

Investigation into aircraft landing limits trial on Ngapunatoru Plateau

Legislation	Ombudsmen Act 1975, ss 13, 22 National Parks Act 1980, ss 4, 43, 46-49 Conservation Act 1987, ss 17R, 17W, 17Z, 17ZC, 17ZG (see Appendix 1 for full text)
Agency	The Department of Conservation
Complaint about	Decision to raise the daily aircraft landing limits on the Ngapunatoru Plateau
Ombudsman	Leo Donnelly
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Summary

The Ngapunatoru Plateau is an identified aircraft landing site on a glacier in the Darran Remote Setting in the Fiordland National Park.¹ There is a strong tourist demand for scenic aircraft landings at glacier sites, and this demand has been accentuated in recent years due to record tourism growth. The Fiordland National Park Management Plan (the Plan) prescribes limits to the number of aircraft landings that can occur at the Ngapunatoru Plateau on a daily and annual basis. An aircraft cannot land within the Park unless it has been issued with a concession (permission) for that purpose.

To address the growing tourist demand for scenic aircraft landings, in February 2016 the Department of Conservation decided to ‘trial’ raising the daily aircraft landing limits on the Ngapunatoru Plateau. On 8 March 2017, Federated Mountain Clubs made a complaint to me about the Department’s decision.

Based on the information before me, I have formed the opinion that the Department’s decision was unreasonable, and aspects of this decision appear to have been contrary to law.

In my opinion, the Department has a statutory responsibility to administer the Fiordland National Park in accordance with its management plan. This means implementing, managing and adhering to the aircraft landing limits for the Ngapunatoru Plateau as set out in that Plan.

The Department is also required to ensure all relevant statutory provisions are followed when changes to the content of a management plan are sought.

I recommend that the Department: cancel its decision to raise the daily aircraft landing limits on the Ngapunatoru Plateau; take steps to ensure the existing concessions become consistent with the management plan’s aircraft landing limits for the Ngapunatoru Plateau; and formulate

¹ Also known as the Ngapunatoru Ice Plateau, and the Mt Tutoko Glacier.

a strategy for the allocation of limited aircraft landing opportunities at the Ngapunatoru Plateau.

Ombudsman's role

1. Under section 13(1) of the Ombudsmen Act 1975 (OA), I have the authority to investigate the administrative acts, decisions, omissions and recommendations of the Department.
2. My role is to consider the administrative conduct of the Department, and to form an independent opinion on whether that conduct was fair and reasonable (sections 22(1) and 22(2) of the OA refer).
3. My investigation is not an appeal process. I would not generally substitute my judgment for that of the decision maker. Rather, I consider the substance of the act or decision and the procedure followed by the Department, and then form an opinion as to whether the act or decision was properly arrived at and was one that the Department could reasonably make.

Background

4. Parliament enacted the National Parks Act 1980 to preserve New Zealand's national parks in perpetuity, for their intrinsic worth and for the benefit of and use by the public. The legislation makes it clear that our national parks are areas 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.² To that end, each national park has a 10-year management plan, which is the primary document used in making management decisions for that park.
5. The Fiordland National Park Management Plan came into effect on 21 June 2007, and is due for renewal this year. Amongst its various provisions, the Plan seeks to manage aircraft access in a way that facilitates public use and enjoyment of the Park but does not have unacceptable adverse effects on its natural values or visitors.
6. The Plan sets clear limits to the number, and frequency, of aircraft landings that can occur within the Park, and at particular sites within it. One such site where the Plan prescribes both daily and annual limits for aircraft landings is the Ngapunatoru Plateau. This is an identified aircraft landing site on a glacier, located within the Darran Remote Setting. An aircraft cannot land within the Park unless a concession for that purpose has been obtained from the Minister of Conservation.³

² Section 4(1) of the National Parks Act 1980.

³ Section 17ZF of the Conservation Act 1987. A concession is a permission to use Crown-owned public conservation land for any 'activity'.

7. There is a strong tourist demand for scenic glacier landings within the Fiordland National Park. According to the Department, this demand has been accentuated in recent years due to record tourism growth. This has meant that the existing opportunities for scenic glacier landings did not meet the growing tourist demand.
8. Consequently, in October 2015, the Department met with representatives from the aviation tourism industry to identify potential solutions to address the growing tourist demand. The suggestions put forward included the removal of or increase to the daily aircraft landing limits prescribed in the Plan.
9. In November 2015, the Department held an internal workshop to consider solutions to this issue. In respect of the Ngapunatoru Plateau, the Department proposed to 'trial' raising the daily aircraft landing limits. The trial would permit the existing concessionaires to increase their daily landings, and for one operator to increase their annual landings.
10. Following the workshop, the Department provided Federated Mountain Clubs (FMC) with an opportunity to comment on the proposed increase to the daily aircraft landing limits on the Ngapunatoru Plateau. FMC objected to the Department's proposal, and in particular expressed concern about the impacts of over-flight noise in remote areas, and on pedestrian visitors to those areas.
11. The Department acknowledged these concerns, but on 25 February 2016 communicated its decision to implement the proposed changes. FMC subsequently complained to the Department's Director-General. On 17 June 2016, the Department reaffirmed its decision to raise the daily aircraft landing limits on the Ngapunatoru Plateau.
12. The Department's decision is fully explained in a report to the Deputy Director-General Operations, entitled *'Options paper for addressing the Aircraft Industry demands for additional Glacier and Snow landings 2015/2016 season and beyond'* (the DDG Operations Report). In my view, the Department's decision comprised three discrete elements:
 - a. Not to implement the Plan's aircraft landing limits for the Ngapunatoru Plateau.
 - b. To raise the Plan's daily aircraft landing limits for the Ngapunatoru Plateau as a 'trial'.
 - c. To incorporate the increased aircraft landing limits for the Ngapunatoru Plateau, in existing concessions, by way of a 'variation.'

