

Investigation of DOC renewal of Routeburn Track concession

Agency: Department of Conservation
Complaint about: Grant of Routeburn Track concession
Ombudsman: Professor Ron Paterson
Reference number: 361523
Date: December 2014

Contents

Summary	2
Background	2
Complaint	4
Ombudsman's role	5
Department of Conservation's response	5
Routeburn Walks Ltd's response	6
Analysis	7
Statutory scheme	7
Inconsistency with Mt Aspiring National Park Management Plan	8
Inconsistency with Otago Conservation Management Strategy	9
Exceptional circumstances	11
Conclusion	14
Opinion	14
Recommendation	14
Publication of opinion	15

Summary

1. In my opinion the decision in 2013 of a Department of Conservation delegate of the Minister of Conservation – to grant a new concession to Routeburn Walks Ltd, on terms permitting the concessionaire to increase from 24 to 40 the number of its overnight guided walkers entering the Routeburn Track each day – was unreasonable. The decision flew in the face of the limits set in the newly promulgated Mt Aspiring Plan. There had been a careful and extensive public consultative process and general endorsement of the provisions of the new Plan. As the complainant states, the decision to approve the increase in overnight guided walker numbers makes a “mockery” of the process of public consultation in the development of the Plan and undermines public participation.

Background

2. The Routeburn Track traverses both the Mt Aspiring and Fiordland National Parks and can be walked from the northern end (starting at Routeburn Shelter) or the southern end (starting at The Divide). The Track’s management is required to be in accordance with the management plans for those parks.
3. From 2006 until 2010, the Otago Conservancy of the Department of Conservation, in consultation with the Otago Conservation Board, reviewed the Mount Aspiring National Park Management Plan, which had been in force since 1994. The review process involved public notice (in July 2006) and (from 2007 to 2009) development of a draft plan in consultation with interested parties, following public and sector meetings and workshops for a steering group (whose members represented a range of interests). There was extensive public and concessionaire participation in the process.
4. A draft Mount Aspiring National Park Management Plan was publicly notified in April 2009. A total of 436 submissions were received on the draft plan. Three hearings were held for submitters who wished to be heard in person. A revised draft plan was submitted by the Otago Conservancy and the Otago Conservation Board to the New Zealand Conservation Authority in a Notice of Compliance report in June 2010. The draft plan included the following paragraph in relation to the Routeburn Walks Ltd (RWL) concession:¹

“Routeburn Walks Ltd—guided overnight walking on the Routeburn Track has been carried out by one concessionaire (Routeburn Guided Walks) for many years. It operates one hut, Routeburn Falls, within the Mount Aspiring National Park section of the track. The plan contains limits on the total daily number of overnight walkers (both guided and independent) entering the track on any one day. The limits are consistent with limits in the Fiordland National Park Management Plan ... and generally aim to preserve the existing

¹ Page 9 of Draft Management Plan Review 2010.

experience on the track, already experiencing some use pressures in certain areas at certain times.”

The draft plan also noted that RWL *“has recently indicated that it wishes to increase guided numbers on the track”*.²

5. In June 2011 the New Zealand Conservation Authority approved the new Mount Aspiring National Park Management Plan (the Mt Aspiring Plan or the Plan). Policy 8.5.2 of the Plan placed the following limit on the number of overnight walkers entering the Routeburn Track daily:

“During the walking season the total daily number of overnight walkers (guided and independent, but excluding independent campers) entering the Routeburn Track on any one day should not exceed 92 people. The number of overnight independent walkers within this total will be maintained at 68 per day.”

6. The effect of this limit was that the maximum permitted number of overnight guided walkers and guides³ entering the Track each day was 24, being the difference between the total daily number of overnight walkers (92) and the prescribed daily number of 68 overnight independent walkers.
7. In March 2011 the Department of Conservation received an application from RWL, seeking a renewal of its Routeburn Track concession and an increase in the number of its overnight guided walkers permitted to enter the Routeburn Track each day, from 24 to 40. RWL had held a concession to conduct guided walks on the Routeburn and Greenstone tracks since 1999, and had a good record with the Department. The original concession (as varied in 2006) allowed RWL a daily limit of 24 overnight guided walkers, and was *“simply based on the amount of beds available”*.⁴
8. Around the same time (March 2011), the Department approved a separate application from RWL, permitting it to extend and refurbish its two lodges on the Routeburn Track, at Routeburn Falls and Lake Mackenzie. RWL was not seeking to increase the total accommodation at its lodges, but to add ensuite bathrooms to cater for the growing number of overnight guided walkers who wanted to stay in a private room with its own bathroom.
9. In a report dated March 2012 (the *“Notified Concession Officer’s Report to the Decision Maker”*), a Community Relations Officer in the Department (Mr Richard Clarke) analysed the RWL application to renew and extend its Routeburn Track concession, and recommended that a new concession be approved in principle and publicly notified.

