

# **Critique of *Roading Law As It Applies To Unformed Roads* (Hayes, 2007a)**

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## **Abstract**

This critique corrects errors, omissions and misconceptions in *Roading Law As It Applies To Unformed Roads* (RLAIATUR) (Hayes, 2007a), a dissertation as advice to the New Zealand Government's Walking Access Consultation Panel. The Panel found Hayes's publication persuasive when recommending to Government how recreational access issues in the countryside might be resolved.

Using extensive case law, statutes and experience, this critique demonstrates that the advice offered by Hayes is flawed in key aspects and is therefore not a sound basis on which to redefine recreational access rights in New Zealand. Its central premise—that the law has never differentiated between formed and unformed public roads—is correct, but is contradicted by Hayes's proposition that 'occupation' of unformed roads by adjoining landholders (engaged principally in farming activities) should be accommodated in law and practice as a 'special need'. This constitutes a dangerous challenge to the defining essence of public roads in New Zealand—that no one has the right to occupy or assert private ownership, or veto rights of public passage. Hayes's advice to Government threatens to subordinate these fundamental principles to private interests, setting an ominous precedent for public-access rights nationwide.

Hayes strengthens his argument for enhanced private and local authority interests over unformed roads by seriously understating the nature of existing public rights of passage over such roads. This critique challenges Hayes's proposal and its selective reasoning by reiterating the subordinate relationship of private rights to long-standing public rights. The relationship is not 'undefined' in law as Hayes claims. It is well established, being supportive of the common law. Review of applicable statute and bylaw confirms that unformed roads are capable of effective management by local authorities without new legislation to overturn or prejudice existing public-access principles.

Similarly, this critique shows that Hayes's recommendations for 'access strips' (with much inferior public access) are based on a flawed assertion that there are insurmountable difficulties to creating new unformed roads when realignment of poorly sited unformed roads is justified. Though acknowledging that access strips would confer lesser rights of public passage, Hayes does not specify the degree to which they would be inferior. His proposal would assign to local authorities and adjoining landholders pre-eminent powers (without due public process) to control, restrict or extinguish public rights of access to the countryside.

This critique highlights the pressing need for Government to critically re-examine the basis of recommendations made by Hayes and the Access Panel for the recreational use of unformed roads.

## Preface

The author of this critique, Bruce Mason, has a long history of professional involvement in the outdoors:

- National Parks and Reserves Ranger 1975-82.
- Researcher for the former Public Lands Coalition 1982-92.
- Researcher for Public Access New Zealand 1993-2005.

Mason is currently researcher for Recreation Access New Zealand.

His publications on public access issues include:

- *Public Roads: A guide to rights of access to the countryside* (Mason, 1991)
- *Public Access to Land* (Mason, 1992a)
- *Proof of dedication as public road* (Mason, 1992b)
- *Public Roads. A Users' Guide* (Mason, 1992c, 2002)
- *Public Roads: Rights of way for all* (Mason, 1998)
- *Improving public access to the outdoors: A strategy for implementing Government's election policies* (Mason, 2003)

In *Public Roads*, Mason argued that unformed public roads should become the basis for a 'public way' system throughout New Zealand. In *Improving Access*, Mason discussed the nature of public roads, identified major shortcomings in access strips and Walkways, and presented a detailed strategy for use of unformed roads for recreation. This was provided to the Land Access Ministerial Reference Group, the Walking Access Consultation Panel, and all relevant Ministers of the Crown (see Appendix 1).

*Roading Law As It Applies To Unformed Roads* (RLAIATUR) is an edited publication. It is not clear to what extent all of its content or omissions can be attributed to its author. It is assumed for the purposes of this critique that, as author, Hayes is in agreement with its content. Hayes is a former Registrar-General of Land, and barrister and solicitor, with an interest in the outdoors.

A second report by Hayes—*Elements of the Law on Movable Water Boundaries* (2007b)—is not reviewed here.

Hayes's *Roading Law as it Applies To Unformed Roads* and the subsequent report of the Walking Access Consultation Panel (2007) are available from [www.walkingaccess.org.nz](http://www.walkingaccess.org.nz)

In this critique, all emphases in citations and elsewhere are those of the author alone. So too are the opinions expressed.

The author acknowledges the critical comment and review by friends and colleagues of drafts of this critique. This greatly improved the readability of this work.

Every effort has been made in this critique to cite and represent accurately the law, Hayes, and the Access Panel. Errors made are those of the author, who accepts the possibility of public correction and rebuke in the interests of participatory democracy. It is not author's intention to rely on the conventional practice of using disclaimers to avoid such criticism (see for example RLAIATUR, p. ii).

Further explanation of terminology used in this critique, of 'The Law of Highways', and of alternative access mechanisms, is available from the Recreation Access New Zealand web site [www.recreationaccess.org.nz](http://www.recreationaccess.org.nz)

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# 1 Introduction

## Public access review

In January 2003, the Minister for Rural Affairs, for New Zealand's Fifth Labour Government, appointed a Land Access Ministerial Reference Group to inquire into public access to waterways and along rivers, access across private land to public land, and onto private land for public recreation. Minister Jim Sutton promoted codified access irrespective of land ownership and tenure. This was at variance with the Government's 2002 election policies on public access.

In June 2003, Public Access New Zealand (PANZ) published a strategy for implementing the Government's access policies (Mason, 2003); (see Appendix 1). The position taken by the PANZ strategy was that implementation required little more than enhanced use of existing information, legal mechanisms, public roads and the Queen's Chain.

In August 2003, the Reference Group reported its findings. Sixteen months later, in December 2004, the Government abandoned its preference for extending 'Queen's Chain' reserves (signaled in 2002 election policies) and proposed 'footways' over private land along water margins instead.

In June 2005, after heated opposition from rural interests, and with an election approaching, Government abandoned proposed legislation for 'footways'. In August of that year, a Walking Access Consultation Panel was appointed with a mandate to consult further and to achieve greater consensus on a way forward.

In February 2007, the Access Panel reported to Government. Its emphasis shifted from investigating access options over private lands to existing access opportunities and options for enhancing these. Public roads—particularly *unformed* public roads—became a major focus of attention.

Officials from the Ministry of Agriculture and Forestry serviced both the Reference Group and Access Panel. Some of their advice was published. The Panel felt confident of the advice offered by Mr. Brian Hayes, barrister, solicitor and a former Registrar-General of Land. Recommendations in his report on unformed roads—*Roading Law as it Applies To Unformed Roads* (RLAIATUR) (Hayes, 2007a)—were given weight in the Panel's report to Government. RLAIATUR is the subject of this critique.

## ***Roading Law As It Applies To Unformed Roads***

Hayes's report is a major contribution to public understanding of roading law. It provides coverage of many aspects of applicable law which have not previously been published in New Zealand.

Hayes's central conclusion that the law has never differentiated between formed and unformed roads *should* put to rest persistent myths that somehow unformed roads are not 'real' roads with public rights of use. By documenting the principle that public roads are public highways in public ownership and control, Hayes confounds those adjoining landowners and occupiers who assume veto rights over public use.

His report places major emphasis on the historical origins of roading, ownership, and repair and maintenance, though this is only of interest and not central to the key issues of providing recreational access to the countryside. Given the public-access mandate of the Access Panel for whom it was written, Hayes's report is perplexingly deficient in its treatment of public rights to use roads.

In addition to its significant factual errors, the report arrives at key conclusions and recommendations that do not accurately reflect the law. Uncritical acceptance of these errors and misconceptions has potentially dire consequences for the public interest.

Reports received from advisors of Hayes's stature and authority tend to influence Government policy and action. It is vital therefore to correct errors and omissions in these sources and to challenge ill-founded advice developed from flawed reasoning. That is the function of this critique. Its purpose is to alert Government to these matters and their proper remedy before it determines its ultimate course of action.

## **Public roads are public highways**

Much of the content of Hayes's report, and this critique, is probably new to many readers. 'The Law of Highways', a body of law dating from the earliest recording of English law (Hayes, 2007a:v), is applicable with modification to public roads in New Zealand.

The public verses private discord over the use of public roads is not new. However issues of current contention have been settled by our common law-makers—the Courts—for centuries.

Lack of familiarity, both within government, local government in particular, and the public at large as to the existence and nature of public highways, is the single greatest contributor to misunderstanding and tension on the topic of public access to the New Zealand outdoors.

The consequences are serious if, deliberately or unwittingly, Governments and their advisers set about depriving the public of what they do not know they own. There are adverse implications for all public roads, formed as well as unformed, arising from Hayes's recommendations.

The right of unhindered passage over roads is 'owned', not by central government, or local government managers of roads, but by every citizen. Hayes makes this point as does this critique. It is this fundamental civil liberty that is in greatest danger of being lost during the current land access review, despite its purpose of enhancing public access to the outdoors. Loss of these liberties is avoidable, as this critique demonstrates. It is a question of choice—not one of legal necessity or for political expedience.

A motivating aspiration of this critique is that the growing body of publications on public roads (including this work) will engender mutually reciprocated respect for public and private rights over New Zealand's extensive unformed roading network. Public roads of all types are the foremost means of passage throughout New Zealand. They extend for more than 156,000 km. Thirty-six percent (56,900 km) of these are unformed (WACP, 2007:133)—the equivalent of four times the distance by road from Peking to Paris. The unformed network is an immense but largely overlooked strategic asset, much of which is amenable to recreational use.

In preparation for what follows, there hardly seems a more succinct statement on the subject of 'public highways':

"The term "highway" is applicable to all public ways over which every member of the public has a right to pass, and includes roads, streets, and rivers. A highway may be a way for foot-passengers only, for persons going on horse or on foot, or for vehicles as well as for passengers.

Under the common law the right of the public in regard to the user of highways is the right of passage, the right to pass and repass, together with what is generally recognised as a reasonable and usual mode of using a highway as such. Any other user of a highway may give rise to an action for trespass or for nuisance according to the circumstances.

...at common law a landowner whose land abuts on the highway is entitled to access to the highway from his land...(from any part of his frontage). If any obstruction is placed to prevent his obtaining access from his premises to the highway, this would be an interference with a right.

The rights of the public to pass along the highway are subject to this right of access; just as the right of access is subject to the rights of the public and must be exercised subject to the general rights of nuisance and the like imposed upon a person using the highway".

Adams (1954: 314)

## **What this critique covers**

This critique addresses key contentions of Hayes:

- An implied limited extent of public rights
- The proposition that farmers can 'occupy' roads
- The notion of an 'undefined relationship' between public and private interests which makes room to accommodate farmers' activities as a new class of 'special-needs' rights over public roads
- The claim that the law does not allow adequately for the management of farming and public uses of unformed roads

- The claim that there are formidable if not insurmountable difficulties to creating new unformed roads when realigning access (and the consequent view of the Access Panel that new unformed roads cannot be created)
- The proposal to substitute 'access strips' (with inferior rights of public passage) for new unformed roads when realignments are justified

The critique explains where each of these propositions overturns or is inconsistent with existing law and how each subordinates public rights and the public good to private interests. It follows a logical progression in subject matter and argument through each point of contention, ending with conclusions and recommendations.

