# PROPERTY LAW AND EQUITY REFORM COMMITTEE

## INTERIM REPORT ON THE LAW RELATING TO WATER COURSES

WELLINGTON NEW ZEALAND

# THE LAW RELATING TO WATER COURSES

INTERIM REPORT

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Presented to the
Minister of Justice
May 1983

PROPERTY LAW & EQUITY REFORM COMMITTEE

TO: The Minister of Justice

# Interim Report on Law Relating to Water Courses

## Introduction

1. This topic was referred by you to the Committee for consideration by letter dated 10 April 1978. The Committee was asked to carry out a study and reassessment of the law relating to ownership of riverbeds and water courses and land adjacent thereto, including specifically ownership rights and control of rivers; the concept of "navigability" and related definitions; problems of accretion and erosion; the suitability of traditional common law concepts to present-day New Zealand conditions.

2. The Committee invited comments on the topic from interested parties and to date has received these from:

   Department of Lands & Survey (Surveyor-General)
   Department of Justice (Registrar-General of Land)
   Ministry of Transport
   Department of Maori Affairs
   New Zealand Catchment Authorities Association (Inc.)
   The Manawatu Catchment Board and Regional Water Board

   These comments have to date necessarily been of a preliminary nature. They have, however, been of considerable assistance to the Committee and it is grateful for them. It is proposed that if this study is taken further then an invitation to submit more comprehensive submissions or comments will be extended to all parties who have or are likely to have an interest in the topic. The Committee has also only recently been informed that the Department of Lands & Survey is undertaking a review of the Land Act 1948 and that this will encompass the question of riverbeds

under section 261 of the Coal Mines Act 1979 and, also, that of the seaward boundary of Crown grant land under section 35 of the Crown Grants Act 1908.

3. The Committee considers that it is fair to say that the topic is a relatively extensive and complex one. In an endeavour to try and isolate the problems involved in and arising from the reference, a summary of the general legal position was undertaken in the form of a background paper. A copy of this paper is attached ("A"). This was, it should be emphasised, essentially intended to do no more than summarise the general legal position and isolate some of the principal problems and areas of difficulty which arise. No doubt further inquiry will reveal others.

4. As can be seen from the background paper, the Committee's efforts to date have concentrated principally on the ownership of riverbeds and associated matters, rather than other specific matters such as the law relating to adjacent land and riparian rights; accretion and erosion; artificial and underground water courses; lakes and other stagnant water; seaward boundaries and boundaries of land abutting tidal waters; reclamations; river islands; customary Maori rights and claims in respect of rivers. However, it is considered that the primary and essential problems for consideration in regard to the topic as a whole arise from and in regard to the ownership of riverbeds.

Purpose of interim report

5. Following on from the background paper and further consideration the Committee has come to some preliminary, albeit tentative, conclusions and recommendations as to the ambit of any reform in this area. These views must necessarily be subject to further submissions and comments from and consultation with other interested parties in regard to them which

the Committee may receive, should the Committee be requested to proceed further with its study. However, the Committee considers that an interim report should be made to you at this stage on this topic for the following reasons:

a) to indicate the progress made to date

b) to provide a basis and catalyst for further comments and submissions from interested parties

c) more specifically, to seek from you confirmation that the Committee should continue its study along the general direction of the lines indicated in the preliminary conclusions and recommendations outlined in paragraph 6 of this report.

Until recently, the Committee itself had not necessarily been convinced as to there being any particular need for reform or rationalisation in regard to this area of the law. While it is undoubtedly the case that the relevant legal concepts are not altogether satisfactory or clear, as is indicated in the background paper, the actual and practical problems (as distinct from largely theoretical ones) in this area seem, at least based on the evidence which the Committee had previously gathered, to be rather in the nature of jurisdictional and demarcation ones as between government departments and statutory agencies. However, more recent discussions with the Department of Lands & Survey would suggest that there is in fact a real need for reform of the law in this area and it may be that the Committee should make further inquiry into what the actual problems being experienced in this area are. If there is to be reform in this area the Committee's present views are that it should be of a comprehensive and fundamental nature rather than, for instance, the alternative of merely some relatively limited amendment to section 261 of the Coal Mines Act 1979. Furthermore, the principal recommendations of the Committee set out in paragraph 6.6 below are confiscatory of existing rights, although further comment on this aspect is made later on. The Committee also presumes that if the inquiry is to be pursued further, it should consult with the Department of Lands

& Survey in regard to the review which it is undertaking.

Preliminary recommendations and conclusions

6.1 Any reforms in this area would probably be most appropriately effected by either an amendment to the Land Act 1948 or, if it was practicable, by inclusion in the current revision of that act. Alternatively, a specific reform statute could be enacted.

6.2 There should be new and precise statutory definitions of "river" and "riverbed", possibly based on width but in any event not based on any concept of navigability. These definitions will necessarily need to provide for and accommodate the position of small streams and water courses. A statutory definition (as against merely relying on common law definitions) is considered necessary, especially because of the relatively unstable and indefinite physical nature of many New Zealand rivers. Otherwise, any reform in this area is likely to be doomed to uncertainty from the start. It is suggested that a workable statutory definition should be able to be derived from the common law definitions referred to on pages 1 and 2 of the background paper and existing statutory definitions. In most common law jurisdictions statutory definitions of rivers or water courses involve the concept of water flowing in a definite channel with a bed and bank or sides. Generally, but not necessarily, this water will flow into another body of water but it is feasible to have a definition whereby a river or water course may exist despite the fact that it does not flow or empty into another body of water. Accordingly, the substantial indications of the existence of a river, ordinarily a moving body of water, may suffice as a basic definition of a river or water course. Existing statutory and common law definitions and criteria as to the definition of a river's banks and, consequently, its bed by reference to regular but not extraordinary floods would also seem to be an appropriate guide as to any new statutory definition of a "river" (although the

position of flood channels as such may need to be separately considered). It is also to be noted that existing statutory definitions in New Zealand are generally consistent with the common law definitions. The definition in section 261 of the Coal Mines Act 1979 is used in a number of other New Zealand statutes. The Department of Lands & Survey has suggested that only the beds of rivers 20 metres wide bank to bank should vest in the Crown (i.e. as opposed to the present criterion of navigability) but the Committee would want to consider this and the specific statutory definition of a "river" and a "riverbed" further. It may well be that this suggested width is too wide. For instance, in the context of provision for reserves in subdivisions, the Local Government Act 1974 section 289 provides that generally subdivisions affected by the act which contain (inter alia) rivers or streams must provide for a reserve along the banks of such rivers and streams which have an average width of not less than 3 metres. In the context of reserves from the sale of Crown land, the Land Act 1948 section 58 also adopts a measurement of 3 metres. The various points along the river at which this or any other measurement is to be taken would also have to be considered further, as would the method of measurement. Indeed, the question of whether there should be a minimum prescribed width at all would need to be considered further. No doubt the Department of Lands & Survey will be directly interested in these aspects in particular.