² Footnote 8 of Draft Management Plan Review 2010.

³ The Department advised that the Plan limit of 24 non-independent overnight walkers included guides (letter to Ombudsman, 21 August 2014).

⁴ Director-General of Conservation report to Ombudsman, December 2013.

10. The Minister of Conservation's intention to grant a new concession was publicly notified in April 2012. The complainant, Mr Chas Tanner, was one of 13 individuals and groups who made a submission; all opposed the new concession.
11. A public hearing (concession hearing) was held in July 2012. Evidence was presented by the applicant RWL and five opposing submitters (who did not include the complainant). The hearing panel was chaired by Ms Marie Long, Manager Planning and Permissions of the Department.
12. In a report dated November 2012, Ms Long, as delegate of the Director-General of Conservation, recommended the approval of the new concession to RWL, permitting the requested increase in the number of its overnight guided walkers.
13. In February 2013, a delegate of the Minister of Conservation (Mr Alan McKenzie, a senior official with the Department of Conservation), granted the new concession permitting RWL to increase the number of its overnight guided walkers entering the Routeburn Track each day to 40.⁵

Complaint

14. In June 2013, Mr Tanner complained to the Ombudsman about the decision by the delegate of the Minister of Conservation to grant a concession to RWL permitting it to increase to 40 the number of its overnight guided walkers entering the Routeburn Track each day.
15. Mr Tanner was a member of the Otago Conservation Board at the time of the review of the Mt Aspiring Plan. He states that the decision to increase numbers contravenes section 17W(1) of the Conservation Act, which provides that a concession shall not be granted unless it is consistent with the relevant national park management plan. He considers the decision of the Minister's delegate to be inconsistent with the Mt Aspiring Plan, and therefore unlawful.
16. Mr Tanner submits:
 - a. The facts that the Routeburn Track traverses through two national parks (Mt Aspiring and Fiordland) and that the Fiordland Plan has a research provision that envisages an application to increase overnight walker numbers, do not amount to "*exceptional circumstances*".
 - b. Departmental staff and the Otago Conservation Board were aware, during the review of the Plan, of the desire of RWL to increase numbers on the Routeburn Track, and of the research provision in the Fiordland Plan, yet chose not to increase

⁵ The new 2013 concession sets a daily limit of 46 overnight walkers, including guides, whereas the original concession (as varied in 2006) set a limit of 24, excluding guides. The RWL application for the new concession stated that the number of clients per day would not exceed 40.

- the limits in the Mt Aspiring Plan, nor to include a research provision in the Mt Aspiring Plan.
- c. The Mt Aspiring Plan is a statutory document and had only recently (in June 2011) been approved by the Department of Conservation, the New Zealand Conservation Authority and the Otago Conservation Board. The Department's decision to approve the increase in guided walker numbers makes a "mockery" of the process of public consultation in the development of the Plan and undermines public participation.
 - d. The Plan recognises that the Routeburn Track is a place where walkers can experience natural quiet and a sense of remoteness. The concession granted is inconsistent with the Plan and undermines the protection of the Track's values by strict limits on overnight walkers.
 - e. *"I am not at all opposed to commercial activity by the concessionaire, indeed I think they provide a very good experience for those unable to freedom walk the track and they do it very well, but the correct balance must be maintained."*
 - f. There were no exceptional circumstances warranting the increase in the maximum number of overnight guided walkers permitted under the new RWL concession and the Minister's delegate acted unreasonably in the exercise of the discretion to grant the new concession.

Ombudsman's role

17. Under section 13(1) of the Ombudsmen Act 1975, I have the authority to investigate the administrative acts, decisions, omissions and recommendations of the Department of Conservation.
18. My role is to consider the administrative conduct of the Department of Conservation, and to form an independent opinion on whether that conduct was lawful and reasonable (Ombudsmen Act, ss 22(1), (2)).