The Walking Access Consultation Panel was apparently lacking prior familiarity with much of this subject matter when it described the Hayes report as a "robust examination of the law applying to unformed roads" ... "extremely thorough research" ... "a very comprehensive analysis" (WACP, 2007: 10,ii,30). PANZ described the Hayes's report as "brilliant" (PANZ, 2007).

This critique concludes that such faith is perilously ill-founded.

## 2 Terms of reference

At the outset, Hayes adopts terms of reference for RLAIATUR which defy the lack of legal distinction between public roads despite differing origins:

“To avoid doubt, the following classes of road, which do not meet the criterion of Crown ownership of the land at the time when first legalised as road are excluded from discussion”: roads created by the dedication of landowners; roads vested under the Local Government 1974, Resource Management Act, Public Works Act, and roads taken under the PWA” (Hayes, 2007a:v).

This exclusionary criterion is both perplexing and unjustified. Aside from historic public rights that carry forward to the present, the origins of our roading network are of little consequence to recreational users or providers. A road is a road. Whether it is created over Crown land or not is immaterial to a road’s suitability and availability for public recreational use. Once dedicated as a public highway, common rights of use exist with powers to control roads vested in local authorities.

Hayes does not declare who stipulated the criterion for exclusion. Its effect is to remove from consideration roads in rural areas created subsequent to initial subdivision and settlement by the Crown. What useful purpose this exclusion serves is not obvious since, as Hayes states, “the law on formed and unformed roads is in material respects the same law” (Hayes, 2007a:1).

Hayes’s approach implies an exclusion from consideration of most post-settlement unformed roads as well as the possibility of new roads, including foot-paths, originating from private land. The full range of creation, (that is, dedication by private owners and by all current means of statutory authority) is inexplicably “excluded from discussion”.

Approximately two-thirds of New Zealand is privately owned (lands of the Crown being the balance). It is through private lands that the greatest need exists for improved public access. The need to relocate some roads and create new public access through private land was a recurrent theme arising from public submissions to the Access Panel’s Consultation Document (WACP, 2006).

### Exclusion of formed roads

The Hayes report confines itself to unformed roads but walkers and other recreational users would benefit from a consistent approach over all public roads—formed and unformed.

There are two justifications for the broader perspective. First, the distinction between formed and unformed roads has no legal basis in New Zealand. Second, an arbitrary distinction between the two will be counter-productive to achieving Government’s stated recreation objectives: “Labour believes that these [recreation] opportunities must be accessible to all New Zealanders of all ages and lifestyles” (Labour Conservation [Outdoor Recreation] Policy, 2002).

Many of the access problems common to unformed roads affect formed roads too. In rural areas, for instance, remedies are required for pressing issues of unlawful obstruction and misleading, or absent sign posting. Problems of obstruction to walking access extend into urban areas. Remedies would benefit all users of public roads.

It is difficult to see how Government initiatives to improve public access can succeed if consideration of recreational access to public lands is confined to unformed roads whilst access remains obstructed over formed roads.

Many vegetated but previously formed roads would fall within modern perceptions of ‘unformed’, but would be ideal for recreational use. As well, in many places it is necessary and desirable to create formed paths for walking.

### 3 The right of 'free' passage

#### Absence of explanation

Hayes identifies four 'key elements' of current roading law, including 'the right of free passage' (Hayes, 2007a:3-9). Comment is confined to this last element. There are also other components to the public interest.

The phrase 'right of free passage' is Hayes's summation of the central component of public rights. A more accurate reflection of case law would be 'right of unhindered passage'.

Hayes provides no full or definitive explanation of public rights, despite copious law on the subject. There have been significant recent developments of public recreational rights by the Courts (*Re Ruapehu DC* (2002), *Re Upper Hutt CC* (2003)). These cases recognise for the first time recreation as a distinct and deserving form of public passage over roads. This is directly relevant law that was not addressed by Hayes.

Despite stating that his report "explains what the right of free passage is" (Hayes, 2007a:1), it does not.

Hayes identifies the origins of public rights—the historic entity of the "Queen's [King's] Highway"—and affirms (correctly) that these rights are held by the public and not by the local authorities in which the ownership of roads is vested. However, Hayes confines his observation about the 'right of free passage' to references to 'a' right or 'the' right, without explaining much about what that right entails.

For instance, he says:

"In New Zealand as in England ... the crucial distinction is that a public highway is a public right of way ... This refers to the right of all subjects to pass over it and not to any rights of ownership in the Crown" (Hayes, 2007a:4).

"A road is a public highway providing a right of free passage for the public. The courts have always provided rigorous protection for the right of passage" (Hayes, 2007a:6).

"Unless a road is positively documented as a bridle path or a footpath, a full right of passage with or without vehicles may be assumed" (Hayes, 2007a:7).

"When a road has once been made or has become a public road, the right of the public to use it as a public road continues forever unless it has been legally stopped by process of law, or "once a highway, always a highway" (Hayes, 2007a:9).

#### Case-law definitions of public rights of passage

Public rights over roads are nowhere to be found in New Zealand statute. This is not because they do not exist. They are derived from case or common law progressively developed and modified over time. New Zealand is a common-law country, with a body of legislation, which either extinguishes, modifies or supports the common law. In the case of public roads, our statutes are largely silent about public rights but are, with a notable exception (see 13), supportive of the common law.

The process of judicial development of the common law continues to this day, delivering copious judgments relevant to 'the public right of passage'. In a chapter headed *Leading decisions in roading law*' (Hayes, 2007a:22), there is no case law cited concerning the public right of passage.

In a summary entitled *'Summary: preserving the right of passage'*, Hayes states:

"The essence of a public road, whether formed or unformed, is that it offers a right of passage to all members of the public who want to use it. The territorial local authority in which a road is vested holds title to the road in trust for the public and is obliged to see that the right of passage is preserved—not for the council or its ratepayers, but for the public" (Hayes, 2007a:52).

This is a warranted observation but it does little to further define the nature of the public right.

Private rights as well

Public rights of passage are not the only rights applying to public roads. There are also private rights (frontagers' rights of access) attached to the property abutting roads, as distinct from the right to use the highway as one of the public. These private rights are most comprehensively expressed in *Fuller v. MacLeod*:

The Court observed that:

- (i) a frontager has the right of egress and ingress at all points on his street boundary
- (ii) the right of access encompasses access of pedestrians to the footpath and of vehicles to the carriageway
- (iii) the rights of the frontager arise from his ownership of land abutting the street and are not dependent on any prior dedication of the land comprised in the street or the ownership of the subsoil
- (iv) the rights of the frontager are not absolute and involve an accommodation of his private rights with the rights of passage of the public...This is a right that must be reasonably exercised so as to not interfere with the reasonable exercise by the public of their rights of way...the rights of the public are subject to the reasonable exercise by the adjacent owner of his private rights."

*Fuller v. MacLeod* (1981) NZLR 390 CA, at 393, citing *Pratt and McKenzie's Law of Highways* and *Halsbury's Laws of England*

Understanding both sets of rights, public passage and private access, is necessary in any consideration of user rights over public roads. Hayes omits any discussion of the nature of private rights or their relationship to public rights. Given the above citation, particularly para (iv) which clarifies the public-private relationship, it is disappointing that Hayes adopted this view of *Fuller*:

"The common law rights of frontagers as expressed in *Fuller* do not directly provide assistance in clarifying the rights of the public on unformed roads and the case is not therefore included in the substantive discussion in "Roading Law as it Applies to Unformed Roads." " (Hayes, 2007c).

The rights expressed in *Fuller v. MacLeod* are long-standing. At a working level that relationship is defined in other Court determinations, and in legislation concerning farming-related activities (see 9). There is no 'undefined relationship' as Hayes asserts:

"The principal deficiency in the law for managing unformed roads relates to the undefined relationship between the occupiers of such roads and the recreational users" (Hayes, 2007a:54).

## 4 Public rights from case law

Compilation of all that Hayes has to say on “the public right of passage” is that it constitutes:

- Rights exercisable by all subjects.
- Free passage.
- Rights of vehicle use can be assumed unless dedication of a road is expressly confined to horses or foot.
- Territorial local authorities are obliged to see that the right of passage is preserved.
- These rights continue until such time as a road is stopped.

These do not reflect the full extent of public rights. What Hayes omits to say is what New Zealand’s Courts have also held (those elements of the public right not identified by Hayes underlined):

- It is an absolute right to pass and repass without hindrance.
- The customary uses of roads extend beyond mere passage from one point to another. They include ancillary activities, including recreation, so long as these do not conflict with the passage of others to an unreasonable degree.
- The right of assertion by the public, including removal of appreciable interferences (i.e. obstructions) and/or legal action against those creating or authorising such nuisances.
- A road is incapable of occupation to the exclusion of the public.
- Frontagers have rights of access between their properties and public roads, which are not absolute, and involve an accommodation of private rights with the rights of passage of the public.

The summations above are derived from cases and authorities cited in *Mason, 1991*, and the following cases (see Appendix 2):

- 1896. *Queen v. Mayor, Councillors, and Citizens of Wellington*
- 1977. *Lower Hutt City v. AG ex Moulder*
- 1977. *Moore v. MacMillan*
- 1981. *Fuller v. MacLeod*
- 1988. *Frecklingham v. Wellington City Council*
- 1992. *Paprzik v. Tauranga District Council*
- 2002. *Re Ruapehu District Council*
- 2003. *Re Upper Hutt City Council v. Akatarawa Recreational Access Committee*

**Hayes has seriously misrepresented applicable law by omitting from his dissertation the public right of assertion of unhindered passage, including for recreation, and the principle that roads are incapable of occupation to the exclusion of the public.**

## 5 Short's 'Roads and Bridges'

Amongst his supporting references, Hayes refers to Short's '*Roads and Bridges*' (Short, 1907). Hayes describes Short as "... perhaps the most comprehensive [text] on roads ever written in New Zealand and his style is crisp and authoritative" (Hayes, 2007a:6).

Despite this endorsement Hayes is curiously selective in his use of this authority. On page 136 of RLAIATUR Hayes cites the first paragraph on page 44 of Short, entitled 'How road rights arise in N Z.', but omits the content of two succeeding paragraphs on that page which bear directly on 'the right of passage' (see Appendix 3).

Paragraph 2:

**"Public right to use highway**

"The public has a right to use a highway only for the purpose of passing and re-passing along the same, with or without vehicles, horses, cattle, etc., and not to enter it for any other purpose. No one has the right to occupy the soil of a highway which does not belong to him by right of ownership. If he does so he is in law a trespasser; and though, as one of the public, he has a right to be on the highway, he must move on" (Short, 1907:44, para 2).

