## Chapter 6

# Public Access to Land

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*Part I*

# OUTLINE OF THE LAW RELATING TO ACCESS

## 1. Introduction

Public access to and over land in New Zealand is dependent upon its ownership and the rights that any occupiers, licensees or tenants hold. There is no clear distinction, by virtue of ownership, as to what is available for public use. Lawful possession or occupation of land carries with it trespass rights for the occupier. In the absence of public rights of way, public use of privately occupied land, whether publicly owned or not, is a privilege not a right, requiring the occupier's consent. So this chapter is only an introduction to a very broad subject area. Methods for protection and enhancement of public access rights are noted. Indeed, much can be achieved by private citizens identifying rights of public access and taking steps to protect or enhance them.

If you are researching an access issue you must establish who owns the land and whether any access rights are registered against the title of the property. Certificates of title are not required for unalienated Crown-owned lands. Copies of the title can be obtained from your local District Land Registry.

If the land is publicly owned it will be administered by a government department, state-owned enterprise or local authority (for example, the Department of Conservation or a district council). Land owned by state-owned enterprises is treated as private land. You should contact the administering body to determine existing public rights of access and, once you have researched the issue thoroughly, you can promote the improvement of access rights. Access to public land is discussed in detail on pages 131-136.

In New Zealand, unlike in some other countries, no common law right of public access exists over privately occupied land. Lawful possession or occupation of land carries with it trespass rights for the occupier. Public use of privately occupied land is a privilege, not a right, requiring the occupier's consent. On some properties, rights of passage may have been granted. But overall, there are markedly fewer rights of public access over private land than have long been enjoyed over publicly owned land. Part III of this chapter covers rights of access to private land.

## 2. Resource Management Act 1991

The maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers is a matter of national importance under the Resource Management Act (s.6(d)). All persons exercising functions and powers under the Act are required to recognise and provide for these matters and all policy statements and plans prepared under the Act must reflect them. Public participation in the preparation of policy statements and plans provides opportunities to protect and enhance public access

and recreation (ss.45, 58 (see app.6); s.62 (see app.7)). A key role for public involvement is in making submissions on district plans and rules concerning esplanade reserves (see pages 53-54). Existing access opportunities are also jeopardised if district councils fail to provide adequately for public access rights when approving subdivisions (ss.220(1)(a), (1)(b)(iv), (1)(f)).

## 3. Trespass Act 1980

Trespass on land is simply being on land without the permission of the occupier. However, trespass without a dog, weapon or vehicle is not a statutory offence, but it may become one if the lawful directions of the occupier are ignored.

Every person commits an offence who trespasses on private land and, after being warned to leave by the lawful occupier, neglects or refuses to do so. The warning can be given either orally or in writing by registered letter. Signs or public notices are insufficient warning. Every person commits an offence who wilfully trespasses again on the same place within two years after they have had a warning. The occupier can require any person found trespassing to give their correct name and home address. Failure to provide these constitutes a further offence. Every person commits an offence who wilfully or recklessly disturbs any domestic animal on private land, or does not leave gates as found (open, closed, fastened). Penalties under the Trespass Act are relatively severe (i.e. large fines or imprisonment), reflecting the fact that the offences are classed as criminal rather than civil.

## 4. Accessways

### 4.1 Public roads

Formed, partly formed and unformed ("paper") public roads provide the main and often only means of access past private lands and onto public lands. There are no distinctions in law, in terms of public rights of passage, between formed and unformed roads. Public roads consist of publicly owned strips of land generally one chain (20 metres) or less wide. They do not form part of adjoining land titles. Public roads provide a significant part of the "Queen's Chain" along much of the coastline, lake shores and river banks.

The existence of roads can usually be confirmed by viewing survey plans held by the Department of Survey and Land Information. District and regional plans, held at local authority offices, also show some public roads but give no indication of their origin. For further discussion you should read *Public Roads: A Guide to Rights of Access to the Countryside* (see page 319).

