

Public Roads

'rights of ways for all'

Bruce Mason, Public Access New Zealand
(Reprinted material: October 1998)

Proposed road user charges a threat to civil liberties

Aside from the basic commodities of air, water, food, shelter, and the need for personal security, there is one basic human requirement that must be satisfied for any civilised community to function anywhere on this Earth.

That need is the freedom of individuals to move from one place to another. So basic, so obvious really, that we scarcely ever think about it. Freedom of movement, other than in wartime, civil emergency or under authoritarian regimes, has always been taken for granted in civilised societies.

We get up in the morning, travel to work, to school, or go on holiday. We visit friends, go shopping, see a movie, or play sport, and in all cases we expect our freedom of movement to be unhindered. That expectation may soon be curtailed, if Government is allowed to proceed with its so-called 'reform' of New Zealand's public roading system.

The Government intends to commercialise the roads –to replace our present time-honoured system with an extreme version of user-pays. The excuse for this change, according to Transport Minister, Maurice Williamson, is that road funding is in crisis. However much of the money now collected from road users never goes back towards roads. The proposed changes are driven by ideology, not through shortage of revenue.

Satellite technology is available to track the movement of individual vehicles anywhere in New Zealand. This will enable billing road users on a regular basis for use of individual roads or parts of roads. This is all designed primarily to one end – to make a profit for the new corporate owners of the roads.

"The advent of new charging technology opens up great possibilities for direct charging", say Government's advisers. They have unintelligently likened the new approach to a telephone service, where of course those who default on payments have the service cut off, but life goes on. However they will need to fine or imprison errant road users who refuse to be monitored by Big Brother or can't pay bills and fines for this brave new road system to work.

Government's advisers believe that all users should be charged for the use of roads, including pedestrians and cyclists. There's one small problem – they haven't quite got the technology yet, but the intention is clear. They already have electronically mapped every road in New Zealand and can locate individual vehicles to within three metres. Next will we be compelled to carry mini transponders so we can be individually tracked from above?

As someone in local government commented, the technocrats have a 'mad scientist' approach. They have the technology; they feel compelled to use it everywhere no matter what the consequences.

This writer believes that the proposed use of satellite tracking technology is not the prime threat to civil liberties that will result from its use. The primary threat is the mindset of its proponents who are driven by a

new order of 'market forces' serving corporate rather than democratic ends.

Two years ago the Business Roundtable proposed the privatisation of public roads. Government, under the front of an appointed 'Roading Advisory Group', is now delivering. The Group's language of 'efficiency', 'competitiveness', etc., is also found in other 'reforms' that have been thrust upon society. The lives of the ill don't appear to matter in the 'reforms' of the public health system, therefore it is a small step for everyone to now take the market medicine.

The most basic of infrastructures, our roading network, is to be subjected to the holy writs of the market. There is no room for doubt, for history, or reality. There is only one solution. Only future buyers of rights of passage along our roads will have personal and economic 'freedom'. The more wealth you have the more you will be able to 'purchase' from the profit-driven roading company 'providers' destined to become the owners of our roads.

There is no mention of rights of use in any of the legislation affecting road administration and management in New Zealand. That is not because such rights don't exist, but because the Common Law has already determined those rights, rights that were often obtained through painful and bloody conflict.

The 'law of highways' both here and in England guarantees the public the right to pass and repass without hindrance at all times. These are personal rights, conveyed on every individual, who is capable of exerting them against authorities and others that unlawfully obstruct them (except on urban motorways which are subject to specific legislation). Anyone unlawfully obstructed can sue the obstructor and/or take direct action to remove obstacles –the epitome of individual standing and rights in a democracy. They are incalculably precious. They are rights that have been reaffirmed by our Courts. We have no other protection for them such as a written constitution.

Market-place ideologues view our living history with disdain. Common Law, dating from the 16th century, is the central obstacle to the application of direct user pays and corporate ambition. That is why, in the eyes of the 'reformers', such law must be abolished. In future our 'rights' will become 'codified' in statute, meaning determined by politicians and technocrats with profit and corporate agendas. These new 'rights' can then be further amended from time to time by simple legislative amendment.

