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Public access along the Queen's Chain and Public Roads

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Introduction

"Walking on the hills or cliffs within sight and sound of the sea is a special pleasure, comparable to traversing alpine valleys and passes. The New Zealander has endless scope for the latter but little for the former. In his underdeveloped and underpopulated country...he enjoys much less freedom than in more densely inhabited places." (Ron Locker 1973).

This paper reviews opportunities for public access to the New Zealand countryside via the "Queen's Chain' and public roads, and avenues for improvement of that access.

The 'Queen's Chain' concept of public access along the shores of waterways is well known throughout New Zealand. Many people would describe it as a priceless common heritage inseparable from being a New Zealander. The concept has gained prominence since recent Government 'reforms' to some of the controlling legislation.

As one component of the 'Queen's Chain', and as New Zealand's prime provision for overland access, I believe that the value of public roads, and unformed roads In particular, as a recreational resource has been greatly undervalued. Most recreational user emphasis has been placed on obvious recreational outlets such as parks, reserves, and Walkways. Greater utilisation of the public road network for recreation has the potential to greatly increase the public's access to the countryside in general.

The 'Queen's Chain'

Two views-

"...by natural law itself these things are the common property of all:
air
running water
the sea
and with it the shores of time sea."
(Justinian, 1400 years ago).

"Marginal strips were designed to deal with historical circumstances that are of no relevance today."
(Ackroyd 1989).

New Zealand is widely admired among the international community for the foresight in ensuring that public access to and along our waterways is provided for by what is colloquially known as the "Queen's Chain." Many countries are not so fortunate as New Zealand, resulting in great social inequality, and great expense on the part of governments attempting to improve public access through purchase of private land. The 'Queen's Chain' takes its name from the nominal one chain (20 mere) width of the reservations and Queen Victoria's instruction of 5th December 1840 to Governor Hobson, to

"reserve...for public roads and other internal communications, whether by land or water.. .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 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

1990 protest outside Parliament. Photo: Charlotte Bon.

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."

The essence of the Queen's Chain concept is public ownership and public use. Over the last few years these founding tenets have been subjected to Government-initiated attack, and the attacks continue.

For two very different accounts on the origins of the 'Queen's Chain' see Anderson (1977), and Ackroyd (1989).

Legislative Origins

Historically there have been a variety of mechanisms for the creation of 'Queen's Chain' strips along New Zealand's water margins.

Up until the recent past the main mechanism for the creation of 'Queen's Chains' was the Land Act 1948 for the creation of 'Section 58 strips'. The Land Act, its predecessors, and a string of survey regulations throughout colonial settlement provide the major source of the 'Queen's Chain' that we know today. Public roads also formed substantial lengths of the 'Queen's Chain'. 'Esplanade reserves' were created as a consequence of urban subdivisions of private land.

The basic notion behind the 'Queen's Chain' concept is that the Crown wishes to retain public ownership of lands along the margins of the seacoast and larger (navigable) rivers, streams and lakes. Whenever Crown lands have been disposed of the practice has been in most cases to exclude strips of land from sale or other disposition. These sips of Crown land have generally been *"not less than"* one chain wide from the high water mark, river bank or lake shore.

Although the purposes of these strips were not specified in the initial legislation, the purposes of public access and access for settlement have long been established by customary use, administrative practice, government statements, and by the origin of the concept in New Zealand (Cf Royal instructions 1840). One previous legislative clue as to the purpose of 'Section 58 strips' was in the proviso to section 58(1) Land Act 1948 that, prior to section 58's repeal in 1990, allowed the Minister of Conservation to approve the reduction of width of a strip *"if in his opinion the reduced width will be sufficient for reasonable access to the sea, lake, river or stream."* This proviso is clear evidence that the purpose of the section 58 strip reservation was the provision of reasonable access to water. The question is whose access? Since the Crown was the land owner selling or otherwise disposing of its land it was free to protect its rights of access by contract or by easement (right of way). The only satisfactory inference is that the access was being reserved for the public.

The Conservation Act 1987 saw the creation of 'marginal strips' *within* conservation areas but not elsewhere. An emphasis on both conservation and recreation purposes, with the power to close public access, caused no public concern over conditional access rights due to the limited extent of marginal strips. Within the following two years only one sip was known to have been established as result of conservation land disposal, and the balance, being undefined, was indistinguishable from wider protected areas to which the public had access. The perception then was that public access was available anyhow by virtue of public ownership under DOC ie. these new 'marginal strips' were of little practical consequence.