6.3 As to the common law distinction, insofar as it affects proprietary rights, between tidal and non-tidal rivers, it is considered that generally this distinction no longer serves any meaningful purpose and accordingly should be abolished. Its historical originals are no longer of any relevance. A small river may be tidal near its mouth yet be of little significance in any other relevant respects, compared with a larger river, above its ebb and flow (or tidal point). At common law the bed of a tidal river is prima facie vested in the

Crown. It follows that any general statutory reform to the contrary (e.g. by enacting that the ad medium filum presumption should apply in regard to rivers narrower than a prescribed width) would, if this distinction is abolished, necessarily derogate from the Crown's existing rights. The extent of this would, however, depend upon the width adopted (i.e. assuming that the criterion of a minimum width was to be adopted). If a relatively narrow width was adopted then such derogation would not be very significant. An alternative would be to leave existing common law and statutory foreshore principles intact, so that they would continue to apply in regard to tidal rivers and streams of less than the prescribed width. The ordinary high water mark would then still fall to be fixed under these general foreshore principles. This alternative might be seen as accommodating any problems which may arise from a riparian owner of a tidal river being obliged to accept land that he may, possibly, not want. A further possible alternative in regard to any such problems, should they be thought likely to arise, would be to make appropriate express statutory provision for such riparian owners who may not want to acquire title to the bed of a tidal river, consequent upon the proposed abolition of the existing common law distinction between tidal and non-tidal rivers.

6.4 The common law and present statutory concept of "navigability" as a criterion of proprietary rights should be abolished. It is considered that this too no longer serves any useful purpose as a means of determining the ownership of riverbeds. Again, its historical origins are no longer relevant in New Zealand. Historically it derived from the notion that the public had no substantial interest in or demand for the use of inland waters, other than for transport and, to a lesser extent, for fishing. In earlier times people had neither the time nor money to make demands upon inland waters other than for commercial navigation. Public rights in regard to inland waters, both in England and other common law jurisdictions,

developed in response to these limited demands. As a result, commercial navigability has, until more recent times, consistently been used as the line of demarcation for establishing public interest in or rights over such waters. However, the concept of commercial navigability and notions of transport and navigation along rivers were never generally applicable in New Zealand, although certainly they were in the past and still are of importance on some rivers. The concept has always been an inherently uncertain one and has proved to be difficult in actual application. Problems associated with it, both actual and potential, are referred to in the background paper. Indeed, one commentator has noted that in California (where the concept was previously applied) there are more reported cases in that state in the field of water rights and rivers than any other. Furthermore, whatever the historical considerations, it is today considered to be unsuitable and inappropriate as being outdated and superseded by modern forms of water transport which have extended its possible applicability, at least in theory, far beyond what was possible as at 1903, when section 206 of the Coal Mines Act 1926 (now section 261 of the Coal Mines Act 1979) was originally enacted. It is considered that there is no longer any logical or valid reason why modern statutory controls over the use of water or, for example, minerals in riverbeds should depend at all on whether the river is or is not navigable. Indeed, most present-day legislation in New Zealand which bears to any extent at all on the control of water in rivers is not dependent upon this concept.

6.5 Express or necessarily implied grants of proprietary rights by the Crown, whether by statute or otherwise and including traditional and customary Maori rights, should be left intact and unaffected by any general statutory reform in this area. It is apprehended that such express or implied grants would be of the type that refer, either expressly or by necessary implication, to the riverbed as such (i.e. the land covered by water). At this stage it is envisaged that

customary Maori claims and rights would continue to be dealt with separately by the Maori Land Court on a specific basis and would not per se be affected by the proposed reforms.

Otherwise, the reform could well be seen as being unacceptably confiscatory of existing rights. However, the Committee does not consider that, except as to those rights which it is necessary to specifically preserve (see paragraph 6.7), existing rights arising merely from the application of the ad medium filum presumption should be left intact, other than in respect of rivers less than whatever width (if any) is adopted for the definition of a "river" (see paragraph 6.2). This aspect is referred to further in paragraph 6.6, in the context of the Committee's principal preliminary recommendation.

The Crown would, however, even in regard to express and implied grants need to have the power to declare the beds of any such rivers to be Crown land. It is considered that any such power should be subject to appropriate procedures as to:

(i) public notification of intention
(ii) public rights of objection
(iii) independent investigation and recommendation or adjudication by e.g. the ordinary courts or the appropriate regional water board (or a specially constituted tribunal)
(iv) such body would be required to hold a hearing
(v) rights of compensation for existing express or necessarily implied rights to land or rights to riverbeds taken as a consequence would also be determined and fixed by this body.

6.6 The fee simple title to all other riverbeds (i.e. wider than the prescribed width, if any) should vest in the Crown. This is the Committee's principal preliminary recommendation. It would consequently follow that section 261 of the Coal Mines Act 1979 should be repealed. It is considered that the only realistic and

practicable general reform in this area would be in accordance with this recommendation.

Insofar as the recommendation may be viewed as confiscatory of existing rights:

(i) the title to the beds of tidal rivers is vested in the Crown at common law anyway

(ii) this is almost certainly the case also with regard to non-tidal rivers navigable as at 1903 or whenever the original grant by the Crown was made, in terms of section 261. Indeed, there is a possible argument that the application of this section in favour of the Crown may now be quite extensive, because of modern forms of water transport (e.g. jet boats). This and other problems in regard to the concept of navigability are also referred to in the background paper. It is accordingly considered that the Crown in fact may well already own the beds of a large proportion, if not the majority, of the length of New Zealand rivers.