Paragraph 3 of page 44, entitled 'rights of foot passengers' is also relevant to the issue of 'the public right of passage'.

One possible explanation for Hayes overlooking these two paragraphs is that it clears the way for the assertion that there can be road 'occupiers', and that there is an 'undefined relationship' between public and private users (Hayes, 2007a:54). His failure to cite Short, in this instance, is only helpful to that assertion.

Dispensing with confounding authority, and the legal precedent that forms its basis, appears to be necessary preparation for his subsequent recommendation that farming uses be accommodated, through law change, as a 'special need'.

**Whether such conspicuous omission was intentional or not, advice given under these circumstances to the Access Panel, and ultimately to Government, cannot be construed in any way as either full or fair or in accord with best public-service practice** (State Services Commission, 2005). **Given their grievous implications for public rights, these omissions are inexcusable.**

There are other authoritative texts worthy of reference. Pratt and Mackenzie's '*Law of Highways*', (1923:1-5) is as emphatic as Short on the question of 'occupiers and trespassers' but is not cited by Hayes.

## 6 Adjoining land occupiers as road ‘occupiers’?

Hayes’s use of the term ‘occupier’ is a central area of contention in this critique.

### Confusion and partiality, not clarity

Hayes claims in his opening summary in RLAIATUR that his:

- “commentary...removes some common uncertainties by making clear that:
- no rights may be acquired by occupancy, use, or care over any road whether formed or unformed” (Hayes, 2007a: 1).

However any initial clarity is negated by his following extended references to what he terms ‘occupiers’ of unformed roads and recommendations to give such ‘occupancy’ unspecified legal force.

Anyone in ‘lawful occupation’ of any place or land has trespass rights (s. 2 Trespass Act 1980).

In the context of a legal discourse, the use of ‘occupation’ terminology attacks the very foundation of roading law and public rights. Hayes offsets this in part by stressing, paradoxically, that a public right of passage exists. Such a dichotomy could only exist if rights of public passage were subordinated to private rights. That would be a spectacular reversal of the law of highways.

Subsequent to RLAIATUR Hayes suggests (Appendix 4, 3<sup>rd</sup> para from end), that a lesser right of trespass/occupation may exist without ‘lawful occupation’. Such explanation was not evident in RLAIATUR.

Hayes goes on to state in RLAIATUR:

“The theory of both the common law and statute law, which together underpin unformed roading, is well enough settled when identified” (Hayes, 2007a:54).

The trouble with Hayes’s RLAIATUR is that he has not identified the large body of relevant case law and statute that confounds his assertions about ‘occupiers’ and an ‘undefined relationship’.

### Adjoining land and roads confused

There is confusion by Hayes between –

- occupiers of adjoining land, and
- ‘occupiers’ of roads

–even when citing the same legal authority (s 353(b) LGA 1974)

This confusion is apparent in the following:

“The council may require the occupier of any land (including a road) [\* ] that contains a hole or other place dangerous to people passing along it to fill in, over, or enclose the danger. <sup>8</sup>” (Hayes, 2007a:39).

“Footnote  
“8 = Section 353 (b) Local Government Act 1974”.

[ \* Incorrect ]

“The council may require the occupier of any adjoining land [+ ] that contains a hole or other place dangerous to people passing along the land to fill in, over, or enclose the danger <sup>14</sup>” (Hayes, 2007a:40).

“Footnote  
“14 = Section 353 (b) Local Government Act 1974”.

[ + Correct ]

Suggestions throughout of existing ‘occupiers’ rights are confused by Hayes’s overarching conclusion that:

“There may be situations where councils should provide bylaws to protect the interests of legitimate users of unformed roads, as well as those of adjoining owners” (Hayes, 2007a:46).

"The special character of unformed roads which generally are in the occupation of adjoining owners creates a series of special needs **not** catered for in existing law" (Hayes, 2007a: 46).

*This prompts Hayes to suggest legislative remedies*

**"Occupiers' peaceable use**

"Territorial bylaws may therefore be the most appropriate way of:

- regulating good order on an unformed road intersecting private property;
- preventing damage to the surface of the road and any structures on it;
- making sure that people exercising a right of passage do not unreasonably interfere with the occupier's use of the land." (Hayes, 2007a: 48).

The first two points are already capable of implementation by either bylaw or statute. The last point would be a reversal of the current legal duty of non-interference by adjoining occupiers on public passage. More is added about statutory powers and bylaws at 10.

Hayes's confusion continues:

"Suggested statutory framework for bylaws

- ensure that persons exercising the right of passage over any unformed road so behave themselves as to avoid undue interference with the enjoyment of the land comprising the road by other persons and occupiers<sup>4</sup>" (Hayes, 2007a: 49).

"Footnote

4 = adjoining landowners' occupancy to be respected.

Hayes's confusion of roads and adjoining land is complete: adjoining ownership and occupation have become indistinguishable from road 'occupation'.

In legal parlance, Hayes's use of the phrase 'enjoyment of the land' is synonymous with private benefit, and possession to the exclusion of others.

**Hayes's admission that his "perceived series of special needs" are **not** catered for under existing law** (Hayes, 2007a: 46), **indicates an agenda for law change to cater for so-called 'occupiers'.**

## 7 Does occupation confer ownership or other rights?

Hayes discusses the issue of ownership at length and correctly answers the question that occupation of roads does not and cannot confer ownership. Although important, ownership is not the only question that needs to be addressed in relation to land occupation.

Hayes cites section 172(2) of the Land Act 1948:

“Notwithstanding any statutes of limitation, no title to any land that is a road or street, or is held for any public work, or that has in any manner been reserved for any purpose, or that is deemed to be reserved from sale or other disposition in accordance with section 58 of this Act, or the corresponding provisions of any former Land Act, and no right, privilege, or easement in, upon, or over any such land shall be acquired, or be deemed at anytime heretofore to have been acquired by possession or user adversely to or in derogation of the title or Her Majesty or of any local authority, public body, state enterprise referred to in the Second Schedule to the State-Owned Enterprises Act 1986 or person in whom the land has been at any time vested in trust for the purposes for which it has been reserved as aforesaid.”

Section 172 excludes any interest, not just ownership or possession, from being acquired by adverse possession or “user adversely to...the title...of any local authority”.

In response to this reviewer’s initial criticism of his report (Hayes, 2007c), Hayes focused on ‘ownership’ and ‘possession’ without addressing his implication that ‘occupation’ may not necessarily be reliant on either.

Hayes relied on his statements in RLAIATUR to rebut what he saw as this reviewer’s “confusion” over this issue:

“The law, however, is very clear. There is no possibility of the occupier acquiring any rights of ownership or possession through occupancy, use, or care of any unformed road.” (Hayes, 2007a:9).

“Many unformed roads have now been occupied by, and incorporated into the holding of the owner of the surrounding land for very long periods—in some cases more than a hundred years. Questions have often been raised about ownership, and opinions expressed about supposed rights to the land so occupied. The law, however, is very clear. There is no possibility of the occupier acquiring any rights of ownership or possession through occupancy.” (Hayes, 2007a:19).

These statements do not rule out Hayes’s ‘less-than-ownership-or-possession-occupier’ thesis (Hayes, 2007c, 3<sup>rd</sup> para from end). Aside from the prohibitions of the Land Act, it is difficult to envisage that such ‘rights’ can exist independently of statutory allowances made for grazing and fencing, as set out in 9 below.

Hayes’s attempts, in rebuttal of this reviewer’s initial criticism of RLAIATUR (Mason, 2007a), to define ‘occupier’ by way of ordinary dictionary meanings—as something less than ownership or possession—are unobtainable and futile under existing law.

As an ‘occupier’ of a road cannot, by Hayes’s admission acquire any legal rights, there appears to be no useful purpose to his extended and varying explanations as to what he means by ‘occupier’. Only confusion is served.

### The Land Act and Short have the final say

Contrary to Hayes’s repeated suggestions of legal entitlement, the legal reality is that section 172(2) of the Land Act precludes any form of user through occupation (“right, privilege, or easement”) from being acquired over roads.

Short is unequivocal on the subject. There are no qualifiers to his view of occupiers:

“No one has the right to occupy the soil of a highway which does not belong to him by right of ownership. If he does so he is in law a trespasser...” (Short, 1907:44, para 2)

Given Hayes’s possession of this legal authority, and page 44 in particular, the above should have been evident to him from the outset (see Appendix 3).

**Hayes should have directed his discourse to a full, balanced presentation of roading law. If that had been accomplished, then areas for possible policy and legislative change could have been identified in an open and transparent manner to the owners of the right of passage—the public—as well as to the Access Panel and Government.**

## **8 ‘Occupiers’, in relation to roading statute**

### Local Government Act 1974

Part XXI and Schedule 10 of the Local Government Act 1974 are the primary statutory provisions dealing with local authority roads. The powers given to Councils are generally of two types:

- General powers in respect of construction, diversion, alteration and stopping of roads.
- Particular powers in furtherance of these general powers and which may interfere with public and private rights.

The only ‘occupiers’ any of these provisions recognise are not occupiers of the roads themselves but:

“the occupiers of all land adjoining the road proposed to be stopped or any new road proposed to be made in lieu thereof” for the purpose of notification

Clause 2, 10<sup>th</sup> Schedule), LGA 1974

The occupiers of land “in the vicinity of roads” are further recognised whereby the construction of cellars or any excavation requires prior council consent (s 354 LGA 1974).

Section 341 of the Local Government Act 1974 permits councils to grant a lease above roads or of the subsoil beneath roads, provided that in the case of airspace, the Council ensures that sufficient airspace remains above the surface of the road for the free and unobstructed passage of vehicles and pedestrians. This provision is usually used for electricity, telecommunications and other utilities, or bridges and tunnels. It specifically excludes usage’s that obstruct public passage.

Section 341(3) precludes the granting of leases over the surface of roads. The scheme of the LGA 1974 suggests that Councils have no general leasing power in respect of roads. The application of the Public Bodies Leases Act 1969 to LGA s341 leases is expressly excluded.

### Public Bodies Leases Act 1969

The Public Bodies Leases Act has extensive leasing powers over lands held by Councils, but section 4(1) precludes leasing under its provisions in substitution to other statutory powers or if contrary to any trust. Roads are held in trust by local authorities as public highways. The PBLA should therefore be inapplicable to roads. Leasing, with inherent rights of exclusive occupation, would be contrary to the purpose of public highways.

### Public Works Act 1981

Section 45 of the Public Works Act 1981 enables land “held for public work” to be leased, but this should be inapplicable to public roads. They do not require any ‘work’ to be effected for their status—they fulfil their function as roads ‘held’ as public highways with or without formation.

