

10. Overseas Investment Act 2005

Public access benefits



Introduction

This is a guide to the statutory provisions, processes and criteria used by the New Zealand Walking Access Commission when addressing walking access benefits that may be offered by intended overseas purchasers of sensitive land. These benefits may be a consideration in the assessment by the Overseas Investment Office (OIO) and responsible Ministers of applications for approval to purchase sensitive land under the *Overseas Investment Act 2005* (OIA).

The Commission has no statutory role under the *Overseas Investment Act* in advising on or determining these walking access benefits. The Commission has, however, a role under the *Walking Access Act 2008* to lead and support the establishment and improvement of walking access. This role has been recognised by the OIO and the Commission's advice is sought on walking access benefits that may be proposed in respect of OIA applications. Decisions on OIA applications are, however, a matter for the OIO and the responsible Ministers.

Statutory provisions

The most relevant provisions of the *Walking Access Act* are:

9 Objective of Commission

The objective of the Commission is to lead and support the negotiation, establishment, maintenance, and improvement of walking access and types of access that may be associated with walking access, such as access with firearms, dogs, bicycles, or motor vehicles.

10 Functions of Commission

(1) In meeting its objective under section 9, the Commission has the following functions:

(a) providing national leadership on walking access by—

(i) preparing and administering a national strategy; and

(ii) co-ordinating walking access among relevant stakeholders and central and local government organisations, including Sport and Recreation New Zealand.

The Commission also has a specific responsibility for the establishment and administration of walkways, a particular form of walking access that is recognised in statute.

The OIA contains several criteria that the OIO and Ministers must consider when assessing an application from an overseas person to acquire sensitive land. These include benefits that the investment may confer on New Zealanders. From a walking access perspective the most relevant provisions are in the following paragraphs of section 16:

(ii) the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders), as determined by the relevant Ministers under section 17:

(iii) if the relevant land includes non-urban land that, in area (either alone or together with any associated land) exceeds 5 hectares, the relevant Ministers determine that that benefit will be, or is likely to be, substantial and identifiable.

The walking access benefit in section 17 is in the following paragraph:

(e) whether there are or will be adequate mechanisms in place for providing, protecting, or improving walking access over the relevant land or a relevant part of that land by the public or any section of the public.

The Commission process

The Commission becomes involved in the purchase of sensitive land by an overseas person either:

- When the OIO or Ministers have made it a condition of the acquisition that the purchaser reaches agreement with the Commission on the implementation of a walking access condition. This may be in the form of a standardised walking access condition developed in consultation with the Commission; or
- When an intending purchaser approaches the Commission seeking its views on a possible walking access benefit. In this case the Commission is able to consider the matter and provide its views which the intending purchaser may then include in their application.

In addressing walking access conditions of approved purchases the Commission will if relevant consult with other parties with an interest in public access, such as the Department of Conservation, local authorities, Fish and Game New Zealand and recreational groups about the desirability of walking access on the land and any implementation issues.

When addressing an approach from intended purchasers, prior to an application being made to the OIO, the Commission will treat each request in confidence and will not approach other agencies for their views without the specific agreement of the intending purchaser.

The Commission's criteria

The Commission's criteria in considering whether walking access will be beneficial in respect of a particular area of sensitive land that is subject to an application under the OIA the Commission will be guided by the provisions in section 11 of the *Walking Access Act*:

11 Consideration of priorities for walking access over private land

In considering its priorities for negotiating walking access over private land, the Commission must take into account the desirability of walking access—

(a) over land on the coast where there is not already walking access over the foreshore or the land adjoining the foreshore on its landward side:

(b) over land adjoining rivers or lakes where there is not already walking access over the land:

(c) to parts of the coast, rivers, or lakes to which there is not already walking access:

(d) being continuous over land adjoining the coast, rivers, or lakes (for example, by replacing walking access that has become obstructed by being submerged beneath a body of water):

(e) to conservation areas (within the meaning of section 2(1) of the Conservation Act 1987):

(f) to areas of scenic or recreational value:

(g) to sports fish (within the meaning of section 2(1) of the Conservation Act 1987) and game (within the meaning of section 2(1) of the Wildlife Act 1953).

In addition the Commission will consider the practical implementation of any proposed walking access and who will bear the cost of implementation. This could include route marking, track formation, signage and ongoing maintenance and administration.

Legal mechanisms for walking access

If walking access is to be a public benefit offered by a proposed purchaser it is desirable that it be secured by an appropriate legal mechanism. These include:

- A walkway established under the *Walking Access Act*, usually requiring an easement over the land;
- A public access easement other than one specified for a walkway;
- An esplanade strip or access strip agreed between the landowner (purchaser) and the local (territorial) authority; and
- An open space covenant which provides for public access agreed between the landowner (purchaser) and the Queen Elizabeth the Second National Trust.

Walkways made under the *Walking Access Act* are a walking access mechanism that has been favoured by the OIO and the Commission. They have a detailed statutory process for establishment, are specifically tailored for walking access and have an ongoing administrative arrangement. The Commission has developed a standardised form of easement for walkways that amongst other things makes clear the relationship between the easement and the statutory provisions that apply to easements.

Public access easements (easements in gross) other than those made for walkway purposes under the *Walking Access Act* need to be individually tailored for their purpose. There may be some circumstances where such easements provide a satisfactory walking access solution.

Esplanade strips are favoured by the Commission for walking access alongside water margins (rivers, streams, borders of lakes or the coastline) where there is not existing public access such as road, marginal strip or esplanade reserve. This is because esplanade strips move with any change in the location of the water margin

such as may occur with erosion or accretion.

Open space covenants can, in addition to their environmental benefits, provide walking access. In some circumstances it may be appropriate to provide for walking access within the context of an open space covenant. This would be reinforced in the covenant conditions in cases where walking access benefits were a condition of purchase.

In considering possible walking access conditions the Commission will want to be clear about who will bear any costs relating to any necessary route marking, track formation, signage and maintenance, and who will be responsible for the ongoing administration of the access. In the case of a walkway made under the *Walking Access Act* there must be appointed by the Commission a controlling authority responsible for administering the walkway. The controlling authority must be a public body such as the Department of Conservation or a local authority. The Commission itself does not normally take on this role.

Landowner liability

A concern that sometimes arises in respect of walking access conditions is the possible liability of the landowner to users of the access. Possible injury that might be suffered by walkers is dealt with under the *Accident Compensation Act 2001*, but in addition the *Walking Access Act* limits the possible liability of landowners as provided in section 66 of the Act:

66 (1) A landholder is not liable for any loss or damage suffered by a person using—

(a) walking access on the landholder's land, in the case of private land; or

(b) a walkway on the landholder's land, in the case of public land.

(2) The liability referred to in subsection (1)—

(a) means liability under—

- (i) the Occupiers' Liability Act 1962; or*
- (ii) any common law rule referred to in section 3 of that Act; and*
- (b) includes liability for both compensatory and exemplary damages.*
- (3) However, subsection (1) does not apply to any loss or damage caused by the landholder's deliberate act or omission.*

Prior consultation with the Commission

Applicants for approval to acquire sensitive land may wish to consider approaching the Commission at an early stage to seek its view about the desirability of walking access over the land under consideration. This could be done prior to or in parallel with a formal application to the OIO. The advantage of doing so is to provide greater certainty for the applicant and avoid a detailed process after an approval has been given centred on the standard default walking access condition that may have already been inserted as a condition of the approval.

The extent to which walking access is considered desirable by the Commission in respect of the land under consideration is not binding on the OIO of the responsible Ministers who must make their own judgement on the relevance and weighting to be given to a walking access benefit.