

DEPARTMENT OF ENVIRONMENT AND CONSERVATION



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Access to Inholdings – Guidelines for Granting Easements, Rights of Way and Licences

Introduction

Inholdings are parcels of land completely or partially surrounded by lands reserved under the *National Parks and Wildlife Act 1974* (the Act). Access through a park is often required to gain entry to and/or egress from inholdings for a variety of purposes. Inholdings may be held by private individuals, public and private companies, partnerships, incorporated bodies, charities, or local, state or federal agencies.

Access to many inholdings is available along public roads or park roads which are open to the general public. Under section 153C of the Act, the Minister may, in certain circumstances grant an easement, right-of-way or licence through or over land reserved under the Act for the purposes of enabling access to other land.

Objectives

This policy aims to:

- Ensure that the NPWS gives consistent, fair, legal and transparent consideration and advice on access applications to inholdings through NPWS reserves;
- Ensure that the NPWS fully considers the impacts of use of the proposed access route, particularly the impacts on natural and cultural heritage, and that arrangements for access are acceptable to the community and park visitors; and
- Ensure that access arrangements are effectively administered, monitored and reviewed and are consistent with the Act.

Scope / Application

This policy applies to all NPWS reserves that have inholdings that are totally or partially surrounded by land reserved under the Act and to which access is required through a NPWS reserve.

This policy does not apply to access for services such as pipelines or telecommunications infrastructure.

Background

Uncontrolled access to inholdings may compromise natural and cultural heritage values and create impacts for other users and/or neighbours. Impacts may include: increased spread and threat of weeds, plant pathogens and/or feral animals; trampling of bushland; erosion of soils and sedimentation of waterways; grazing pressure on native plants; user conflict extending to scenic, noise, dust and safety impacts; and habitat fragmentation. The management of these impacts may also create a further financial burden on the NPWS and impact on other land management authorities and/or neighbours.

Many owners of inholdings currently have no formal access agreement in place. Any informal access arrangements must be reviewed and formalised in compliance to comply with section 153C of the Act and this policy. It may not be possible or appropriate to formalise access in some situations.

Policy

Legislative provisions

1. Under section 153C of the Act, the Minister may, on such terms and conditions as he/she thinks fit, grant an easement, right-of-way or licence through or over land reserved under this Act for the purposes of enabling access to other land if:
 - the other land is completely or partially surrounded by land reserved under the Act, and
 - the Minister;
 - is satisfied that it is not practical for the owner of the other land to obtain an alternative means of access, by land or water, because it is not legally or physically available, or
 - while satisfied that it is practical for the owner of the other land to obtain an alternative means of access, considers that the proposed means of access will have a lesser environmental impact than that alternative means of access to the land concerned, or
 - while satisfied that it is practical for the owner of the other land to obtain an alternative means of access, considers that the proposed means of access will assist in more efficient management of the reserved land and will have no greater environmental impact than that alternative means of access to the land concerned.
2. The Minister must not grant an easement, right of way or licence unless he/she is satisfied that;
 - the proposed access arrangement will not have a significant impact on the environment of the area adjacent to the proposed access, and
 - the proposed access arrangement is consistent with the relevant plan of management.
3. The Minister must not grant an easement, right of way or licence unless he/she has considered:
 - the extent of, and legality of, any access that the owner had to the land before that access became unavailable, and
 - any guidelines prepared by the Director-General in relation to access to land.
4. The Director-General is required to prepare and adopt, after consulting with the National Parks and Wildlife Advisory Council, guidelines relating to the

provision of access to land under section 153C of the Act, and may, from time to time, vary those guidelines after further consultation with the Council.

5. These guidelines have been prepared for the purposes of Section 153C of the Act.

What is 'practical'?

6. When assessing an application for access to an inholding, all practical alternative means of access must be considered, ie all means of access that are legally and physically possible, including access via land or water. An element of reasonableness should be used in assessing 'practical alternative means' in cases where such alternative means impose considerable challenges in terms of time or physical access. However it is important that the most convenient or cost effective means of access is not deemed the only practical means of access simply because of its convenience or cost.