Rights of public use have evolved from common law. A road cannot be possessed by anyone to the exclusion of other members of the public. Everyone has the right to pass and repass along a road without hindrance. At common law a road is incapable of being possessed by anyone to the exclusion of the right of each and every member of the

public to assert their right to pass and repass without hindrance over every part of it (*Moore v MacMillan* [1977] 2 NZLR 81 (SC)). Remedies are available against those who create public nuisances on roads by, for example, erecting obstructions, such as fences or buildings, locking gates, or having gates without "Public Road" signs.

**Closure and stopping of roads**

Local roads are administered by local authorities while motorways and state-highways are administered by Transit New Zealand. These roading authorities are restricted in their powers to close or stop roads. Public notification and objection procedures apply to the stopping of roads by district councils (s.342 and 10th Schedule, Local Government Act 1974 (LGA)). There are no comparable rights of public objection to temporary closures by local authorities. The Minister of Land's prior consent must be obtained before any road in a rural area is stopped (s.342(1)(a) LGA 1974). Where a road that is being stopped is adjacent to a river, lake or seashore an esplanade reserve of not less than 20 metres width must be set aside subject to any rules in the relevant district plan (s.345(3) LGA). The Minister of Lands has the power to return unformed roads to Crown ownership (s.323 LGA). Councils may temporarily close roads to all traffic, including foot traffic, for reasons of repair, improved traffic flow and public disorder or, so long as they do not exceed 31 days per year in total, for shows, markets or sports events (s.342 and cl.11 10th Schedule, LGA 1974).

Motorways and state highways are subject to the Public Works Act 1981 and the Transit New Zealand Act 1989. Roads can be temporarily closed by the police (s.342A LGA 1974) and civil defence authorities (s.62 Civil Defence Act 1983) for reasons of public safety and in emergencies. Vehicles can be temporarily excluded under the Transport (Vehicular Traffic Road Closure) Regulations 1965.

### 4.2 Walkways

The New Zealand Walkways Act 1990 provides for the establishment of walking tracks over public and private land so that New Zealanders can have safe, unimpeded foot access to the countryside. Maps and brochures of walkways are available from the Department of Conservation, which administers the Act.

Subject to the provisions of the Act and regulations, and conditions of use on private land, every member of the public may, without charge, at any time pass or repass on foot over any walkway (s.9).

Under the Act walkways must be managed so that the rights of property owners are respected. Public access is for walking only, unless otherwise provided for (by way of lease or easement) (s.3). Walkways can be established by any government department, local authority, conservation board or other statutory authority (s.11). If you want to see a walkway developed, you should first approach the landowner concerned and the local conservation board. Walkways can only be established with the consent of the

landowner (s.8(1)). If the land is publicly owned you should lobby the managing agency.

Conditions for public entry and use of walkways and the setting of charges for the use of facilities may be established by regulation (s.20) and bylaws (s.21). It is an offence under the Act, to enter onto private land from a walkway when in possession of a firearm or dog or to light fires, discharge firearms, interfere with stock or markers or lay poison (ss.23, 24).

Walkways may be closed by the controlling authority for safety, emergencies, maintenance or development. They may also be closed at the request of the occupier of adjacent land. Notice of closure must be given at the walkway entry points and in a local newspaper (s.28).

### 4.3 Rights of way/easements

Although a piece of land may be privately owned, other people may have a right to travel across it. Such a right is known in law as a right of way or easement.

A right of way may allow anyone to travel across the land or it may be restricted to owners of nearby properties. It might allow passage by any means and at any time (unusual) or might be restricted, for instance, to pedestrian access during daylight hours. The best way of determining the legal position is to view the records of the local District Land Registry. At the Registry (or at the Department of Survey and Land Information) you can look at both the plan of the area (which will indicate the existence of right) and the document that originally established the right of way (which will describe the nature of the rights and on whom they are conferred). Some of the terminology used in these documents can be daunting but staff at the registries are generally helpful.