(iii) either the Crown or the relative local authority necessarily acquires rights (i.e. public ownership) to riverbeds where strips of land along the banks of rivers are vested in it, whether as reserves under existing statutory provisions, or otherwise.

(iv) as stated, under the proposed reforms even express grants from the Crown or those which arise by necessary implication would be subject to being taken as well, in accordance with the procedures suggested above. However, it is considered that these rights are in a somewhat different position as against rights which arise merely from the application of the ad medium filum presumption. In the former case they are more secure and can reasonably be considered as entitling the grantee to compensation for their loss. Furthermore, potentially any such rights of compensation for the loss of common law rights would be extensive

and there would no doubt be revenue considerations.

(v) it now appears to be accepted in New Zealand that common law rights arising under the presumption do not, without more, involve an indefeasible legal title under the Land Transfer Act 1952. So this potential problem does not arise in New Zealand. No change in this regard is presently proposed.

(vi) perhaps most importantly, rivers and water resources have in more recent times, both in New Zealand and elsewhere, become increasingly viewed as matters of public and national importance and concern. It is considered that it can no longer be seen as totally inappropriate or unnecessary that the Crown should have the ownership of riverbeds, rather than the adjacent riparian owners. The use and conservation of water in rivers are clearly now considered to be important in the national interest, whether in respect of irrigation, drinking water for people and stock, hydro electricity, fishing, natural and scenic reserves, habitats for wild life, recreational areas or sources of flooding, erosion and pollution. These considerations are of the type which led to the adoption last century and earlier this century in some areas of New Zealand of the doctrine of prior appropriation whereby traditional riparian rights to water resources were displaced by rights in favour of the State so as to ensure the most efficient, beneficial and equitable use of water on a centralised basis. A similar development took place in the United States. Viewed in this way, it is considered that the allocation of a country's water should be such so as to satisfy the greatest possible number of beneficial uses, including what has been termed "consumptive uses" (e.g. for agricultural or urban water supplies) or "instream uses" (e.g. navigation, fishing, scenic and aesthetic, recreational, scenic and wildlife preservation uses). A number of common law jurisdictions now

have legislation whereby all water within that particular country or state is the property of the State and, as in New Zealand, the right to use any water may only be acquired by application, appropriation and allocation in the manner provided by law. Accordingly, the conditional nature of rights to the use of water as exists in New Zealand under such legislation as the Water and Soil Conservation Act 1967, including the 1981 amendment to that Act, reflects this fundamental principle that water rights are what has been termed "usufructuary" (i.e. based on use and enjoyment) rather than proprietary. Both in New Zealand and other common law jurisdictions the State retains continuing regulatory jurisdiction over water rights so as to ensure the maximum benefit to the public from such resources, which are very often limited or scarce (this has been termed, in this context, as "distributive administration"). In California the analogous concept of the public trust doctrine provides for public ownership of waters in recognition of the State's effective trusteeship over waters which requires the legislature to implement methods whereby water resources are administered in the public interest.

(vii) following on from the immediately preceding point, the present-day reality is that private interests have become increasingly meaningless as more and more public rights are recognised. This is now the case in New Zealand. Attached is a schedule ("B") prepared by the Department of Justice for the Committee which sets out a preliminary list of statutory provisions in New Zealand which affect in some way the use and control of rivers and water courses. The list is not necessarily comprehensive although, as will be readily seen, it is nevertheless fairly extensive. Accordingly, apart perhaps from the right to take shingle, the ownership as such of the bed of a river or water course, without more, today generally carries with

it few legal rights or anything of real value insofar as the adjacent riparian owner is concerned, at least while water continues to flow over the bed. As already noted, the use of water in rivers in New Zealand is today strictly controlled by numerous statutes. Minerals and mining rights are almost exclusively vested in the Crown. Other rivers are or are liable to be vested in the Crown by existing, specific, empowering legislation (e.g. Waimakariri River Improvement Act 1922; Ashley River Improvement Act 1925).

(viii) traditional, albeit increasingly limited, common law riparian rights arising from the ownership of the banks of rivers would not, at least in general terms, be affected by the proposed reforms (e.g. rights to the uninterrupted flow of water, as to the purity of water, as to the consumption of water for domestic and stock purposes, in regard to controlling access to rivers, as to the use of rivers for navigation, boating and fishing etc.). However, even in this context, it is to be noted that various statutes already control or provide for jurisdiction over river banks as well as rivers themselves, for such purposes as public works, drainage, flood and erosion control, power lines and public access (e.g. under the Rivers Boards Act 1908, the Public Works Act 1981, the Land Act 1948, the Water & Soil Conservation Act 1967, the Local Government Act 1974).

6.7 The common law ad medium filum presumption would continue to apply in regard to rivers less than the prescribed width (i.e. in the event that this criterion for determining public ownership rights is adopted).

6.8 It is apparent from an analysis of the legislation referred to in schedule "B" and from comments received by the Committee to date from interested parties that jurisdictional problems in regard to rights and obligations may presently exist between various government departments and statutory agencies as to the

control and administration of rivers. These need not be directly the subject of the proposed reforms but, on the other hand, the opportunity could be taken to deal with such problems if it was thought appropriate to do so. For instance, the appropriate local regional water board could possibly be the body which should have vested in it the ultimate responsibility for the administration and control of rivers, subject to any express statutory provisions. The Crown could delegate any of its rights arising from the proposed reforms to such a body or to any other specially constituted body.