However the Conservation Law Reform Act 1990 saw the revocation of thousands of kilometres of 'Section 58 strips' right throughout the country and their designation as 'marginal strips' with a new management regime. This allowed public closures, and management and development by private interests. This legislation radically altered the historical basis for the Queen's Chain. The public sensed this as a fundamental attack on a long-cherished public right. The sense of loss was reflected by a protest banner outside parliament buildings reading *"Government Tarnishing the Queen's Chain"*. Substantial public outcry forced the then Government to back-off from the worst disposal and closure provisions of the CLR Bill, however the original essence of the Queen's Chain concept was fundamentally changed in terms of law, if not yet in practice.

The Resource Management Act 1991 places greater discretion with district and regional councils as to the future provision of esplanade reserves and allows disposal of roads in 'Queen's Chain' situations without the necessity of creating esplanade reserves in their place.

The Ministry of Transport currently has a review of road management legislation under way. This may see further shifting of responsibility from central to local government, with systematic removal of Ministerial and statutory constraints that protect public rights of usage. It is believed that changes canvassed within Government include the possibility of private ownership and management of 'public' roads, greater reliance on the courts than on government to constrain the actions of the road controlling authorities, mechanisms for the speedy disposal of unwanted roads driven by a requirement to achieve monetary returns on road 'assets', new provisions allowing restrictions on public use in addition to the existing powers of temporary closure and permanent 'stopping'.

It remains to be seen if the requirement for *"the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers"*, being a

matter of national importance under section 6 Resource Management Act 1991, will effectively override existing and future legislation directly administering each component of the 'Queen's Chain.'

The 'Queen's Chain' does not exist beside all waterbodies, in particular on Maori lands and many other private lands where for various historical reasons strips have not been provided for. Although discontinuous in their extent and not always providing practical access, the presence in the majority of riparian situations makes it an invaluable resource. Ultimately it is capable of providing complete public access to and along the margins of major water bodies. Human needs for recreational access to water are as great now as at any previous time in human history. As Graham Anderson observed in 1977-

"The fault lies not in the laws but in ourselves that we have crowded the coast, and the Queen's Chain concept is as appropriate right now to the new idealism of environmental management as it was to the nineteenth century (with) problems of land grabbing, coastal shipping by sail, river communication, and lack of roads, not to mention the idealism of at least some of those who had before them the squalor and injustices of industrial England as they attempted to frame legislation for a new very raw colony."

Current Mechanisms & Purposes—

Marginal Strips

Marginal strips now provide the majority of the 'Queen's Chain' along much of New Zealand's sea coast, lake shores, and river banks with beds an average of 3 meres or more wide. They are reserved from sale or other disposition for conservation purposes, and to enable public access to adjacent waterbodies and public recreational use of the strips and waterbodies (Section 24C Conservation Act 1989). The strips are normally 20 meres wide but can be more or less. Newly created strips cannot be wider than 20 meres (section 24).

Marginal strips are established when there is any disposition to state-owned enterprises or private interests of any lands of the Crown, or when leases are issued, renewed or freeholded, and Crown forestry licences granted, in situations where provision of marginal strips has not already been made (section 24). Other triggers for reservation are the sale, vesting, or transfer of railway lands.

Section 24K provides that land within 25 metres of the centre of railway lines are exempt from the provision of marginal strips as long as lines are not permanently removed and continue to be operated. Every railway operator must allow members of the public to have access on foot over land that, but for Section 24K(3), would otherwise be reserved as marginal strip, except for land within 5 meres 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 (Section 24L).

The Minister of Conservation may appoint adjoining landowners, or more suitable persons, as managers of the strips (section 24H). Managers may request the Minister to close temporarily the strip where any proposed operation 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, and to manage it in a manner that "*best serves*" the purposes and to enable public access. There is no provision for public objection to closures. The Minister may close any conservation area, including marginal strips. Under section 13 four reasons for closure are provided-

- on request of a manager;
- if in accordance with a management plan or strategy;
- for conservation of any natural or historic resource in the absence of a management strategy or plan;
- for public safety or emergency.