### Other statutory provisions

There are statutory provisions that ‘deem’ (declare by way of a legal fiction) roads, or part thereof, to have ‘occupiers’ for the purposes of making telecommunication facilities rateable (s 341(2) LGA 1974). Adjoining occupiers may also be deemed to be road ‘occupiers’, creating liability for weed control over roads but with no rights created (s 2 Biosecurity Act 1993).

Section 357 of the Local Government Act 1974 allows for council-authorized site-specific encroachments on a road in the form of “buildings, fences, ditches, or other obstacle or work of any kind”, including the planting of trees or shrubs. However, council is not entitled to create a nuisance or deprive any person of any remedy against a local authority in respect of any nuisance (s 191 LGA 2002). The Courts have held that encroachments can be lawful, but not to the extent that they create an appreciable interference with public or private rights (i.e. by impeding pedestrian or other traffic).

### Land Act precludes any rights being acquired

Again, the Land Act 1948 confounds Hayes’s suggestions that there can be farming-type road ‘occupiers’ with implicit use rights extending generally over roads. Such a view is in defiance of the express terms of section 172(2): “no right, privilege, or easement in, upon, or over any such land shall be acquired”.

## 9 How statutes and the Courts treat farming activities

In this section, this critique outlines the relationship between public and private users of roads insofar as it affects farming activities. Many relevant statutes and the Courts have made the nature of this relationship explicit. Their provisions and determinations contradict Hayes's fundamental premise that no such relationship is defined. They reinforce the fundamental legal principle that no-one is entitled to rights of occupation, of what-ever form, over roads.

### 9.1 Grazing

#### *"The King's Highway is not to be used as a stable-yard"*

Lord Ellenborough, C.J. in *Rex v. Cross* (1812), 3 Camp. 224.  
*In Pratt and MacKenzie*, 1923:137

The Impounding Act 1955 treats stock on roads as 'straying or wandering' (s 2). This includes "being on or near the road without being under proper guidance and control; and being herded or drafted or grazed upon or near the road other than in the course of being driven." This is consistent with the common law (*Pratt and Mackenzie*, 1923:67).

#### Impounding Act 1955

##### **"Section 33 Stock straying or wandering on roads**

(1) Where at any time of the day or night any stock is found straying or wandering on any road, or tethered on any road in such a manner as to obstruct or be reasonably likely to obstruct the road, any person may seize the stock, and may either impound it or, where the owner thereof is known to him, return it to the owner; and in any such case the owner of the stock, in the case of entire animals, is liable to a fine not exceeding \$100 for every head thereof and, in the case of other animals, to a fine not exceeding \$50 for every head thereof, in addition to any other rates and charges payable under this Act".

Section 33 reinforces public rights of passage and the common law. Any member of the public may seize or impound stock if they "obstruct or be reasonably likely to obstruct the road". This conceivably includes obstruction of non-motorised traffic: e.g., danger or hazard to pedestrians. Section 33 also reinforces the fact that the public are the holders of the rights of passage that may be interfered with by stock, not the local authorities.

**An exemption from the above impounding provisions is particularly applicable to unformed roads.** Section 34 is a non rights-based accommodation of grazing without degradation of public rights.

Section 34 IA 1955

##### **"Section 33 not to apply in certain cases**

(1) Where —

(a) A local authority is satisfied that any road or any portion of a road within its district is so infrequently used by motor traffic that stock depasturing on or near the road will not constitute an inconvenience or danger to the users thereof; and

(b) The road or portion thereof is unfenced or only partially fenced on one side only or on both sides,—

the local authority may, by resolution publicly notified, declare that the provisions of section 33 of this Act shall not apply with respect to that road or portion thereof.

(2) Where any such declaration is made under this section, the occupier of the land by which the road or portion thereof is bounded shall —

(a) Erect and maintain in some permanent manner and in some conspicuous place at each entrance to the road or, as the case may be, at each end of the portion thereof, a warning notice in a form approved by the local authority to the effect that stock is depasturing on or adjacent to the road; and

(b) If the local authority so requires, and subject to section 344 of the Local Government Act 1974, erect cattle stops or swing gates at such places on the road or portion thereof, as the case may be, as the local authority specifies—

and the declaration shall have effect only so long as those notices and the cattle stops and swing gates required by the local authority are so erected and maintained".

It is an indulgence on the part of local authorities to tolerate stock depasturing on roads. There is no 'right' to depasture stock. There are clear rules as to cattle stops, gates and signage (see 9.3). The owner of stock has no ability to recover damages for loss. The relationship between the public, public authorities, and private graziers of roads is well defined.

An important point to note is that, in relation to roads, this Act defines 'occupier' as "the occupier of the land by which the road or portion thereof is bounded, i.e. the adjoining occupier" (s 34(1)(c)).

## **9.2 Fencing**

At common law, an owner or occupier of land is under no duty to fence off their land from the adjoining land of a neighbour or from a road or highway. There is, however, a common law duty to erect or repair a fence where a person who is using the highway might otherwise be endangered by a nuisance on the land close to the highway. Again, there is no recognition of any 'right' to graze highways, only that there is a duty not to create nuisances for users of highways as a result of leaving road boundaries unfenced.

### Local Government Act 1974

The LGA 1974 extends beyond 'endangerment' under common law, to instances of public inconvenience.

"Whenever the public safety or convenience renders it expedient, require the owner or occupier of any land not separated from a road by a sufficient fence to enclose the same by a fence to the satisfaction of the council" (s 353(c) LGA 1974)

### Fencing Act 1978

The Fencing Act 1978 provides (section 9) for adjoining occupiers to share the cost of fencing their common boundaries. "...[U]nder this Act, the occupiers of adjoining lands not divided by an adequate fence are liable to contribute in equal proportions to work on a fence". However, section 3 expressly excludes application of the Fencing Act to roads. Councils are not required to contribute to fencing costs if an adjoining owner wishes to fence their boundary with a road.

The Courts have considered the question as to who are 'occupiers' for the purpose of contributing towards fence construction and maintenance if only one boundary of a road is fenced. *Rhodes v. Beckett* determined that, when one proprietor attempted to establish that another proprietor on the other side of an unformed road was an 'occupier' of the road and so liable to contribute to fencing costs, the other had no liability as he could not be an occupier for the purposes of the Fencing Act.

However, if a person takes advantage of fencing along the road boundary of an adjoining occupier's land, there is provision to recover a portion of fencing value and repairs (s 18). This is by deeming (by way of creating a legal fiction) that a person is an occupier for this purpose alone. Section 18 does not recognise any person as having entitlement to use a road for private purposes, only that they may take advantage of another's fenced road boundary.

Section 18 Fencing Act 1978

#### **"Person taking advantage of fence**

(1) In any case where there is a fence along the boundary between any land and a road, if a person (other than the owner or *occupier* or some other person lawfully in possession of *that* land) adopts or takes advantage of any means by which the fence is rendered of beneficial use to himself, or avails himself of the fence, the occupier of that land may serve on that other person a notice in writing requiring him to pay interest at the rate of 10 percent per annum on half the value of the fence at the time of the serving of the notice; and, so long as that other person continues to take advantage or avail himself of the fence, he shall be liable to pay that interest to the giver of the notice or his successor in title, and he shall also be liable for repairs to the fence as if he were an adjoining occupier".

In regard to fences as encroachments (i.e. not on boundaries), section 357 LGA 1974 makes it an offence to erect any fence without Council authorisation.

### 9.3 Gates and cattle stops

#### Local Government Act 1974

Section 344 of the Local Government Act 1974 authorises local authorities to permit the erection of an approved swing gate with 'public road' signs affixed, a cattle stop, or both, and fencing to either side of a road, where it is not practicable or reasonable to fence the boundary of a road. The local authority may not place conditions or restrictions on or confer rights or obligations on the permit holder.

If a permit to have a gate so as to avoid boundary fencing is granted, then the permit holder can control the resting position of the gate at any time. Persons who are enjoying their right to pass and repass on the public road must accept that limitation and honour the integrity of the permit (*Hanning v. Cooke*).

If a gate or cattle stop is considered redundant or an inconvenience, either by the council or by a petition supported by 20 or more local residents, the council may require their removal.

There is an on-going obligation on the permit holder to maintain permitted fences, gates and cattle stops to the council's satisfaction.

These provisions are an indulgence granted to owners of land adjoining a public road to avoid the obligation they otherwise may have to fence the roadway. Such indulgence does not create any form of 'right of user' over a road, or 'occupation'.

### 9.4 Noxious plants

#### Biosecurity Act 1993

The Biosecurity Act 1993 repealed the Noxious Plants Act 1978. Comparable provisions for control of 'pest plant organisms' under section 6 BA 1993 were enacted, whereby land may include all or parts of roads, and occupiers of land adjoining roads may be required to control or destroy pests, including weeds on roads.

No rights are created over roads, only obligations for adjoining occupiers. Obligations are not automatic; they depend on the express provisions of Regional Pest Management Strategies. Different rules may apply over the berms of formed roads, and over unformed roads.

### 9.5 Overhanging and encroaching vegetation

The common law, and provisions of the LGA 1974, reinforce the principle that roads are public highways, not private domains. Adjoining occupiers can be ordered to remove any vegetative encroachments on or over roads. These are liabilities additional to those of the Biosecurity Act 1993.

#### Local Government Act 1974

Section 355 Local Government Act 1974

**"Council may require removal of overhanging trees, etc**

(1) The council may, by notice in writing under the hand of the Chairman or the principal administrative officer, require the owner of any land *abutting upon* any road within the district to do any of the following acts:

(a) To remove, lower, or trim to the satisfaction of the council any tree or hedge overhanging or overshadowing the road in cases where, in the opinion of the council, the removal, lowering, or trimming is necessary in order to prevent injury to the road or obstruction to the traffic thereon or to any channel, ditch, or drain appertaining thereto:

(b) To cut down or grub up, as the council directs, and remove all obstructions to traffic or drainage arising from the growth of plants or the spreading of roots upon or under the road up to the middle line thereof along the whole frontage of the land occupied or owned by him:

(c) To remove, lower, or trim to the satisfaction of the council any tree or hedge, or to lower any fence or wall, if in the opinion of the council the tree, hedge, fence, or wall is likely, by reason of its obstructing the view, to cause danger to the traffic on that or any other road".

In *Bremner v Dunn* the Court held that the owner or occupier of land fronting a road could be ordered...to cut down or grub up and remove any obstruction to traffic or drainage arising from the growth of plants up to the middle line of a road. There was no limitation or qualification of the liability. It was an absolute obligation imposed upon an occupier or owner. Nothing was said as to the origin of the nuisance (e.g., plants spreading from an adjoining occupier's land or from a road fronting an occupier's land) for which the abatement was ordered.

