Queen's Chain

Marginal strips still under attack

In violation of its election pledges to drop marginal strip leasing proposals, Government was set to ram these through Parliament in May this year. In a national alert by facsimile, PANZ warned supporters that the Conservation Amendment Bill (No. 2) had been reported back from select committee with leasing provisions intact, and could become law very rapidly. Our actions, and newspaper advertisements by fish and game councils, resulted in a flood of protests to MPs' electorate offices and to Parliament. That was sufficient to deter Government *for the time being.*

Since May the Queen's Chain Working Party has been informally reconvened by Government with PANZ as a member. This has involved us in considerable time and effort assessing any new information that may have come before the select committee and reassessing the leasing proposals.

We have found no substantive evidence supporting leasing of marginal strips, despite repeated allegations to the contrary by officials that there are structures on marginal strips 'requiring leases'. We have repeatedly asked officials to furnish such evidence and supporting legal opinion.

In June PANZ submitted to the Minister of Conservation a paper which canvassed the issues, and itemised the large number of existing and proposed alternatives to leases. These could be used for dealing with existing and hypothetical 'occupations' of marginal strips.

There are irreconcilable differences between the advice the Minister is receiving from officials and PANZ on the issue. The Minister is now seeking further legal advice on various questions, however PANZ believes that there are policy and political decisions that need to be made first. The choice is to either uphold the fundamental purpose of marginal strips, which is to maintain them free of any form of disposition, or open the door to private interests holding trespass rights. This would give them an ability to exclude the public from these water margins.

Mr. Marshall has attempted to justify exclusion of the public via leases while at the same time claiming a contradictory position that "the reality [is] that public access is guaranteed". "The situation is that everybody agrees on occasion that exclusive use is needed near a waterway, the clearest example being a port company's transport operations on a wharf when the last thing you want to see is an unsuspecting member of the public, while in the pursuit of public access, crushed beneath the wheels of a straddle carrier" (*Cross Country*, Fielding, May, 1995). This is a spurious argument as the Minister's officials have not revealed *any* operative port facilities on marginal strips. The land occupied by port companies is usually vested in the company or a local authority, not the Department of Conservation. If port facilities *were to be established* on land that is already marginal strip, such industrial use would be contrary to the conservation, public recreation and access purposes of the strip.

PANZ believes that in the very rare situations that incompatible developments may be necessary, it would be preferable to dispose of the land for the duration of the use, but requiring the re-creation of a strip in the eventuality that the land is no longer required. PANZ believes that the Minister's "clearest example" is merely hypothetical. It is being used as a pretext to create broad discretions for exclusion of the public, for private and commercial reasons, over tens of thousands of kilometres of marginal strip throughout the country.

Despite the Minister's more recent protestations to the contrary, he made categorical undertakings to the electorate during the election campaign to drop the marginal strip leasing proposals from the Bill. PANZ intends holding Government to its promise.

Labour's postcard campaign

In response to the re-emerged leasing threat, Labour's conservation spokesman John Blincoe launched a postcard campaign calling on the Prime Minister to honour National's pledge to drop the marginal strip leasing proposals. PANZ supported this initiative. Demand for the cards was such that several reprints were required. 30,000 cards were distributed nationally. Mr. Blincoe said that "the huge public interest in the issue would add weight to the Government realising that it cannot persist with this (leasing)". Mr. Blincoe said there were links with other Government legislation which would allow "wholesale alienation" of public land. He was concerned about the Crown Pastoral Land Bill allowing high country pastoral lease land to go freehold to any buyer. "The Bill appears to serve the Federated Farmers' agenda of privatising the high country" (*Evening Post*, May 10, 1995).

Battle over fishing water access

Waikato Times, March 23, 1995

A major battle is looming over access to some of New Zealand's prime trout fishing water.

The sale of gamebird hunting and trout fishing rights has been prohibited since early this century, but growing tourist interest in some of the country's prime fishing rivers has resulted in some land owners closing access to the general public and selling access rights to fishing guides.

At the national conference of fish and game councils in Wellington [in March] Conservation Minister Denis Marshall said he was reluctant to interfere in what private land owners did with their own properties. He said there was a move away from agriculture as the only use land could be put to and other commercial ventures were encouraged.

In an often heated exchange, delegates said they were not seeking access rights across private property, but simply the rights of access to rivers — many of which did not have access strips or esplanade reserves [part of 'The Queen's Chain; also includes marginal strips and public roads—Ed.].

Long-serving Otago fish and game councillor Don Scott said he, and many others of his generation, had come to New Zealand to get away from Britain where hunting and fishing rights were the exclusive preserve of the privileged.

Early settlers had established an egalitarian society in New Zealand which was now under threat by commercial exploiters who had found a way around the law, he said.

Fish and Game Council director Bryce Johnson said all his council wanted was public access to public resources [fish and game are Crown-owned—Ed].

It was one of the fundamental principles of trout fishing and gamebird hunting tradition in New Zealand and licence holders were becoming increasingly frustrated at the apparent inability of the law to protect rights of free public access, he said.

