

WAIPARA RIVER WORKING PARTY

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- Access rights & privileges; Trespass; Vandalism and;
Liabilities

Summary

This Working Paper sets the scene for the next two working papers which will deal with issues associated with access. As such, this report is an informative paper only and does not make any recommendations. It seeks to inform the Working Party of the relevant mechanisms and legislation that are in place so that these can be considered when making management decisions on access issues.

Firstly, the paper provides an overview of the existing provisions for legal access along water margins and the different legal obligations and restrictions associated with the various reservations.

The paper then briefly touches on the issue of AMF rights and how this impacts on public access. The provisions of the Trespass Act 1980 and the Summary Offences Act 1981 are outlined with respect to trespassing on private property and vandalism.

Finally, the paper looks at other liability issues that may affect landowners should the public be given access over private land.

1 INTRODUCTION

- 1.1 This Working Paper sets the scene for the next two working papers which will deal with issues associated with access such as: walking access, shooting, fishing, dogs and vehicular access.
- 1.2 The public has a long held expectation that they have unrestricted access to and along water margins. For Māori, this expectation is based on customary access and use of coastal resources, confirmed by the Treaty of Waitangi. For other New Zealanders, this expectation is founded on a legal history of reservations along water margins for public use.
- 1.3 The 'Queen's Chain' is often used to describe land under various mechanisms and legislation that provide access along river margins. Most people understand the Queen's Chain to be a 20 metre strip along the edge of substantial rivers, lakes and the coastline, and owned by the Crown or local authority. It is assumed that the public has a right of access along this strip.
- 1.4 However, the legal reality is quite different. At no time has New Zealand law established that the public has full rights to access, or use of, land alongside all rivers, lakes and the coastline. Over time, a number of different statutes have established partial public ownership of land along water boundaries. However, it is often difficult for the public to ascertain exactly where there is public access and where there is private land with no right of access. This is particularly the case in the Waipara River where many properties have *ad medium filum aquae* rights to the middle line of the river.
- 1.5 The New Zealand Walking Access Commission has released the Draft New Zealand Outdoor Access Code ('the Code'). The Code was developed in response to a requirement under the Walking Access Act which came into force in 2008. The Act established the New Zealand Walking Access Commission, which now provides a central point for the co-ordination of all walking access in New Zealand.
- 1.6 The Code provides a useful guide to walking access issues in an informative and easy to read document. As such, the information provided in this Working Paper consists of excerpts from the Draft New Zealand Outdoor Access Code ('the Code') which is attached as Appendix 1.

2 ACCESS RIGHTS AND PRIVILEGES

- 2.1 Public access to land and waterways in New Zealand is extensive, but is often fragmented such as in the Waipara River. Legal access along rivers is provided for in many forms, such as unformed legal roads, marginal strips and esplanade reserves. These various reservations have different legal obligations and restrictions and are discussed further below.

Marginal strips

- 2.2 Marginal strips are strips of land adjoining rivers of more than three metres in width. They were formerly created under section 58 of the Lands Act 1948 on the sale or disposal of Crown Land. Since 1990 they have been created under Part 4A of the Conservation Act 1987, and are deemed to be created automatically on disposal of Crown land. They do not need to be surveyed, and are deemed to always adjoin the relevant water margin i.e. they move with any movement in the water margin. A parcel of land that is subject to a marginal strip will have the notation recorded under the 'interests' on the certificate of title.

Unformed legal roads

- 2.3 Most of the road network in New Zealand was created by reservation of land on the initial sale of land to settlers. The water margin reserves generally took the form of legal road. Not all the land set aside as road has been formed into recognisable surfaced roads and the water margin land reserves as road was, for the most part, never intended to be formed. These water margin reservations were created as roads, as this was the most convenient and secure legal form available at that time to ensure that this land was kept for public use.
- 2.4 Unformed legal roads or 'paper roads' as they are often referred to, are no different in law from formed roads. That is the public have the right to use them on foot, on horse, or in vehicles without hindrance from the adjacent landowner or anyone else. There is a right to assert unhindered passage at all times. This right extends to the ability to remove obstructions and to prosecute those who prevent access.
- 2.5 Public roads offer the highest degree of public access of all the reservations and the highest level of rights.

