.

Millbrook - Mill Stream

At the Millbrook resort near Arrowtown, a stream marginally over 3 metres wide through the development could have required esplanade reserves along both banks. A forty-metre swath for public access along this waterway would have seriously compromised the private and secure nature of the development. Lot 6 (D P 25465) was created to be over four hectares and enclosed that section of the stream, thus avoiding the requirement for an esplanade reserve. By doing this,


the developers allowed the adjoining residential sites to remain private but near the stream. The slender, irregular shape of lot 6 can be seen in figure 7.5 which has been adapted from DP 25465. Alternative access routes are available to the public through the development away from the private dwellings.

Figure 7.5 The imaginative shape and size of lot 6 D P 25465, at Millbrook to include the stream in a lot over 4 hectares and thus avoid an esplanade reserve on a stream close to 3 m wide.

14 Millbrook development: see Lot 6 D P 25465, Otago Land District Aug 1996. The lot of 4.2229 ha encloses a stretch of Mill Stream which is close to 3 m wide.
Johnston & Brown v Dunedin City Council (1994)\textsuperscript{15}

A 1994 Planning Tribunal hearing related to a dispute between a developer and the Dunedin City Council over the City's requirement for an esplanade reserve along the Silverstream in Mosgiel. The block of land was approximately eight hectares in area. The developer questioned whether the Silverstream flowing in that locality in an artificial channel was actually a river. The Tribunal held that it was a river of sufficient width to require an esplanade. The developers were prepared to accept the delay to subdividing the land that would occur with the appeal process. Faced with vesting the 20 metre esplanade reserve and also paying a cash reserve contribution, the developers postponed plans for their residential subdivision.

The Dunedin City transitional district plan stated that if land along the Silverstream (and other stated rivers) was subdivided into lots greater than 4 hectares, then the council (paying compensation) would acquire esplanade reserves. The developer has gained resource consent for a boundary-adjustment subdivision of the land with a lot over 4 hectares abutting the river.\textsuperscript{16} When it issued the subdivision consent, the Council considered that it was obliged to acquire the esplanade reserve and offer compensation. However, Valuation New Zealand which assesses the compensation has objected by asserting that the land will not remain as a small rural-use holding. However, Valuation New Zealand may have no right to become involved in this way. The matter will be settled by the Land Valuation Tribunal. The developers' consultant believes that compensation will be paid for the land.\textsuperscript{17} To date a plan has not been deposited.

Although an artificially created channel, this stretch of the Silverstream has characteristic of a typical stream through open country. See figure 7.6. There is a channel for the regular flow of the river, then above that a wider grassed channel that accommodates freshes in the river. Debris is deposited on this wider "bed" from flood flows. Considerably higher above the normal water level are the tops of the confining stop-banks of the river. They are at least a metre higher than the residential land they protect. To reduce the amount of land that would vest as esplanade reserve or river bed, the developers' surveyor could have defined a narrower, edge of the regular flow as the reserve/river-bed boundary. From an on-site inspection, this appears reasonable as it will allow boundary-fences to be in line with those of earlier development downstream.

Continuing pedestrian access along the river bank is the principal reason for the reserve and twenty metres from this water line provides ample space for this pathway. A similarly satisfactory result on the ground could have been achieved by measuring a reserve width of five metres from

\textsuperscript{16} D P 24179 Otago Registry contains the existing residential development immediately downstream from this site.
\textsuperscript{17} D Johnson, consultant planner/surveyor, pers. comm. Mar. 1997.
the edge of the highest bank. The stop-bank and the slopes of any new roading away from the stream will minimise overland run-off to the stream.

![Diagram of Silverstream and stop-bank]

Figure 7.6 The formed shape of the Silverstream and the alternative locations for the flow width.

**Steamer Wharf at Queenstown**

Public access along the Lake Wakatipu frontage in Queenstown caused controversy at the time the public were debating the *Conservation Amendment Bill*. The Railways Department had owned the "Earnslaw" steamer wharf that extended from the foreshore to over the lake. New Zealand Rail sold its interests and the new proprietors, Steamer Wharf Village Development, built new facilities with shops and restaurants on the strip of land between the road and the lake. The Queenstown Lakes District Council, with support from residents, had sought a twenty metre strip, but the Minister of Conservation decided in 1993 that a three-metre strip and a three-metre width of boardwalk easement would be adequate. This allows the public adequate access along the lake edge. Figure 7.7 shows the completed boardwalk and building which has provided ample access both to and along the lake-front. From my observations on several visits it has high pedestrian usage.

Further conditions include public rights of way through the building. PANZ and others challenged this decision saying there was no assurance of public access if the strip was not shown on plans.\(^\text{18} \) However, after some four years, the survey plan was eventually lodged showing a public

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\(^{18}\) See PANZ news sheet No. 6 August 1995 p 9-11.
This site involved surveyors who were consultants for the developer (private sector), surveyors of DOSLI (public sector) and the District's consultant surveyors.

Figure 7.7 The steamer wharf development and boardwalk at Queenstown. For the present use of the site provides adequate (improved) pedestrian access.

The Awanui River

The land owner had deferred changing from dairying to horticulture because council officials indicated that esplanade reserves/strips could be required as part of the resource consent. This part of the Awanui River also illustrated the uncertainty of river width, even when the river flowed in a well-defined regular-width channel. South of Kaitaia, the section of the Awanui River through Ian Walker's property (approx 6 km of river through the 36 titles) has occasionally flooded beyond its banks for short periods. The grants for the farm titles date back to the middle of last century. In the photograph (Figure 7.8) the high banks are about 25 metres apart - i.e. the length of the farm bridge.

19 Otago Daily Times, 19 Nov 1996, "Marginal strip shown on plan". Also SO 24425 shows the easements and the three metre marginal strip.

Figure 7.8 The substantial private farm bridge over the Awanui River flowing through private land.

The typical winter flow width which is to the edge of vegetation, can be about 15 metres wide. If development occurred, and if the district council's consent required the creation of an esplanade reserve, the surveyor might choose to measure from the edge of the non-aquatic vegetation. This suggests that about 5 metres less land might vest on each bank if the common fresh flow, rather than extraordinary flood flow width was accepted. This would still create a reserve of 15 metres of pasture, more than wide enough for any form of access. On rivers such as this, a reduced width of reserve could be sought but a similar effect can be achieved more expeditiously by defining a narrower river bed.

The increased flooding of this part of the river and its tributaries within the farm has occurred partly because of the removal of vegetation (forest cover) in the upper catchment. This results in a shorter time of concentration of storm water run-off. If a high tide impedes the flow of the river at this time, the river and its tributaries back up and flow much wider than normal. The site is several kilometres from the coast. Thus, property owners who occupy the river flats can have a greater area of land subject to esplanade reserves losses because of the actions of others well beyond the site. District councils' flood-effects mitigation policies may also adversely properties susceptible to flooding. It seems reasonable that the surveyor might define this stretch of river bank close to the normal flow. Ample access would be available and any important riparian habitats and a buffer zone would be within the reserve or strip.
Conclusion
These case studies illustrate how surveyors and developers have either challenged the prescriptive requirements of the law or provided appropriate site developments where the dimensions of the strip are not an issue. Catchment changes, run-off and storm flows can affect the flow widths of rivers and streams. Provided a narrow reserve allows adequate access or riparian environmental protection, then it could be accepted. Tenure reviews of land in Otago and the surveying of the hydro storage lakes for the electricity generating companies has required the formal creation and surveying of marginal strips around the lakes.

In private developments, esplanade reserves have at times been created in excess of the nominal width to provide improved community amenity. In other smaller developments, land owners and developers have used novel approaches to minimise the esplanade reserve, the simplest approach being to create lots over four hectares. At Queenstown a narrower marginal strip, boardwalk and easements provide adequate access.

Some land use changes have been deferred because the amount of esplanade reserve land sought by the local authority has been considered excessive or because of disagreements over compensation. Because of the changed nature of many waterways, their margins and the location of strips and reserves can be uncertain.
CHAPTER 8

THE FUTURE FOR WATER MARGIN ACCESS:

PROVISIONS OF DISTRICT PLANS

As the government moves more land from Crown to private ownership, the Resource Management Act, (RMA) the territorial local authorities, and the district plans and their rules become increasingly important in controlling the land's use. This is particularly so regarding the creation and control of new esplanade reserve and esplanade strips.