## 9.6 Obstructions

The Courts have strenuously upheld public rights of passage in the face of encroachments—both unauthorised and Council-authorised—that constitute a nuisance. Many farming-related activities encroach on to roads; fencing and other structures can constitute actionable nuisances. The resulting case law is directly applicable to unformed roads. It has been held in a succession of leading cases interpreting the provisions of the LGA 1974:

*Queen v Mayor, Councillors, and Citizens of Wellington*, Court of Appeal Wellington. 1896

“Re s357 Local Government Act 1974 - An obstruction by or with the authority of a council is lawful unless it is a public nuisance or interferes with individual rights. Whether a structure is a public nuisance, interfering unduly with the reasonable use of the street under the circumstances, is a question of fact”.

*Queen v Mayor, Councillors, and Citizens of Wellington*, Court of Appeal Wellington. 1896

“Re s357 Local Government Act 1974 - Where a council authorises private work to be constructed on a road and that work subsequently becomes a nuisance, the council will be liable if it permits the work to remain on the road or otherwise fails to abate the nuisance if the council has knowledge of the existence of the nuisance”.

*Moore v MacMillan* [1977] 2 NZLR 81

“Re s341 Local Government Act 1974 - A road is incapable of occupation to the exclusion of the right of every member of the public to assert their right to pass and repass without hindrance over every part of it. (cf. *Mayor of Christchurch v Shah* (1902) 21 NZLR 578).

Re s341 Local Government Act 1974 - A person who erects cattle-yards on a road cannot maintain an action in trespass against a person who demolishes part of the yards”.

The Court held that this was analogous to the principle enunciated in *Hill v Tupper*: the law did not recognise a personal licence as creating any interest in land sufficient to found an action for trespass; likewise the law did not recognise the "right" of any person to occupy a road to the exclusion of the public.

*Re New Plymouth District Council* (1997) 2 NZED 699 [Road stopping]

“Olsen Street [unformed]... still has the status of public road, even though the public have in practice been prevented from using it as such because it is fenced off and used as part of the Selbys' property... While it remains a public road they [the objecting neighbours] have a right at law to exercise access over it... The New Plymouth District Council is directed to carry out its duty as the road controlling authority to ensure that any obstacles to public use of the eastern end of Olsen Street as public road are removed”.

## 10 Road management and bylaws

Hayes's contention is that unformed roads differ from formed roads in having a 'special character', being "generally in the occupation of adjoining owners...creating a series of special needs not catered for in existing law" (Hayes, 2007a:46).

He argues that "the existing statutory powers of councils to create bylaws, not surprisingly, are clearly more applicable to roads which are formed and in use". Giving weight to this view, he subjects existing powers to control the use of unformed roads to scant assessment (Hayes, 2007a:46). It is true that the full body of statutory authority for bylaws applies more to formed roads, because there is greatest need for day-to-day regulation of vehicle use. But contrary to Hayes's inference, existing statutory authority for bylaws, and some bylaws, are applicable to unformed roads.

Hayes observes that "there may be situations where councils should provide bylaws to protect the interests of legitimate users of unformed roads, as well as those of adjoining owners" (Hayes, 2007a:46).

**Clearly there is a need for councils to control the use of roads, as public highways. This is the purpose for which they are vested in Councils. The vesting is not to condone or foster private ancillary purposes, such as implicit in the proposition that adjoining owners are or may be 'occupiers' of roads.**

**Preserving the public right of passage and frontagers' private right of access to and from their properties are the full, legitimate and only existing lawful purposes to be served.** Any other uses, must remain conditional on the preservation of public passage and frontager access. Common and statutory law is supportive of this and the Courts have been strident in upholding these principles.

Limiting his discussion of bylaws to Section 72 of the Transport Act 1962, and Section 146 of the Local Government Act 2002, Hayes asserts that further bylaw-making powers are necessary for unformed roads. To determine whether or not the law is deficient in this regard requires a broader review, particularly of existing statutory and bylaw provision.

### 10.1 Common law relating to nuisance

"Nuisance may be defined, with reference to highways, as any wrongful act or omission upon or near a highway, whereby the public are prevented from freely, safely, and conveniently passing along the highway...Persons who are entitled to use the highway for purposes of passage may become wrongdoers by abusing their right to the inconvenience or hindrance either of other passengers or of adjoining owners".  
Pratt and Mackenzie, 1923:125

Pratt and Mackenzie identifies '*Excessive and Unreasonable User*' by members of the public which creates injury to the private right of access to the highway as a category of nuisance to which there are legal remedies. These include indictment, abatement, and damages (Pratt and Mackenzie, 1923:155). Damage to any road, for instance by inappropriate vehicle use, is one kind of nuisance.

Remedies to nuisance are open to members of the public, adjoining owners, and local authorities. In addition there are many applicable statutory and bylaw powers vested in local authorities:

### 10.2 General powers of councils in respect of roads

Part 21 of the Local Government Act 1974 (s 315 to s 361) provides for the administration and management of roads vested in the ownership of territorial local authorities. Part 21 remains the principal statutory provision for roads despite the revocation of many other Parts of the LGA 1974 by the Local Government Act 2002.

#### Local Government Act 1974

Section 319

##### **"General powers of councils in respect of roads**

The council shall have power in respect of roads to do the following things:

(a) To construct, upgrade, and repair all roads with such materials and in such manner as the council thinks fit:

...

- (c) To lay out new roads:
- (d) To divert or alter the course of any road:
- (e) To increase or diminish the width of any road subject to and in accordance with the provisions of the district plan, if any, and to this Act and any other Act:
- (f) To determine what part of a road shall be a carriageway, and what part a footpath or cycle track only:
- (g) To alter the level of any road or any part of any road:
- (h) To stop or close any road or part thereof in the manner and upon the conditions set out in section 342 and Schedule 10 to this Act:
- (i) To make and use a temporary road upon any unoccupied land while any road adjacent thereto is being constructed or repaired:
- (j) To name and to alter the name of any road and to place on any building or erection on or abutting on any road a plate bearing the name of the road:
- (k) To sell the surplus spoil of roads:
- (l) For the purpose of providing access from one road to another, or from one part of a road to another part of the same road, to construct on any road, or on land adjacent to any road, elevators, moving platforms, machinery, and overhead bridges for passengers or other traffic, and such subways, tunnels, shafts, and approaches as are required in connection therewith”.

General powers of this sort are applicable to any road, with power to undertake (or not undertake) works anywhere as councils see fit. There is nothing peculiarly limiting councils’ management of unformed roads. ‘Laying out’ of new roads, with or without formation, is envisaged by para (c).

These general powers are supplemented by specific powers:

Section 332 authorises councils to form public cycle tracks on any road, and may make bylaws under section 684 of the LGA 1974 regulating and controlling their use.

Section 334 authorises the provision of facilities on, over, or under roads for the safety, health, or convenience of the public. Such facilities could be for the benefit of recreational users.

As noted earlier, section 344 authorises gates, cattle stops, and related fencing across roads, with attendant sign posting as ‘public road’.

Section 357 makes it an offence, amongst other matters, to do or cause “any act whatsoever by which any damage is caused to a road or any work or thing in, on, or under the same”. This creates liability for anyone who damages a road, including an unformed road, for instance from inappropriate 4WD use. Fines “not exceeding \$1,000 and, where the offence is a continuing one, to a further fine not exceeding \$50 for every day on which the offence has continued” are provided for. Such offence provisions can be supplemented by bylaws.

Clause 13 of the Tenth Schedule permits the temporary prohibition of motor vehicle traffic where:

“it appears to the council that owing to climatic conditions the continued use of any road in a rural area ... not being a road generally used by motor vehicles for business or commercial purposes or for the purpose of any public work, may cause damage to the road, the council may by resolution prohibit, either conditionally or absolutely, the use of that road by motor vehicles or by any specified class of motor vehicle for such period as the council considers necessary”.

Under clause 16 no person shall “use a motor vehicle, or permit a motor vehicle to be used, on any road where its use has for the time being been prohibited by a resolution under clause 13 of this Schedule”.

The above clauses are designed to prevent damage and are particularly applicable to poorly surfaced or unformed roads.

### 10.3 Bylaws

Under the Local Government Acts 1974, 2002, and Transport Act 1962, there is a statutory framework for making bylaws. Many of the provisions are applicable to unformed roads.

#### Local Government Act 1974

**The bylaw provisions of the Local Government Act 1974 are omitted from RLAIATUR.**

The range of bylaws permitted by s 684 “concerning roads...and the use thereof” is unlimited.

#### “Section 684. Subject-matter of bylaws

(1) Without limiting the power to make bylaws conferred on the council by any other provision of this Act or by any other Act, the council may from time to time make such bylaws as it thinks fit for all or any of the following purposes:

Roads

(13) Concerning roads and cycle tracks and the use thereof, and the construction of anything upon, over, or under a road or cycle track:

(17) Requiring any allotment in such parts of the district as are specified in the bylaws to be fenced along its line of frontage to any road, and to be kept clear of noxious plants:

(18) Prohibiting the cutting of grass for seed on roads or on any specified roads without the previous consent in writing of the council, either at all times or during any specified part of the year”.

The Dunedin Consolidated Bylaw 1991: Part 11 Roothing, illustrates the application of section 684 LGA 1974. It is applicable to all roads, with many provisions applicable to unformed roads.

#### “11.2 Things in Roads -

(1) No person shall without the consent of the Council or in accordance with the provisions of this Bylaw place or leave anything on any road other than a vehicle lawfully parked.

(2) Without limiting the generality of 11.2 (1) no person shall:

(e) Erect any scaffolding, fence or structure of any kind on or over any road; or

(g) Erect or install or cause to be erected or installed any gates or doors capable of being swung over or across any roads.

11.3 **Council may Require Things to be Removed** - Where any thing is on the road contrary to the provisions of 11.2 the Council may serve notice on the person who left the thing on the road or any other person who has any interest in or control over the thing requiring that the thing be removed within the period stated in the notice.

#### 11.4 Council may Allow Things in Roads

(1) - The Council may grant to any person on such terms as it thinks fit permission for a specified thing or things to occupy a place or places in a road.

(2) The Council may in granting permission under 11.4 (1) impose conditions on the grant of permission in relation to the health, safety and convenience of users of the road and for the protection for the road and for another relevant matter. The Council may charge such fee as it may fix in respect of the grant of permission for the thing to occupy roads.

(3) If a thing is left in the road in breach of conditions imposed pursuant to 11.4 (2) or the fee payable under the clause has not been paid the Council may require the thing to be removed pursuant to 11.3.

#### 11.5 Activities that Damage Roads

(1) No person shall undertake any activity that causes or may cause damage to any road.

(2) Without limiting the generality 11.5 (1) no person shall:

(c) Use any vehicle whose wheels or tracks causes or may cause damage to the surface or any part of any road.

(d) Drag or trail anything whether on a sledge or skids or otherwise so as to damage any road.