Esplanade strips and reserves

- 2.6 Section 6 of the Resource Management Act 1991 (RMA) makes provision for the creation of esplanade strips and reserves on land adjoining the river where subdivision has occurred. Esplanade reserves, esplanade strips and access strips, collectively referred to as esplanade areas, are statutory mechanisms to protect riparian and coastal margins. The protection of these margins helps to conserve environmental values and provides opportunities for public access and recreational use.
- 2.7 Esplanade reserves may be required when land is subdivided or alternatively they can be created voluntarily. They are classified as reserves under the Reserves Act 1977 and land ownership is transferred upon deposit of the subdivision plan to the territorial authority. The boundary of an esplanade reserve is measured from the bank of the river and the landward line is a fixed survey line. Accordingly, the landward boundary does not change as the water boundary accretes or erodes.
- 2.8 An esplanade strip is a form of easement over water margin land, created in favour of the territorial authority. They are usually created at the time of subdivision and are a width of 20 metres or less. The easement is registered on the certificate of title, but the land within the strip remains in the ownership of the land owner. Although identified on a survey plan, they do not need to be formally surveyed. The creation of a strip, and restrictions and requirements relating to its use and management, are noted on the title and bind every party having an interest in the land.
- 2.9 The form of the agreement and standard restriction to be imposed on an esplanade strip are defined in Schedule 10 of the RMA. Esplanade strips can include provisions to exclude access by the public during certain time or under certain conditions. Unlike esplanade reserves, the width of an esplanade strip remains unchanged within the same allotment. So if a river bank is eroded by 2 metres, the width of the esplanade strip then extends beyond its old boundary by 2 metres to offset the lost ground.
- 2.10 Under the RMA, esplanade reserves or strips are mandatory in the case of subdivision to lots of less than four hectares. No compensation is payable to the landowner, as the benefits accruing from the subdivision can be seen as compensation for the reserve or strip that is taken.

2.11 The Hurunui District Plan provides for the establishment of esplanade reserves or strips in respect of subdivision of four or more hectares along the Waipara River. However, the RMA requires that compensation must be paid to the landowner. The requirement for compensation greatly limits the likelihood of the creation of esplanade reserves, or strips on subdivision of lots of four hectares or more. Furthermore, the provision of a 20 metre wide esplanade strip along the margins of the Waipara River, is not practicable in many instances given the topography of the land adjoining the river.

Access strips

2.12 Access strips are created by an agreement between a territorial authority and a landowner, and are easements over land for a defined purpose and for specific users, rather than for general public access. They are similar to gazetted walkways in that they are surveyed, recorded on the certificate of title and do not move if the waterway moves, and ownership remains with the landowner.

Ad medium filum aquae (AMF) rights

2.13 Ad medium filum aquae (AMF) rights is a common law principle that owners of land that is bounded by a (non-tidal) river are presumed to own the bed of that river to the middle of the stream, unless there is evidence or a statutory provision to the contrary.

2.14 AMF rights are limited and do not include rights to interfere with the natural flow of a river to the injury of other riparian owners, nor to interfere with rights that have accrued to the public. The boundary of the property is liable to move with the river. The ownership rights are therefore not complete rights, and accordingly will not generally be recorded on the computer register.

2.15 There is no requirement to “claim” AMF rights through any official process. At common law, the default position is that the presumption will apply and the owners of riparian land on non-tidal and non-navigable) rivers own the land under the river to the centre line.

2.16 Whether riparian owners along the Waipara River have property rights to the middle of the river bed will depend upon several factors and specific assessment of each parcel of land. It is likely that many of the properties adjoining the Waipara River are subject to AMF rights and as such the riverbed is considered to be privately owned.

2.17 The Code notes that there is no right of access over private land. Owners of private land have an inherent right of exclusive occupation and enjoyment of that land. This right is enforceable by the provisions of the Trespass Act 1990 which is discussed further below.