This chapter examines the background to reorganised local government, district plans and their rules relating to esplanade land. It reviews the provisions of district plans and illustrates the range of options that the local authorities consider for esplanade reserves. It reviews the different provisions of nine proposed District Plans for the creation of esplanade reserves and strips devised to meet the districts' particular circumstances. Prior to the RMA all local authorities had to comply with the strict requirements of Part XX Local Government Act 1974. These applied nationwide with few possibilities for local adaptations of the law to suit local water-area use, climate, topography or population.

Compared to Local Government Act, the direct influence of the Minister of Conservation has been diminished. The Minister can have an active role when the District Plan is being prepared and can make submissions, like the public, on any notified application to subdivide. Under previous law, the Minister had the final discretion to allow any reduction or waiver of esplanade conditions. This was often a contentious issue with protracted discussions. The developer for whom any delays were expensive was reliant on the council making the case for waivers or reductions and for coaxing a decision from the Minister.

District Plans and Their Rules

As part of the government reforms of the 1980s, local government was reorganised, in 1989, into fewer, larger districts and cities replacing many counties, boroughs and cities. Central government has now devolved more responsibilities, including planning and resource management issues to these better resourced, larger, multi-purpose local authorities. This included any decisions to waive or reduce esplanade reserves along particular water margins by way of district plan rules. Previously this had been a responsibility of the Minister of Conservation.

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Local Government Amendment Act 1988 No. 3, ss 15A-15E.
A massive land accumulation for the local authorities (or disincentive for development) has been averted by the Resource Management Act requiring that esplanade reserves now be created subject to rules in the district plan. The territorial authority, in its district plan can nominate specifically the waterways on which it wants esplanade reserves or strips. Even where the council has not nominated streams, it is possible for the standard 20 metre requirements to be waived or reduced in the resource consent to subdivide.\(^2\) This selection of streams for reserve might appear to limit public access but the district plan review process allows DOC or any citizen the right to make submissions, if they feel esplanade reserves are not going to be created where they are desirable. The local authority must pay compensation if it wants a reserve width of more than 20 metres.

The Resource Management Act set out a wider array of reason for esplanade reserves to be created, greatly increased from the "public purposes" or "access" in the Local Government Act 1974. Section 229 has five environment protection reasons, plus public access and public recreational use listed as reasons for creating esplanade reserves. Dealing specifically with esplanade reserves, the Reserves Act 1977 states:

\[\ldots\text{nothing in this paragraph shall authorise the doing of anything} \ldots\text{that would impede the right of the public freely to pass and repass over the reserve on foot, unless the administering body determines that access should be prohibited or restricted to preserve the stability of the land or the biological values of the reserve.}\] \(^3\)

The creation of esplanade reserves, for whatever purpose, until the passing of the Resource Management Amendment Act relied on the "accident of subdivision". A continuous chain strip could not be created if one land owner was not contemplating subdivision or if the lots created were to be larger than 4 hectares. Removing the 4 hectare limit did not work as it just discouraged rural subdivision. However, new forms of easement, esplanade strips and access strips, have been provided for and these can be created without land being taken from private titles.

Before the RMA changes, difficulties arose in applying the law in existing urban areas. Within these areas there are locations where indivisible residential lots exist, abutting water margins. Examples of these exist along parts of the urban rivers of Christchurch such as the Heathcote and Avon and in North Dunedin, along parts of the Waters of Leith. The Computing Services building of Otago University actually straddles the Leith. Allotments abutting the waterways had been created before esplanade reserve requirements were introduced for municipalities. This has meant that continuous esplanades could not be created as further subdivision was unlikely. However, if a lot could be subdivided, the local authority was obliged to "take" an esplanade reserve. It then had the maintenance responsibility, unless it applied successfully to the Minister.

\(^2\) Resource Management Amendment Act 1993, s 230 (5).

\(^3\) Reserves Amendment Act 1979, s 7.
of Lands (Minister of Conservation after 1987) for a waiver. Apparently waivers were not readily granted or indeed sought because of the associated delays. The local authority, not the developer, had to seek the waiver or reduction from the Minister.

The difficulties that had been presented by the mandatory requirements for esplanade reserves in municipalities can be illustrated by an example. A subdivisible lot of 1,012 m², rectangular shape, chain wide could be subdivided to two lots under many district schemes. However if the lot backed onto a stream it stood to lose 400 m² (20m x 20m) as a strip of esplanade reserve. Subdivision could not proceed because only 600m² would then be left for the houses. Therefore, neither subdivision nor any reserve would be feasible so the objectives of continuous reserves were thwarted. Even if a reserve was created it would likely be an isolated patch of unaccessible land, impossible for the council to maintain. If any stream was over 3 metres wide, a 40 metre wide swath might be taken if it flowed through a property on which subdivision was sought.

Land below mean high water springs, i.e. in the coastal marine area vests in the Crown on subdivision of the adjacent land. The beds of lakes and rivers must now vest in the local authority if the subdivision consent requires this. The territorial authority or the Crown must pay compensation if the bed or foreshore is from land divided into allotments larger than 4 hectares.

**District Plans Reviewed**

The plans chosen for this review were Rotorua District, Wellington City, Porirua City, Clutha District, Dunedin City, Waitakere City, Nelson City, Timaru District and Queenstown Lakes District. They were chosen for their availability, a reasonable geographic spread of the country, a range of countryside and land uses, differing populations and variety of types of water margin lands. These plans are in varying stages of acceptance. None are fully operative plans. However, it is unlikely that the philosophies of the plans with respect to water margin lands will be greatly altered by the public submission process.

Rotorua and Queenstown Lakes have significant lakes and tourism bases but no sea-coast, Nelson is a unitary authority (both regional and district council). While some districts were able to adapt much from their District Schemes, others had more difficult tasks of providing a plan for much larger authorities. Dunedin and Queenstown Lakes, for example have been formed from the amalgamation of several boroughs and counties. The order of analysis of the plans relates to the dates they were announced. However, there have been varying amounts of public consultation before the proposed plans were published.

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District and city councils in their district plans have not quantified the amount of existing or potential esplanade reserves, esplanade strips or other water margin land.

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<th>DISTRICT</th>
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<th>Area: hectares</th>
<th>Plan Date</th>
<th>Coast?</th>
<th>Min. Width</th>
<th>Accept Strips</th>
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</tr>
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<td>some</td>
<td>20 m</td>
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</tr>
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<td>846,714 ha</td>
<td>1/96</td>
<td>none</td>
<td>20 m</td>
<td>yes</td>
</tr>
</tbody>
</table>

Figure 8.1. Comparative data for the districts and cities considered.

**Rotorua District**

The Rotorua District covers an area of the central North Island with diverse land features, land uses and water ways. Many of its lakes and rivers, like those in Queenstown Lakes District, are of national significance for sightseeing, fishing and various forms of recreation such as waterskiing, swimming, canoeing. Many small streams are significant spawning places for trout. The waterways and their margins are very important to the District's economy.

Rotorua notified its plan in December 1993. It has not had the difficulties of combining various county and borough schemes that other districts have had to address with their plans. The proposed Rotorua plan of April 1996 deals clearly with the various water issues. Under "water bodies" 7, the plan addresses issues of lakes, river, streams and other wetlands.

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Figure 8.2 Map shows the location and relative sizes of the districts and cities considered in this chapter.
Resource consent aspects that the plan identifies as significant are the following:

- Recreational use.
- Water supply (for consumption).
- Landscape and scenic values.
- Energy generation
- Cultural importance (30% of the population of the district is Maori compared with the national average of 12-13%).
- Conservation values - the water bodies and their margins - importance as habitat for flora and fauna.

A problem identified in the district has been the encroachment onto esplanade reserves by adjacent property owners. These owners have established lawns and gardens to the water's edge, giving the reserves the appearance of private land. Also, owners have built boatsheds on the esplanades and by doing so, impeded public access. This plan suggests the use of indigenous vegetation on margins to trap and screen nutrients. The Council will embark on public awareness campaigns, notably with schools, to emphasise the importance of water quality.

The anticipated results the Rotorua District Council is seeking include providing appropriate access, protecting the various values of the water and its margins and minimising adverse effects and conflicts. Under Part Four: significant Resource Management Issues, the plan lists the following matters in subdivisions.

- Degradation of water quality,
- Loss of amenity values,
- Change of landscape character,
- Degradation or destruction of native vegetation and habitats,
- Soil loss and siltation.

The plan particularly notes the desire to maintain the natural character of wetlands, lakes and rivers and their margins and recognises that grazing stock can damage the margins. Also the plan points out that subdivision can lead to the fragmentation of what is left of habitats and threaten their viability. Damage can occur to the indigenous vegetation and fauna. Since many streams discharge to lakes rather than the ocean, the plan has rules intended to minimise siltation and nutrient enrichment of the lakes.

