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Walking Access Consultation Panel
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Outdoor Walking Access Submission

Thank you for the opportunity to provide comment on the *Outdoor Walking Access Consultation Document*.

The New Zealand Forest Owners Association (NZFOA) was set up in 1926 as an advocacy group for commercial plantation forest owners, and is now one of the country's most active resource sector organisations.

NZFOA members' forests comprise more than 75 per cent of the country's plantation forests. With annual export earnings of $3 billion, the industry is New Zealand's fourth largest export earner. The NZFOA adds value to its members' businesses by undertaking activities that are better handled collectively than by individual growers working alone, for example, fire prevention and control, forest health surveillance, training and safety.

Overview

1. Extensive recreational use is made of New Zealand's plantation forests by hunters, trampers, mountain bikers, and many others, with consent for access at the discretion of the owner or manager. Managing these consents is time-consuming and frequently represents an uncompensated cost to the forest operator.

2. This discretion is essential, however, because of the need to manage risks to the forest (such as fire), to the user (from forest operations and natural hazards) and to other users (from hazardous activities like hunting and motocross).

3. In addition, forests are private property where owners/managers and their business partners have the right to personal and commercial privacy. This is a fundamental property right which few land owners would relinquish lightly. We are concerned that the aim of the Walking Access Consultation Panel "… for New Zealanders to have fair and reasonable access on foot along the coastline and significant rivers, and around lakes", is in conflict with the concept and practice of private legal title.

4. The Consultation Document makes repeated reference to the need for a consensus to be found between private and public interest in this issue. However, it does not explicitly address the apparent conflict between public

interest and private property rights. Nor does it acknowledge that the desire for "the legal right of access … (to) endure over time implies land owners legal rights cannot "endure", where these two "rights" are in conflict.

5. Because plantation forestry is a commercial land use which must compete for land and resources with other uses such as farming and tourism, recreational access is dependent on the economics of forestry itself. At present, because forest economics are unfavourable, forest land is being converted to alternative uses at unprecedented rates. This reality means forest owners cannot be expected to be sympathetic to any alienation of private land for access ways etc, which might be incompatible with alternative land uses, or the needs of future owners of the land.

   If the returns from conventional forest products continue to be uneconomic, land owners who are committed to forestry will increasingly look at alternative revenue options to improve their viability. This could see increasing commercialisation of recreational activities.

6. The Consultation Document acknowledges the uncertainty and cost created by central Government's changes to land owners' obligations under health and safety, biosecurity and climate change legislation. Forest owners share these concerns, in particular the potential costs and liabilities associated with health and safety legislation.

7. The Association is therefore unable to support changes in Government policy designed to facilitate wider public walking access to rural land other than by voluntary negotiation with forest owners, or where access is regarded as a priority and negotiation fails, through the use of the Public Works Act and compensation paid.

8. However we note the reassurance on page 16 that "The Government has abandoned the legislation that it had proposed …" and has no intention to legislate for increased rights of public access to private land.

9. NZFOA supports the sentiment expressed on page 17 that "legislation required to realign private property rights on a significant scale is a legally complex area". We would go further, and suggest that legislative realignment is politically and constitutionally fraught, and carries the risk of alienation of public and private interests.

   Page 31 notes that Maori submitters were opposed to "… the idea of legislated access across Maori land, but did not oppose access by permission. The legal and constitutional implications of general land owner and specific Maori opposition, underscores the problems in securing public rights of access to and or across privately owned land.

Principal recommendations

1. Private property and Maori Treaty of Waitangi rights must be accorded paramount importance in any policy designed to improve public access to rural land.

2. Where existing legal access ways (paper roads, Queen's chain margins etc) provide practical, usable access across private land, these should be properly documented and signposted by a Crown agency after discussion with the land owner.

3. Where existing legal access ways are inappropriately located (because of historical surveying errors, shifts in water courses, erosion, accretion etc), a Crown agency should negotiate with the land owner with a view to resurveying the access way so that it is in a location which is practical for both the land owner and recreational users, or by replacing it with a walkway under the provisions of the New Zealand Walkways Act 1990.

4. In areas where there is high public demand for access but no legal access ways, greater use should be made of the provisions of the New Zealand Walkways Act 1990. Key elements include:

    + No compulsion – land owners are free to withdraw from negotiations with the Crown agency at any stage before an agreement is signed.

    + For walkways gazetted or subject to an agreement under section 8(1) of the Act, compensation will be paid to the land owner if it can be shown that loss or damage is directly attributed to use of the walkway. This should include loss of economic use of the land.

    + The land owner may impose special conditions of use. For example, a walkway could be closed to the public during periods of high fire risk or to allow forest operations to take place.