2.18 However, it is noted that particular rights of access across private land can be provided for by:

- Easements or leases over private land forming part of walkways under the Walking Access Act;
- Other easements or rights of way providing for public access;
- Esplanade strips;
- Informal arrangements allowing access over private land, such as negotiated agreement for access to a fishing river or on a case by case basis.

3 TRESPASS

3.1 The Trespass Act 1980 provides for the rights of an occupier of land to deal with any person that unlawfully enters onto land. Disturbing domestic animals, setting traps,

shutting an open gate and opening a closed gate on private land are all offences under the Trespass Act 1980.

- 3.2 The process for dealing with trespassers under the Trespass Act includes giving a warning to a person who is trespassing. If a person then refuses to leave, they commit an offence against the Act. However, the offender has several defences, such as proving that it was necessary to remain for their own protection or to protect someone else. If the person has left the property then, to prevent future trespassing, a trespass notice should be served on the person. Once a person has been given a warning to stay off, they commit an offence if they enter the property within 2 years.
- 3.3 Legally, an occupier has the right to sue a trespasser for trespass to land. However, because of the costs involved this is often not a realistic option unless the trespasser has caused substantial damage and compensation is sought. Any person who commits an offence under this Act may be convicted and can be fined up to \$1,000 and/or 3 months imprisonment.

4 VANDALISM

- 4.1 Vandalism can be defined as the wilful, wanton and malicious destruction of the property of others.
- 4.2 Vandalism is a problem in the Waipara River with respect to both public and private property. Many landowners adjoining the river have experienced the destruction and removal of fences, gates and other structures in close proximity to the river. Public signage established along the river has also been targeted by vandals on a regular basis.
- 4.3 The wilful damage of property is an offence under Section 11 of the Summary Offences Act 1981 as follows:

Wilful damage

- (1) *Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000 who intentionally—*
(a) *Damages any property; or*
(b) *Sets on fire any tree or other vegetation.*
- (2) *For the purposes of subsection (1) of this section, a person does an act intentionally if he does it intentionally or recklessly, and without lawful justification or excuse or claim of right.*
- (3) *The fact that the person charged had an interest in the property at the material time shall not prevent his act constituting an offence against this section if he did it with intent to defraud or to cause loss to any other person.*
- (4) *For the purposes of subsection (3) of this section, where any property is subject to any mortgage or charge, each of the parties to the mortgage or charge shall be deemed to have an interest in the property.*
- 4.4 It is suggested that the Working Party have a zero tolerance policy with respect to vandalism. However, this is an issue that is often difficult to police and prosecute. It may be that the Working Party re-address this issue at a later date when considering signage matters for the river.

6 OTHER LIABILITIES

6.1 With respect to those areas where the river bed is in private ownership, landowners may have other liabilities with respect to the following legislation:

Accident compensation

6.2 No-fault accident compensation was introduced to New Zealand in 1972. Since then, there has been no right to sue for compensation for injury, except for punitive damages. The current law is provided by the Injury Prevention, Rehabilitation and Accident Compensation Act 2001 (ACC legislation). It is noted that landowners cannot be sued for compensation should someone be injured on their property, except in exceptional circumstances.

Health and Safety in Employment Act 1992

6.3 Under section 16 of the Health and Safety in Employment Act 1992, people who control workplaces, including farmers, have a duty to warn visitors who have permission to be on their properties of any work-related, out-of-the ordinary hazards that they know about that may cause serious harm.

6.4 Under section 16 of the Act, farmers have two types of duties:

- A duty to warn authorised visitors
- A full duty to employees, contractors and their employees, people in the vicinity of the place of work and people who are paying customers.

6.5 Landowners are not liable if anyone comes on to their land without their permission and suffers harm, whether from a work related hazard or for any other reason.

7 CONCLUSION

7.1 In considering management strategies for the Waipara River, particularly with respect to those issues that revolve around public access it would be in the public interest to try and reach an agreed way forward on this matter, bearing in mind the ownership rights of landowners.

7.2 Some members of the Working Party have expressed a desire to maintain some form of public access along the river. It would be ideal if through this process, there could be some agreement between landowners and other Working Party members, how and where this access might be provided.

7.3 Walking access and vehicular access will be further discussed in Working Papers 8 and 9 respectively.