Unless otherwise provided for in Part 11, Rotorua requires the vesting of esplanade reserves or the creation of esplanade strips upon the subdivision of the lots or lease areas adjoining a lake or river. Part 11 provides the rules for esplanade reserves or esplanade strips. Rotorua has not listed waterbodies along which it will require esplanade reserves or esplanade strips. The council will assess each application and each stream using the criteria of Part X of the RMA for streams over

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8 Rotorua, p 16.15.
9 Rotorua uses the definitions of lake and river from s 2 RMA.
3 m wide, or on lakes over 8 hectares. For lots under 4 hectares, the preference is for reserves, not strips. In considering any application for lots less than 4 hectares, Rotorua will either:

- apply a 20 metre reserve, waive the requirement, vary the width required (paying compensation if this is over 20 m) or,
- negotiate the creation of an esplanade strip.

Rotorua notes that RMA s 108(9)(b) does not apply to Maori land subdivisions if the land remain within the same hapu. However, the Council may use covenants, kawatena or Maori reservations to protect water margins. Under s 345 Local Government Act, the council can deal with any closed road along a water boundary by creating an esplanade reserve, waiving any requirement, varying the amount of land to be reserve, or creating an esplanade strip. The plan notes requirements of s 237B RMAA-93 (creating access strips) may be appropriate to use in these situations. Negotiated strips in these situations would be a suitable application of the RMAA-93.

Rule 11.5.6 sets out a clear list of criteria for assessing whether a reserve or strip should be created and what width that strip should have:

- Respecting the purposes for esplanade reserves as set out in s 229 RMA.
- Determining the intended use or effect of the reserves or strip.
- The contour, topography and the nature of the water margin land.
- The existence and nature of other reserves, strips or marginal strips in the area.
- Any effect, positive or negative on adjoining owners or uses.
- If relevant, public access.
- If needed, compensation money available.
- The current policies of the Council regarding esplanade reserves or esplanade strips.
- Lake levels with respect to existing lot boundaries.
- Public safety and security near power generating plants and whether other access is available.
- Whether the Crown or regional council requires protective management of riparian lands.

Access strips are dealt with briefly by rule 11.5.8 which notes that at the time of subdivision, an assessment will be made whether an esplanade reserve or esplanade strip will be required. Details of the access strip are subject to the terms of agreements negotiated with the subdivider.

Where lots of a subdivision are over 4 hectares Rotorua may require a strip or reserve. An appropriate width will be negotiated and compensation will be paid. The Rotorua plan has not specifically attempted to indicate which streams it might require reserves or strips along.

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10 Rotorua, 11.5.1.
11 Rotorua, 11.5.3.
12 Rotorua, 11.5.2.
Figure 8.3 Rotorua District. From Infomap sheet 242B-2, 1:500,000, DOSLI, June 1995.
Wellington City

Wellington City's proposed District Plan of July 1994 refers to *esplanade lands*. These include esplanade reserves that vest in the city and esplanade strips that remain with the land owner. The Wellington City plan accepts the criteria and dimensions from the *RMA*-91 for esplanade reserves, i.e. 20 m width above MHWSprings and 20 m width along banks of streams over 3 m and lakes over 8 hectares. It states that the objective for esplanade lands is to maintain and enhance the quality of the coastline adjoining any subdivision. The public should be able to enjoy the coast and this is to be achieved by requiring that access is maintained.

The plan specifically requires developers to enhance the natural values of the coast by considering the ecological values and providing well-designed developments. Wellington hopes to achieve this by its District Plan rules, advocacy (promoting the benefits of esplanade lands), and by complying with the National Coastal Policy statement and the Regional Coastal Plan. Esplanade land is required on all the coast within the city, and along the Porirua and Kaiwharawhara Streams and their tributaries.

In assessing needs, the council follows the criteria of the *RMA*. It will consider conservation or ecological values of the adjoining site, public access to or along the water margin and whether the esplanade land is necessary to maintain and enhance other natural values of the site. If there is no need for the council to own the land to meet its objectives of providing access for recreational purposes, protecting conservation or ecological values, maintaining or protecting the values of adjacent land, or providing for future public access or to maintain or enhance other landscape values, then the council will consider the creation of esplanade strips. It points out:

> Access to waterways and the coast remain an important issue. Council aims to continue to provide access to water bodies and conserve their natural values.\(^{13}\)

A general objective in Wellington is to enhance the quality of the coast. Developers will be required to consider the ecology values and enhance these on site. Specific streams to be considered together with their tributaries include: Karori Stream, Makara Stream, Makara Estuary, Oteranga Stream where they are over 3 m wide and adjoin lots over 4 hectares.

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\(^{13}\) Wellington City, Proposed District Plan, 1994, 15.5.4.6.
Figure 8.4 Wellington and neighbouring Porirua City. From Heinemann New Zealand Atlas, 1987.
Porirua City

Porirua is a small area with a growing suburban population. Porirua identifies coastal issues as one of twelve "Significant Resource Management Issues" and remarks particularly on the city's extensive and diverse coastline. The general term Porirua uses is riparian strips. Favoured by environmental protection, the rural zone policy sets out:

The riparian strip etc. provisions... are designed to further enhance the protection of the streams, rivers and coastal environment and the adjacent rural environment where this is at risk.

The council's emphasis on conservation is illustrated by its policy: "To protect and enhance the spiritual, cultural, ecological and amenity values of rivers and the coast." Access is not mentioned. Rather, the plan explains that "...esplanade reserves, esplanade strips and protective covenants etc. ...[also] provide buffer areas to heritage sites from development."

Porirua appears unyielding on the requirement of 20 metre reserves. A 20 metre foreshore yard is required on any building lot abutting the coast, or along a stream over 3 metres wide. A resource consent is required to build in that riparian area. Establishing a form of greenbelt by requiring this yard could, perhaps, provide a useful and ecologically valuable corridor for fauna such as pukeko, lizards or eels. However, side fences may limit the full value of this corridor. Subdivision is not the only trigger relied on for protecting this land. Porirua council sees its role as acquiring reserves to protect and enhance the quality of the coast and rivers.

Porirua goes further than other councils, in that it will encourage esplanade reserves and strips to be created voluntarily at the owner's initiative, and without subdivision, development or payment of compensation. Access (improved, extended or enhanced) is not recorded as an anticipated environmental outcome.

In addressing matters Coastal (C10), Porirua does state that

The maintenance and enhancement of public access to and along the coastal marine area (CMA) is also a matter of national importance.

Facilitating access to and enhancing recreational qualities of the coast is ranked below ecosystems, water quality and aquatic habitats as reasons for reserves although this does not necessarily reduce its importance.

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15 Porirua, p 60.
16 Porirua, p 113.
17 Porirua, p 115.
18 Porirua, p 116.
Porirua may consider esplanade strips where a river frontage is changing (eroding or accreting) because a strip moves with the water body: "Maintenance considerations may also lead the Council to opt for a strip as responsibility for the strip rests primarily with the land owner."

Incentives for land owners "such as rates relief, or land purchase, a waiver of administrative charges on resource consents etc. . . ." are options Porirua is willing to consider to acquire continuous public access which is significantly impaired between existing riparian strips.\(^\text{19}\) Perhaps this approach would have considerable merit, rather than awaiting a subdivision that might not occur for decades. The plan notes that the option for the council to negotiate with land owners to acquire strips or reserves is an important factor.

In Part E, "Financial Contributions" imposed as the condition of a land use consent, there are requirements to provide esplanade reserves: to help protect conservation values, to enable public access to the water, to enable public recreational use of land which are compatible with conservation values. As for the other nine items under financial contributions, the plan states that council can require the contribution here to be " . . . in the form of cash, land, works, services or any combination thereof." It is not clear why this has been done as these options are not appropriate for riparian land that, under the RMA, requires protection. The land infrequently becomes available, and the public expect either access rights to it or that the land be held for environmental protection.

**Clutha District**

The Clutha District, with a declining population of around 18,000 is the smallest population considered in this review. There are major rivers through the district: Lower Clutha, Pomohaka, Tokomairiro, part of the Taieri catchment and the Lower Waipouri. In the Catlins area there are 8 main rivers. There are four major lakes: Mahingerangi, Waipouri, Waihola, and Tuakitoto.\(^\text{20}\)

Recreation is seen as an important and increasing use of the water resources. Access to the rivers and lakes is important for fishing, waterfowl shooting, boating and swimming. The Catlins area's water-features attract visitors from outside the district: for tramping and sightseeing.\(^\text{21}\)

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\(^{19}\) Porirua, p 122.