Lesser environmental impact

7. Where there is more than one practical means of access, the appropriate level of environmental impact assessment should be undertaken to address the environmental impacts of both the proposed and any practical alternative means of access, to determine which alternative will have a lesser environmental impact. Environmental impact refers to impacts in the wider environment, not just in the NPWS reserve.

More efficient management

8. Likewise, if a means of access is considered the most appropriate because it will assist in more efficient management of the reserve, the appropriate level of environmental impact assessment should be undertaken and must demonstrate how such access will result in more efficient management of the reserve with no greater environmental impact.

Easements, rights of way and licences

9. Access can be granted by either easement, right of way or licence under section 153C. Licences are contractual arrangements and are not transferable. Easements and rights of way are property rights that run with the land.
10. The granting of a licence is preferred over the granting of an easement or a right of way. Licences may be issued for a specified or an unspecified period of time. Those licences which are for an unspecified time are to be drafted so that they are revokable with a minimum of one month's notice.
11. Granting of easements or rights of way will be considered only in the following circumstances:
 - to replace an existing easement or right of way;
 - if the applicant can demonstrate exceptional circumstances on environmental or park management grounds; or
 - for access relating to essential public purposes.

Access affected by the creation of reserves under the CRA process

12. Arising from the Comprehensive Regional Assessment (CRA) process, access routes through NPWS reserves may be vested with the Minister for the Environment, in which case, legal access will be retained for the purpose for which it was used immediately prior to gazettal under relevant legislation. In the Northern and Southern directorates, the *Forestry and National Park Estate Act 1998*, the *National Park Estate (Southern Region Reservations) Act 2000*, and the *National Parks Estate (Reservations) Act 2002* provide for such access, for up to a five year period after commencement of the relevant legislation, and until notices are published under that legislation which either close or keep open the access routes. Contact Legal Services for further information.

Existing interests under section 39

13. Existing interest rights under section 39 of the Act and section 8 (5) and (6) of the *Wilderness Act 1987*, preserve legal access entitlements through a national park, historic site, nature reserve, state conservation area and karst conservation area, at least for the term and to the extent of the current legal interest. However such interests are generally not transferable or assignable beyond the current owners of that interest.
14. When an existing interest under section 39 expires, or when the renewal or extension of an existing interest is proposed, it is preferred that the owner apply for access under section 153C of the Act. In addition, an existing interest can be surrendered and exchanged for a licence, easement or right of way, at any time, subject to the provisions of section 153C of the Act.

Native title

15. Easements, rights of way and licences have the potential to affect native title interests. Unless all relevant provisions of the *Native Title Act 1993* are complied with, easements, rights of way and licences will be issued subject to any relevant native title interests and will be invalid to the extent of an inconsistency with those interests. No compensation will be payable to the holder of an easement, right of way or licence, if that easement, right of way or licence is invalid due to an inconsistency with native title. The holder of an easement, right of way or licence will be required to provide an indemnity in relation to any compensation payable to holders of native title interests as a result of the issue and use of land pursuant to the easement, right of way or licence.

Conditions for easements, rights of way or licences

16. Licences granted will be in accordance with the NPWS Property Management Manual unless otherwise authorised by the appropriate delegate. Please also refer to the NPWS Property Management Manual for other guidelines and pro-formas.
17. Easements, rights of way or licences to be granted will, depending on the rights granted, contain fundamental terms and conditions including the requirement for public risk insurance, indemnities, rights of termination, conditions of use and other relevant clauses.

18. Easements, rights of way and licences can be conditional or limited in terms of purpose or use in order to tailor the access agreement to each situation and minimise environmental impact. Examples of conditions could include: limits on expansion of the use of the access route over time limits on use in wet weather; limits on modes of transport; maintenance obligations; and reparation of any damage caused through the use of the access route.
19. Conditions for easements, rights of way or licences must include details of any monitoring or review programs as deemed necessary by the relevant Manager Conservation Programs and Planning Division (CPPD).
20. Licences may be limited in length of tenure in order to minimise environmental impact. They will not be granted for periods in excess of ten years, with a five year period being preferred, unless agreed to by the appropriate delegate.
21. All easements and rights of way will include a condition that the easement or right of way can be revoked or varied at will without a right to compensation if revoking or varying the easement or right of way is necessary to ensure conservation, consistent with the objects of the Act or, if the conditions of the easement, right of way or licence are not complied with.
22. A change in the use of an inholding can affect the use of the access route and may cause additional environmental impacts. Easements, rights of ways and licences will include a condition that provides that, if the use of an inholding changes, the easement, right of way or licence will be reviewed.
23. All easements, rights of way or licences must contain a release and indemnity benefiting the Crown, the Director-General and officers of NPWS in relation to the use of the land pursuant to the easement, rights of way or licence.