6.9 Although, as stated, it is not considered that, as a matter of general principle, existing rights arising merely from the application of the ad medium filum presumption should be preserved (i.e. in regard to rivers wider than any prescribed width adopted), there are certain existing rights which, it may be thought, will necessarily have to be specifically preserved and there are others which it may be thought should be preserved. An example of the former type would be the rights of a riparian owner who owns land adjacent to both sides of a river to cross the riverbed for any lawful purpose, such as normal access or in order to move stock, or to bridge it. An example of the latter would be the right of a riparian owner to extract shingle, particularly if that right has in fact been actively exercised within recent times. It has been suggested (see paragraph 6.6(vii)) that the right to take shingle is one of the few remaining rights of any real value which a riparian owner still has as a result of ownership of a riverbed. It may accordingly be thought that such a right ought either to be preserved absolutely or at least be made subject to grant by the Crown, upon application and as determined or recommended, for example, by one of the various tribunals referred to in paragraph 6.5 above. The preservation of such a right could be seen as being analagous to the preservation of existing, active use rights when water rights were generally vested in the Crown by the enactment of the Water & Soil Conservation

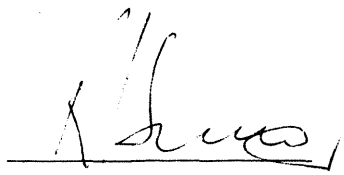
Act 1967. The preservation of an existing, actively exercised right is seen as something which deserves special consideration, as against the loss of a right which has not in fact been exercised in recent times, although it may well be that any past use of or future expectation in regard to such a right would be factors which could properly be taken into account by any tribunal responsible for determining or recommending any express grant by the Crown which is applied for. Other rights which might require particular consideration would include, for instance, the right to culvert a river or to repair or reinforce the banks of a river or to fill in a river or riverbed.

6.10 The suggested reforms may also provide an opportunity for the Crown (i.e. the Government) to make a general statement as to public rights of access to and navigation on rivers where the ownership of the bed is vested in the Crown, whether in accordance with the existing law or as the result of the implementation of the proposed reforms.

6.11 It is not at this stage recommended that the proposed reforms should make any attempt to deal specifically with the principles of accretion and erosion or problems arising therefrom. These doctrines would still continue to apply under the regime implemented by the proposed reforms. However, it may be that the ordinary courts or, as also suggested, a specially constituted statutory tribunal could deal with such matters as: claims to title resulting from accretion and erosion, both as between private owners inter se and the Crown; ownership of river islands; (possibly) defining the boundaries of land abutting tidal waters; (possibly) questions relating to reclamations in respect of navigable and tidal rivers (which are also dealt with to some extent in the Harbours Act 1950); redefining the beds of rivers which have or may have dried up or changed course, although it is contemplated that once the bed of a river is vested in the Crown the

land would remain vested in the Crown but in regard to a river which changes course then the suggested compensation procedures might be applicable when the bed of the new river vested in the Crown, in accordance with the suggested reforms. The powers of the Courts or suggested statutory tribunal could possibly also provide for the power to grant a fee simple or leasehold interest in permanently dried up riverbeds to adjoining owners, in lieu of monetary compensation, at the option of the Crown.

26 April 1983



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PROPERTY LAW & EQUITY REFORM COMMITTEE

A

Background paper on ownership of riverbeds

A. Scope of inquiry

(a) position at common law in respect of rivers, tidal and non-tidal, navigable and non-navigable

(b) relevant statutory provisions

(c) excluded from consideration at this stage:
  (i) artificial water courses
  (ii) underground water courses
  (iii) lakes and other stagnant water
  (iv) riparian rights (i.e. ownership of banks, rights of access to rivers, controls over the use of rivers)

(d) cited authorities and references have deliberately been kept to a minimum

B. Definitions of a "river" and "riverbed" at common law and by statute

Perhaps not surprisingly, no comprehensive definition of what is a river exists at common law. However, the bed of a river has usually been defined either:

(i) by reference to the water flowing over it. All common law definitions of a river involve the notion of an inland current of water flowing towards the sea in a defined course. This necessarily involves problems, especially in New Zealand, as to areas which are sometimes but not continually covered with water, as to rivers which have more than one defined course and as to rivers which change course frequently. At common law a riverbed is generally taken to include areas usually covered by flowing water in times of normal, annual floods or fullest flow. Again, English common law definitions of rivers in this regard are not always appropriate in the New Zealand context. Constable's Arcadian paintings of gently meandering English ruridecanal rivers do not bear much resemblance to the likes of the Waimakariri or

Haast Rivers.

(ii) by reference to the banks of the river. The banks are those elevated areas subjacent to the river left uncovered in times of normal, annual floods and which confine the water in the river. The riverbed is the area of land between the banks usually covered by flowing water in times of such flood. Again, particularly in New Zealand, problems arise in regard to banks which are both indefinite and frequently unstable. Nevertheless, the common law definition of a river involves the notion of confining and usually elevated banks which are more or less definite and stable. Statutory definitions (e.g. Land Drainage Act 1980 s 2; Coal Mines Act 1925 s 206; Mining Act 1926 s 24; Soil Conservation and Rivers Control Act 1941 s 2) are invariably descriptive only and not exhaustive in application and are necessarily limited to the purposes of the particular statute. However, by and large the statutory definitions are at least consistent with the common law definitions as described.

C. Ownership of riverbeds at common law

Although, generally speaking, ownership of the bed of a river is seen as an annexure to the riparian lands, ownership of the banks of a river or the rights of access thereto are strictly a matter distinct from ownership of the bed as such. This has practical consequences in regard to tidal rivers in particular. In regard to non-tidal rivers, ownership of the banks frequently but not necessarily carries with it the right of ownership of the bed (or half of it).

(a) tidal rivers

At common law the bed of all tidal rivers, estuaries and arms of the sea, where the tide ebbs and flows, is prima facie vested in the Crown, up to the line of the ordinary high water mark (i.e. up as far as the tide flows or rises)[1]

This principle applies in respect of both boundary rivers and those flowing through an owner's land. There can, of course, be an express grant by the Crown. All tidal waters on which navigation is possible are deemed at common law to be navigable and are accordingly subject to a public right of navigation, whereas waters above the influence of the tide, even though navigable in fact, are deemed not navigable at law. However, rights of navigation (and associated rights such as the right to anchor and moor etc.) do not involve any right of property in the riverbed. A possessory title adverse to the Crown in respect of tidal rivers and creeks can apparently be obtained after 60 years.[2]

