

## ENVIRONMENT/ RESOURCE MANAGEMENT

OCTOBER 2008

## WHO CAN GET WALKED OVER UNDER THE WALKING ACCESS ACT?



**Josh Gear**  
LAW CLERK



**Vivienne Holm**  
SOLICITOR



**David McGregor**  
SENIOR PARTNER

Public access to private land in New Zealand and council development contributions have been two of the most debated resource management issues of recent times. In the last month there have been key decisions on both. We summarise them in this update.

### Walking access

The controversial Walking Access Bill was passed in Parliament on 25 September, albeit significantly modified from its original form after staunch opposition from the farming community.

The enacted Bill is now very similar to the New Zealand Walkways Act 1990 (NZWA). The main difference between the two is that the Department of Conservation's role has now been transferred to a new Walking Access Commission (the commission).

Public access to private land remains subject to negotiation and agreement with landholders, and there is no power to compulsorily acquire land for public walkways.

### Paper roads

A controversial clause in the Bill that has been deleted from the final gave the commission the ability to declare unformed legal roads to be walkways. Concerns raised related to unformed legal roads (or paper roads) on farmland which currently

provide public access to waterways, the coast, forests and the high country.

The public already enjoyed the same rights over paper roads as apply to formed roads. Fish & Game New Zealand, among others, raised concerns that designating walkways over paper roads could actually dilute those rights including preventing use of those areas for purposes such as access with recreational shooting, cycling, walking dogs, and driving vehicles. These activities were, and remain, prohibited on walkways under other provisions of the Bill.

### Private landholders and paper roads

Where then does this leave private landholders whose land is crossed by paper roads?

The public has a right to use paper roads, but as many of these roads are unmarked, it is difficult for users to know exactly where they lie. Those attempting to follow a paper road can easily stray onto private property, resulting in a trespass.

Additionally, while farmers are allowed to erect gates on paper roads for the purposes of farming operations, this does not infer exclusive possession and the public remains entitled to pass along the land.

A number of reasons for restricting access were put forward by submitters to the Bill. Concerns about stock disruption, excessive

To receive your updates faster, please subscribe to our electronic newsletter service on:  
[info@bellgully.com](mailto:info@bellgully.com)

To view all our publications or update your details please visit our website: [www.bellgully.com](http://www.bellgully.com)

For further information, please contact your usual Bell Gully adviser or:

AUCKLAND

**David McGregor**  
64 9 916 8920  
[david.mcgregor@bellgully.com](mailto:david.mcgregor@bellgully.com)

**Marija Batistich**  
64 9 916 8809  
[marija.batistich@bellgully.com](mailto:marija.batistich@bellgully.com)

**Josh McBride**  
64 9 916 8831  
[josh.mcbride@bellgully.com](mailto:josh.mcbride@bellgully.com)

**Julia Harker**  
64 9 916 8709  
[julia.harker@bellgully.com](mailto:julia.harker@bellgully.com)

**Vivienne Holm**  
64 9 916 8738  
[vivienne.holm@bellgully.com](mailto:vivienne.holm@bellgully.com)

WELLINGTON

**Andrew Beatson**  
64 4 915 6770  
[andrew.beatson@bellgully.com](mailto:andrew.beatson@bellgully.com)

**Simon Watt**  
64 4 915 6854  
[simon.watt@bellgully.com](mailto:simon.watt@bellgully.com)

**Carolyn Hintz**  
64 4 915 6759  
[carolyn.hintz@bellgully.com](mailto:carolyn.hintz@bellgully.com)

Disclaimer: This publication is necessarily brief and general in nature. You should seek professional advice before taking any further action in relation to the matters dealt with in this publication.

All rights reserved © Bell Gully 2007

numbers of vehicles, and damage to private property situated near paper roads, are a few of the reasons given for enabling landowners to restrict access. Some owners also have concerns around public safety, and their own potential liability for accidents.

Unfortunately, these concerns were not dealt with by way of the inclusion of new provisions in the Bill.

That being the case, the only real option for affected landowners is to apply to the relevant local territorial authority under Schedule 10 of the Local Government Act 1974 to have the paper road stopped. This can be an expensive and uncertain process, since the public has a right to make submissions on any application, and to seek a hearing in the Environment Court.

## Development contributions - an end to double-dipping

A court ruling released last week (25 Sept) provides clarity around the issue of development contributions.

The High Court released its decision in *Domain Nominee Limited v Auckland City Council*, confirming that the council acted unlawfully in seeking to impose a 'top up' development contribution on a subdivision consent where it had already imposed a financial contribution on another resource consent relating to the same development. The earlier consent had been granted before the council's new development contributions policy – which changed the rules – was in place.

The shift from financial contributions imposed under the Resource Management Act to the new development contributions regime under the Local Government Act 2002 has caused confusion in a number of respects. In the *Domain Nominee* case the difficulty was that the two consents required for the development (to build dwellings and to subdivide) were sought three years apart. In the intervening period, the council had introduced a development contributions

policy which empowered it to require a far larger amount than was payable under the conditions of the first consent. It therefore determined that the developer should be required to pay a 'top up' amount under the second consent.

The developer argued that this was unlawful because section 200 of the Local Government Act precludes councils from requiring both a financial contribution and a development contribution for the same purpose.

The Court agreed with the developer stating:

“...where the council has imposed a condition on a resource consent for a financial contribution for a particular purpose, s200 of the Local Government Act 2002 does not enable the council to impose a development contribution on a subsequent consent in relation to the same development for the same purpose as the financial contribution.”

It is important to note that the issue of whether a development contribution relates to the same purpose as a previous financial contribution requires careful consideration on a case by case basis. Reference needs to be made to the wording of the conditions in issue and the respective policies and objectives which authorised their imposition.

We suggest developers who may have been asked to 'top up' financial contributions may wish to review the decision in light of their own circumstances and consider whether they may be eligible to seek a refund.