Esplanade Reserves

Since 1923 there have been successive requirements for the establishment of esplanade reserves in situations of small-scale urbanising subdivision of private land. Until now there have been no requirements for reserve establishment when subdivided farm land greater than 4 ha in area continues to be used for rural purposes. Requirements for esplanade reserves have been separate from reserves contributions (land or cash) to territorial authorities as conditions of approval for subdivision or development

The Resource Management Act 1991 redefines the purpose and mechanisms for creating esplanade reserves. Councils can now require the establishment of esplanade reserves in all situations when private lands are subdivided, subject to the provisions of district plans and rules. Strong public input into the formulation of such plans and rules will be essential to ensure that the 'Queen's Chain' continues to be established.

Esplanade reserves have both conservation and recreation purposes. These include enabling public access to and along the sea, a river, or a lake, and to enable public recreational use and of adjacent waters where compatible with conservation values (section 229 Resource Management Act 1991). They can be either local purpose reserves vested in a territorial authority, or a reserve vested in the Crown. They are subject to section 23 of the Reserves Act 1977.

The provision of esplanade reserves in place of 'stopped' roads around shorelines is subject to district rules after the Resource Management Act comes into force. As a transitional measure the Minister of Conservation's consent is required for waiving esplanade reserve establishment over the next three years (section 405).

The new esplanade reserves provisions of the Resource Management Act, if favourably applied by district councils, have the potential to rectify many of the missing links in the 'Queen's Chain.'

Public Roads

Public roads, both formed and unformed, provide a very significant part of the 'Queen's Chain'.

Rights of public use and the rules for their administration and closure are the same whether they are in backblocks 'Queen's Chain' situations or in downtown Auckland.

See 'Public Roads' below.

Limitations of the Queen's Chain for Public Access

• **Incomplete coverage.** This causes public uncertainty as to where access exists, and inadvertent trespass on private land.

• **Exemptions from establishment.** Recent legislation has created broad discretions for the authorities to avoid creating strips.

• **Width and practicality of use.** Broad discretions are now available to reduce the width of marginal strips and esplanade reserves. New marginal strips can now only be a maximum of 20 meres wide-this has already proved to be inadequate, hindering establishment.

• **Lack of movability.** Most strips do not shift with natural changes in shorelines and banks. This frequently results in loss of legal access to waterbodies. Movable marginal strips are currently only possible for *new* strips on lands of the Crown.

• **Conflict between conservation and recreation objectives.** Recent changes of emphasis in legislation make access and recreation secondary to conservation objectives.

• **Closure of access.** New provisions create broad discretions for officials to close marginal strips to public use.

• **Private managers and development.** Radically new provisions (yet to be used?) allow private development and occupation of marginal strips, and allow private managers the right to request closure to the public.

Future possibilities and needs

• **Completion of the 'Queen's Chain'** around all privately occupied coastline, and larger lakes and rivers. Now possible under the Resource Management Act, given the will-power.

• **A national policy statement** under the Resource Management Act setting the above as a national objective and directing central, regional and local government agencies to work towards this.

• **Restrict powers of closure** to emergency agencies (police, civil defence, fire services), for safety and fire reasons only.

• **Protect key conservation values** by exclusion from the 'Queen's Chain' as specially classified reserves, and re-establishing public access as the primary purpose of the 'Queen's Chain.'

• **Remove Ministerial discretion** to exempt Crown leases and licences from provision of marginal strips. This is critical to improvement of public access in the pastoral lease high country.

• **Establish public objection procedures** for exemptions and reductions in width.

• **Legislate common purposes** for marginal strips, esplanade reserves (and roads?), including a statutory right for the public to pass and repass on foot without hindrance.

• **Investigate movable strip mechanisms** for all marginal strips, esplanade reserves and roads.

• **Retain full public ownership and control.** Repeal provision for private managers and developers over marginal strips.

• **Allow marginal strips greater than 20 metres** as

necessary to create practical access.

Public Roads

Formed, partly formed, and unformed public roads provide the main and often only means of access through private lands and to public lands. They provide the mainstay of land access in New Zealand. 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.

Rights of public use derive from common law. At common law e road is incapable of being possessed by anyone to the exclusion of the right of each and every member of the public to assert his right to pass and repass without hindrance over every part of it. (Moore v MacMillan 1977). There are no distinctions in law between rights of use over formed and unformed roads.