#### 11.8 Fences

(1) No barbed wire may be used in the construction of any fence within one metre of any road except at a height of not less than two metres above ground level or in any case where the Council is satisfied that the fence has been designed and constructed in a way that prevents any likelihood of injury to persons or damage to clothing through accidental contact with the barbed wire.

This Clause shall not apply to any area zoned for rural purposes under the Council’s District Plan except where the barbed wire is on a fence abutting a public footpath or a recreation reserve.

- (2) No person shall construct or allow to remain on any property of which they are the owner or occupier:
  - (a) Any fence which is in breach of 11.8 (1); or
  - (b) Any fence which by reason of its design or state of repair is or may be a hazard for users of any road”.

Local Government Act 2002

Section 145 of the Local Government Act 2002 provides general powers to make bylaws for one or more of the following purposes:

- “(a) protecting the public from nuisance;
- (b) protecting, promoting, and maintaining public health and safety;
- (c) minimising the potential for offensive behaviour in public places”.

These powers apply over all public places. Nuisances can be regulated, whether they be obstructions or activities by public or private road users. In view of the specific powers for control of roads under s 684 LGA 1974 use of these would appear more appropriate.

Section 146 provides for specific bylaws.

On page 47 of RLAIATUR, Hayes writes:

- “Section 146 of the Local Government Act 2002 provides for specific powers of territorial authorities to make bylaws. Paragraph (b) provides for bylaws for the purpose:
- (b) of managing, regulating against, or protecting from, damage, misuse, or loss, or for preventing use of, the land, structures, or infrastructure associated with 1 or more of the following:
- ...
- (v) reserves, recreation grounds, or other land under the control of the territorial authority:

For a bylaw to apply to unformed roads, such roads would have to come within the category of “other land” in subparagraph (v). Given the history of the law on roads, the high degree of protection provided by the courts, and the unique public access unformed roads provide to the outdoors, it would appear that any power to make bylaws should be a prescribed power rather than a general power ... the general power to make bylaws (ss 146 Local Government Act 2002) may be inadequate for the purpose (Hayes, 2007a: 47).”

If Hayes had reviewed the prescribed powers for roads in s 684 LGA 1974 his focus on s 146 LGA 2002 would have been unnecessary. It is apparent that Hayes’s ‘purpose’ is to accommodate private ‘occupiers’. If not, there would be no need for further powers as he suggests. Additional powers would only be necessary to override “the high degree of protection provided by the courts, and the unique public access unformed roads provide to the outdoors”.

Transport Act 1962

The Transport Act 1962 contains powers to make the following bylaws applicable to unformed roads.

**“Section 72. Bylaws as to the use of roads**

- (1) Subject ... to the provisions of this Act or of any other enactment in respect of any of the matters referred to in this subsection, any Minister of the Crown in respect of any roads under his control, or any local authority in respect of any roads under its control, may from time to time make bylaws for any of the following purposes:
  - (d) Prescribing the routes by which and the times at which horses, cattle, sheep, pigs, or other animals, or specified classes of vehicles may pass over any such roads; and prohibiting the driving of loose horses, cattle, sheep, pigs, or other animals along any such road, otherwise than at the times and by the routes so prescribed, except with the permission of the said Minister or of the local authority, as the case may be, and on such conditions as the said Minister or the local authority, as the case may be, thinks fit;
  - (dd) Prohibiting, either absolutely or conditionally, the driving of horses, cattle, sheep, or pigs along any road, and requiring that no horses, cattle, sheep, or pigs shall be taken upon or enter any road unless they are confined within a motor vehicle;
  - (f) Prohibiting any specified class of heavy traffic that has caused or is likely to cause serious damage to any road unless the cost of reinstating or strengthening the road, as estimated by the said Minister or the local authority, as the case may be, is previously paid;
  - (i) Prohibiting or restricting absolutely or conditionally any specified class of traffic (whether heavy traffic or not), or any specified motor vehicle or class of motor vehicle which by reason of its size

or nature or the nature of the goods carried is unsuitable for use on any road or roads specified in the bylaw:

- (1) Prescribing fines, not exceeding \$500, for the breach of any bylaw made under this section.
- (2) Any bylaws made under this section may apply generally to all roads under the care, control, or management of the Minister or local authority making the bylaws, or to any specified road, or to any specified part or parts thereof, and may apply to all vehicles or traffic or to any parts thereof, and may apply to all vehicles or traffic or to any specified class or classes of vehicles or traffic, and may operate at any time or at any specified time or times”.

Hayes believes that:

**“Section 72 of the Transport Act 1962**, which extensively authorises roading bylaws, seems largely inapt for passing bylaws affecting unformed roads. Sub-clauses (a) to (l) of subsection (1) are very specific and bylaws directed at unformed roads do not appear to pass the “reasonable” test which all bylaws must meet. For example, when an unformed road is physically incorporated within a farmer’s landholding, a bylaw in terms of para (dd) which would prohibit either absolutely or conditionally “the driving of horses, cattle, sheep or pigs along any road” would not be “reasonable”. Each of the other sub-paragraphs in some degree with the exception of sub-paragraph (i) would similarly create unreasonable bylaws for unformed roads” (Hayes, 2007a: 46).

In all respects, section 72 bylaws meet the test of being specific rather than general. Hayes’s comment is predicated on a desire to be ‘reasonable’ to farmers who have unlawfully “incorporated” roads into their landholdings.

Section 72 provides the most specific bylaws for dealing with vehicle use of roads liable to damage. It is difficult to envisage a council applying bylaw controls under s 72(1)(dd) over the driving of stock on unformed roads, as there would be few if any vehicles for conflicts with stock to arise.

The application of section 72 of the Transport Act is illustrated by a 2004 Dunedin City Council bylaw over a specified reach of an unformed road that was being badly eroded by vehicle use. Such control is consistent with the nature of public highways. Hayes’s proposals are not. If these provisions were ‘inept’ as Hayes states, it is unlikely that the DCC would have utilised them and they would not remain operative (see [Appendix 5](#)). The DCC has subsequently extended such controls over four other roads.

#### Road management powers reasonable and adequate

The existing bylaw provisions in the three Acts are reasonable, given “the primary purpose of a street [road] is passage” (*Fuller v MacLeod* [1981]: Somers J at 414).

The powers outlined above are not obligatory. Individual councils may enact specific bylaws, recognising the circumstances of particular roads or periods of time. They are not obliged to prohibit stock on roads but this may be necessary in cases where there is regular vehicle traffic. For almost all unformed roads it will be neither necessary nor practical.

**Section 34 of the Impounding Act and section 344 LGA 1974 (gates, cattle-stops and fencing) are a means of regulating stock grazing in the absence of applicable bylaws.**

If disturbance of stock from public passage becomes a problem, the owner(s) can elect to fence their boundaries. They would be obliged to do so if stock become a hazard for road users.

The public can continue to tolerate stock on unformed and unfenced roads, as long as the owners of the stock do not obstruct or endanger the public in their lawful passage. This covenant or compact has persisted for 157 years in New Zealand and can continue indefinitely.

**The considerable body of common law, statute and bylaw, makes it clear that the interests of councils as owners of roads on behalf of the public, and the interests of road users, are well protected. The central difficulty presented by RLAIATUR is Hayes’s implicit desire to subordinate public rights to private interest.**

## 11 Realignment of unformed roads

The occasional need to realign unformed roads is a key consideration in their use for recreation. This may arise in situations where unformed roads do not serve public needs but public access to recreation areas or waters in the vicinity is desired. In effect, roads in this position can become bargaining points for negotiating alternative routes.

There may be strong incentives for adjoining owners to agree to exchanges of land if an existing road alignment is inconvenient to them, particularly if they have illegal encroachments they do not wish to remove. Roads for recreational use, especially walking, generally do not need to be 20 metres wide, so there may be additional incentives to agree to stopping of standard 20 m unformed roads and replacement by narrower alternatives.

Independent of realignment, it is desirable to dedicate new roads from private and Crown land for public recreation purposes. These could be confined to footways, cycle-ways, bridle-paths, or combinations of these. Contrary to popular myth, there is no legal requirement to dedicate (and form) new public roads for motor vehicle use.

Irrespective of public recreation needs there are private access rights of frontagers that must be considered during road stopping. This is a matter overlooked by Hayes and the Access Panel. Public roads serve both public passage and private access.

Hayes considers that:

### **“Exchange for other forms of public access**

There are formidable if not insurmountable difficulties in exchanging unformed road for a new unformed road in the same vicinity. The whole network of unformed roads is predicated on the laying out of unformed roads on Crown land whether pegged on the ground or laid out as paper roads. It is not possible to lay out unformed roads in a state of nature over private land; since the enactment of the Public Works Amendment Act 1900 it has been unlawful for the owner to do so when land is subdivided. The Public Works Amendment Act required all new roads to either be formed (in rural areas) or formed and metalled (in boroughs and in proximity to boroughs). Over the last 100 years standards of formation have been progressively increased. Private owners cannot dedicate road without the acceptance of the council. Councils do not accept the dedication of roads which are unformed.” (Hayes, 2007a:49).

Such advice presumably influenced the Access Panel to the view that “it is not...possible to create new “unformed legal roads”” (WACP, 2007:33). As a statement of fact this is wrong (see + below).

Proceeding on the above erroneous assumptions Hayes recommends “an alternative form of public access”, with “something less in terms of public rights” than offered by public roads (Hayes, 2007a:51), (see 12).

Hayes justifies the replacement of roads with a “something less” alternative by referring to Section 20 of the Public Works Amendment Act 1900, as if it, or consequent equivalent provisions, were still operative. Unfortunately for his argument section 20 was repealed long ago and no generally applicable equivalent legislation is in force. Hence, there is no foundation for his contention that “since the enactment of the Public Works Amendment Act 1900, it has been unlawful for the owner to [to lay out unformed roads] when land is subdivided.”

The only statutory prohibition on councils acquiring unformed roads is when private roads or rights of way (ROW) are declared to be public roads (section 349 LGA 1974). It is likely that most negotiated alternative public access routes would be over private or Crown land in the absence of existing rights-of-way. If ROW exist on a desired route, Councils can accept these as public road “if properly formed”. The quality of formation is a judgement for councils to make. Their assessment would be influenced by the nature of the traffic anticipated. In any event a light formation may be necessary or desirable for foot traffic.

(+) Subdivision of land is governed by Part 10 of the RMA 1991 not Part 20 of the LGA 1974 as Hayes states (Hayes, 2007a:50). Part 20 was repealed by the RMA (Eighth Schedule). There is nothing in Part 10 of the RMA specifying any requirement for road formation. Standards for road construction, if any, are relevant only to matters of gradient, as per section 329 LGA 1974:

### **“Road gradients**

- (1) No road shall be laid out or constructed by the council, and no road or proposed road on any scheme plan shall be approved by the council, with a grade in any part of its length steeper than—
  - (a) That fixed by any operative district plan for the district; or
  - (b) Where there is no such district scheme or no such grade is specified in any such district scheme, that fixed by any bylaw or resolution of the council; or

(c) One metre in 8 metres, in any case where that grade is not fixed by any such district plan or by any bylaw or resolution of the council.