    + The Crown agency will maintain the walkway and keep it clean, tidy and free from all debris, rubbish, plants, pests, dry vegetation and other unsightly, offensive or inflammable matter. The land owner is under no obligation or liability to contribute to the cost of maintenance, repair, construction, or reconstruction of the walkway.

    + The Crown agency may erect and display suitable signs and warning notices and do all things necessary to protect the safety of the public and the property of the Transferor.

    + The Crown agency may close all or part of the walkway for reasons of public safety or emergency, or otherwise in accordance with the provisions of section 28 of the New Zealand Walkways Act 1990.

    Ref: http://www.doc.govt.nz/Conservation/Land/Tenure-Review-Pastoral-Manual/005~Part-Five-General-Appendicies/212~In-Gross-Easement-Public-Access-under-NZ-Walkways-Act.pdf

5. Agreements with land owners under the Walkways Act must provide for the insurance of forests and other assets which may be damaged or destroyed as a result of the public having access to a walkway crossing private land.

6. Where access through private land is regarded as a priority and negotiation with the land owner fails, access should be obtained the using the Public Works Act and compensation paid.

7. Legislation must be clarified so that land owners providing recreational access on a not-for-profit basis are not liable under the Health and Safety in Employment Act 1992, the Occupiers' Liability Act 1962, the Forest and Rural Fires Act 1977 and ACC legislation for accidents or damages resulting from members of the public undertaking recreational activities on their land.

Specific comments on aspects of the Consultation Document:

1. Foreword

The focus of the Panel's work is "on the potential of the existing rights of public access along water margins to meet future needs, how these rights may be better understood and managed, and establishing the extent to which this existing water margin access falls short of the reasonable expectations of the public for access along and to water margins and other public land … it may well be that any extension of existing access will be a matter of negotiation on behalf of the public."

The Association believes any mis-match between the access expectations of the public and existing access rights should be addressed using the mechanisms available in current legislation. These normally involve negotiation on a case-by-case basis with the affected land owner, a practice which we endorse.

The Panel also needs to be an aware that access (to say Crown conservation or Maori land) along water margins through forest blocks is in many cases impractical, on account of terrain. This emphasises the need for negotiation on a case-by-case basis with the affected land owner.

2. Introduction

"Public access on foot around the coast of New Zealand, along rivers and around lakes." As above, this access should be limited to that access provided for currently in law, or as negotiated with the landholder.

3. Aim

The "Aim" of the review group is inappropriate to the extent that it does not appear to recognise the legal limits to achieving the aim (ref our Overview Point 3).

The Consultation Document acknowledges the conflict between "the two, often conflicting, values that many New Zealanders hold dear: access to our many natural recreational resources and having our very own piece of dirt" and asks how the aim could the aim be improved.

Question 1

We submit that the aim should be:

To provide improved public foot access to public conservation land, the coastline, significant rivers and lakes; and to better protect land owners who provide public recreational access to their land; by …

- *Mapping, identifying and maintaining existing access ways.*
- *Identifying priorities for new access ways and using existing legal mechanisms to negotiate with affected land owners to achieve this.*
- *Ensuring that land owners are not exposed to added legal or financial liabilities as a result of providing the public with recreational access to their land on a not-for-profit basis.*

4. Principles for walking access

The Panel proposes that a framework and solutions for walking access be guided by a set of principles.

Question 2

Our response to the proposed principles:

- The public generally have the right to be on public land: Agreed
- Landholders generally have the right to manage who may enter private land and what they may do on it: Agreed
- Public recreational access to areas that are designated as being open to access should be: Free, certain and enduring: Do not agree.

  Access rights which are appropriate today may be inappropriate in the future. Land owners must be free to negotiate access conditions under the Walkways Act which allow for the access agreement to be terminated in the event of a change of ownership or land use, or because of a threat to the business carried out on the land.
- Respect for property and the environment: Agreed
- Availability of information and maps: Agreed
- Reinstating lost access/New access: Agreed, provided it involves negotiation and payment of compensation to the land owner. The Walkways Act should be the first preference for all such negotiations. If that is not possible, then the Public Works Act (PWA) provides a mechanism whereby a Crown agency can acquire the rights to land in the public interest. The PWA provides some protection to the private land owner, including appropriate financial compensation.

5. Location and Status of Existing Access Rights to Water Margin Land

Questions 3-6

We support any practical measure which provides land owners and recreational users with reliable information about the location of legal access ways and any conditions applying to their use.

Questions 7-10

We support the signposting of legal access ways. This should be the responsibility of the Crown agency involved, after consultation with the affected land owner(s).

Questions 11-13

We support the concept of a Code of Conduct. It should apply to public and private land, and to recreational visitors whether they are on legal access ways or on land with or without the permission of the owner.

The code should be supported by appropriate public education and encouragement of good practice. However, those most likely to offend against a code are also likely to disregard it.