Department of Conservation's response

19. The Department accepts that the wording of Policy 8.5.2 of the Plan must be interpreted in accordance with Policy 6.1.1.ii, with the result that number of guided walkers may be increased only in *exceptional circumstances*. Policy 6.1.1.ii reads: *"When 'should' is used it is anticipated that there will only be exceptional circumstances where the outcome will differ from that expressed in the policies."*
20. The Department contends that since the Routeburn Track traverses both Mt Aspiring National Park and Fiordland National Park, and the Fiordland Management Plan

(although specifying the same limit of 92 overnight walkers) envisages an application to increase overnight walkers,⁶ these facts, combined with the capacity of the Track to support greater walker numbers, constituted “*exceptional circumstances*” justifying an increase above the maximum of 24 to 40.

21. The Department argues that that such an increase is consistent with integrated conservation management across the two national parks, pursuant to sections 17D and 17E of the Conservation Act 1987.
22. The Department further contends that strict adherence to a limit set in a national park management plan would amount to unlawful fettering of the Minister’s statutory discretion to grant a concession in a national park; that section 17W(1) does not amount to an out-and-out prohibition on concessions that are inconsistent with the relevant strategy or plan; and that “*it is possible for the decision-maker to deviate from the plan if there is information that the effects of the proposed activity will be minor*”.
23. The Department notes that the decision-maker imposed a condition in the new concession, requiring ongoing monitoring of the effects of the increase in overnight guided walkers, and specified that the concession could be modified to remedy any unacceptable effects.⁷ In addition, under section 17ZC(3)(b) of the Conservation Act, the Minister has the power to vary the conditions of any concession where necessary to deal with significant adverse effects on an activity that were not reasonably foreseeable at the time the concession was granted.

Routeburn Walks Ltd’s response

24. Routeburn Walks Ltd made the following key points in response to my provisional opinion:
 - a. The total daily limit of overnight guided walkers set in the Mt Aspiring Plan can be exceeded in “*exceptional circumstances*”, namely circumstances that are “*unusual, or out of the ordinary*”. Such circumstances “*do not need to be unique, unprecedented, or very rare*”.
 - b. The circumstances in this case are exceptional, for the reasons stated in Mr Clarke’s and Ms Long’s reports.
 - c. If exceptional circumstances do not exist in this case, the new concession is consistent with the Mt Aspiring Plan overall, when assessed “*in its entirety and in its planning context*”.

⁶ Subject to the proviso of the applicant undertaking “*appropriate research approved by the Department of Conservation that addresses social capacity carrying effects*” (p 147, Fiordland National Park Management Plan).

⁷ Schedule 3, Special Condition 21 of the concession dated 26 February 2013.

- d. If the new concession is not consistent with the Mt Aspiring Plan, it is consistent with the operative Otago Conservation Management Strategy (OCMS) (1998), which does not distinguish between guided and independent overnight walkers and permits up to 80 persons overnight at any one hut location on the Routeburn Track.
- e. Consistency with the OCMS is sufficient to permit the limit set in the new concession, since section 17W(1) requires a concession to be consistent with the relevant conservation strategy (the OCMS) or plan (the Mt Aspiring Plan).
- f. A national park management plan (such as the Mt Aspiring Plan) must not derogate from a conservation management strategy (such as the OCMS), which is “*a higher order planning document*”.
- g. Sections 17U and 17T of the Conservation Act and section 49 of the National Parks Act set out a number of other matters that need to be considered when assessing and making a decision on a concession application.
- h. The final decision on the RWL concession was for the Minister to make in his overriding discretion. “*The discretion cannot be fettered by any statutory of planning document, but must be exercised in a principled way*”
- i. “*When all of the relevant statutory [provisions] and statutory planning documents are considered in the round, ... the decision to grant [the new] concession was reasonable, in accordance with law, and one that was open to DOC to recommend and the Minister to make.*”

Analysis

25. This case requires examination of the legality and reasonableness of the departmental decision maker’s decision to grant a concession allowing an increase in overnight guided walker numbers on the Routeburn Track, above the limit set in the recently notified and approved Mt Aspiring National Park Management Plan.