Maintenance of access route

24. Landholders will be responsible for part or all maintenance of the access route that is the subject of an easement, right of way or licence under section 153C. Any maintenance requirements, including financial contributions, should be negotiated before an easement, right of way or licence is granted and details will be included in the relevant conditions.

Procedural Guidelines

Delegation

25. The relevant regional Directors or relevant Trusts or Boards may approve licences granted under section 153C. The Director-General or relevant Trusts or Boards may approve easements or rights of way granted under section 153C.

Applications for easements, rights of way or licences

26. Applications for access will be accepted only from the owner of the inholding. However, where a land owner with a licence under section 153C is preparing to sell an inholding, an application for a new licence will be accepted from the person intending to purchase the inholding, with the licence to come into effect when the inholding changes ownership.

27. Applications for the granting of easements, rights of way or licences for access through a park should initially be made using the form attached to this policy. Applications are to be lodged to the relevant NPWS Regional Office.

Assessment of applications

28. For each application for access under section 153C, the relevant Manager CPPD is to identify the appropriate level of environmental impact assessment for the proposed access. The level of environmental assessment will increase as the intensity of the proposed use and the sensitivity of the environment increases. If a Review of Environmental Factors is required, it is to be prepared by or on behalf of the owner of the inholding in accordance with the NPWS Proponents' Guide for the Preparation of Reviews of Environmental Factors and Part 5 of the *Environmental Planning and Assessment Act 1979*.
29. Assessment of the application by the relevant Manager CPPD must consider any issues identified by the relevant Area Office.
30. An easement, right of way or licence must not be granted unless the appropriate level of environmental impact assessment is determined to be in favour of the application for access.

Fees

31. Applicants for access will be required to pay an initial fee when lodging their fee to cover processing costs. This fee is currently set at \$135. The Business Development Division maintains the Schedule of Conveyancing and Property Related Fees which is reviewed from time to time by the Director-General or relevant delegate.
32. If an easement, right of way or licence is granted, additional fees will be incurred. Such fees will be market based and therefore determined on a case by case basis. Where a market based fee is not commercially justified, cost recovery principles will apply. As a minimum, this includes recovery of the NPWS's administrative and management costs associated with the management of the agreement, including staff time, vehicle expenses, overheads etc.
33. Licence fees will be paid annually except where a one off lump sum payment (valuation based) is deemed to be more appropriate. The Manager Business Development Division (BDD) will determine when one off lump sum payments should be paid for licences. One-off payments will be required for easements or rights of way.
34. The landowner may also be required to make financial contributions in respect of maintenance of the access route. See paragraph 24.

Consultation

35. An application for access to an inholding under section 153C must be assessed in terms of its implications for fire management in the area. If the inholding is in a fire prone area, the application should be referred to the Rural Fire Service for consideration and advice.

36. Assessment of the application for access under section 153C should include consideration of potentially affected landowners, park visitors and any other stakeholder groups as deemed appropriate by the relevant Manager CPPD.

Public Register

37. Once granted, easements or rights of way are to be put on the public register set up under section 151D of the Act. Licences are not required to be included on the register.

Additional requirements for applications for an easement or right of way

38. In addition to the above, applicants for easements or rights of way are required to:
- Provide a full survey;
 - Pay for plan registration to facilitate the lodgement of Lot and DP numbers; and
 - Pay all costs relating to legal services, document preparation, registration and stamp duty.

Plans of management

39. If the access to the inholding is deemed acceptable on other grounds but is not consistent with a plan of management, an amendment to the plan will be required before the access is granted.
40. If there is no plan of management, then a plan will need to be adopted before any access rights can be granted under section 153C.