We support providing land owners, the public or the Crown access agency with legal redress in the criminal courts against those whose disregard of the code harms, or poses a high risk of harm, to individuals or property. This would include the ability of the court to make and enforce orders for payment of compensation and orders preventing offenders from using an access way for a defined period.

Questions 14 & 15

We support the establishment of an independent Crown agency charged with facilitating public access while respecting private property rights. To avoid perceptions of a conflict of interest between the access agency and the 'parent' department, the agency should not be part of an existing Crown department.

6. Refusal of Access by Landholders

Questions 16-17

As owners of private property, landholders have the right to refuse access across their land without giving a reason, even if this is seen by some members of the public as unreasonable.

We oppose a policy requiring landholders to submit to a mediation process with those wanting access. This process in itself diminishes the landholder's right to undisturbed occupation of their property.

We note with interest and concern that the Department of Conservation is advocating for public access to the margins of lakes, rivers and the coast without seeking to secure the same right in all instances to public conservation lands.

There are many reasons – including the protection of at-risk flora and fauna, and H&S at work sites – why DoC would wish to exclude the recreating public from parts of its estate, but these and other valid reasons also apply to private land owners wanting to exclude members of the public from their land.

We propose that where a Crown agency believes public access to or across private land is a priority, the agency must in the first instance attempt to negotiate an access agreement with the land owner and where negotiation fails, the Public Works Act should be applied and compensation paid.

7. Water Margin Access

Questions 19-20

Our principal recommendation 3: Where existing legal access ways are inappropriately located (because of historical surveying errors, shifts in water courses, erosion, accretion etc), a Crown agency should negotiate with the land owner with a view to resurveying the access way so that it is in a location which is practical for both the land owner and recreational users, or by replacing it with a walkway under the provisions of the New Zealand Walkways Act 1990.

Questions 21, 23, 24, 25

We do not see access to the margins of all significant waterways to necessarily be desirable or practical in the context of forestry, which is often located on challenging terrain.

However in areas where there is high public demand for access to waterways but no legal access, we support voluntary agreement on a case-by-case basis between landholders and users. The provisions of the New Zealand Walkways Act 1990 are likely to be most suitable for this purpose, but some forest owners may be happy to consider placing the margin of a waterway in a trust for access purposes, in a manner similar to that provided for in the Queen Elizabeth the Second National Trust Act 1977.

We oppose the compulsory acquisition of the land or easements over the land by or on behalf of the Crown, other than under the PWA, and only then when other options have been exhausted.

We oppose the uncompensated taking of land for esplanade reserves or strips on subdivision.

8. Access to Water Margins and Other Public Land

Certain and Enduring Legal Access

Question 22

Covered in our responses to other questions.

We reiterate that a focus on “certain and enduring legal access” is not always a constructive approach. Owners, land uses and circumstances change and

this needs for be provided for when negotiating voluntary access arrangements with private landholders.

Compensation and Prioritisation

Questions 26-28

We support the payment of fair compensation for land taken for access ways. This is not just a matter of justice, it is also a matter of good economic policy. It puts a price on the public's desire for these amenities and enables this to be balanced against other demands the public make on the Treasury. If there is no price, the public's desire could potentially be limitless and largely heedless of the economic consequences for those required to surrender their property rights.

Inevitably, the payment of compensation will drive prioritisation of a finite budget.

In our view the prioritisation should be determined by consultation between an independent Crown agency responsible for managing public access and those seeking the greater access. It would make sense, however, to give initial priority to the mapping, identification and maintenance of existing legal access ways.

Overseas Investment Act 2005: A constraint on the sale of private land to overseas buyers in order to leverage negotiations for public access is to diminish, in principle at least, the value of land to its private owners.

8. Unformed Legal Roads

Questions 29-32

Some unformed legal roads traverse forest land without the knowledge of the public or the land owner. In other cases, the precise location of the road is uncertain. Many roads have only ever existed on paper and take no account of the terrain or existing land use.

Before publicising or signposting the existence of paper roads, the Crown access agency should first inform the landholder and provide for negotiation of alternative access routes – in the interests of both the landholder and public – where this is requested.

Once an unformed public road is identified and access provided for, issues of road maintenance, weed & pest control and environmental damage will inevitably arise. These will presumably become the responsibility of the local authority which for cost reasons might in many cases prefer to see unformed legal roads exchanged for practical walking access.

We support negotiation between the Crown access agency, the landholder and the local authority to enable practical access along the route of, or as an alternative to, paper roads.

9. Possible Health and Safety Liability of Landholders

Question 33

Public access to forest land must be managed because of risks to the forest (such as fire), to the user (from forest operations and natural hazards) and to other users (from hazardous activities like hunting and motocross).