Statutory scheme

26. The power of the Minister of Conservation to grant a concession in respect of a national park is set out in section 49(1) of the National Parks Act 1980. Under section 49(2), the Minister must be satisfied, before granting a concession, that it will not permanently

affect the rights of the public in respect of the park and is not inconsistent with section 4.⁸ It appears that both these preconditions were satisfied in this case.

27. Section 43 of the National Parks Act requires the Department of Conservation to administer national parks in accordance with *“(a) any statements of general policy adopted under section 44; (aa) any conservation management strategy for the time being in force in respect of a park; and (b) any management plan for the time being in force in respect of a park”*. Section 45(1) requires a management plan to be prepared for each national park.
28. The specific requirements for concessions in respect of national parks are set out in Part 3B of the Conservation Act 1987 which, by virtue of section 49(1) of the National Parks Act, *“apply as if references in that Part to a conservation area were references to a park and with any other necessary modifications”*.
29. Under section 17W(1) of the Conservation Act, *“a concession shall not be granted [in respect of a national park] unless the concession and its granting is consistent with the [conservation management] strategy or plan”* for the park.
30. Section 17T(2) of the Conservation Act is also relevant. It states: *“If the Minister is satisfied that the complete application [for a concession] ... is inconsistent with ... any relevant ... management plan, he or she shall, within 20 working days after receipt of the application, decline the application and inform the applicant that he or she had declined the application and the reasons for declining the application.”*

Inconsistency with Mt Aspiring National Park Management Plan

31. On its face, the decision to grant the concession to RWL, permitting an increase in overnight guided walkers above the limit set in the Mt Aspiring Plan, is inconsistent with the Plan.
32. The decision to grant the new concession departs significantly from the Plan limit of 24 overnight guided walkers, permitting as it does an increase of 66% above that limit. In my opinion, the decision to allow such a major increase drives a horse and carriage through the Plan.
33. Indeed, it is arguable that under section 17T(2) of the Conservation Act, the Minister had a duty to decline the RWL application at the outset (within 20 working days of receipt of the application) on the basis of its inconsistency with the relevant management plan.

⁸ Section 4(1) of the National Parks Act 1980 states: *“It is hereby declared that the provisions of this Act shall have effect for the purpose of preserving in perpetuity as national parks, for their intrinsic worth and for the benefit, use, and enjoyment of the public, areas of New Zealand that contain scenery of such distinctive quality, ecological systems, or natural features so beautiful, unique or scientifically important that their preservation is in the national interest.”*

Inconsistency with Otago Conservation Management Strategy

34. RWL argues, in the alternative, that the new concession is consistent with the conservation management strategy for the park, even if it is inconsistent with the Plan. Under section 17W(1) of the Conservation Act, *“a concession shall not be granted [in respect of a national park] unless the concession and its granting is consistent with the [conservation management] strategy or plan”* for the park (emphasis added).
35. The Routeburn Track falls within the Otago Conservation Management Strategy (OCMS) and the Southland Conservation Management Strategy. RWL rests this part of its submission on the OCMS, which was formulated in 1998 and is currently under review.
36. The following objective is stated for the Routeburn Track in clause 10.37.8 of the OCMS:
- “To provide a high-use, through route, walking opportunity on the Routeburn Track for users with little to moderate experience, with overnight accommodation, while at the same time maintaining the natural setting for which the track is renowned, and retaining for users an experience of remoteness and relative lack of the development.”*
37. The implementation methods for the objective include (a):
- “That the maximum hut accommodation provision of 80 persons overnight at any one location (set out in the Mount Aspiring National Park Management Plan) which establishes limits on the use and development of the whole track, be confirmed.”*
38. RWL argues that since the OCMS permits 80 persons to stay overnight at Routeburn Falls and Lake Mackenzie (the two locations where it has lodges),⁹ and since the DOC huts have 48 and 50 bunk spaces respectively at those locations, it follows that up to 32 and 30 overnight guided walkers are permitted to stay at the RWL lodges. RWL submits that *“the OCMS is notably less restrictive than the current MANPMP in respect of the Routeburn Track guided overnight walker limits”*.¹⁰
39. It is not obvious how RWL’s reliance on the outdated (though still operative) OCMS circumvents the section 17W(1) prohibition on the grant of an inconsistent concession. A concession allowing 40 overnight guided walkers to enter the Routeburn Track each day, staying their first night at the RWL lodge at Lake Mackenzie, would still mean that more than 30 guests were staying overnight at the lodge (40 walkers, plus guides and lodge staff). Thus on summer nights when the DOC hut at the same location is full (50 independent walkers plus a hut warden), if RWL operated to the limit of its concession, the OCMS maximum of 80 persons overnight at any one location would inevitably be