Local Government New Zealand, the combined voice of the local authorities that manage most of our roads sees "the roading network as an integral part of people's lives and the reforms as threatening both the access and social cohesion that roads provide", however the association perplexedly welcomes user-pays for the country's roads. It seems that pragmatics of costs and 'efficiency' rules government both nationally and locally.

Roading is such a basic resource that its use is compulsory. Its potential for profit is unlimited. Treasury has number-crunched the value of roads at \$23 billion. This is the biggest single economic asset in New Zealand. It's ripe for privatisation in the new global market place.

Roading reforms 'may destroy structure of society'

Government's intended changes to road ownership and management undermine an essential basis of a property-owning democracy – legal frontage onto a public road, being part of a national network to all other property.

Our entire land settlement and ownership system is dependent on public roads providing linkages between individual allotments. Landlocked, isolated land is almost worthless, incapable of economic use. The reforming 'mad-scientists' may not realise that they are destroying the whole structure of our society, including private property rights that they assume the so-called 'free market' promotes above all else.

There is also risk of mass depopulation of rural New Zealand because these areas could become too expensive to live in and to service. Without cross subsidisation of lightly used roads, as occurs now, they may be disposed of because they are 'uneconomic'. Alternatively, as Government's Roading Advisory Group cynically comments, they could become 'economic' because if road users could be charged appropriately "then very few roads would in fact be uneconomic". That means most roads servicing rural communities will become expensive to use, even allowing for rate reductions if the 'reforms' proceed.

What Government's advisers fail to see or don't care about is that their premiss that 'roads' just mean 'transport', vehicles etc., is fallacious. As a 'transport' mode they have equated roads to railways and other forms of transport that can be operated under current fashionable economic models. To them roads have no social or any other function. The ideology driving the roading 'reform' requires a 'zero-based' approach which denies the existence of present and past. This is regarded by believers as 'innovation'.

However New Zealand's roads are much more than carriageways for vehicles. They provide the foundation for our settlement, a settlement that predates motor vehicles by about 70

years and is entwined with rights of public passage inherited from England from the Middle Ages. A highway may be a footpath alone, it may be a combined footpath and bridlepath, or it may be a way for persons on foot, on horseback or in vehicles. Usually they are for all forms of passage. Whether a road is formed or unformed (so-called 'paper roads') has no bearing on the legal status and public rights. They all serve the same end – providing rights of passage for all who wish to pass and rights of frontage or access for property owners abutting the roadway.

Approximately half our roads are unformed however Government's advisers dismiss these as "nominal roads", only worthy of disposal through a review process with unspecified purposes. Half the Queen's Chain along our waterways consists of roads.

Transport Minister Williamson has stated that legal ownership of the land underneath road formations will not pass to roading companies, despite his Advisory Group making recommendations that directly contradict him. The Minister also claims that "there will be no effect on the public's existing rights to pass along roads. These rights will remain in place unaltered". Whereas his advisers have expressly recommended to him that existing rights under common law be extinguished.

All that Mr Williamson offers is "some form of access" to property owners (no mention of anyone else). The commercial, corporate model Government promotes will dictate what form that 'access' will take. He further states that 'paper roads' will not go to the companies but erroneously claims that they will "remain" with "individual property owners". In one sentence he thus extinguishes public ownership of these roads, or more accurately expresses his intention as to who the future owners will be.

In the world of ideological illusion, official assurances and words have become meaningless. Private now means "public" and public means "private".

We are assured that roads will remain in “public” ownership because the roading companies will be owned by central and local government. How ‘public’ has any state-owned enterprise (SOE) or Crown health enterprise proved to be when run for business purposes by an appointed board of directors which acts without external accountability? The shareholding Ministers obviously don’t see any responsibility falling on them for actions affecting individual SOE ‘clients’ or their rights. The reality is that the existence of SOEs is constantly used as a shield to avoid Ministerial accountability.

Many people would find it hard to believe that there would be any durability to the Minister’s so-called ‘public ownership’ of roading companies, after the sale of many SOEs over the last decade. The meaninglessness of the Minister’s words is compounded by his advisers describing truly publicly owned roads administered by the Department of Conservation as ‘private’. These are also now to be driven by the same profit management as the roading companies.