Transitional Provision

41. No amendment made by the *National Parks and Wildlife Amendment Act 2001* affects the validity of any lease, licence, easement or right of way in existence at the commencement of the amendment.

Definitions

Act means the *National Parks and Wildlife Act 1974* unless by way of reference to another Act.

Comprehensive Regional Assessment (CRA) means an assessment of the attributes and values (including flora, fauna and natural and cultural heritage) of forests in NSW. These assessments form the basis of NSW Forest Agreements and Regional Forest Agreements with the Commonwealth Government.

Easement means a right enjoyed by an owner of land, because he/she is the owner of land, over lands of another. An easement is annexed to land to which it provides a benefit and forms an estate in the land over which it is granted. A right of way is a type of easement.

Existing interest means any authority, authorisation, permit, lease, licence or occupancy issued by a relevant authority of any land affected by a park reservation and any associated terms and conditions in existence at the time.

Inholding means land including any freehold land or licensed, leased or other registered holding of Crown land; that is completely or partially surrounded by land reserved under the Act. If a property is adjoining a reserve on one side and access through the reserve is still required due to geographical features (such as waterways or escarpments), it may be considered 'partially surrounded' for the purposes of this policy. The legislation refers to 'other land' and is taken to mean 'inholding' for the purposes of this policy.

Licence means an authority to do something, which, without that authority would be unlawful. A licence to go onto land for certain purposes does not operate to confer or vest an estate in that land on the licence holder.

Owner means the person/s or organisation/s who is registered in an official record as the holder of the land (including a mortgagor); and includes the registered holder of any license, lease or the holder of any interest issued by a relevant authority.

Park means an area reserved under the Act.

Right of way means a type of easement authorising a landowner to pass over land of another.

The Minister means the New South Wales Government Minister who for the time being is administering the Act.

Relevant legislation

Crown Lands Act 1989 (Part 4 Division 5 - Easements for public access and Division 6 - Enclosure of roads and watercourses)

Environmental Planning and Assessment Act 1979 (Part 5)

Forestry and National Parks Estate Act 1998

Forestry Revocation and National Parks Act 1996 (s.9 - Special provision as to access roads)

National Park Estate (Southern Region Reservations) Act 2000

National Parks Estate (Reservations) Act 2002

National Parks and Wildlife Act 1974

Wilderness Act 1987 (s.8(5) and (6) regarding preservation of existing interests)

Relevant policies and other documents

NPWS Field Management Policies for:

- Oversnow Vehicles
- Vehicle Access
- Recreational Horse Riding

- Access for Professional Fishing

NPWS Property and Leasing Manual

NPWS Proponents' Guide for the Preparation of Reviews of Environmental Factors

'Is an EIS Required?' guidelines issued by Planning NSW

The NPWS Plan of Management Manual

Contacts

Enquiries should be directed to the relevant local NPWS Area or Regional Office. Telephone numbers can be obtained through the DEC (Department of Environment and Conservation) Environment Line on telephone 1300 361 967 or from the internet at www.nationalparks.nsw.gov.au.

The Business Operations Unit of the Visitor and Business Programs Section in the NPWS Hurstville office can also be contacted in relation to pro forma agreements (easements, rights of way or licences) on telephone 9585 6363.



Attachment A: APPLICATION FOR ACCESS THROUGH A PARK TO AN INHOLDING

<p>Name and contact details:</p>
<p>Address:</p>
<p>Tel: (W) (H)</p>
<p>Description of Property and Access Route required (attach a map if possible and define length and width of access route):</p>
<p>What permission and/or legal rights have you had to previously use this route? (please attach evidence of such):</p>
<p>What type of access do you need and how often do you need it?</p>
<p>Are there any other possible ways of accessing your property?</p>
<p>Have you obtained other necessary approvals required to access this route? (for example, eg approval from neighbours, Council etc). Please provide details.</p>

Who will be using the access route and how often? (Please estimate maximum number of trips per day and monthly average number of trips to the property include visitors, employees etc):		
	Mode of transport	Amount of use
Residents		
Employees/tradespersons		
Visitors (including family, friends, customers)		
Other		
Total		