\(^{21}\) Clutha, p 31.
Figure 8.5 The large river catchment areas in the Clutha District. From Infomap sheet 242B-4.
Clutha District has its own term *esplanade margins* which encompass Crown marginal strips, esplanade reserves, river bank reserves or unformed legal roads adjoining rivers, streams and lakes or the coast. The plan lists some 120 waterbodies which have public access requirements. Although the Clutha plan provides maps and a schedule of these rivers, the council does not treat this as an exhaustive list of where strips or reserves would be required.

The plan points out that sports fisheries and game birds (mostly ducks) resources require quality freshwater habitats which are under pressure from competing uses such as farming and farm development. The coast of the Clutha district contains important habitats and is also well used by recreationalists. Many of those who use the recreational resources (to fish, shoot, boat or tramp) come from outside the Clutha district so there can be a conflict between providing recreational access for these people and allowing local residents to productively use their land.

The Clutha plan emphasises the need to maintain and enhance public access. However, development alongside waterbodies has potential to further reduce public access. The plan deals at some length with structures "... on any water surface of any water body, or within 20 metres of the shore or bank of various water bodies." These structures range from navigational aids to fences or bridges, to *maimai* (duckshooters' hides) and whitebait stands. A general requirement is that the structures do not impede public access or the movement of fish. The general tenor of the plan suggests that temporary structures that have minimal impact on the environment may be erected as discretionary activities. However, a requirement is that disturbance to the land has minimal effect on riparian activities. However, a requirement is that disturbance to the land has minimal effect on riparian activities. However, a requirement is that disturbance to the land has minimal effect on riparian activities. However, a requirement is that disturbance to the land has minimal effect on riparian activities. However, a requirement is that disturbance to the land has minimal effect on riparian activities. However, a requirement is that disturbance to the land has minimal effect on riparian activities. However, a requirement is that disturbance to the land has minimal effect on riparian activities. However, a requirement is that disturbance to the land has minimal effect on riparian activities. However, a requirement is that disturbance to the land has minimal effect on riparian activities. However, a requirement is that disturbance to the land has minimal effect on riparian activities. However, a requirement is that disturbance to the land has minimal effect on riparian activities. However, a requirement is that disturbance to the land has minimal effect on riparian activities.

The council intends to assess the effectiveness of its policies in part by analysing any complaints from resource users. The anticipated environmental results - for water - emphasise safe navigation, fishing and recreational activities, and water quality and habitats.

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22 River bank reserves was a term settled on by the Surveyor General for the Crown land strips, see chapter 3.
23 Clutha, p 33.
24 Clutha, p 304.
25 Clutha, p 42.
26 Clutha, pp 51-53.
27 Clutha, p 124.
28 Clutha, pp 130-31.
29 Clutha, p 134.
Under "subdivision" there is specific requirement that appropriate provision should be made for public access. The requirements reflect the rural nature of the district. For lots less than four hectares, a 10 metre wide esplanade strip is required. Where the lots are over four hectares, the Council may require a strip or a reserve on water margins identified on the planning maps or listed in the schedules. Clutha indicates a general preference for esplanade strips, but if there is significant vegetation or habitat, possible pollution, an important site, or where valued recreational hunting is available then a reserve may be required. The council is prepared to negotiate esplanade strip agreements and will also negotiate access strips where they will facilitate access. The plan quotes s 229 of the RMA as the purposes for strips and reserves.

Clutha's plan notes the need for the maintaining riparian vegetation to filter nutrients in surface run-off and also the need to protect banks from erosion. Minimising direct faecal inputs from stock and excluding stock from the waterways and riparian margins are also objectives.

Clutha District acknowledges that public access to its coastline is important. Development is seen as likely to restrict public access. Anticipated satisfactory outcomes from the policies include:

- protection of significant flora and fauna, the natural character, special sites;
- protection of areas from inappropriate subdivision
- the maintenance and enhancement of public access, but not necessarily by vehicles.

Dunedin City

The Dunedin City proposed Plan of July 1995 does not contain a great deal on esplanade strips and reserves. However, in the issues, policy and outcome statements in the plan, access is treated as highly as environmental protection. More prominence is given to protecting the "natural landscape character" of the coastal environment, wetlands, lakes and rivers and their margins than to protection of any delicate ecosystems, flora and fauna. The visual values of the dramatic coastlines are a dominant consideration. The anticipated environmental outcome expected from these policies is that the landscape character of the city's coastal environment and riparian areas is protected.

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30 Clutha, p 139.
31 Clutha, p 159.
32 Clutha, p 160.
33 Clutha, p 212.
34 Clutha, p 221.
36 Dunedin, p 10.28.
Figure 8.6. Dunedin City. From DOSLI Informap 242B-4.
Dunedin's proposed plan notes that the *RMA* makes the protection of water margins from inappropriate subdivision, a matter of national importance but it also notes the national importance, of maintaining and enhancing public access to and along the water margins. Dunedin's plan says the City aims to maintain and enhance public access, and protect intrinsic values of ecosystems along selected bodies of water. The council may require access strips to facilitate public access to esplanade reserves or esplanade strips. Section 13 says there are no natural lakes in the City but the Logan Burn reservoir and some domestic supply reservoirs might need to be considered under the Act. Although "there is an extensive range of rivers in the City," the plan nominates only the more significant waterways for providing esplanade reserves or esplanade strips.

Dunedin requires esplanade reserves on the coast, the Taieri River below the Outram bridge, the Waters of Leith, the Kaikourai stream and the Silverstream on the Taieri. For any subdivision on the Waikouaiti River and Estuary, Tomahawk lagoon, the lower Pleasant River and the Kaikorai lagoon, only esplanade strips will be required. The conditions that the plan sets out for reductions or waivers include the possibility that security of proposed industrial or commercial developments may be adversely affected by public access. Current council practice for the Kaikourai Stream is to require five metre strips on both banks.

For the purposes for esplanade reserves, the Dunedin plan refers to those set out in the *RMA* s 229, without further elaboration. Dunedin City may require access strip easements to be created if an esplanade reserve is otherwise landlocked. From the way the scheme is written, esplanade reserves and strips may be consider as financial contributions. No detail is provided. The requirements for esplanade reserve on lots over 4 hectares in area would only be "when the Council considers the land concerned has high conservation, recreation or public access value." Compared with the plan of the neighbouring Clutha district, the Dunedin plan provides less detail on the management of water areas, particularly the coastal environment.

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37 Dunedin, p 15.6.
38 Dunedin, p 13.1.
40 Dunedin, 15.14.
42 Dunedin City, p 15.13.
Waitakere City

Waitakere is one of the four Auckland Region cities. In an area about 11% of Dunedin it takes in a diverse range of urban and rural land that includes the Waitakere Ranges, coastline to the Tasman Sea, the Manukau Harbour and the Upper Waitemata Harbour. Also within the city there are six important water supply reservoirs on dammed streams, four lakes and a number of streams creeks and rivers. Figure 8.7 indicates the extent of the streams, particularly through the Ranges.

Figure 8.7 The vast number of small watercourses through the Ranges in Waitakere City can be seen on this map from the District Plan.
Waitakere promotes itself as "the eco-city" and its plan endeavours to convey this philosophy throughout.\textsuperscript{43} Its council has been mindful that the city contains outstanding landscape features (such as the Ranges and the West coast beaches like Piha and Bethells) and that access to these is an important consideration for the whole greater Auckland region. The area has a fairly high rainfall \textsuperscript{44}(1200-2000 mm per year) but has only short waterways compared with some districts like Timaru and Clutha.

Waitakere City contains a "green network" which is described as:

the combination of significant and outstanding natural and physical resources within the City which are grouped together to enable a comprehensive management approach. Areas [include] . . . natural coastal areas, riparian margins . . . \textsuperscript{45}

Other components of this network significant and outstanding vegetation, outstanding fauna habitat, outstanding natural features and linkages and restoration areas.