⁹ I reject the fanciful submission by counsel for RWL that its lodges may be at a different location to the DOC huts at Routeburn Falls and Lake Mackenzie (in which case 160 persons could stay overnight at those places). The relevant locations in terms of the OCMS are, undoubtedly, Routeburn Falls and Lake Mackenzie, rather than the precise spot where the hut or lodge is located.

¹⁰ Letter to Ombudsman, 18 July 2014.

breached. The most one can say is that the inconsistency is less egregious than the inconsistency with the Mt Aspiring Plan limit.

40. In any event, I am not convinced that the OCMS limit can sensibly be applied in light of the current Plan. The Mount Aspiring National Park Management Plan referred to in the 1998 OCMS was an earlier 1994 version, which stipulated a maximum of 80 persons to be accommodated in huts at any one location on the Mount Aspiring portion of the Routeburn Track. That management plan has been superseded by the current, 2011 Plan (which instead sets a limit on overnight walkers entering the track each day).¹¹ Given the cross-reference to an earlier Plan limit that no longer exists, it seems highly improbable that the OCMS accommodation limit remains in force.
41. It also seems a tenuous argument to suggest that the claimed consistency with the OCMS (in relation to the limit of 80 persons overnight at any one location) means that an inconsistency with the management plan can be overlooked. The 1998 Strategy does not impose a limit on overnight walkers entering the Routeburn Track each day; the 2011 Plan does impose such a limit. This is not a situation where the national park management plan derogates from the conservation management strategy, which is higher in the hierarchy of planning documents. The Plan regulates an aspect of the activity (daily overnight walkers entering the track) that the Strategy does not address.
42. Put simply, it would be a nonsense to have a plan that provides specific, relevant direction in relation to an activity, yet be free to ignore that plan on the basis of a higher level document (albeit outdated) which has effectively been superseded. The sensible and logical interpretation, which I adopt, is that the activity in question needs to be consistent with the specific rules or policies affecting it.
43. I note that it has not been argued that the relevant provision of the Mt Aspiring Plan is *ultra vires* in that it derogates from the OCMS. It is also telling that at no point has the Department, in seeking to justify the grant of the new concession to RWL, relied on the OCMS. There is passing reference to the 80-person accommodation limit in Mr Clarke's March 2012 *"Notified Concession Officer's Report to the Decision Maker"*, where it is stated that the activity is considered to be consistent with the OCMS.¹² The Department seems to have proceeded on the basis that *"all the detailed management provisions were contained within the [Mt Aspiring Plan]"*.¹³ In my opinion that was an appropriate stance for the Department to take.

¹¹ In relation to this point, Mr Tanner comments: *"The old OCMS and park plan provisions were considered as the latest management plan was prepared, but new provisions, which took account of changing circumstances and pressures were inserted, widely supported and ultimately approved by the NZCA"* (letter to Ombudsman, 18 July 2014).

¹² Paragraph 4.1.3, March 2012 Report.

¹³ Letter from Deputy Director-General, Policy and Regulatory Services, to Ombudsman, 21 August 2014.