A landowner cannot legally obstruct a right of way to prevent its legal use. In the case of an obstruction being created by an owner, at common law users of the right of way may skirt around the obstruction if not easily removed even if this takes them outside the geographic limits of the right. There is no right to deviate if the right of way becomes impassable through some other cause other than the act of the owner (see Hinde, McMorland and Sim, 1986, *Introduction to Land Law*, para 6.024).

An owner of land that is subject to a right of way must observe the terms of the right. Where a right is granted to all members of the public for access to publicly owned land (for instance, access to an esplanade reserve through a right of way over private land) the "owner" of the right will be the public body administering the land, for instance the Minister of Conservation, Minister of Lands or the local authority. If the right is to be altered or revoked the Minister or authority represents the public interest in negotiations with the landowner. This process may involve public submissions and it is vital that people do indeed make submissions.

The issue of rights of access arises whenever public land is transferred to private ownership, for instance when land is transferred to a state-owned enterprise or simply sold to a private individual. You should make representations to the public body transferring the land to ensure that public access rights are created or retained. Be aware that the reservation of public right of access will usually reduce the value of the land to the purchaser and hence reduce the financial return to the Crown and, as a result, your representations may be resisted.

*Part II*

# PUBLIC LAND

## 1. National parks

The public has freedom of entry and access to national parks subject to the provisions of the National Parks Act 1980 and to the conditions and restrictions that are imposed for the preservation of the native plants and animals or for the welfare of the parks (s.4).

No one is allowed to enter or remain in any specially protected area of a national park except with a permit (s.13). An example of such an area is the takahe nesting area in the Murchison Mountains in Fiordland.

The granting of leases and licences for business, accommodation and farming purposes are permitted if they are in accordance with the park management plans (ss.49-51). See pages 134 for a discussion of charges for huts and tracks. Such leases and licences can exclude the public. Park management plans are reviewed at least every ten years and the public can participate.

## 2. Reserves

The Reserves Act 1977 provides a wide range of reserve classifications, each with different scope for public use. These classifications are likely to be simplified following a *Protected Areas Review* currently being conducted by the Department of Conservation. For discussion of the purposes and objectives of reserves see pages 218-221. Leases and licences may be granted over reserves (ss.54, 56, 58A, 60, 61, 72, 73, 74).

### Recreation reserves (ss.17, 53, 54)

These are intended primarily for recreation and sporting activities. The public has "freedom of entry and access" subject to sections 53 and 54, bylaws, and any conditions and restrictions for the protection of the reserve and control of the public. Some activities can be prohibited, and exclusive use rights can be granted (s.53). Section 54

allows the granting of leases for facilities, businesses or occupations. Public notification and objection procedures to the granting of leases are provided (ss.119 and 120). Historic and scenic reserves are subject to similar provisions to sections 53 and 54.

**Historic reserves (ss.18, 58)**

Admission fees and charges may be levied for the use of facilities or amenities.

**Scenic reserves (ss.19, 55, 56)**

These reserves allow "freedom of entry and access" subject to temporary closures for works or for conservation reasons. Parts of reserves can be leased out for camping grounds etc. and charges can be levied by the lessee.

**Nature reserves (ss.20, 57)**

No one may enter a nature reserve without a permit but the Minister of Conservation may declare that a permit is not required for certain reserves at certain times. In the case of off-shore island nature reserves (e.g. Kapiti, Little Barrier) no one is allowed to enter, or make contact by boat or by mooring, or contact foreshores abutting them without a permit. The principal concerns are the introduction of pests such as rats, stoats or ferrets and the disturbance of nesting grounds.

**Scientific reserves (ss.21, 59)**

The Minister may from time to time prohibit access to these reserves. Access by permit may be allowed to closed areas.