(b) non-tidal rivers

At common law all rivers above the ebb and flow (or influence) of the tide are prima facie private rivers, but subject to public rights of navigation by statute or prescription. The ad medium filum aquae presumption applies as to the title to non-tidal boundary riverbeds.[3] It is both a rule of construction of instruments evidencing title to land bounded by such rivers and a prima facie presumption of fact that the ownership of the bed of a non-tidal river is divided between the subjacent riparian owners by the middle line of the river measured bank to bank. So, for example, the presumption applies to the conveyance of land bounded by a river and if the right to the riverbed is to be excluded then this must be done expressly. Merely defining the area of the grant or annexing a plan without reference to this right (even if such area can be satisfied without including half of the riverbed) is not sufficient to displace the presumption. But the presumption is rebuttable. A relevant, although not necessarily conclusive, fact has been held to be that the river had in fact always been widely used for public navigation, making private ownership of the bed inconsistent with this public right.[4] Also, at common law the presumption was displaced by proof of a several (or private) fishery but such rights do not exist in

New Zealand (apparently because there were no indigenous fish in New Zealand rivers that were thought worth fishing).[5]

At common law there is no distinction between navigable and non-navigable non-tidal rivers, in so far as ownership of the riverbed is concerned.[5]

(c) rights pertaining to ownership of riverbeds at common law

These are in fact basically the same as in respect of dry land. (As previously mentioned, the incidents of ownership of the banks must be distinguished here.) Generally, then, the incidents of ownership of the bed at common law include the right to remove shingle,[6] minerals,[7] exclusive navigation, and rights of fishery[8]. On the other hand, the owner cannot injuriously interfere with the flow of water or with rights acquired by the public and his boundary is liable to change with changes in the courseof the river.

D. The ad medium filum aquae presumption and the land transfer system

It has been held that a District Land Registrar cannot issue a certificate of title for land submerged by water, at least in the absence of specific statutory authority.[9] This applies both to a river flowing through the owner's land as well as to one which bounds it. It is a pity that the idea of noting the title as to the riparian owner's rights to the bed to its middle stream has not found favour in New Zealand. It is, however, the established, although not invariable, practice of Land Registry Offices throughout New Zealand. Indeed, rivers and streams on a registered proprietor's land are sometimes not recorded at all on the certificate of title. Obvious and particular problems potentially arise if such rivers are in fact navigable, for reasons explained later.

So the ownership of a riverbed derives from the common law legal estate only. Possession of the riparian land presumably carries with it the right to possession of the riverbed (or half of it) as against anyone whose right is

not as good [10] but no indefeasible title under the Land Transfer Act 1952 can be obtained and accordingly it is liable to be displaced by adverse possession or rights acquired by prescription. In contrast, the position is apparently different in Australia, where the riparian registered proprietor's estate has been held to include the bed of the river up to the middle line.[11] The New Zealand approach has been criticised and is somewhat difficult to explain satisfactorily. There does not appear to be any valid reason as to why the registered proprietor's right cannot in principle include a presumptive title to half the riverbed. However, having said that, it is to be noted that there is support of the New Zealand approach in Canada.[12]

E. Accretions and erosions

The common law principles involved are reasonably clear but their application to particular circumstances often causes notorious difficulties. Natural water boundaries are inherently susceptible to change through natural causes. This is particularly so in New Zealand. The doctrine of accretion applies at common law if:

(i) there is a freehold with a natural water boundary

(ii) there is a gradual and imperceptible change, by natural or lawful artificial causes, in this boundary, by either silting up against the bordering land (alluvion) or the permanent retreat of the water (dereliction).[13]

The converse applies to erosions to the natural boundary or the imperceptible encroachment of waters. Accreted land acquires all of the characteristics, incidents and legal estate of the land to which it accretes and it ceases to be part of the riverbed. Rules exist for apportioning accreted land amongst several riparian owners. Broadly they take in proportion to what each held along the original shoreline.[14]

On the other hand, a sudden change (called avulsion) in the position of the riverbank (e.g. by a flood or earthquake) does not alter the boundary.

There is an onus of proof of any party asserting any change

in the course of a river (e.g. if seeking an amendment to his certificate of title). The doctrine of accretion (or movable freehold) applies to the land transfer system, notwithstanding that measurements or the area of the land are defined on the title. Accretions and erosions also affect the middle line of a river under the ad medium filum aquae presumption.

F. Coal Mines Act 1979 section 261 (formerly section 206 of the 1925 Act) A copy of this section is annexed ("A1") This legislation has also caused notorious difficulties. It was apparently passed in response to the decision in Mueller's case[4], even though in that decision the Crown's title to the bed of the Waikato River was upheld. In this and at least one other decision immediately prior to the original passage of this legislation in 1903 judges had suggested that the Crown only had title to a riverbed if it was a public, navigable river. The intention of the legislation was apparently to both protect public rights of navigation and the Crown's right to mineral resources (coal in particular) which happened to lie under navigable rivers. The latter was no doubt the more influential factor. Indeed, the legislative intention was very probably directed at the preservation for the Crown of minerals rather than the retention of title to the subsoil of riverbeds as such. The legislative history of the section supports this view. This no doubt explains why the section appears in legislation relating to coalmining, even though it might otherwise seem an odd place to find a general provision as to the beds of navigable rivers.

G. Problems arising from the construction of s 261 and generally in respect of the ownership of riverbeds.

The application to particular cases of the statutory definition in s 261(2) has proved difficult, as is perhaps not surprising. Difficulties encountered have included:

(i) whether the prescribed "navigation" includes both recreational as well as commercial and economic purposes and irregular as well as regular usage. Certainly the definition of "navigation" has elsewhere been confined to the concept of commerce.

(ii) whether it applies to all or only some types of boats and craft and whether types of craft not mentioned in the definition of "navigable river" (particularly modern types such as hovercraft and jetboats) can render a river "havigable" when it would otherwise not be to more conventional or traditional types of craft and certainly would not have been in 1903 when the legislation was passed.

(iii) whether the section is (or was intended to be) confiscatory of existing private rights or is merely declaratory in its effect. The relevant words used are "shall remain". How does this rest with the common law position and the ad medium filum aquae presumption? Is there any significance in that what is "vested" in the Crown is not the title to or ownership of the riverbeds or any proprietary interest as such but the beds themselves?

(iv) whether grants of the beds of navigable rivers by the Crown, which are outside the application of the section, extend only to express grants or include grants by virtue of the ad medium filum aquae principle (which would largely render the effect of this section nugatory).