There are legal remedies available against those that create public nuisances, such as fence or building obstructions, locked gates, or gates without 'Public Road' signs, or against negligent controlling authorities.

Technically the means of public passage is unlimited In reality it is limited by terrain and the controlling authorities' discretion as to development that might be necessary to allow vehicular traffic etc. Ill-defined road alignment, in relation to adjoining lands, can be a major constraint on the public exercising their rights of use.

Ownership and control of non government roads is vested in district councils. Government roads are vested in the Crown.

Administering authorities are constrained as to their powers to close or 'stop' roads or in creating public nuisances. Public notification and objection procedures apply to the stopping of roads (Section 342 and Tenth Schedule Local Government Act 1974). 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 stopping of any road in a rural area (Section 342).

Councils may temporarily close roads to all or specified forms of traffic, including foot traffic (Section 342 and Tenth Schedule. The Minister of Transport may disallow a council resolution for closure owing to climatic conditions causing road damage (Clause 15, Tenth Schedule).

Government purpose roads such as motorways and state highways are subject to the Public Works Act 1981 and the Transit New Zealand Act 1989. Similar provisions to the Local Government Act apply.

Roads can also be temporarily closed by the Police (Section 342A Local Government Act 1974) and Civil Defence authorities (Section 62 Civil Defence Act 1983) for reasons of public safety and in emergencies. Temporary exclusion of vehicles can be effected under The Transport (Vehicular Traffic Road Closure) Regulations 1965.

The Minister of Lands can resume unformed roads into Crown ownership (Section 323 Local Government Act 1974).

Limitations of roads for recreation

• **Dedication (status) and alignment can be uncertain**, discouraging public use.

• **Roads serve multiple purposes** (utilities, vehicular transport, communications, frontagers' legal access, stock droving, public access and recreation, some conservation.

• **Roads are available for 'upgrading' for the #highest' user at any time.** Development of a carriageway is usually antagonistic to non-motorised users and the environment.

• **Roads must be shared with all other users** (all have equal rights of use). eg vehicle use not necessarily compatible with other classes of user. However physical constraints, such as lack of formation, gradient, natural and unnatural obstructions, may exclude some classes of user.

• **Encroachment by adjoining land owners.** Widespread lack of policing by controlling authorities, and lack of knowledge by the public about rights of use, has resulted in extensive occupation and obstruction of unformed roads. This has resulted in popular depreciation as 'paper roads', incorrectly implying a lack of reality as to their existence and legal status.

Advantages of roads for recreation

• **They are present in all urban, rural, and backcountry settings.** There are tens of thousands of kilometres of roads right throughout New Zealand, a large proportion of which are unformed. These accessways greatly exceed all other forms of legal public access.

• **Public roads provide unhindered rights of passage**, being the strongest right of public use over any category of land in New Zealand.

•**They have potential as a major recreational resource,** due to their prevalence, and suitability for a variety of users. This compliments other accessways eg Walkways.

• **They are capable of immediate public use,** without the necessity of protracted negotiations with private land owners.

• **They are capable of use-initiatives** by individuals and groups irrespective of controlling authority disin-

terest. For instance direct actions by the Otago Peninsula Walkers to encourage public use, leading to Dunedin City Council policies and efforts to improve public access.

• **They can be used as 'bargaining chips'** by way of exchange etc to obtain more suitable access over private land

Future possibilities and needs

To deal with immediate threats to the integrity of public roads-

• **A matter of national importance;** include provision of public road access through the countryside and to public lands in section 6 Resource Management Act.

• **Provide statutory provisions for the public requesting Councils to remove obstructions, and obligation on Councils to have obstructions removed.** Could alternatively parallel section 357(2) Local Government Act 1974 (to protect roads for use by utilities) to require that Councils are not to authorise or suffer any encroachment which inhibits public passage.

• **Legislative review of the applicability of 'temporary prohibition of traffic' provisions** in Tenth Schedule Local Government Act, and oppose new restrictions.

• **Add power of public objection to temporary closures.**

• **Retain principle of full public ownership and control** over public roads.

• **Retain public objection and appeal procedures for all road stoppings.'**

• **Require controlling authorities to do survey definition and marking** on public petition?
• Insistence on compliance with legal requirement for **'Public Road' signs** on all gates.
See Mason 1991.

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