Mr. Marshall said he wanted details of specific problems which he would then discuss with fish and game council executives—NZPA.

Queen's Chain continued...

Queenstown wharf development

No provision for public access

Denis Marshall's decision in 1992 to only require a three metre wide marginal strip in Queenstown Bay, when government surplus land was sold, created considerable controversy. Many locals, and the district council, wanted a full twenty metre wide strip when NZ Railways Corporation (NZRC) sold the area to a private developer. The Minister settled on a three metre strip along the lake shore plus another three metres of 'right of way' over a boardwalk. The Minister also required other public rights of way through the proposed development.

The controversy raged during the time of the general election debate over Government's plans to 'liberalise' provisions for waiving and reducing marginal strips, and to create new powers for leasing strips. PANZ believes that the steamer wharf case highlights a misapplication of the existing law. This occurred despite seemingly clear restrictions on the Minister's powers to reduce the width of marginal strips along lakes. The Minister has argued that similar, seemingly explicit, safeguards which are proposed in the Conservation Amendment Bill as a check against leasing, will safeguard the public interest. PANZ believes the Queenstown case provides a stark illustration of what can happen when commercial interests prevail.

It appears that the fate of the marginal strip was determined at a very early stage. In PANZ's view, commercial and political commitments were made for a minimum width strip before the requirements of the Conservation Act could be properly implemented. In our view this has defeated the intent of the Act which is to ensure that when any lands of the Crown are disposed of, a 'Queen's Chain' is created.

PANZ's investigations have revealed that the Minister has failed his most crucial test — to create a marginal strip at all. It appears that, despite the Minister's decision to create a minimum three metre wide strip, that none exists. Other requirements that public rights of way through the development be registered against the certificates of title have also not been implemented.

North & South described the steamer wharf development as a 'Blot on the Bay'. A redeeming feature, much touted by Denis Marshall, was that rights of public access would be provided where none existed previously. However, even the minimal provision for public access agreed to by Marshall has not been provided. This is four years after Government agreed to sell the land, with the development now complete.

In August 1991 agreement was made between NZRC and private developers for the sale of 3390 square metres of surplus Government property. This was beside the wharf used by the historic steam ship *TSS Earnslaw*. Marginal strips are required to be established when government land is disposed of. There was a condition of purchase by Steamer Wharf Village Development Ltd. that NZRC obtain the Minister of Conservation's consent to a reduction of the width from the normal twenty metres to three metres.

In July 1992 the Minister of Conservation agreed to a reduction in width to three metres. The DOC case made to the Minister states as background that "*as disposal of the Crown's interest is proposed a marginal strip of 20 metres must be provided in terms of section 24 Conservation Act. This requirement will severely restrict future options for the site and application has been made to reduce the width of the marginal strip to three metres on disposal"*. The 'background' also states that "existing building development (by NZRC) extends down to the water's edge and on to a jetty structure. These buildings and structures obstruct public access along the lake edge..." The 'explanation' and an 'illustrative map' describe or show "permanent buildings" within twenty metres of the shoreline, being a goods shed, bus depot, and ticket office. The DOC case implies that the existence of 'permanent' buildings provides a 'permanent' obstacle to public access, ignoring the clear intention of the developer to demolish these structures. This has now been done to make way for the new development.

The 'explanation' stresses that no legal right of public access existed at the time. In PANZ's view this, and the presence or otherwise of buildings, is not a relevant consideration. There is no right of access on *any* SOE lands, however *the presumption* of the Conservation Act is to create such when government land is disposed of. The presumption of the Act is also that a marginal strip twenty metres wide is required, unless the Minister is satisfied that the value of a full width strip for conservation, recreation and access will not be diminished by a narrower width. In the DOC case to the Minister there is no consideration of the requirements of conservation, recreation, and access "not being diminished" if a strip less than 20 metres were created. The department appears to rely on an appended NZRC discussion of this issue. The department's recommendation to the Minister implies that the creation of 'rights of way', other than marginal strip, satisfy the legal requirements that must be considered when reducing the width of strips. PANZ believes this to be erroneous.

There is little doubt that the development, with its attendant provisions for public access if these were implemented (see below), are an improvement for public access. However this, and the previous unattractive semi-industrial nature of the site, is not the main point at issue. If a full width marginal strip had been created as the public was entitled to, this could have been redeveloped as a green open space. This would have *best* fulfilled the conservation, recreation, and access purposes of the Conservation Act. There is immense pressure for public open space in Queenstown, particularly along the lake shore. It is certain that the value of a three metre wide strip for conservation, recreation, and access is less than what could have been provided by a twenty metre wide strip. In this respect we believe that the Minister has failed to properly fulfil his duties under the Act.

Queen's Chain continued...

On August 4, 1993 a memorandum of transfer was signed. The 'consideration' or purchase price for the land was $2.86 million. Transfer of freehold ownership from the Crown to the developers followed in September and was registered on certificates of title, *subject to Part IVA Conservation Act 1987.* Reference to Part IVA, being the marginal strip provisions, however does not necessarily mean than marginal strips were created on transfer of the land, or will be created in the future (see more below).