**Government purpose reserves (s.22, 60)**

From time to time, access may be prohibited from these reserves unless in possession of a permit. Examples of government purpose reserves include lighthouse reserves, quarry reserves and wildlife management reserves (also classified under the Wildlife Act, see page 210).

**Local purpose reserves (s.23, 61)**

Local purpose reserves may be established by any purpose to achieve the objectives of the Reserves Act. As long as public notice is given, the administering authority may restrict access only to permit holders. In the case of esplanade reserves nothing should be authorised that impedes the right of the public to walk in the reserve unless the administering body determines that access should be restricted to preserve the physical stability or biological values of the land.

## 3. Esplanade reserves

Esplanade reserves, often referred to as part of the *Queen's chain*, are reserved areas along the banks of some rivers and lakes and along the seashore. For further discussion of esplanade reserves see pages 175-176. The Resource Management Act defines the purpose of, and mechanisms for, creating esplanade reserves (ss.229-237). They are

derived from the subdivision of private lands where no provision for the Queen's chain has been made previously.

Esplanade reserves are established for the purposes of access, conservation and recreation. These include enabling public access to and along the sea, a river or a lake, and to enable public recreational use of adjacent waters where this is compatible with conservation values. Esplanade reserves can either be classified as local purpose reserves vested in a local authority, or a reserve vested in the Crown. Their administration is subject to the Reserves Act 1977 (s.23).

Where a road that is being stopped is adjacent to a river, lake or seashore an esplanade reserve of not less than 20 metres width must be set aside subject to the rules of the relevant district plan. The process is similar to that required in the case of subdivision under section 229 of the Resource Management Act (s.345 Local Government Act 1974).

## 4. Marginal strips

Marginal strips are strips of land very much like esplanade reserves except that their origins are in the disposal of Crown land rather than subdivision of private land. Like esplanade reserves, they are often referred to as the *Queen's chain*.

Marginal strips constitute the majority of the Queen's chain along much of New Zealand's sea coast, lake shores, and river banks. They are reserved (in Crown ownership) for conservation, access or recreational purposes (s.24C Conservation Act 1987) and are normally 20 metres wide, but this can be varied (s.24A).

They are established, in situations where provision of marginal strips has not already been made, when there is any disposition of Crown land to state-owned enterprises or private interests or when leases are issued, renewed or freeholded or Crown forestry licences are granted (s.24).

Marginal strips do not exist beside all areas of water. For instance, with much Maori land and many other private lands no provision has been made for marginal strips, esplanade reserves, or roads. The reasons are historical.

The Minister of Conservation may appoint adjoining landowners, or others, as managers of the strips. Managers may request the Minister to temporarily close the strip where any activity will significantly affect public safety or where fire hazard conditions exist. The manager is required to comply with any Ministerial requirements or restrictions to maintain access to and recreational use of the strip (s.24H). There is no provision for public objection to closures. The Minister may close any conservation area, including marginal strips (s.13). For further discussion on conservation areas see 6. below.

Land within 25 metres of the centre of railway lines is exempt from the provision of marginal strips as long as lines continue to be operated (s.24K). Nevertheless, every railway operator must allow the public to walk over land that would otherwise be reserved as a marginal strip, except within five metres of the centre of the rails, unless in the opinion of the operator, such access would be likely to endanger the safety of persons or property (s.24L).

## 5. Local authority land and reserves

Most regional and district councils hold extensive land and reserves and endowments for public purposes that are freehold in the name of the council and they also administer many public reserves. The extent to which local authority reserves may be used for public access and recreation is governed by the Reserves Act 1977 (as discussed under 2. above) and by local policies and bylaws. See page 220 for further discussion.

## 6. Conservation areas

Conservation areas is a generic term for all land protected under the Conservation Act 1987 (s.17A). This includes privately owned land protected by covenants and agreements. There are three categories of publicly owned conservation area — specially protected areas, marginal strips and stewardship land. See pages 207 and 221 for further discussion.