(v) whether it was, in any event, necessary for the protection of the Crown's claim to minerals and public rights of navigation to vest the beds themselves of navigable rivers in the Crown. Need proprietary rights necessarily be related in any way to navigability?

(vi) whether there is now any valid basis for differentiating at law between tidal and non-tidal rivers, whether or not they are navigable.

(vii) whether the section applies to navigable streams, creeks and water courses, as well as rivers in the popular sense of a substantial inland current of water.

(viii) whether the whole or at least the greater part of the river must be navigable in fact, in terms of the section. Do any better means exist for determining whether a river is "navigable"? Would a fixed minimum width from bank to bank and minimum depth be a better method? Or is the width or depth of a river in fact material in so far as the Crown's proprietary rights are concerned?

(ix) whether the river has to be navigable in both directions. A swift flowing river may in fact only be navigable one way, at least to the majority of craft.

(x) whether the river must be navigable in its natural state or whether it can be made navigable by artificial means.

(xi) whether the river must have been navigable in 1903 (when the section was originally enacted) or at the time of the relevant Crown grant (whether prior or subsequent) or whether it is sufficient that it was (or is) navigable at any time. Does this section apply to rivers which were navigable prior to 1903 (or the date of the relevant grant) but had by that date ceased to be? Are the Crown's rights adversely affected if a river was navigable (at whatever is the relevant date) but has since ceased to be (e.g. as the result of an earthquake or a change of course)? It appears that if a navigable river abruptly changes course, the bed of the "new" river will presumably vest in the Crown under s 261.

(xii) whether the Crown's rights under the section apply to accretions.

(xiii) whether the matter of the Crown's rights to title of riverbeds should now be more appropriately dealt with in another statute (e.g. Property Law Act 1952; Land Act 1948).

(xiv) whether the procedures whereby riverbeds are declared or become Crown land should, whether as to existing rivers or in the future, be subject to public notice, objection and determination procedures.

(xv) whether the proprietary rights of the Crown or, indeed, others in riverbeds should depend upon such an inherently uncertain concept as navigability and which is not decreed or promulgated publicly in any way or with any certainty.

In summary, s 261 must be regarded as entirely unsatisfactory. Indeed, if F.B. Adams J.'s view in Leighton's case [9] is correct, it has virtually no practical effect at all. In an excellent dissertation for his degree at the University of Auckland 1972 entitled "Title to Riverbeds in New Zealand", Mr K.H. Goddard suggested an amended form

of s 261. This is annexed ("A2").

H. Other statutory provisions affecting riverbeds.
It is suggested that a schedule of all statutory provisions affecting the proprietary rights in or use of riverbeds or imposing controls over rivers should be prepared so as to assist in determining how far the Committee should take this topic and any report made by it.

I. Conclusion
At least one thing on this topic can be asserted with confidence and with which there is really no room for disagreement.

> "The law in New Zealand as to the ownership of riverbeds is indeterminate".
>
> - J.A.B. O'Keefe "The Law and Practice Relating to Crown Land in New Zealand" (1967).

(or unfathomable?)

A.J. Forbes
10.9.81

Footnotes

1 Crown Grants Act 1908 s 35

2 Limitation Act 1950 s 7(1)

3 Micklethwait v Newlay Bridge Co. (1886) 33 Ch D 133

4 Mueller v Taupiri Coalmines Co. Ltd (1900) NZLR 89 (CA)

5 ibid. See now the Fisheries Act 1908.

6 see the River Boards Act 1908, which restricts this right.

7 see e.g. Coal Mines Act 1925, Land Act 1948, Mining Act 1971 and other statutes which variously reserve all mineral rights to the Crown

8 see Fisheries Act 1908 ss 88, 89, 90.

9 A.G. v Leighton (1925) NZLR 750 (CA)

10 but subject to the Coal Mines Act 1925 s 206 in respect of navigable rivers and to the limited statutory title of river boards under the River Boards Act 1908 in respect of non-navigable rivers.

11 Lanyon Pty Ltd v Canberra Washed Sand Pty Ltd (1966) CLR 342 (HC)

12 Rotter v Canadian Exploration Ltd (1959) 23 DLR (2d) 136 (CA of BC)

13 see E.C. Adams "Acquisition of title by accretion" (1948) 24 NZLJ 110

14 Riddiford v Feist (1902) 5 GLR 43

MISCELLANEOUS

206. Right of Crown to bed of navigable river - (1) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown; and, without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown.
(2) For the purpose of this section -

"Bed" means the space of land which the waters of the river cover at its fullest flow without overflowing its banks:
"Naviable river" means a river of sufficient width and depth (whether at all times so or not) to be used for the purpose of navigation by boats, barges, punts, or rafts.

(3) Nothing in this section shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers.

A2

MODEL DRAFT OF SECTION 206

(1) The beds of all navigable rivers are hereby vested absolutely in the Crown and are deemed always to have been so vested.

PROVIDED HOWEVER that:

(a) This section shall have no application in any case where the bed of a navigable river is or has been granted by the Crown either expressly or by necessary implication (other than by virtue of the presumption ad medium filum aquae);

(b) The Crown's title derived from this section shall be subject always to the law respecting accretions.

(2) No person shall have any right to compensation for any loss of title sustained by him through the operation of this section.

(3) "Navigable river" means a river or stream or other watercourse or any portion thereof which is or was of sufficient magnitude in its natural state to be or to have been susceptible (periodically or otherwise) of actual or potential navigation by any vessel for commercial or other useful purposes.

NOTES

1. The above suggested draft gives complete retrospective effect to the confiscation of the beds of navigable rivers. It is not, of course, entirely clear that this is what the section originally enacted was designed to achieve - but more than likely than not such a legislative intent was contrived. The legislature probably had not sufficient courage to express a confiscatory intent clearly!

2. A statutory definition of "bed" is hardly warranted since the common law is quite sufficient in that regard.

3. The re-drafted section would most appropriately appear in the Property Law Act 1952. The draft could be enacted, it is suggested, by way of a Statutes Amendment Act whereby:

   (a) the present section 206 is repealed; and

   (b) the above draft is enacted and deemed to be a new section inserted in the Property Law Act 1952.