In a further DOC case to the Minister, dated September 2,1993, it was stated that the outcome of the Minister's decision "is vital to the interests of the (Ngai Tahu Maori) Trust Board". "The Chief Executive has advised that the Board supports the approval already given for a three metre strip, but if you are contemplating a variation of this approval it would jeopardise Ngai Tahu interests and in that event...the Board would wish to make urgent representations".

Mr. Marshall was reported at the time as saying that "the decision had very sensitive commercial implications for a number of parties involved" and that a full twenty metre strip was not practical at the site. "You'd have to demolish all the sheds, the ticket office, the bus sheds and all sorts of things. It is a wharf. It's not a piece of pristine beach we're looking at" (*Otago Daily Times,* September 13, 1993).

DOC's Regional Conservator, Jeff Connell, provides a possible reason why he recommended to the Minister only a three metre wide strip. He was reported as saying "...if NZRC had kept the site and perhaps redeveloped it, the minister could not have imposed any marginal strip at all. Now, the people of Queenstown have continuous access to the shores of Lake Wakatipu, and though it is not the full 20 metres, they should realise that DOC has waived the marginal strip altogether on seven other sites around the country" (*North & South,* November 1994).

Mr. Connell's implied threat of 'accept three metres or we may take nothing' has no foundation, as the Minister has no statutory ability to waive marginal strips along lake shores. While it is true that if NZRC held on to the site there would be no opportunity to create a marginal strip, on the basis of NZRC's earlier advice to the Minister this seems unlikely. In their application for reduction in the width of the marginal strip they stated that sale of the land, "as a non-core asset, is a key objective of the Corporation". They described the site as "one of, if not the, prime commercial site in Queenstown. It is at present undeveloped (except for being wholly tar sealed) and represents one of the few sites in Queenstown which is readily available for development".

Although a full width marginal strip would have reduced the area available for development by 40 to 50 per cent, the balance remaining would have remained a prime development opportunity. What would have changed would have been the scale of the development and the sale price received by NZRC, and by the Government as the corporation's owner.

When is a marginal strip not a marginal strip?

When it is not recorded.

In April this year PANZ asked the Minister of Conservation if a marginal strip exists at the Queenstown site, and if so where it is. Mr. Marshall replied that there is a three metre marginal strip at the Steamer Wharf (*Otago Daily Times,* April 14, 1995). PANZ believes that Mr. Marshall was wrong then, and that a marginal strip still does not exist.

While Mr. Marshall has provided the Department of Survey and Land Information (DOSLI) with authorisation to record a marginal strip, to date it has not proved possible for them to do so. DOSLI is charged under the Conservation Act with showing marginal strips on survey plans. DOSLI's difficulty appears to be that prior to development commencing the 'normal level of the bed of the lake' was not determined. It is from this point that the width of a strip is measured. The area intended for 'marginal strip' is now board-walked and appears wholly or partly to be over the original lake bed. However marginal strips can only be created along and *abutting the landward margin* of lakes. It appears that the original dry land that would have qualified for a marginal strip has been built on. If this is the case, short of demolishing new buildings, it is impossible, under the Conservation Act, to create a marginal strip in accordance with the minister's decision.

As noted earlier, a notation on a title or plan that a given piece of land is subject to Part IVA or section 24 of the Conservation Act does not necessarily establish that a marginal strip exists. All such notations do is record that the land may be subject to the creation of marginal strips at some future time. All SOE lands are required to have such notations recorded on their titles, even when they cannot possibly qualify for marginal strips. They can be land-locked without any waterbodies within them or along their boundaries, but still have a notation registered against the title. One of the four sections sold by NZRC at Queenstown is a case in point.

To establish that a marginal strip exists requires more than a notation on a title or on a survey plan. It requires *the showing of the marginal strips* (section 24D (3)) on the relevant survey plans. This is more than a mere technicality, as the holder of a freehold title, showing no marginal strips excluded from the area, owns all the land to the boundaries of that title. If no marginal strip is recorded on survey plans the public is not to know whether a strip exists, or where it is. In the absence of proof of the existence of a marginal strip there is no assurance that rights of public access exist. Therefore public use of the so-called 'marginal strip' at the Steamer Wharf may be, in law, at the pleasure of the owners and could be discontinued at any time.

In PANZ's view the precedence given, from the outset, to commercial considerations has subverted the application of the marginal strip provisions of the Conservation Act. This is contrary to the intent of the legislation, and to public and local government wishes, to see a proper marginal strip created.

As a 'fix-it' for the present case, PANZ would be opposed to any amendment of the Act that would allow a marginal strip over water or lake bed. This would undermine the concept of a 'Queen's Chain' providing dryland access *along the banks and shores* of waterways.

The Minister and officials have botched their Queenstown deal. It is up to them to fix it without further jeopardising the Queen's Chain.