Exceptional circumstances

44. I conclude that the new concession granted to RWL in respect of a national park was not consistent with the conservation management strategy (the OCMS) or the plan (the Mt Aspiring Plan) for the park (the Mt Aspiring National Park). Thus the Minister was not legally permitted to increase the overnight independent walkers over 68, and *should* not have permitted an increase of overnight guided walkers over 24. This raises the question whether exceptional circumstances existed.
45. Under the planning framework, *should* is defined to mean that the Minister is to exercise his or her discretion to exceed that limit only in exceptional circumstances. That is evident from the express wording of section 6.1.1.ii of the Plan, which states: *“Policies that carry with them a strong expectation of outcomes, without diminishing the constitutional role of the Minister and other decision-makers, state that a particular action ‘should’ be undertaken. When ‘should’ is used it is anticipated that there will only be exceptional circumstances where the outcome will differ from that expressed in the policies. While it is essential to acknowledge the discretionary nature of decision making, this plan and its policies are designed to give as much certainty as possible to management practice; ...”*¹⁴ (emphasis added).
46. What this means is that, unless there are exceptional circumstances, the concession should not have been granted. I accept the Department’s view that in *“exceptional circumstances”* elements of the Plan can be deviated from. I turn to consider the critical issues of whether *“exceptional circumstances”* existed in this case, and whether the Department’s conclusion that such circumstances *did* exist was reasonable.
47. The reasons given by the departmental officers in claiming that *“exceptional circumstances”* exist do not bear scrutiny. Both reports (of Mr Clarke and Ms Long) read as if seeking to justify an *a priori* decision that the concession should be approved.
48. There are two key reasons advanced by the Department as establishing exceptional circumstances. First, both departmental officers suggest that any adverse effects of the proposal can be avoided, remedied or mitigated. Mr Clarke considers that *“the effects of increasing numbers as requested will be no more than minor”*.¹⁵ Ms Long accepts that *“there are some uncertainties associated with the increase in the number of overnight guided walkers on the track”* and that ongoing monitoring should be required to ensure that *“the effects are appropriately avoided, remedied or mitigated”*.¹⁶

¹⁴ The first sentence of section 6.1.1.ii replicates Policy 1(d)(ii) of the *General Policy for National Parks* issued by the New Zealand Conservation Authority in April 2005, pursuant to section 44 of the National Parks Act 1980. Management plans for national parks are required to be consistent with the *General Policy for National Parks*.

¹⁵ Page 8, March 2012 report.

¹⁶ Pages 15, 20, November 2012 report.

49. On this point, the June 2012 submission of the Otago Conservation Board (which fulfilled a statutory role in the preparation of the Mt Aspiring Plan) is compelling:

“The question of whether the concession is consistent with the relevant National Park Management Plan is pivotal in determining whether or not the concession should be granted. The Department’s apparent belief that it has the power to grant a concession that is inconsistent with a management plan because it considers the effects are minor or can be mitigated has no basis in law.”

50. The second reason advanced by the Department — and the decisive factor in Ms Long’s “on balance” decision to recommend approval — is the distinction in the wording of the limit on overnight walkers between the Mt Aspiring Plan and the Fiordland Plan: namely that the Fiordland Plan allows for the possibility, if supported by appropriate research as to “social carrying effects”, of an application to increase the limit on overnight numbers on the Routeburn Track.
51. The Department’s decision (insofar as it is based on Ms Long’s recommendation) seems somewhat perversely to determine that, because the Mt Aspiring Plan did not spell out the reasons for not increasing the limit in overnight walkers, and did not explain the non-inclusion of the research provision in the Fiordland Plan, it was not underpinned by an adequate rationale and this was an “exceptional circumstance” permitting departure from a management plan that had been fully debated in an extensive review process and recently adopted by the Department. This is nonsense on stilts. There is no credible basis on which to conclude that the circumstances here were so unusual or out of the ordinary to be “exceptional”.
52. The plain fact remains that both the Mt Aspiring and Fiordland plans stipulated the same limits (92 overnight walkers, inclusive of 68 independent walkers). Furthermore, as Ms Long notes, the Notice of Compliance that preceded approval of the Mt Aspiring Plan specifically footnoted submissions that the research provision should *not* be included in the Plan, at the same time as noting that RWL wished to increase guided numbers on the track.¹⁷
53. The survey research referred to in the departmental reports did not indicate what an appropriate threshold for overnight numbers might be, and failed to show that the increase would *not* have an impact on social values such as overcrowding. I note that the Routeburn area is identified in the Plan as “predominantly ... a place to experience peace and quiet and enjoyment of natural mountain, forest and river environments”.¹⁸ No doubt these factors led the reviewers of the Plan to hold to the limit of 68 independent overnight walkers, and 92 overnight walkers in total, when setting the limits in 2011.
54. There is often a temptation for decision makers, when determining whether rule making bodies intended rules to apply to a particular set of circumstances, to circumvent the

¹⁷ Page 9, fn 8, June 2010 report.