(2) In this section the term road does not include an access way”.

Section 329 does not require construction of a road. It provides a minimum gradient of 1:8 for laying out (i.e., legal and survey action without formation) of a road in the absence of a district plan or any bylaw or resolution of council. This section was clearly intended for vehicle provision.

It is not an ‘insurmountable problem’ for councils to pass bylaws and resolutions permitting specific roads, or unformed roads in general, to be footways steeper than 1:8. In the absence of any such administrative action, a gradient of 1:8 would normally be very suitable for pedestrian use.

When a new unformed road is being negotiated from private land in exchange for an existing unformed road, gradient would no doubt be taken into account so that the new road was suitable for intended users.

In a recurrent pattern, Hayes does not separate law and policy. He states that “Councils do not accept the dedication of roads which are unformed (Hayes, 2007a:49) and, “new unformed roads are no longer laid out on Crown land (Hayes, 2007a:50). Such policies and practices, not being statutory strictures, are matters for local and central government to determine according to changing needs. If government decides on new unformed roads for walking purposes it can do so.

In regard to Crown land held under lease or licence, land can be resumed at any time for roads, subject to either rent reduction or compensation. There are no stipulations for formation (s 117 Land Act 1948).

**There are no significant statutory obstacles in the way of dedicating new unformed roads from private [or Crown] land, as claimed by Hayes, and accepted by the Access Panel** (WACP, 2007:33). It is largely a matter of discretion for local authorities. The main obstacle is perceived additional liability for road management. However almost all liabilities fall on adjoining occupiers (see 9), unless councils authorise nuisances, then they are liable—as they should be. Central government could overcome most difficulties by encouraging or directing local authorities to create pedestrian ways with the status of legal road and that they, and others, obey the law by not obstructing public passage.

Construction standards for roading vary between Councils, reflecting variations in the provisions of their district plans, roading policies and engineering standards. These are applied as conditions to resource consents as considered appropriate by the consent authority (s 108 RMA 1991).

### **Bushey Park Road Stopping and Road Dedication**

A successful ‘road swap’ serving public-walking purposes has been negotiated\* recently in north-east Otago. This was an agreement between objectors to road stopping, the adjoining landowner and the Waitaki District Council. Sections of the unformed Bushey Park Road were stopped and a newly dedicated unformed road added to an existing unformed coastal road, providing a practical alternative walking route to the mouth of the Shag River.

Having considered the proposal for road stopping, the alternative access proposed, and the statutory requirements of the LGA 1974, the Environment Court agreed to the stopping subject to vesting of the new road in the Council (*Re Waitaki District Council*. C100/05, C074/06).

Contrary to the Access Panel’s prediction that Court process is likely to be prejudiced by ‘prior agreement’ between parties to swaps of this kind (WACP, 2007:34), no such difficulty occurred. In the Bushey Park case, the Court made up its own mind. It was required to consider the district plan, among other matters, apart from any ‘agreements’ reached between parties (Cl 6, Tenth Schedule LGA 1974).

This case is an illustration of matters that the Access Panel was required to consider on a national scale when forming its advice to Government. Such matters should have been addressed more accurately in the advice Hayes provided to the Panel.

[\* Mason was the negotiator on behalf of the objectors]

## 12 An alternative form of public access?

On the insupportable premise that it “is not possible to lay out unformed roads in a state of nature over private land” (Hayes, 2007a:49), Hayes offers an alternative—‘access strips’.

### Access Strips

Hayes recommends that “the territorial local authority negotiates an access strip (under section 237B Resource Management Act 1991) along another route” (Hayes, 2007a:50). Other than acknowledging that this would be “something less in terms of public rights” than over a public road (Hayes, 2007a:51), Hayes offers no further information about these rights nor does he state to what degree they would be “something less” than existing rights over roads.

Access strips are easements over private land, unlike publicly-owned roads with rights of passage held by and enforceable by the public. Public passage over access strips is granted by the landowner and the territorial authority as a result of private negotiations, with extensive powers of restriction and closure. Only the views of those with registered interests in the land are required to be considered. An access strip may be cancelled or varied at any time with no obligations to public process (see Appendix 6).

In the event of obstruction of access, local authorities can exercise discretion in their choice to uphold, what may be limited, public rights to use access strips. Unfortunately, most public authorities have a conspicuously poor track-record on such matters.

**Given the dire implications for public use, it is most disturbing that Hayes did not see fit to make clear the major distinctions between roads and access strips.**

### Road resumption

Rather than using the LGA’s procedures for public notification and objection to road stopping, in exchange for access strips Hayes envisages that the Minister of Lands resumes into Crown ownership unformed roads under s 323 of the Local Government Act 1974. This would become Crown land able to be disposed of to the adjoining owner (Hayes, 2007a:50).

The only protection offered for the public interest is:

“Given that a road is being exchanged for something less in terms of public rights, there is a case for amending legislation which could make the terms of the easement conditional on the approval of the Minister of Lands [Information], and any surrender thereof subject to Ministerial approval” (Hayes, 2007a:51).

However, it won’t be the Minister who will be making the decisions. His powers will most likely be delegated to officials of Land Information New Zealand (LINZ).

There is no cause for optimism here. LINZ has an alarming record on public access provision. This has been demonstrated amply by their decisions on tenure review (most notably in the Ben Avon ‘access-over-the-cliff’ case (see [www.recreationaccess.org.nz](http://www.recreationaccess.org.nz)), and in their circumventing of marginal strip requirements when disposing of Crown land (e.g., on banks of the Manuherikia River, Otago). How will the public interest be kept at the forefront of official consciousness when decisions to dispose of public roads are made in-camera?

### Road-stopping procedure essential

It is essential that public road-stopping procedures apply on a case-by-case basis because both the interests of public passage and private access are served by public roads. The Environment Court has proved its ability to consider road-stopping applications and alternative access proposals. Unlike official and political decision-making that is not so open to public view and scrutiny, the Court is guided by legal principles and a large body of precedent evolving from case law.

If accepted as a tenable alternative to realigned/new unformed roads, the proposed access strips would be a major derogation of the public interest: private landowners would gain freehold ownership of stopped roads without having to provide equivalent alternative public access.

**Given the unique character of public rights over public roads, if public roads are stopped and disposed of in exchange for realigned access, equivalent public rights of passage should result. Exchange of like for like is imperative.**

### 13 Walkways over unformed roads

Hayes notes (Hayes, 2007a:45) that section 6 of the New Zealand Walkways Act 1990 contains “a curious provision which is inconsistent with the common law, the statutory law protecting the status of roads, and the rigorous protection the New Zealand courts have provided for the interests of the public”.

Hayes continues—

“An unformed road may be included in a walkway with the prior consent of the territorial local authority in which the road is vested.

Before giving consent, the territorial local authority has to consult with every owner who has a frontage on or access to the unformed road. Those owners retain the right to use as a road the unformed legal road after it is incorporated in a walkway. However, the public are restricted to using the road as a walkway. The Minister of Conservation may specify any other conditions of use in the notice designating the unformed legal road as a walkway” (Hayes, 2007a:45).

#### New Zealand Walkways Act 1990

##### “6 Walkways over public land

(3) In every case where the land to which the recommendation relates includes unformed legal road the prior consent of the local authority shall be obtained, and the following provisions shall apply in relation to such consent:

- (a) The local authority shall consult with every owner of land having a legal frontage or access to the unformed legal road before giving its consent:
- (b) Every owner of such land shall retain the right to use the unformed legal road.

(4) Where any consent under subsection (3) of this section is obtained subject to conditions as to the use of unformed legal road, the Minister shall specify in the notice the conditions under which it may be used”.

##### “28 Closure of walkways

(1) Every controlling authority—

- (a) May close any walkway or part of a walkway under its control for reasons of safety or during emergencies, or for the purpose of maintenance or development work:
- (b) May close any such walkway or any part of such a walkway, at the request of the occupier of the adjacent land:
- (c) Shall close any such walkway or any part of such walkway established over private land in order to comply with any condition as to use to which the establishment of the walkway is subject—  
for such period as the controlling authority considers necessary or as may be necessary to comply with the condition as to use, as the case may be”.

It appears that section 6, and consequent bylaw, offence and closure provisions (ss 9, 20, 21, 23, 26, 28) are the only direct statutory derogation of common law rights of passage over New Zealand’s public roads. **They are peculiar provisions that have no regard for the law of highways, except for the interests of frontagers** (Cf. s 6(3)(b)). **The Walkways Act changes roads from public highways, open to all, to private rights of way.**

As a member of a district walkway committee (convened by the Department of Lands and Survey) before and after the passage of the Walkways Act 1975, this reviewer was unaware of any debate on this issue. At that time there was little or no public understanding of the nature of public highways and of what may be lost as a consequence of designating roads as walkways.

To this reviewer’s knowledge, section 6, has not been used. However, it remains operative opening the possibility that adjoining landholders may invoke it to impose unlimited restrictions on public use of roads. **As these provisions have proved to be unwarranted, and remain potentially very damaging to the public interest, they should be repealed.**

To a large degree these particular provisions mirror the state of public consciousness at the time the first Walkways Act was passed 30 years ago. Widespread ignorance of public rights, their nature, and the implications of their loss condoned passage of that legislation.

The intent of the Walkways Act was good. The legislation received uncritical support. Is Hayes’s and the Access Panel’s erroneous advice on unformed roads going to lead to a repeat of history 30 years later?

## 14 Conclusions

*“The King’s Highway is not to be used as a stable-yard.”*

Lord Ellenborough, C.J. in *Rex v. Cross* (1812)

Although it adds significantly to the sum of public knowledge about roads in matters not impacting directly on public use, Hayes’s dissertation is flawed in key areas concerning the public right of passage and the relationship between public and private interest. Hayes did not identify (and consequently did not take into account) key case and statute law, and legal principles directly related to The Law of Highways. Nor did he cite pertinent material that he did obtain—material that directly contradicts his assertions about road ‘occupiers’ and the entitlement of farmers to unspecified rights.

These are bewildering omissions. This critique found that the relevant laws and legal authorities are readily available, and they articulate explicitly the principle that public roads are ‘public highways’, not private domains.

*Roading Law As It Applies To Unformed Roads* misrepresents the essence of roads as public highways. If enacted by Parliament, Hayes’s misrepresentation of public roads would create precedent for privatisation, the desire for which was evident in the user-pays and tolling policies of the last National Government (Williamson, 1998). Since Hayes acknowledges that the law always has been (and remains) the same for unformed and formed roads, his diminishing of public rights over unformed roads will likely lead to future Government assaults on the fundamental civil right to freedom of movement over roads in general.