Warning visitors to the forest workplace about potential hazards can be complex, especially in a large forest where a range of potentially hazardous activities may be taking place in different locations at the same time. Yet recovering the costs of managing recreational access increases the legal liability faced by a land owner under H&S legislation.

A further complication is a request from the NZ Police that forest owners should approve access to forests only to known persons, and then only via a permit system. The NZ Police are concerned that unfettered access would be used by persons intent on growing cannabis, or other illegal activities.

Under a March 1998 amendment to Section 16 of the Health and Safety Employment Act 1992 (HSE Act), people who control workplaces have only a simple duty to warn visitors who have permission to be on their properties, of any work-related, out-of-the-ordinary hazards that may cause them serious harm.

The relationship changes if people are charged to use the land for any purpose, or if they are employees, contractors or other people on the land for a business purpose. In this case the person who controls the forest workplace has a full duty to take “all practicable steps” to ensure that they are not harmed by any hazard arising on the farm.

We support a change in the HSE Act to exempt landholders from a higher duty of care when they charge an administration fee to manage unsupervised recreational access to their land. The full duty would remain for landholders involved in profit-making, hosted, recreational activities.

10. Fire risk

Question 34

There are two aspects to fire risk: the cost of fighting a fire, and the losses to the landholder as a result of fire.

While the Department of Internal Affairs review of fire legislation may result in a change to liability laws, at present under the Forest and Rural Fires Act 1977 fire-fighting costs are recoverable from a “liable” party and can conceivably run to millions of dollars.

Some forest owners and managers do not insure. Others are constrained by the cost of such insurance.

We support the adoption of a policy whereby agreements with landholders under the Walkways Act automatically provide for the insurance of forests and

other assets which may be damaged or destroyed as a result of the public having access to a walkway crossing private land.

11. Biosecurity

Question 35

Improved access to rural areas is unlikely to significantly increase the level of biosecurity risk to our plantation forests. However our knowledge of risk factors, especially in relation to plant pathogens, is growing rapidly and in light of better information, recreational access may need to be restricted in some areas in the future.

This further highlights flaws in the Panel's focus on 'certain' and 'enduring' access. We submit that it is better to have conditional managed access to large areas of forest land, rather than very limited access because of the reluctance of landholders to foreclose on their future land-use and management options.

12. Rural Crime and Security

Questions 36 & 37

Managed public access to the forest workplace is the best option for crime prevention as well as for the many reasons cited above. As noted in our response to Q 33, the NZ Police want forest owners to approve access to forests only to known persons, and then only via a permit system.

13. Treaty of Waitangi Concerns

Question 38

Tangata whenua, particularly iwi organisations, are the owners of large areas of plantation forest. The Crown, as a Treaty partner, has an obligation to protect these property interests.

While permission to enter Maori land is seldom refused, Maori have a particular interest in protecting the exercise of their customary rights and the safety of customary sites and resources. These are in addition to the concerns they share with other landholders about increased health and safety, fire, security or biosecurity risks and liabilities associated with uncontrolled public access to their land.

The Association welcomes the government's assurance that it will not now legislate greater public access to rural (including Maori) land.

We believe that private property and Maori Treaty of Waitangi rights must be accorded paramount importance in any policy designed to improve public access to rural land.

Conclusion

The Consultation Document notes but fails to address the conflict between the public interest in recreational access to private land, and the private landholder's interest in controlling and, on occasion, curtailing that access. Where landholders have a legal right to control and curtail public access, they must be allowed to continue to exercise that right.

The NZFOA admits to being somewhat mystified by the energy which being devoted to the access 'issue' and the previous focus on controversial solutions. We are not convinced that there is a widespread unsatisfied demand for access through private rural land to waterways, the conservation estate, or areas of high recreational value.

Instead, the demand is specific to certain districts where, often as a result of accidents of history, land erosion and accretion, there is inadequate public access, or such access is in the wrong place. If there is the political will, these shortcomings can be easily addressed through the use of the Walkways Act or, where improved access is deemed to be essential, via the Public Works Act, which assures land owners are adequately compensated for the loss of property rights. Local bodies also have a role to play in negotiating with land owners over the fate of paper roads, many of which may be better replaced by suitably located walkways.

Clearly there is a need for better mapping, identification and maintenance of access ways. Also those who venture into the outdoors for recreation need to be aware of accepted codes of behaviour. This work, and the purchase of land for new access ways, needs to be funded and co-ordinated by an independent Crown agency.

Given the large numbers of New Zealanders who each week use private rural land for recreational pursuits with the permission of the landholders, we are surprised by the limited focus to date by the Panel and its predecessors on ensuring that landholders who provide this service do not expose themselves to extra legal liabilities and financial risks. Seeking the appropriate legislative changes, including a means of enforcing a rural Code of Conduct, are the main access policy priorities for this Association.

Yours truly,

Chief Executive
NZFOA

Unsigned draft