The integrity of the Green Network can be maintained or enhanced by preventing the destruction of indigenous vegetation and to adopt plant-out procedures which give the native plants opportunities to succeed. Public access which is likely to damage the riparian vegetation regeneration is in competition with many of the aims of the Green Network on water margins.\textsuperscript{46}

Waitakere's plan gives particular importance to the natural character of the coast, rivers, lakes, wetlands and their margins. It points out that:

the natural character of the margins of rivers, lakes and wetlands is those qualities and features created by any movement of any waterway, and the presence of vegetation that creates aquatic or riparian habitat, which serves as a buffer for the absorption of contaminants. . . \textsuperscript{47}

Describing the city's general thrust for enhanced riparian management, the plan gives some detail of the needs for providing appropriate vegetative cover to protect the waterways or as habitats in their own right. The Riparian Natural Areas " . . [vary] in width depending on the characteristics of the area - including the steepness of the stream banks." \textsuperscript{48} Waitakere sees public access as "the provision of routes, which the public can walk and/or ride bicycles or horses to get to streams,

\textsuperscript{43} Waitakere City, Proposed District Plan part 2 p 1.
\textsuperscript{44} Waitakere City, 1995, p 3.3.
\textsuperscript{45} Waitakere, glossary p 3.
\textsuperscript{46} Waitakere, 7.1.3 "Theme Three: The Green Network".
\textsuperscript{47} Waitakere, glossary p 4.
\textsuperscript{48} Waitakere, 7.2.10 "Riparian Management" p 24.
lakes, the coast, reserves or parks." It envisages this being achieved by various forms of reserve and by covenants such as esplanade strips, access strips, and walkways.  

The policy section of the Waitakere plan talks only of the general needs for access and the protection of the sensitive riparian environment; it does not specifically identify any criteria for particular coasts or streams if subdivision occurs. However, as the introduction to the plan's policy document notes "Achieving environmental sustainability is the central strategic goal of Waitakere City Council . . .".  

The Waitakere Ranges in particular provide significant indigenous wildlife habitats close to Auckland, the major population area of the country (sec. 3.5.2). Waitakere contains a diverse range of coastal and riparian features from sand dunes to mangroves to outstanding landscape forms of cliffs and native bush covered hills. The city also contains significant urban residential and industrial areas such as New Lynn and Henderson. Public access along the margins of waterbodies which abut low lying swampy land in industrial areas can provide security access problems as well as problems of public safety for children at play.  

In section 6.1 the plan refers to "Riparian Margin Natural Areas" where subdivision is possible but no new buildings can be erected within the margins. These prohibitions would be more for environmental protection than for the provision of unimpeded public access. No new subdivision is possible within protected and Coastal Natural Areas, but buildings on existing sites is permitted. In Managed Natural Areas, subdivision to lots of 4 hectares or greater is possible.

There is a general policy that subdivisions should be designed so that adequate public access is available. Policy 10.21 states that public access to and along waterways and the coast should be provided so that the potential of the adjacent sea, harbour, river or lake can be provided for; so long as that use or access is compatible with protection of conservation values. The policies are not specific as to locations or the amount of land that may be required. The plan uses phrases like "adequate provision" or "land may be required to be set aside". In the council's policy statements, the satisfactory protection of the environment appears to dominate any requirement for a particular width (the 20 m strip) of land to vest in the council. 

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49 Waitakere, 3.5.5, p 3 12, & glossary p 6.
50 Waitakere, Introduction, p1.
51 George Easton, FNZIS, consultant surveyor, pers. comm. October 1996.
52 Waitakere, 1995, 7.2.10.
Timaru District
Timaru’s plan, in considering the land resources and the natural environment, gives particular prominence to rivers, coast and the value of esplanade land. Timaru appears to place an equal importance on protection, conservation and enhancement of water/riparian land as it does on access. Ecosystem protection is prominent. In its objectives the Ti maru Plan talks of providing linkages between fragmented areas to "... ensure that a range of areas of indigenous vegetation and habitats is represented across the district ...". The plan talks of achieving "... greater protection of aquatic habitats and the natural character: of riparian and coastal margins." 53 An equally important objective is:

(3) Improve opportunities for public access to rivers or to the coast and associated natural areas or places of scenic or recreational value.

But this is qualified by explaining: "Council has a statutory responsibility to provide for public access to rivers and the coast." 54

The plan recognises that under s 35(5)(ja) RMA, (inserted by RMAA 1993), councils have a responsibility to maintain records of "... the location and area of all esplanade reserves, esplanade strips, and access strips in the district ...". Probably people concerned about public access will welcome Timaru’s adherence to the requirement for information on all water margin strips and reserves in the Timaru district (including those created under Conservation legislation) to be readily available to the public. Information on ambulatory marginal strips could be useful for those seeking access.

The detail of this Plan on conservation and ecological values compared with "access" provisions, has not made access subordinate. Simply there is more that can be written about environmental protection. Timaru proposes an education campaign to increase public awareness of important natural areas and about "...activities contributing to the degradation of river or coastal margins, the quality of the water resources, and the aquatic habitats in rivers, wetlands and coastal areas."55

Timaru will consider varying the size or width (reduction from 20 metres) of an esplanade strip or reserve, but requires a notified resource consent application to be made for this. 56 It supports esplanade strips instead of reserve land vesting in the council on appropriate water margins:

(b) In some cases esplanade strips will not give sufficient control over land to protect the values identified as being of importance. In those cases esplanade reserves will be used 57

The Plan recognises that there is a "...public expectation that the "Queen's chain" is present along all rivers and along the coast. However, it concedesthat this is true only for parts of the District." 58 Timaru is the only District in this review that uses the term "Queen's Chain".

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54 Timaru, p 18.
55 Timaru, pp 19-27.
56 Timaru, p 21.
57 Timaru, p 21.
58 Timaru, p 30.
Figure 8.8 Timaru District. From DOSLI Infomap 242B-4
Access that the council intends to have retained and enhanced is for "pedestrian access that is favoured over other forms of access." In rural zones protection standards, the plan notes at 5.6: "The closest part of any shelter belt, wood lot or forest shall be set back a minimum of 20 metres from a river." "River" (or stream) is as defined in the RMA.

In its general rules (Pt D Section 6) the Timaru Plan has considerable detail for esplanade reserves and strips and access strips. Within urban areas and lots under 4 hectares it requires a reserve of 20 metres. Outside the urban areas, it prefers a strip at least 3 m wide, but if there are valuable features that need protection, a wider reserve would be required. Recreational and access values and also conservation would be considered when assessing the width of reserves or strips.

Esplanade strips are preferred for lots over 4 hectares in area if a plan rule requires some form of access. However, for the protection or enhancement of conservation values, water quality or for areas subject to erosion then a reserve is required to vest. If the reserve or strip is required mainly for access, then 3 metres can be adequate. Requiring sufficient width to protect the values and/or to act as a buffer can be part of a resource consent. The plan acknowledges that the council is liable to pay compensation for esplanade reserve required from any lot over 4 hectares. With respect to waivers or width reductions the plan states:

An application to reduce or waive an esplanade reserve or strip shall be a discretionary activity which shall be publicly notified.

Timaru has a comprehensive, but not necessarily exhaustive, list of 54 waterways "that have been identified as having significant esplanade values." Forty-four of these have specific recreation or public access value. All the rivers and streams listed have natural or habitat values. The council may negotiate access strips (through private land to the water) with landowners. In addition to the listed waterways, Timaru accepts that there may be other streams having values that the council would like protected.

Generally the Timaru plan gives a clear if not innovative set of requirements and reasons for esplanade lands to be made available for the public. As esplanade strips are given some prominence, it would appear that access on foot would be a dominant reason for creating new public rights in esplanade land. Attention has been given to the needs for conservation and protection of water margins from unacceptable development.

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59 Timaru, p 30.
60 Timaru, p 139.
61 Timaru, p 20.
62 Timaru, p 268.
63 Timaru, p 268.
Nelson City considers itself fortunate because it is a unitary authority. That is, it is both the district and the regional council so it has planning responsibilities for both the area above Mean High Water Springs (MHWS) and the coastal marine area below MHWS. The city's proposed plan recognises that "riparian areas and the coast have important recreational, scenic and aesthetic qualities." Patterns of land and coastal use may, it accepts, compromise public access.

Nelson see the establishment of vegetated riparian buffer zones adjacent to waterways as important. Not only does the vegetation protect the conservation values by mitigating erosion, the vegetation can also intercept run-off of contaminants to the water. The Plan, in sec. 8.5(A), also notes the need for appropriate public access that does not conflict with conservation values. Nelson's plan would allow coastal structures on the esplanade reserves that do not impede public access.