The specific findings of this critique focus on the following key issues.

### 14.1 The nature and extent of public and private rights

Although stressing that the right of passage vests in each and every member of the public, and not in government, Hayes seriously understates the magnitude of that right.

Hayes omits reference to the public right of assertion of unhindered passage (including for recreation) and the principle that roads are incapable of occupation to the exclusion of the public.

Collectively, Hayes and Mason identify the following characteristics of the public right of passage and the private right of ‘frontager’ access:

- It is an absolute right to pass and repass without hindrance, exercisable by all subjects.
- The customary uses of roads extend beyond mere passage from one point to another. They include ancillary activities, including recreation, so long as these do not conflict with the passage of others to an unreasonable degree.
- The right of assertion, including removal of appreciable interferences (i.e. obstructions) and/or legal action against those creating or authorising such nuisances.
- A road is incapable of occupation to the exclusion of the public.
- Rights of vehicle use can be assumed unless dedication of a road is expressly confined to horses or foot. Use of vehicles cannot however cause nuisance by damaging the road surface.
- Territorial local authorities are obliged to see that the right of passage is preserved.
- These rights continue until such time as a road is stopped.
- Frontagers have rights of access between their properties and public roads, which are not absolute, and involve an accommodation of private rights with the rights of passage of the public.

In any discourse on public roads, it is necessary to understand both sets of rights (public passage and private access). Although Hayes acknowledges the existence of ‘frontagers’, he does not discuss the nature of their rights or their relationship to public rights. That relationship is articulated extensively in case law and legislation.

### 14.2 Farmers as ‘occupiers’ of roads

Hayes argues at length that informal, unsanctioned use of unformed roads by adjoining farmers gives rise to the existence of unspecified ‘occupation’ rights over those roads. His arguments are convoluted and confused.

Legal authorities and the full body of statute and common law refute suggestions of 'occupation' rights by anyone, with or without rights to exclude others. The Land Act 1948 rules out any form of special user-rights being acquired, informally or otherwise, over roads. Use of the term 'occupier' is totally repugnant—in any context—to the concept of public highways.

Hayes's recommendation that farming uses be accommodated through law change as a 'special need' requires him to dispense first with confounding arguments and precedents. He achieves this by omitting them from consideration. Whether his omissions are intentional or not, advice given accordingly to the Access Panel (and ultimately to Government) cannot be construed in any way as either full or fair, or in accord with best public-service practice. Given their grievous implications for public rights, these omissions are inexcusable.

Hayes should have directed his discourse to a full, balanced presentation of roading law. If that had been accomplished, then areas for possible policy and legislative change could have been identified in an open and transparent manner to the owners of the right of passage—the public—as well as to the Access Panel and Government.

### **14.3 Unformed road management and the public-private relationship**

The Courts have strenuously upheld public rights of passage in the face of encroachments—both unauthorised and Council-authorised—which constitute a nuisance. Other forms of nuisance by public users or private encroachers are also actionable. Members of the public can create a nuisance if, for example through 'excessive and unreasonable user', they injure the private right of access to the highway. This too is a category of nuisance for which there are legal remedies.

Common law remedies for nuisance are available to members of the public, adjoining owners, and local authorities. In addition, there are many applicable statutory and bylaw powers vested in local authorities.

Many farming-related activities encroach on to roads; fencing and other structures can constitute actionable nuisances. However, unless there is an appreciable interference with others' rights to use roads, there is no basis for legal action. Encroachments of this sort and passive uses such as grazing may be tolerated as they have since time immemorial. This does not create any 'right of user' or 'occupation' over a road.

Relevant statutes and the Courts have made the nature of the relationship between public and private rights explicit. Their provisions and determinations contradict Hayes's fundamental premise that such relationship is undefined. They reinforce the fundamental legal principle that no one is entitled to rights of occupation, in whatever form, over roads. The 'accommodations' noted in 9 and 10 of this critique do not derogate from the common law. They are indulgences granted by local authorities acting as trustees for the public.

Hayes claims that the law is inadequate to allow provision for and management of farming as well as control of public use. This critique demonstrates that the law is quite adequate for management, for grazing and vehicle use in particular.

#### ***Grazing***

Straying and wandering stock on roads may be impounded. However, as an exemption under section 34 of the Impoundment Act 1955, Councils may permit grazing on roads used infrequently by motor traffic if this does not constitute an inconvenience or danger to road users. Warning notices must be erected and maintained. Gates and fencing may also be authorised. If desired, section 34 has direct application to many unformed and unfenced roads. No 'right of user' or 'occupation' is created.

As long as adjoining farmers do not obstruct public passage or create other nuisances, their informal use of unformed roads may make use of the Impoundment Act unnecessary.

#### ***Gates, cattle-stops, and fencing***

There is no obligation to fence a boundary with a road unless highway users are endangered by a nuisance on the adjoining land.

As an indulgence granted to owners of land adjoining a public road to avoid any obligation they otherwise may have to fence the boundaries of roadways, Councils may authorise the erection of gates, cattle-stops, and associated fencing across roads. Gates must have 'Public Road' notices.

### **Weeds**

The law is clear: adjoining occupiers are liable for weed control on adjoining roads unless councils accept the responsibility. Liability for 'pest plant organisms' depends on the provisions of Regional Pest Management Strategies. Different rules may apply over the berms of formed roads, and over unformed roads.

### **Road damage**

There is widespread dismay at the damage caused to unformed and poorly surfaced roads by recreational vehicles. Rapid expansion nationally in the number of four-wheeled drives has ominous implications for use of unformed roads. Many 4WD owners show little apparent concern for the environment or for other road users. 'Tread lightly' codes of practice have not moderated driver behaviour or attitudes discernibly.

An exponential increase in damage to many roads creates potential liabilities for local authorities and is a basis for their reluctance to encourage public use of unformed and other roads.

Powers to prevent damage to roads are already available to local authorities but only a few councils have exercised controls over unformed roads. Contrary to the views held by many vehicle users, the law does not recognise an *absolute* right of passage, no matter what damage is caused.

Both common law and statute are well equipped to deal with damage to roads and to prevent damage of any origin, including by vehicles.

### **Existing powers adequate**

Hayes gives scant assessment of bylaws and the statutory licence to create these. The bylaw provisions of the Local Government Act 1974, being the primary bylaw provisions, are omitted from *Roading Law As It Applies To Unformed Roads*.

Local authorities have a portfolio of statutory and bylaw powers applicable over all roads under their control, with a range of substantial penalties for offences. No further powers are necessary or desirable.

Clearly, councils must control the use of roads as public highways—that after all is the sole purpose for which they are vested in Councils. The vesting is not intended to condone or foster private ancillary purposes such as those implicit in the proposition that adjoining owners are, or may be, 'occupiers' of roads.

The full, legitimate and only existing lawful objective served by the administration of public roads is to preserve the public right of passage and frontagers' private right of access to and from their properties.

A considerable body of common law, statute and bylaw makes it clear that the interests of councils and the interests of road users are well protected. The central difficulty presented in *Roading Law As It Applies To Unformed Roads* is Hayes's implicit desire to subordinate public interest to private interest.

## **14.4 Creating unformed roads**

The occasional need to realign unformed roads is a key consideration in their use for recreation. This may arise in situations where public access to recreation areas or waters is not served by existing unformed roads in the vicinity. Under these circumstances, roads can become points on which alternative routes may be negotiated.

Hayes claims that there are formidable if not insurmountable difficulties to creating new realigned unformed roads. He implies that Councils can only accept formed roads. As a consequence of these erroneous propositions, the Access Panel concluded that it is not possible to create new 'unformed legal roads'.

Review of relevant law in this critique reveals that there are no significant statutory obstacles in the way of dedicating new unformed roads from private or Crown land. The Resource Management Act 1991 repealed and replaced the provisions in the Local Government Act 1974 on which Hayes relies to support his position on unformed roads.

There is nothing in the RMA specifying any requirement for road formation. Standards of construction, if any, are matters for local government to determine. If Government decides on new or substitute roads for public walking purposes, it can do so readily. Roads can be dedicated as carriageways for cycles, bridle paths or footpaths. There is no necessity for creating formations suitable for vehicle use.

It is of paramount importance that there is 'road for a road' swap in any deals with private landowners. There are no comparable rights of public passage under any other legal mechanism in New Zealand.

#### **14.5 'Access strips'**

Following his erroneous advice that it is not possible to create new (realigned) unformed roads, Hayes advocates resumption of existing roads (without public process), disposal, and replacement by alternatives on new alignments over private land. His alternatives are 'access strips'.

Access strips are easements over private land. They do not confer the same enforceable rights of passage which apply over public roads held by the public. The discretion to restrict or close access on access strips is extensive. Strips may be cancelled or varied at any time with no obligations to public notification and no provisions for public appeal.

Hayes did not see fit to make these distinctions between roads and access strips explicit. Instead, he confined himself to observing that access strips conferred "something less in terms of public rights". Calculated or otherwise, this obfuscation is disturbing—its implications for public use are dire.

There is no justification for replacing unformed roads with any form of easement over private land, and certainly no justification based on the flawed reasoning Hayes presses into service for his 'access-strips' proposal.

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*"Experience teaches us to be most on guard when the government's purpose is benevolent. The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning but without understanding."*

Justice Louis Brandeis, of the United States Supreme Court  
Attributed to: *Omstead v United States*. 1928.

## **15 Recommendations**

*Recommendations are confined to those issues addressed by this critique and do not extend to all matters concerning roads raised by the Walking Access Consultation Panel.*

1. Government should address the issue of obstruction of all roads, formed and unformed.
2. Government should remind territorial local authorities that roads under their control are held in trust on behalf of the public and are to be managed in accordance with statutory and common law.
3. Public rights of passage and frontager rights of access must remain subject to the determinations of the Courts, with no codification of the law concerning public passage and private access.
4. No statutory provisions must be made which have the effect of extending private rights over roads.
5. Road-stopping procedures involving rights of objection and appeal must continue to apply.
6. The Minister of Land Information must not exercise his powers of resumption over unformed roads to achieve realignment of recreational access, whether or not this is at the request of Councils.
7. Realignment of access must be by negotiation and road-stopping procedures, with alternative access retaining the status of legal road and dedicated as pathway, bridle-track, cycle-way or vehicle carriageway as appropriate.
8. The New Zealand Walkways Act 1990 must be amended to prohibit walkways over unformed legal roads.
9. Government must advise local authorities that:
  - grazing of unformed roads should be regulated, if necessary, by section 34 of the Impoundment Act 1955, with associated fencing and gates bound by section 344 Local Government Act 1974;
  - existing bylaw provisions of the Local Government Act 1974 and Transport Act 1962 should be used more extensively to protect unformed and poorly surfaced roads from vehicle damage;
  - the requirement for 'Public Road' signs on gates across public roads should be adhered to.

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