The Ministerial and corporate spin-doctors are engaged in allaying public concerns and avoiding public debate if at all possible. That could only be an impediment to the tight legislative timetable that his predecessor Jenny Shipley planned. One has to question the propriety of the process when public meetings to discuss the ‘reforms’ are not publicly advertised. Also when submitters on earlier reports are not sent subsequent reports and not invited to make further comment.

The disdain with which Government and its chosen elite of advisers treat the public is indicative of their contempt for democracy and the individual. The forces of corporate self interest are so compelling, that I believe that our leaders, who are behaving more like dictators than elected representatives, will not change their ways voluntarily.

Hopefully the threats to fundamental human rights inherent in the so-called roading ‘reforms’ will provide the wake-up call that will shake us out of our passivity and sense of helplessness. It will require a reassertion of public will over those intent on enslaving us. That reassertion needs to be massive and forceful, if New Zealand is to remain a fair, humane, and peaceful society that we and those yet to come can be proud of.

Rights of public to pass along a road

Common Law

Subject to the express or implied statutory powers of a district council, the public has the absolute right at common law to pass and repass along a road without hindrance.

Judge Chilwell: “I have come to the conclusion that a road is incapable of being possessed by anyone to the exclusion of the right of each and every member of the public to assert his right to pass and repass without hindrance over every part of it. This is no mere exercise in theory...” *Moore v MacMillan* [1977] 2 NZLR 81 (SC); *Pratt & McKenzie’s Law of Highways* (21st ed) p 53.

A permanent obstruction erected on a road without lawful authority and which renders the way less commodious than before to the public is a public nuisance, provided the obstruction constitutes an appreciable interference with the traffic in the road. *Lower Hutt City v A-G ex rel Moulder* [1977] 1 NZLR 184 (CA). (‘Traffic’ is use in all its forms).

Nuisance, negligence, and obstruction

Statute Law

Section 242 Local Government Act 1974. **Council not authorised to create nuisance**–

“Nothing in this Act shall entitle the council to create a nuisance, or shall deprive any person of any right or remedy he would have against the council or any other person in respect of any such nuisance.”

Common Law

Cf. Section 334 Local Government Act 1974. Erection (by council) of monuments, etc., and provision of facilities on or under roads.

A permanent obstruction erected on a road without specific statutory authority and which renders the way less commodious to the public than before, is a “public nuisance”, provided the obstruction constitutes an appreciable interference with the traffic on the road. *Several cases*.

While roads are vested in and under the control of a Council this does not mean that the Council is liable for obstructions to the road of which it has no knowledge. However, should the Council become aware (either through its own inspection, or through information passed to it by members of the public) that an obstruction which it has authorised has become a nuisance (eg –by impeding pedestrian or other traffic), it may be liable on the basis that it has allowed a person to create an obstruction that is a kind of public nuisance. *Mayor, etc of Invercargill v Hazelmere* (1905) 25 NZLR 194.

Private occupation

Statute Law

Section 341 Local Government Act 1974. **Leases of airspaces or subsoil of roads:**

Section 341(1) permits Councils to grant a lease above roads or of the subsoil beneath roads, provided that in the case of airspace, the Council shall ensure that sufficient airspace remains above the surface of the road for the free and unobstructed passage of vehicles and pedestrians lawfully using the road.

Common Law

In *Moore v MacMillan* [1977] 2 NZLR 81 (SC) it was held that a road was incapable of being possessed by anyone to the exclusion of the general public’s right of unhindered passage and that therefore the law did not recognise the “right” of any person to occupy a road to the exclusion of the public. Accordingly a person who erected cattle-yards on a road could not maintain an action in trespass against a person who demolished part of the cattle-yards. See also *Fuller v MacLeod and Wellington City* [1977] 2 NZLR 705 (affirmed on appeal [1981] 1 NZLR 370 (CA)), where a restrictive view was taken of the council’s powers in relation to roads.