The Department of Conservation has a duty to (amongst other things) foster the use of natural and historic resources for recreation, and allow their use for tourism in so far as those uses are consistent with conservation values (s.6). However, the Minister of Conservation may close a conservation area to public entry if closure is provided for in a management strategy or plan, or for reasons of public safety or emergency. In the absence of such a plan they may be closed only if it is necessary for conservation of the natural or historic resource.

### Charges and levies

Charges can be levied for the use of facilities (e.g. huts and camp-sites) where these have been provided by the Department or by lessees/licensees (s.17). They may not be levied for the use of paths or tracks provided by the Director-General. However, restrictions can be placed upon the places where people may camp which can effectively mean that people must either pay for huts/camp-sites or not use the track. For example, on the Milford Track no one is allowed to "free camp" within 500 metres of the track. Since the walls of the valley are near vertical the practical effect is a total camping ban, unless hut fees are paid. Apart from these charges and charges for hunting permits, public access to, and the use of, conservation areas must be free of charge (s.17(9)).

In May 1992 the Minister of Conservation announced a new charging structure for facilities. Facilities (huts and camp-sites) are now classified as "premier", and catego-

ries 2, 3 and 4. Premier huts are 36 huts on nine high profile tracks with high usage and good quality facilities (Lake Waikaremoana, Tongariro Northern Circuit, Whanganui River, Abel Tasman, Heaphy, Routeburn, Kepler, Milford and North Arm Link Stewart Island). A dated accommodation pass system will operate with the intention to limit the utilisation of the tracks. Charges will range from $6 to $20 per night (adult rates). Charges of $8 and $4 respectively will be levied for the use of category 2 and 3 huts through nightly (undated) tickets or annual passes ($58). Bivouacs, shelters and basic huts in category 4 will continue to be free of charge.

Leases and licences, if in conformity with a management strategy or plan, can be issued for up to 60 years, but only after public notification and submissions (ss.14, 49). In the absence of a management plan or strategy the Minister may, after consultation with the local Conservation Board, grant a lease or licence for up to five years (s.14).

## 7. Crown lands

Most areas of unalienated or unoccupied Crown land (UCL) have either been allocated to the Department of Conservation or to state-owned enterprises. Residual areas are administered by the Office of Crown Lands which is in turn administered by the Department of Survey and Land Information. Other areas are sometimes "rediscovered". These areas are then evaluated for allocation to the appropriate government agency, depending on the land's qualities. Pending allocation, unallocated Crown land is administered under the Land Act 1948.

The Land Act does not provide for public access onto UCL. Despite the absence of a legal occupier on such lands, it is an offence to trespass on, or use UCL without authority (s.176 Land Act 1948). In practice, however, successive governments have permitted public access to and recreation on rural and backcountry UCL.

## 8. Crown forests

These are former state forests and Crown lands allocated under the Crown Forests Act 1989 to the Forestry Corporation (which manages areas such as the Kaiangaroa Forest and the Waipa sawmill), and former Crown forests for which cutting rights have been sold but the land retained by the Crown.

Crown forestry licences may be granted to purchasers of Crown forest assets (s.14 Crown Forests Act 1989). While the Crown retains ownership of land subject to licences, public foot access rights are provided under a public entry provision common to all licences. This acknowledges that the public shall at all times have the right to enter on foot and use the land for recreational purposes.

Many licences are issued subject to allowing public recreational uses in the forests and access to adjoining public lands and waters. Rights of use are determined by the

Ministers of State-Owned Enterprises and Finance in consultation with the Minister of Conservation and any other persons or organisations with an interest in access (s.24). Rights of way may allow foot, horse, bicycle, motorcycle or light motor vehicle access, subject to the licensees' discretion to close or restrict use during the hours of darkness, for safety, and protection of assets. Licensees are required to erect and maintain notices indicating access and conditions or closures. Permission for other kinds of access, for example with animals or firearms, is at the discretion of the licensee (s.24).