¹⁸ Page 105 of the Mt Aspiring Plan.

plain meaning of words and devise innovative solutions. (No doubt an Ombudsman must be alert to a similar temptation.) It is striking in this case that the Director-General's delegate saw the "very clear direction" in the Plan "that increasing overnight guided walkers is not the intention on the Routeburn Track".¹⁹ Yet Ms Long convinced herself that "it isn't desirable for the Minister to be constrained by the number if she is satisfied that having regard to the [Fiordland] Plan and the Track as a whole, and to the actual effects (as supported by the surveys) on the entire track due to any number increase, that the Track could support greater walker numbers".²⁰ This reasoning is unconvincing and contrary to the statutory scheme for national parks in New Zealand.

55. The National Parks and Conservation legislation seeks to ensure the protection of national parks by the requirement that each park has a management plan, developed in consultation with the public. Because concessions over national parks pose a risk to the use and enjoyment of national parks by the public, section 17W(1) of the Conservation Act *forbids* the grant of any concession that is inconsistent with a park's management plan and section 17T(2) requires the Minister to reject an application once satisfied that it shows such inconsistency.
56. The scope of a statutory discretion is determined by the legislation conferring it and cannot be narrowed (fettered) or broadened by policy decisions. Pursuant to section 17W(1), the Minister's discretion does not extend to granting a concession that is not consistent with the relevant strategy or plan. The Department's submission that strict adherence to the limit set in the national park management plan would amount to unlawful fettering of the Minister's statutory discretion is misconceived.
57. Much of the discussion in the departmental reports on RWL's application for a new concession focuses on whether there are "exceptional circumstances" justifying a departure from the Plan limits. That overlooks the key consideration of the need for "as much certainty as possible" in the application of the Plan.²¹
58. I note that the Supreme Court has recently emphasised (albeit in the context of New Zealand Coastal Policy Statement promulgated under the Resource Management Act 1991) the importance of decision makers following "a carefully structured legislative scheme" and "a hierarchy of planning documents".²² In the present case, the Mt Aspiring Plan and the *General Policy for National Parks* set clear directives for the limits of concessions within the Mt Aspiring National Park.

¹⁹ Page 10, November 2012 report.

²⁰ Page 11, November 2012 report.

²¹ Policy 1(d)(ii) of the *General Policy for National Parks* issued by the New Zealand Conservation Authority in April 2005, pursuant to section 44 of the National Parks Act 1980.

²² *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38 at paras 142, 151.

Conclusion

59. I have significant reservations about the legality of the decision to increase the daily limit of overnight guided walkers above the Plan limit of 24. However, given my view of the reasonableness of the increased limit, it is not necessary for me to express a firm opinion on whether that decision appears to be contrary to law.
60. In my view it was totally unreasonable for the Department to make a decision that flew in the face of the limits set in the newly promulgated Mt Aspiring Plan. The Department (through its Otago Conservancy) had undertaken the review in consultation with the Otago Conservation Board. There had been a careful and extensive public consultative process and general endorsement of the provisions of the new Plan. As the complainant states, the decision to approve the increase in overnight guided walker numbers makes a “mockery” of the process of public consultation in the development of the Plan and undermines public participation.

Opinion

61. In my opinion the decision in 2013 of a Department of Conservation delegate of the Minister of Conservation – to grant a new concession to Routeburn Walks Ltd, on terms permitting the concessionaire to increase from 24 to 40 the number of its overnight guided walkers entering the Routeburn Track each day – was unreasonable.

Recommendation

62. I recommend that the Department:
 - consider placing a public apology on its website;²³
 - review its processes for handling applications for concessions in national parks in light of this opinion;²⁴

and request that the Department confirm to the Ombudsman that the above steps have been taken, by **21 January 2015**.

²³ I note the submission of Mr Tanner that “*this concession should never have been granted and I believe a public apology from DOC is warranted*” (letter to Ombudsman, 23 January 2014). I leave it to the professionalism of the Department to decide whether to offer an apology in this way.

²⁴ I note the suggestion of counsel for RWL that “*the most you can helpfully and appropriately do is recommend that DOC review its processes for considering applications in the future*” (letter to Ombudsman, 18 July 2014).

Publication of opinion

A copy of this opinion will be sent to the Minister of Conservation, the New Zealand Conservation Authority, the Otago Conservation Board and Routeburn Walks Ltd, and will be published on the Ombudsman's website, for educational purposes.

Professor Ron Paterson
Ombudsman