Public roads – a users’ guide

The key concept behind the law of highways is the right of passage. Your rights, and limitations on your actions, and those of administering district councils, hinge on this concept.

Whether a public road is formed or unformed (including so-called ‘paper roads’) has no bearing on their legal status, or on your rights of use. There is the same right of passage.

New Zealand public roads are strips of land normally 20 metres wide with ownership vested in district councils. Adjoining land owners have the same rights of use as members of the general public, plus a right of ‘frontage’ (access) to their property along their legal boundary with the road. They are not ‘The Owners’ of public roads, as frequently asserted or implied.

What you can do–

- each and every member of the public can assert their right to pass and repass without hindrance, by whatever means they choose (provided it doesn’t damage the surface).
- do other things related to passage, e.g., parking, resting etc.
- remove ‘public nuisances’*, erected without statutory authority, sufficient to enable your passage.

* Recommend leaving to one side without unnecessary damage. Not every encroachment amounts to a ‘nuisance’–needs to be ‘an appreciable interference’ with, or an obstruction to, your rights of passage. What amounts to ‘appreciable interference’ is a matter of fact on a case by case basis. Remove no more than what is necessary for passage.

- remove vegetation sufficient for passage (ie. clear tracks).
- as an adversely affected member of the public, sue the person responsible for a nuisance, and the district council if it authorised it.

What you cannot do–

- occupy or obstruct a road to the exclusion of the public.
- encroach on a road by any building, fence, ditch, or other obstacle, or plant any tree or scrub, without authorisation from the district council.
- dig up, remove, or alter in any way the soil or surface or scarp or a road, without authorisation from the council.
- damage or remove or alter any gate or cattle stop lawfully erected.

What you must do–

- leave a lawfully erected gate in the position (whether open or closed) in which it is found.

What district councils can do–

- close roads temporarily to traffic or any specified type of traffic with public notification, for reasons of road construction or repair, resolution of traffic problems, when public disorder exists or is anticipated, for temporary diversion to other roads, for exhibitions, fairs, public functions etc., and to motor vehicle use, or any class of motor vehicle, when climatic conditions may cause road damage.
- close roads temporarily (for motor races or other special events) to vehicular traffic, with public notification and right of objection.
- ‘stop’ or permanently close roads after a public notification and objection procedure (watch out for public notices in local newspaper). Council decisions to ‘stop’ roads are subject to a right of appeal to the Environment Court. The key determinate is the need for the road (e.g., provides sole legal (not necessarily practical) access to individual allotments), not any perceived need for ‘stopping’, such as claimed undesirability of public access.

- grant leases of airspaces above roads, provided that sufficient airspace remains for the free and unobstructed passage of vehicles and pedestrians.
- permit in writing the erection of a swing gate with a ‘Public Road’ sign, or a cattle stop, or both across a road, where it is not practical or reasonable to fence the boundaries of the road.
- sue any person in respect of a nuisance arising from an unreasonable interference with the public right of passage.
- compel or recover the cost of removal of an obstruction.

What district councils cannot do–

- create a nuisance, or deprive any person of any right or remedy they would have against the council or any other person in respect of any such nuisance.
- lawfully authorise obstructions (e.g., fences, stock yards, buildings) across roads.
- grant rights of use or occupation that create a public nuisance or interfere with public rights.

What district councils are liable for–

- obstructions it has authorised when they become nuisances, should they become aware of them.
- permitting an obstruction it has authorised, once it becomes a nuisance, to remain on a road or otherwise fails to abate the nuisance.

What district councils are not liable for–

- spending money on road construction or maintenance (a Council discretion).
- obstructions to roads of which they have no knowledge.

Caution

1. The above advice reflects current New Zealand statutory and common law. The directions noted above have been repeatedly ‘field-tested’ without any legal liabilities falling on the practitioners.
2. This is a summary and not the complete law relating to roads. Consult a lawyer.
3. This advice is dependent on the road being properly dedicated.
4. You must be certain you are on the correct alignment.

For a fuller explanation of legal rights and how to research the status and location of roads see ‘Public Roads-A Guide to Rights of Access to the Countryside’ at–

www.publicaccessnewzealand.org