Nelson intends to be pro-active in seeking ways to improve access to and along the coastline. The plan says to achieve this the city will:

* encourage land owners to permit public access,
* purchase land for roads, access strips or reserves,
* negotiate access strips and easements,
* encourage or facilitate the establishment of walkways,
* attach conditions to resource consents
* provide formed access through ecologically sensitive areas.

Despite these options, maintenance or improvement of public access is only one of fourteen beneficial environmental results anticipated. The plan notes that subdivision can be a useful tool for the protection of significant features.

In dealing with its rural zone, Nelson plan continues to state its concern for protecting vegetation. This can be associated with the riparian system, ecosystems and corridors which wildlife have as a habitat.

The riparian vegetation provides the following benefits that may cause conflict with easy pedestrian access:

* habitat and wildlife corridors,
* filters to reduce contamination of the water,
* influence stream habitats by shade or organic material input,

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66 Nelson, p 16.
67 Nelson, p 90.
68 Nelson, p 97-98.
69 Nelson, p 140.
provide a buffer zone for floods or inundation,
protect stream banks from erosion,
improve the general amenity of an area.  

Figure 8.9. Nelson City, a unitary authority. From Heinmemann New Zealand Atlas, 1987.

Queenstown Lakes District
This district contains a number of nationally significant lakes and rivers. Requirements of electricity generation and the recreational use of the water surfaces are important considerations for the council. However, when compared with other plans, this contains comparatively little on

Nelson, p 141.
esplanade reserves and strips. Most of what is stated concerns nature conservation and environmental protection.\textsuperscript{71}

Queenstown Lakes is different from many other authorities in that it contains a considerable amount of land held by the Crown. The Council will "encourage the Crown" to provide marginal strips or esplanade reserves of adequate width to protect the natural values of the landscape when Crown land is subdivided, freeholded or pastoral leases are renegotiated. This appears as a reversal of roles.

The tendency has been for the Department of Conservation (often "the Crown") to be encouraging councils to take and then maintain esplanade reserves. One of the key environment results, for recreation and open space is an "[i]ncrease in the number and location of esplanade reserves and strips and access strips held by the council." \textsuperscript{72} The council can in fact only hold the reserves, the strips are easements over private land, not Crown land. The plan notes, but does not quantify, that much of the marginal land of the lakes and rivers of the District are already held in public ownership as recreational reserves and marginal strips. However, where they do not exist, and the opportunity arises on subdivision for their creation, the council has a policy of taking reserves of ". . . adequate width to protect the natural character and nature conservation values . . ." around the lakes or along rivers when any small lots are developed.\textsuperscript{73}

The Queenstown Lakes plan lists the major rivers and lakes of the district, noting that along their margins the council would like to see indigenous ecosystems reinstated. No minor waterways are included in that list.\textsuperscript{74} Nor is there any selection of minor streams where reserves might be required. Access matters are not considered in the subdivision policies. In dealing with subdivision, under Part 15, walkways and other linkages are briefly mentioned. Allowing the public safe access from arterial roads to esplanade reserves and marginal strips is specifically noted. Presumably this access would be for fishing, tramping or boating.

There is nothing innovative in the requirements for esplanade reserves. The plan follows the RMA (s 229 - s 237D) very closely and accepts that Council must pay compensation if an esplanade reserve is required from lots over four hectares. A novel feature, different from the other plans reviewed, is that the Council may require a performance bond to ensure that any conditions for esplanade reserves or esplanade strips are adhered to by the developer.

\textsuperscript{71} Queenstown Lakes Proposed District Plan, '995, Pt. 4.

\textsuperscript{72} Queenstown Lakes, 4.10.4 (vii).

\textsuperscript{73} Queenstown Lakes, Pt. 4 policy 17(vii).

\textsuperscript{74} Queenstown Lakes, Pt. 4 policy 18.
Figure 8.10. The extensive area of the Queenstown Lakes District with nationally significant lakes and rivers. From DOSLI Informap 242B-4.

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Conclusion
The Resource Management Act now provides the framework for the local authorities within their district plans to select which water margins need reserves. These decisions are subject to public submissions, objection and appeal. The district plan is subject to periodic review so waivers need not be final. Also, with the application to subdivide, the resource consent can impose or waive the esplanade reserve requirement.

The plans examined here all indicate some effort by the councils to provide locally appropriate rules for water margin reserves. There is now a variety of new names for these lands: esplanade lands, riparian strips, esplanade margins, and riparian natural areas. All of the plans reviewed give significant emphasis to the protection of the environment and make access subordinate to this. Most plans see enjoyment of the environment (viewing the landscape, fishing, swimming in clean water) as primary reasons for requiring access.

The new plans place more emphasis on the environment than previous requirements when district schemes were first produced under the Town and Country Planning Act and the Local Government Act. Plans such as Nelson's note farming activities as damaging to the riparian environment and advocate the return of riparian areas to native flora cover. Two councils, Timaru and Waitakere, plan education efforts to ensure the local public are aware of how the riparian and coastal environment can be protected and enhanced. Some councils, such as Waitakere state that the access they are catering for is pedestrians, cyclists or horse-riders, not motor vehicles.

Councils that have money available indicate they are prepared to purchase riparian land to protect ecosystems, without awaiting the accident of subdivision. Other less affluent authorities, such as Porirua, are willing to negotiate protection of lands or to find generous benefactors who will donate reserves. Although the RMAA-93 has not demanded reserves where lots are larger than four hectares, the councils want to negotiate some form of strip.

Where continuous access, is an important consideration, councils indicate that they are prepared to negotiate esplanade strips along the water margins or access strips to them. These strips can be as narrow as three metres (Timaru) or ten metres (Clutha). Generally esplanade strips are acceptable on larger lots; reserves are required on smaller lots. This is a sensible solution. Even where reserve land or an easement is not acquired, some councils, e.g. Porirua and Waitakere, envisage imposing building line restrictions so that a greenbelt can be established along the waterway in private land. Nelson indicates it might provide tracks to minimise damage and require that suitable vegetation is planted. Timaru will not allow shelter belts or forest within 20 metres of a river.

From the district plans and comments of council staff and consultants, it is apparent that councils favourably consider esplanade strips where they can be appropriately used. The advantages of the strips are several: they remain in the title of the land owner so the council is not responsible for maintenance; they remain rateable land, they are easier and less costly to acquire; they do not require surveying because they move with the water margin; the council and the land-owner can negotiate terms; the land-owner is not cut off from water access. However, esplanade strips are not suitable for small urban land parcels, actively migrating streams and where several new land parcels will abut the waterbody.
This final section has three functions. First it summarises and links the eight preceding chapters. Next it suggests areas where future related research could be carried out. Then finally it draws conclusions about issues that were discussed.

The Summary
In reviewing the evolution of our laws regarding access to and along water margins this thesis began by considering trespass - illegal access. It then followed through an historical trail of custom, land laws, controversial Bills and how surveyors apply the law. It concluded with the examination of district plans and their rules that provide for future access along esplanade lands.

Chapter one looked at trespassing because if there was no offence in trespassing then there would be less need to make provision for water margin access strips. Trespass Acts, introduced for rural problems have mostly been applied in urban situations. Access to rivers for family recreation had been a concern when trespass laws were debated. Now, safety issues for visitors may be discouraging people from enjoying the countryside. However, there are no reported trespass convictions of people seeking recreational access probably because if they are actually noticed, a warning-off by police is adequate enforcement.

Chapter two explored how access customs in different cultures developed where roads were few and where there were social benefits from visitors who traded goods and exchanged skills. Maori had developed similar access customs to European cultures. Gathering and trading pounamu throughout the country was an important reason for extensive Maori access trails to be developed. Access was available but often with conditions and restrictions.

Chapter three traced the evolution of marginal strips, along former Crown land water margin; from the Instructions of Queen Victoria, through survey regulations and Land Acts to the Conservation Amendment Act 1996. It noted how the requirement to reserve strips has continually increased as narrower rivers had to be considered. The public have opposed law changes that would allow sale or closure of any strips. Innovative new laws to allow ambulatory strips were introduced.

Chapter four reviewed the legal requirement for creating esplanade reserves from the water margin land of private subdivisions. This law, although generally for residential development has been similar to that for Crown developments. New options for ambulatory esplanade strips and a access strip to provide improved access were described. These had been introduced by the Resource Management Act 1991 and improved by the Resource Management Amendment Act 1993.
Chapter five examined details of the Queen's Chain. It considered the huge amount of water margin land that might be available for access, what people understand the Queen's chain to be, and the fairly recent origins of that term. The chapter then reviewed the controversy that greeted the Conservation Law Reform Bill when it proposed selling or not creating some Crown marginal strips and creating unsurveyed ambulatory marginal strips to cut survey costs. The more publicly debated but less significant Conservation Amendment Bill, with its provisions for leasing, was also examined. The discussion concluded that legislation proposals to rationalise problems with marginal strips may have been more successful if they had not been presented alongside plans to privatise tracts of Crown land.