# PRELIMINARY LIST OF STATUTORY PROVISIONS AFFECTING THE USE AND CONTROL OF WATERCOURSES

E

## Mining Act 1971

S.2 The term land includes water and also the foreshore and seabed as defined in s.27 of the Act.

S.26 Subject to the consent of the appropriate Minister being obtained before a mining privilege is granted, the classes of land that can be mined include:

- all land that is part of the bed of a navigable river within the meaning of s.206 of the Coal Mines Act 1925 (now s.261 of the 1979 Act) whether vested in the Crown or not;
- all land that is part of the bed of a river (not being a navigable river), or part of the bed of a lake, if it is held by or on behalf of the Crown, or if, in the opinion of the Minister, it is not clearly established who is the owner of the land.

## Petroleum Act 1937

S.2 The word "land" means all land within the territorial limits of New Zealand including land below the sea and any other water.

S.29 The consent of the appropriate Minister is required before mining operations can be commenced on any land that is part of the bed of a navigable river within the meaning of s.206 of the Coal Mines Act 1925 whether vested in the Crown or not and or any land that is part of the bed of a non-navigable river or lake that is held by or on behalf of the Crown or where in the Minister's opinion it is not clearly established who is the owner of the land.

## Public Works Act 1981

S.27 Where natural material is required for the construction or maintenance of an essential work the Minister or the local authority may subject to the approval of the Catchment Authority dig and remove natural material from any river or stream in such a manner as will not divert or interrupt the course of the river or stream.

S.242 The Governor-General can declare the banks of any river, stream or watercourse protected or alter or divert the course of any river, stream or watercourse where this is desirable for the safety, maintenance, use or enjoyment of any public work.

Fisheries Act 1908

S.2 As amended by Territorial Sea and Exclusive Economic Zone Act 1977 defines "New Zealand fisheries waters" as including the waters of every lake, river and stream where fish indigenous to New Zealand are found.

S.77(2) Preserves existing Maori fishing rights in regard to sea fisheries.

S.78(1) "Private waters" for the purpose of freshwater fisheries provisions of the Act means waters wholly contained within the land of one private owner but does not include the water of any permanent river or stream or lake which passes or extends from the land of one owner to that of another, nor any water not wholly contained within the land of one private owner. The provisions of this part of the Act do not apply to such an owner or any person authorised by him.

S.89 Prohibits the sale or leasing of fishing rights.

S.90 Allows an occupier to fish without a licence.

S.91 Exempts navigable rivers from the land that may be acquired or set apart for fish hatcheries.

Harbours Act 1950

S.2 The term "harbour" or "port" includes any navigable lake or river in or at which ships can obtain shelter or ship goods.

S.146A The Crown or a statutory authority in whom is vested the bed of a navigable lake or river may grant a licence to remove shingle, sand etc.

S.150 Tidal navigable rivers and the land under navigable rivers can only be disposed of to Harbour Boards or other bodies by statute.

S.154 A Board may grant 21 year leases of land vested in it on the shore of any navigable river communicating with the sea.

S.165 Control of the bed of any navigable lake or river may be granted to any public body for a period of 21 years.

Shipping and Seamen Act 1952

Pt IX Wreck and Salvage of Ships and Aircraft

These provisions apply where any ship or aircraft is wrecked, stranded or in distress in any river, lake or other inland water.

Health Act 1956

S.61(2) The Governor-General by Order in Council may in the interests of public health declare any watercourse, stream, lake or other source of water supply to be under the control of a local authority for the purpose of preventing pollution.

Land Act 1948

S.58 In disposing of land, the Crown is to retain a 20 metre wide strip along the banks of all rivers and streams which have an average width of more than 3 metres. The strip can be reduced to not less than 3 metres if this is sufficient for reasonable access to the river or stream.

Local Government Act 1974

S.289 On every scheme plan unless consent to the contrary is obtained there is to be set aside as reserves for the purpose of providing access to the sea lake river or stream and to protect the environment, a strip of not less than 20 metres in width along the banks of all rivers and streams which have an average width of not less than 3 metres. This can be reduced to a width of not less than 3 metres with the consent of the Minister of Lands if this will enable the members of the public reasonable access.

Timber Floating Act 1954

S.3 Any person wishing to float timber down any river, stream or creek must obtain a licence.

S.6 The holder of a licence may construct any dam, boom or other device necessary for driving timber, which has been approved by the Minister of Forests and may enter onto any land to recover timber which has been swept ashore while being transported.

S.11 A licensee is not to injuriously interfere with the ordinary navigation of any river, stream or creek and to do as little damage as possible to the land, the course of any river, stream or creek or any river works.

S.16 The laying down of booms in navigable waters is deemed to be a harbour work within the meaning of the Harbours Act 1950.

River Boards Act 1908

S.73 All rivers, streams and watercourses within a river district whether or not they are navigable or are altered by the ebb and flow of the tide are under the jurisdiction of the River Board to the extent necessary for the construction or maintenance of any flood control works.

S.76 A river board may inter alia make and maintain protective works on any land bounded or intersected by any river or stream or on any such river or stream and it may impound, divert or alter the course of any river or stream.

Land Drainage Act 1908

S.2 The term "drain" includes every passage, natural watercourse or channel on or under ground through which water flows continuously or otherwise except a navigable river ....

The term "watercourse" includes all rivers, streams and channels through which water flows.

S.17 A drainage board may erect and maintain, deepen, widen or divert or otherwise improve any watercourse or outfall for water etc.

S.64 The Governor-General may direct that any drains or drainage works are to be under the control of a local authority.

S.80 Where a private owner wishes to construct a drain which will divert any natural watercourse from its ordinary channel into any other natural watercourse he must serve notice on certain persons who might be affected by the diversion and also advertise the notice in a local newspaper.

Soil Conservation and Rivers Control Act 1941

S.2 "Tidal lands" are defined for the purposes of this Act as such parts of the bed, shore or banks of a tidal water as are covered and uncovered by the flow and ebb of the tide at ordinary spring tides.

"Tidal water" is defined as any part of the sea or of a river within the ebb and flow of the tide at ordinary spring tides.

