

THE PUBLIC'S RIGHT OF ACCESS TO PRIVATE JETTIES – Part II

In this article I examine again the public's right to use private jetties in light of a recent High Court decision. Given that jetties, wharves and moorings are constructed adjacent to and over the foreshore and seabed it is no surprise that public access to them can be hotly debated. As noted in a recent judgment disputes over use of the jetties arising under the Resource Management Act have, at their centre, contemporary concerns over access to the foreshore.

Some time ago I wrote an article about a Court of Appeal decision (which I refer to as the Hume case) which affirmed the public's right to use private jetties. In particular the Court of Appeal ruled that the public could use the Hume's jetty in a reasonable manner for the purpose of gaining access to those parts of the coastal marine area which were adjacent to the jetty. In doing so they should not unreasonably impede the Hume's access to and use of the jetty.

The Hume decision remains a highly influential one in this area but a High Court decision late last year shows that significant limitations can still apply to the public's right to use private structures. I will refer to this decision as the Coleman decision. Both the Hume and Coleman decisions related to jetties on Kawau Island. The background of the Coleman decision was that a number of jetty owners had applied for coastal permits which would grant them exclusive use of their jetties. The Rodney District Council decided to process the applications on a non-notified basis and granted them. The Plaintiffs were upset that the applications had not been notified and as a result members of the public were denied the ability to make submissions in opposition to the applications. The Plaintiffs sought a judicial review of the decisions not to notify and the case was decided on the narrow issue of whether the decision maker had acted properly in not notifying the applications. However the decision does supply useful pointers on facts that can be taken into account when deciding to limit public access. Some of the relevant factors were that the jetties led directly onto private land and there was no realistic way of accessing public land from them. Also in at least one case the owners operated a workshop at the base of the jetty and they were concerned about Health and Safety issues that would arise if the public were allowed to use the jetty and therefore have access to the workshop.

The upshot of the above is that there may well be considerable confusion as to who is able to access what wharves as this will depend on the terms of the Coastal Permits issued to the owners. Some owners may claim the right to exclude the public when this is not provided for in their permits.

There are a couple of issues that may cause the owners of the structures to take a harder line in the future. Firstly I expect many of them may be more concerned about Health and Safety issues given the prosecution of the Berryman's for the alleged failure to maintain the bridge on their private farm property.

The second interesting issue is what impact the imposition of coastal occupation charges will have on jetty use. Regional Councils have the power to impose coastal occupation charges pursuant to section 64(A) of the Resource Management Act and while Regional Councils have put off making decisions regarding these charges because of the complex issues that are raised I understand that most Councils are now

moving towards setting charges. Depending on what method of valuation is used the charges could be significant. If the owner of a jetty is required to pay significant charges to the Council for the use of their jetty they may be more minded to try and keep the jetty to themselves. On the other hand, given that two of the factors that the Councils are required to take into account before imposing a charge are the extent to which public benefits are lost or private benefit gained from occupation of the coastal area, jetty owners may be prepared to allow public access on the basis that this would lead to a lower charge.

I will discuss other issues arising from the proposed coastal charges in a later article.