Rights of way can be varied or cancelled, with provision for public notification, objection and hearing where the easement is significantly affected (ss.26, 27) or, without provision for public notification, on return of land to Maori ownership (s.28). All easement certificates must be registered with the District Land Registrar (s.25). These are available for public inspection.

Crown forestry licences, related conservation covenants and public access easements are administered by the Office of Crown Lands (administered by the Department of Survey and Land Information). Inquiries about access provisions should be made to this office.

## 9. Crown leaseholds and licences

All leaseholds (e.g. pastoral leases) and most licences (e.g. pastoral occupation licences) carry occupier status in terms of the Trespass Act 1980. However, formal provision for public access may exist. This could be in the form of public roads, marginal strips or rights of way over the land. Official records, such as survey plans and certificates of title need to be inspected for each parcel of land to determine the existence of such public rights. Those records are available for inspection at District Land Registries and Department of Survey and Land Information.

The South Island's pastoral leases are currently administered by Landcorp (with Department of Conservation providing conservation and recreation advice) on behalf of the Commissioner of Crown Lands (Department of Survey and Land Information). Suggestions for improvements in public access should be given to the Department of Conservation and the Office of Crown Lands.

*Part III*

# PRIVATE LAND

## 1. Freehold

In the absence of accessways through or over freehold, Maori land, and leases and licences with occupier rights, the Trespass Act 1980 applies.

## 2. State-owned enterprises

Huge areas of government land have been allocated by Ministerial decision to state-owned enterprises (SOEs) under the State-Owned Enterprises Act 1986. Such land is treated in law as private land. The main land-holding SOEs are Landcorp, Forestry Corporation, Electricity Corporation of New Zealand, Coalcorp and their subsidiary companies. In many cases, allocations are subject to conservation covenants and/or the provision of public access. The precise terms of such provisions are being progressively finalised by negotiation between the SOEs and the Department of Conservation.

The Department of Survey and Land Information is responsible for establishing freehold title for the SOEs once all survey and covenanting requirements are finalised. In the meantime, by virtue of sale and purchase agreements with the Crown, the SOEs, or their tenants, are the legal occupiers. All allocations of Crown land to state-owned enterprises are subject to the provision of marginal strips (s.24(6) Conservation Act 1987).

Public roads, or rights of way over the land may exist. Leasehold titles should record these, as well as future SOE freehold titles. Inquiries about the existence of public access rights should be directed to the Department of Survey and Land Information and the SOE concerned. The Department of Conservation should be approached if access provisions are inadequate.

Public access must be settled before land is transferred from the Crown as it is much more difficult to establish access later. You should make your access needs known to the Office of Crown Lands and Department of Conservation before the passing of land to SOEs is finalised.

## 3. Covenants and agreements

Increasing areas of private land are subject to voluntary agreements or covenants for conservation of natural or historic resources. Some also provide for public access, often conditionally, for example the access may be closed during lambing. Agreements or covenants are usually registered against the title, in which case they are binding on future owners.

The Department of Conservation is responsible for protected private land agreements, as they are equivalent to private reserves (s.76 Reserves Act 1977) and the Department or a local authority for conservation covenants (s.77). The Department is also empowered to negotiate covenants and management agreements under the Conservation Act 1987 (s.37 and s.29, respectively).

The Queen Elizabeth II National Trust negotiates open space covenants with private landowners or lessees (s.22 Queen Elizabeth the Second National Trust Act 1977). Few open space covenants contain access agreements, this being the reason why local councils are often unwilling to grant rating relief. The Trust is also empowered to acquire land (s.21).

Heritage covenants can be negotiated with private landowners by the New Zealand Historic Places Trust (cl.5 Historic Places Bill 1992) and such covenants may include provision for access (cl.5(2)). Heritage covenants can be registered against the title of the land (cl.7). See page 240 for further discussion.

Inquiries should be directed to the appropriate body. For detailed discussion of the protection of private land see pages 208-214.