The roles that surveyors have played in defining water margin strips was reviewed in chapter six. Instructions from Chief Surveyors of several Land Districts were investigated. The distinctly opposed ideologies - whether surveyors were employed by the Crown or private developers - was examined. In the former case, marginal strips were withheld from transfer by the Crown; in the latter case, esplanade reserves were required to be transferred from the developer to public ownership. Practices of surveyors in the field and contributions by them to law changes were considered.

South Island hydro lake margins and their surveys were reviewed in chapter seven. Also considered were particular situations where surveyors, developers or owners proposed innovative solutions for esplanade reserves or marginal strips in Pauanui, Mosgiel, Arrowtown, Queenstown and Kaitaia.

Finally, looking to the future, chapter eight reviewed a selection of proposed district plans, which allow local government to decide where new esplanade reserves are required. The options of access and esplanade strips introduced by the RMAA-93 were described and also the councils' authority to select which water margins should have reserves or strips.

**Researching further**

Access issues can be in tension with production from adjoining land, and with preservation/conservation. Aspects of access have been covered here and this work has identified specific areas worthy of further investigation. There are eight distinct areas where further research could be beneficial:

1. The tension between conservation/preservation and access rights along water margins could be reviewed from the legal perspective of restricting public rights of entry to benefit the environment. Might private ownership and responsibilities under the Resource Management Act afford better preservation?
2. This thesis has focused on New Zealand. However, research of how water margin and 
countryside access is handled in other parts of the world could be of great value. The thesis briefly 
mentioned Scandinavian practice but other Commonwealth countries particularly may provide 
guidance. The idea of a New Zealand "right to roam", noted particularly by Sutton, needs 
thorough investigation. Work done for Scotland provides an excellent starting point.

3. Since all districts have had the freedom to create their own district plan rules, a review and 
analysis of the relative effectiveness of different approaches would be worthwhile once district 
plans have become operative. A fuller review could be contemplated.

4. The debates over the Conservation Bills suggested the potential for both restricted access 
and certainty of legal access. Investigation could be carried out, to find out if marginal strip 
managers are restricting any public rights.

5. Are there really unsatisfactory consequences from unsurveyed ambulatory strips when 
land affected by ambulatory strips is later subdivided? If necessary, appropriate laws should be 
devised so that property boundaries can be right-lined to provide certainty of titles to allow full 
use of the land.

6. There does need to be investigation of the effectiveness of narrow esplanade strips and 
access strips to provide access without land being removed from a title. The effectiveness of local 
authorities selecting only certain water margins could be reviewed.

7. The usefulness of modern technology such as Global Positioning Systems for rapid natural 
boundary location with appropriately low cost mapping standards to depict for the public the 
stream margins they have access rights along could be investigated. Has haste to prepare Crown 
land for sale created marginal strips which are not usable?

8. Investigating effective ways of educating the public of their rights to enjoy water margins 
which cause least environmental damage would also be desirable. Because people are unaware 
of access, areas have remained unspoilt. Better information for access would need to be balanced 
with improved education about protecting riparian areas and adjacent waterways. Rotorua and 
Timaru districts have noted public education as important in protecting the near water areas.

SOME CONCLUSIONS DRAWN

Now to conclude. Is the Queen's chain a myth? In various respects the answer is "Yes". A strip 
of land around all the coast and all the rivers was no required by Queen Victoria's Instructions. 
Even now some 30% of significant water margins lack legal strips and perhaps half of the strips
that do exist are roads not controlled by the Minister of Conservation. Many strips that have been created are eroded by the sea or rivers along whose banks they had been created. However, good public access is available in most areas - by tolerance and good neighbourliness. The Minister of Conservation is not alone in being able to close or lease parts of the Queen's chain. Local councils can lease or license the use of esplanade reserves and unused roads can also be closed and the land sold.

Law changes for watercourses were necessary by 1989 as erosion problems had shown the inadequacies of the existing laws. Trying to resolve an array of complex water issues alongside sales of Crown land was a poorly considered move by the government. The resulting protests and publicity were justified to protect and retain the use of lands that people had taken for granted. Separate administration for esplanade reserves, roads and various vintages of marginal strips will continue to confuse people about their rights. Ambulatory strips along relatively minor water courses on newly sold blocks accompanied by no legal access along parts of other significant rivers will provide more confusion. Law changes may have introduced more legal certainty about access rights, but the public will be troubled to find where this exists on the ground.

Problems can always exist for natural boundaries, either between two neighbours, or those among owners and public visitors who want recreation areas. For open country we might investigate trading rights to water margins for rights to roam, and creating more alternative walkways along logical routes. If this was done clearly for the sake of public access, and not accompanied by a suspicious agenda for privatisation of assets, as happened in 1989, then it might succeed. Tolerance, and respectful countryside behaviour, rather than ever more detailed legal definitions of rivers or lakes, might be more effective for ensuring that access to and along significant water margins land remains undiminished.
APPENDICES

Appendix 1  Time line of legislation dealing with Crown water margin land.

Appendix 2  Legislation cited
            Cases cited

Appendix 3  Full text of the relevant 1840 Royal Instructions from Queen Victoria.

A TIMELINE OF LEGISLATION DEALING WITH CROWN WATER MARGIN LAND,
1840 TO 1996

Royal Instructions 5 December 1840.
Land Claims Ordinance No. 2 1841.
Land Claims Ordinance No. 14 1842.
Public Reserves Act 1854
Block and Section Surveys, Otago Provincial Government 1862
Abolition of Provinces Act 1875.
Plans of Towns Regulations Act 1875
Land Act 1877
Public Reserves Act 1877
Public Reserves Act 1881
Land Act 1885
New Zealand Gazette 1886 (regulations)
Land Act 1892
Regulations for conducting the survey of land in New Zealand 1897
Land Act 1908.
Land Act 1924
Land Act 1948
Conservation Act 1986
Conservation Law Reform Act 1990
Conservation Amendment Act 1996
LEGISLATION CITED

Abolition of the Provinces Act 1875
Animals Act 1967
Clutha Development (Clyde Dam) Empowering Act 1982
Conservation Act 1987
Conservation Law Reform Act 1990
Conservation Amendment Act 1996
Counties Amendment Act 1961
 Crimes Act 1961
Fisheries Act 1908
Lake Wanaka Preservation Act 1973
Land Act 1877
Land Act 1886
Land Act 1892
Land Act 1948
Land Act 1948
Land Claims Ordinance No. 2 June 1841
Land Subdivision in Counties Act 1946
Local Government Act 1974
Local Government Amendment Act 1978
Local Government Amendment Act 1989
Manapouri-Te Anau Development Act 1963
Municipal Corporations Act 1954
Police Offences Act 1927
Public Works Act 1981
Public Reserves Act 1854
Queen Elizabeth II National Trust Act 1977
Reserves Act 1977
Reserves Amendment Act 1979
Resource Management Act 1991
Resource Management Amendment Act 1993
Royal Instructions 5 December 1840
State Owned Enterprises Act 1986
Treaty of Waitangi Act 1975-93
Walkways Act 1975
Wildlife Act 1953
APPENDIX 3: The ROYAL INSTRUCTIONS (5 Dec. 1940)

18

ACTS OF PARLIAMENT, &c.

...
INSTRUCTIONS OF 1840.

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"General as aforesaid shall be finally approved by you, with the advice of
our said Executive Council, the same shall be deposited among the Public
Records of the said Colony, and that an exact transcript thereof shall be
deposited in the Office of the Surveyor-General of our said Colony, and
that another transcript thereof shall be transmitted to us through one of
our Principal Secretaries of State.

40. And for the better guidance of the said Surveyor-General in the
execution of the duty so to be committed to him, you will, with the advice
of the said Executive Council, issue to him such instructions as may from
time to time become necessary.

41. And it is our further will and pleasure, and we do hereby specially
authorize and empower you in our name from time to time to issue under
the Public Seal of our said Colony, Letters Patent for erecting into
Counties, Hundreds, and Parishes, such Districts as may in manner aforesaid be selected for that purpose by the said Surveyor-General, in and by any reports so to be made by him and approved by you; and all such Letters Patent so to be issued by you in our name shall be enrolled among the Public Records of the said Colony, and shall be of record; and the issuing of any such Letters Patent shall by you be made known to all our loving subjects within our said Colony by Proclamations, to be by you from time to time published for that purpose in the most usual and public manner.