"Watercourse" as used in the Act includes every river stream passage and channel on or under the ground, whether natural or not, through which water flows whether continuously or intermittently.

S.126 The principal function of every Catchment Board is to minimise and prevent damage by floods and erosion and to promote soil conservation and it has the power to construct and maintain such works and to perform such acts and deeds as are necessary for controlling the flow of water into and from watercourses.

S.130 The Governor-General by Order in Council may vest in a Catchment Board exclusive care control and management of designated watercourses whether natural or man-made.

S.133 A Catchment Board may construct, maintain, deepen, widen, divert or otherwise improve any watercourse or outfall for water.

S.149 The Catchment Board may make bylaws providing for the maintenance of any watercourse by the occupier of the land through which it flows, preventing any watercourse being made wider, deeper or its course altered without the consent of the Board, prohibiting or regulating the removal of shingle, sand or other material from any watercourses etc.

Water and Soil Conservation Act 1967

S.21 The sole right to dam any river or stream, divert take discharge or use natural water is vested in the Crown except for certain limited riparian rights which are preserved. A regional water board may grant a right to dam any river.

An application must be made to a regional water board for the grant of a right to dam any river or stream, or to divert, take, discharge or use any natural water, these rights now being vested solely in the Crown. No grant is required by any person using natural water for domestic or livestock needs or fire-fighting purposes.

S.26A-26KA The Water Resources Council may classify natural water into nine classes for which minimum standards of quality are prescribed in order to promote the conservation and best use of water.

S.20A-20I Water and Soil Conservation Amendment Act 1981

A national water conservation order can be made by the Governor-General and a local water conservation notice may be gazetted by a Regional Water Board relating to all or part of any river, stream or lake for the purpose of preserving it as far as possible in its natural state or protecting its (in the case of a national water conservation order; outstanding) wild scenic or other natural characteristics or its (outstanding) recreational wildlife, scientific or other feature.

Part I Water and Soil Conservation Amendment 1971

Part I of this amendment contains provisions relating to mining privileges in respect of water.

Water and Soil Conservation Amendment 1973

Part I of this Amendment confers on Regional Water Boards powers to make bylaws regulating the use of underground water and abolishing underground water authorities and transferring their assets and liabilities to specified local authorities.

Local Government Act 1974

S.50 Where a river or stream runs between two or more districts the boundary is for the purposes of this Act deemed to be along the middle line of the natural course of that river or stream.

Pt XXIII Water supply by Territorial Authorities

S.378 For the purposes of water supply a territorial authority has control of all water courses streams, lakes and other sources of water supply within its district not being water courses etc. to which Part XXIV of the Act applies.

Pt XXIV Regional Water Supply

S.399 "Watercourses" includes all rivers, streams, lakes, waters ... watersheds, catchment areas etc.

S.401 A regional or united council may construct or purchase watercourses and may among other things, subject to this Act and any right granted under any other Act, take the water from any river, stream, lake or bore.

S.406 A regional or united council may contract with the owner of any waterworks or any other person for such supply of water as the council thinks necessary for the purposes of this part of the Act.

Part XXV Water Races

S.426 General powers are conferred on a Territorial Authority in relation to the construction and maintenance of any water race or water race area and these include the right

- to make water races across any stream or river but so as not to impede the flow of any such stream or river or the navigation upon any navigable river, except under the provisions of a special Act;

- to take or divert the water from any stream or river ... whether or not the stream or river forms part of the water race.

S.429 The Territorial Authority on the application of 2/3 of the occupiers may declare a natural water channel to be a water race.

Pt XXVI Sewerage and Stormwater Drainage by Territorial Authorities

S.450 A Territorial Authority may without liability to pay compensation erect dams, reservoirs etc. in the bed of any watercourse for the purpose of retaining water to flush any public drain or watercourse.

Pt XXVII Regional Drainage

S.479 A Regional or United Council may utilise any watercourse within the region for the discharge of stormwater.

Waikato Valley Authority Act 1956

S.9 The Waikato Valley Authority has all the functions, powers and duties of a Catchment Board under the Soil Conservation and Rivers Control Act 1941.

Rangitaiki Land Drainage Act 1956

This Act is to be read with and deemed part of the Land Drainage Act 1908.

S.15 The Rangitaiki Drainage Board can make bylaws which include prventing the widening and deepening or altering of the course, of watercourses under the control of the Board without the consent of the Board and prohibiting or regulating the removal of shingle sand or other material from any watercourse under the control of the Board.

Maori Land Amendment and Maori Land Claims Adjustment Act 1926

S.14 This section vests the bed of Lake Taupo and the bed of the Waikato River from lake Taupo to the Huka Falls and the right to use these waters in the Crown.

Maori Purposes Act 1951

S.36 Jurisdiction was conferred on the Court of Appeal relating to the ownership of the bed of the Wanganui River.

Maori Purposes Act 1954

S.6 Further provisions were made in regard to the above proceedings.

Local Acts

1. Waihou and Ohinemuri Rivers Improvement Act 1910 (Thames area)

The object of this Act is to prevent the silting and overflow of these rivers and their improvement for navigation purposes.

S.2 The term "river" is defined as meaning the water within the bed of a river or stream and includes the land in such bed from bank to bank as defined in the original survey plans, whether such bed is normally covered by water or not.

S.20 When the Minister of Works had completed certain works authorised by the Act the lands affected were to become a district within the meaning of the River Boards Act 1908.

2. Wanganui River Trust Act 1891

This Act had as its purpose the conservation of the natural scenery of the upper waters of the Wanganui River and the protection of navigation.

S.4 The Wanganui River Trust was deemed to be a river board under the River Boards Act 1884 and had all the powers of a river board except for levying rates and borrowing money. In 1922 the Trust was replaced with a board which was deemed to be a river board under the River Boards Act 1908.

S.11 The Act was not to affect any rights conferred upon the Maoris by the Treaty of Waitangi nor to affect private or Maori lands.

Wanganui River Trust Amendment Act 1893

S.2 This empowered the Trust to remove earth stones and sand from the channel and banks of the river.

Wanganui River Trust Amendment Act 1920

S.5 The Trust was declared to be entitled to all the gravel and shingle in that part of the river under its control and authorised to sell it at a price approved by the Minister of Works.