42. And we do further authorize and require you, in and by any such Letters Patent as aforesaid, in our name and on our behalf, to grant to our loving subjects resident within any such County, Hundred, or Parish, all such Franchises, Immunities, Rights, and Privileges whatever as, consistently with the circumstances, situation, laws, and usages of our Colony of New Zealand, may be properly granted to such loving subjects in that behalf; provided that such Franchises, Immunities, Rights, and Privileges shall, as far as the circumstances of the said Colony may admit, be such as are and of right may be claimed, held, enjoyed, and exercised by our subjects inhabiting and residing in any County, Hundred, or Parish in that part of our United Kingdom of Great Britain and Ireland called England, and not otherwise.

43. And it is our pleasure, and we do further direct you to require and authorize the said Surveyor-General further to report to you what particular lands it may be proper to reserve in each County, Hundred and Parish, so to be surveyed by him as aforesaid, for public roads and other internal communications, whether by land or water, or as the sites of Towns, Villages, Churches, School-Houses, or Parsonage-Houses, or as places for the interment of the dead, or as places for the future extension of any existing Towns or Villages, or as places fit to be set apart for the recreation and amusement of the inhabitants of any Town or Village, or for promoting the health of such inhabitants, or as the sites of Quays or landing-places which it may at any future time be expedient to erect, form, or establish on the sea coast or in the neighbourhood of navigable streams, or which it may be desirable to reserve for any other purpose of public convenience, utility, health, or enjoyment; and you are specially to require the said Surveyor-General to specify in his reports, to distinguish in the charts or maps to be subjoined to those reports, such tracts, pieces, or parcels of land in each County, Hundred, and Parish within our said Colony as may appear to him best adapted to answer and promote the several public purposes before mentioned; and it is our will and pleasure, and we do strictly enjoin and require you, that you do not on any account, or on any pretence whatsoever, grant, convey, or demise, to any person or persons any of the lands so specified as fit to be reserved as aforesaid, nor permit or suffer any such lands to be occupied by any private person for any private purposes.

44. And it is our will and pleasure that all the waste and uncleared lands within our said Colony, belonging to and vested in us, which shall
remain after making such reservations as before mentioned for the public service of our said Colony of New Zealand, shall hereafter be sold and disposed of at one uniform price per acre, which price it is our pleasure shall from time to time be fixed and determined by such instructions as we shall from time to time convey to you through one of our Principal Secretaries of State.

45. And we do further direct that the survey of lands in our said Colony shall be carried forward with all practicable expedition, and that the land shall be divided into lots, consisting of not more than one square mile each, which said lots may be further divided into such smaller lots, being equal parts of square miles, as may hereafter be directed by us through one of our Principal Secretaries of State: Provided nevertheless, and we do hereby require, that the amount of the expense to be incurred from year to year in effecting such surveys be included in the estimate of the public expenditure of the said Colony, to be annually laid before the legislature thereof, and that such expenses be a charge upon the land revenue of the current year, and be not in any year greater than one-fifth part of the estimated amount of such land revenue, and that such estimate be never exceeded in the actual expenditure for the service aforesaid during the year.

46. And we do direct that charts of all the lands surveyed as aforesaid shall be kept for public inspection in the office of our Surveyor-General or Deputy-Surveyor-General for the said Colony.

47. And we do further direct that there shall be kept at the office of our said Surveyor-General, Registers of all lands hereafter to be appropriated in the said Colony, and that Registers shall also be prepared at the same office, as far as may be practicable, of all lands which may have been appropriated within the said Colony.

48. And it is our pleasure that such Charts and Registers shall be kept in such form and manner as to exhibit to all persons applying for the same full and authentic information of all appropriations of land, and all surveyed lands not appropriated.

49. And we do direct, that any person within our said Colony of New Zealand, who shall pay to the Treasurer or Deputy-Treasurer of our said Colony any sum or sums of money for the purchase of lands situated in the said Colony, shall be entitled to receive from such Treasurer or Deputy-Treasurer a certificate of such payment; and on production of such certificate at the office of the Surveyor-General in the said Colony, every such person shall be entitled to have appropriated and granted to him or her such unappropriated land within the said Colony as may be selected by him or her, the number of acres to be granted to him or her corresponding with the amount of the payment so appearing to have been made by him or her divided by the said uniform price per acre.

50. And we do direct, that no person within our said Colony shall be entitled to purchase land therein except by payment made as aforesaid to the Treasurer or Deputy-Treasurer of our said Colony.

51. And we do further declare our pleasure to be, that any person within our United Kingdom, who shall pay to the agent for our said Colony of New Zealand, resident in London, any sum or sums of money, in such amount as may from time to time be fixed by us for that purpose, for the purchase of land situated in the said Colony, shall be entitled to receive from such agent a certificate of such payments; and on production of such certificate to our Commissioners of Colonial Land and Emigration in this our United Kingdom, every such person shall be entitled to receive from the said Commissioners a certificate that he or she hath become the purchaser of such a number of acres within the said Colony as may be selected by him or her for that purpose, the number of acres to be appropriated to every such purchaser corresponding with the amount of
INSTRUCTIONS OF 1840.

the payments so appearing to have been made by him or her, divided by
the said uniform price of land per acre.

42. And we do further declare our pleasure to be, that on the production
by any such purchasers as last aforesaid of any such certificate as last
aforesaid, from the said Commissioners of Colonial Land and Emigration,
at the office of our said Surveyor of Crown Lands in the said Colony
of New Zealand, the said purchaser shall be entitled to have appropriated
and granted to him or her such unappropriated lands as may be selected
by him or her under the same regulations as aforesaid.

43. Provided nevertheless, and it is our will and pleasure, that all such
purchases so to be made as aforesaid, whether by payments in our Colony
of New Zealand or in this our United Kingdom, shall be made in lots,
consisting of such number of acres as shall from time to time be fixed
for that purpose by us or under our authority.

44. And we do further direct that grants of all lands, so to be appro-
priated as aforesaid, shall with all practicable speed after the appropriation
thereof, be issued under the public seal of our said Colony to the pur-
chaser thereof, and that for ensuring method and punctuality in that
respect a sufficient number of such grants, with blanks for the names of
the purchasers, and for the description of the lands so to be purchased,
shall be kept at the office of the Surveyor-General of our said Colony, all
lands so to be granted as aforesaid being described in such grants with
exact references to the Charts and Registers as aforesaid.

45. And we do further declare our pleasure to be, that any persons by
whom such purchase of land as aforesaid shall have been made within this
our United Kingdom, shall be entitled either to the free conveyance to
the said Colony of any Emigrants who may be named by them to our
Commissioners of Colonial Land and Emigration for the purpose, provi-
ded such Emigrants shall fall within the rules to be approved and
established on our behalf by one of our Principal Secretaries of State,
and that the number of such Emigrants shall not exceed such proportion
of the amount paid for land, as may be fixed and determined on our
behalf by one of our Principal Secretaries of State, or else shall be en-
titled to the payment of a bounty on the introduction of such Emigrants
as aforesaid into our said Colony, according as the one course or the
other may be provided by any rules and regulations hereafter to be
established in that behalf by one of our Principal Secretaries of
State.

46. And we do further declare our pleasure to be that, anything herein-
before contained to the contrary notwithstanding, no land shall be sold in
any part of the said Colony of New Zealand, which the said Surveyor-
General may report to you as proper to be reserved for any of the several
public uses hereinbefore mentioned.

47. AND WHEREAS we have by our said recited charter authorized the
Governor of our said Colony for the time being, upon sufficient cause to
him appearing, to suspend from the exercise of his office within our said
Colony any person exercising the same under and by virtue of any Com-
misson or Warrant granted or to be granted by us, or in our name, or
under our authority: now we do charge and require you, that before pro-
ceeding to any such suspension, you do consult with the said Executi-
ve Council, and that you cause to be recorded in the minutes of the said
Council, whether they, or the majority of them, assent or do not assent
to the said suspension, and that you do signify by a statement in writing
to the person so to be suspended, the grounds of such your intended pro-
ceeding against him, and that you do call upon such person to commu-
nicate to you in writing a statement of the grounds upon which he may
be desirous to exculpate himself, and that you transmit both of the said
statements to us through one of our Principal Secretaries of State by the
earliest conveyance.
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