Complaint

13. The complaint is that the Department's decision of 25 February 2016, to raise the daily aircraft landing limits on the Ngapunatoru Plateau, was unreasonable and contrary to law.

14. FMC is concerned that the value of the Plan is undermined when its content is altered without wider public consultation. National Park Management Plans have been developed through public consultation, and incorporate compromises made between various stakeholder groups. FMC argues that these management plans represent a negotiated settlement.
15. FMC is concerned that the Department has misused certain provisions of the Plan in classifying its decision as a 'trial.'
16. FMC seeks a recommendation reinforcing the Department's duty to apply the plain meaning of conservation law, including giving effect to National Park Management Plans.

Investigation

17. On 4 August 2017, I notified the Department of my investigation. I requested a copy of the relevant papers and a report addressing the concerns that had been raised. The Department provided the requested material on 28 September 2017.
18. After taking into consideration the information provided by both the Department and the complainant, I formed my Provisional Opinion. This was conveyed to the Department on 23 January 2018. I invited the Department to make any further comments it wished me to consider before I decided whether to confirm my Provisional Opinion as final. As part of its response, I asked the Department to consult with the concessionaires, and to provide me with a copy of their comments.
19. On 19 February 2018, I agreed to the Department's request to extend the deadline for providing its comments, as it required further time to complete its consultations with the concessionaires.
20. On 1 March 2018, I met with the Department to discuss my Provisional Opinion and proposed recommendations. On 8 March 2018, the Department provided its written response to my Provisional Opinion, and a copy of the written comments from the concessionaires. After taking into consideration all of the information provided, I formed my Final Opinion.

Department's comments during my investigation

21. The Department explained that over the last 10 years, its various decision makers agreed not to implement the Plan's aircraft landing limits for the Ngapunatoru Plateau until it designed a way to manage the allocation of its limited aircraft landing opportunities.
22. The Department decided not to implement a process to allocate the limited aircraft landing opportunities for the Ngapunatoru Plateau, as it anticipated there would be significant difficulties in designing a fair and reasonable process that would not be at risk

of challenge. It had originally expected to allocate these limited aircraft landing opportunities through a booking system, but this was never developed.

23. The Department explained that it was aware that the Plan's aircraft landing limits for the Ngapunatoru Plateau were being exceeded, but elected not to enforce these as there was no evidence of any significant adverse effects on other users of the Park.
24. The Department commented that the Plan's aircraft landing limits were based on activity returns dating back to the early 2000s, well before the current growth in tourism was anticipated. The Plan's aircraft landing limits were not effects based, but simply reflected what had been occurring.
25. By raising the Plan's daily aircraft landing limits for the Ngapunatoru Plateau, the Department did not intend to exceed the Plan's overall annual limits for aircraft landings across the whole Fiordland National Park. Rather, it intended to change how these aircraft landing allocations were used.
26. After meeting with the aviation tourism industry, it agreed to take an integrated approach to the tourism growth, rather than requiring each concessionaire to undertake their own research. The Department considered that raising the Plan's daily aircraft landing limits for the Ngapunatoru Plateau, as an experiment to monitor the effects of the increased aircraft activity, was the most practical way of doing this.
27. The Department relied on Part 5.5.1, Implementation 23 of the Plan as the basis for the 'trial'. All concessions were permitted to land a maximum of 10 times per day, with one concessionaire granted an additional 2000 landings per annum.
28. The Department did consider formally reviewing only the Plan's aircraft landing provisions (notwithstanding that a full review of the Plan was due in late 2017/early 2018), but rejected that approach as the management of aircraft was considered to be integral to the overall framework of the Plan.
29. Consequently, the Department made a variation to each concession to increase the daily landing limits on the Ngapunatoru Plateau. The variations were made pursuant to section 17ZC(1)(a) of the Conservation Act 1987. The variations were considered to be of a minor or technical nature as the increased aircraft landings were authorised for a limited period of two years, at one location, to understand the effects of increased aircraft activity.

Department's comments on my Provisional Opinion

30. The Department did not have any comment to make on my analysis and findings. The Department accepted that, despite its best intentions, its decision to trial an increase in the number of aircraft landings at the Ngapunatoru Plateau was ill advised.
31. In response to my proposed recommendation that the Department cancel the trial to increase the daily aircraft landings on the Ngapunatoru Plateau, the Department advised

that it could implement this recommendation within 20 working days of the date of my finalised opinion.

32. Regarding my proposed recommendation that the Department take appropriate action to ensure that the existing concessions are made consistent with the Plan's aircraft landing limits as soon as reasonably practicable, the Department advised that its strong preference would be to return to the status quo in operation before the trial commenced. The Department explained that enforcing the Plan's aircraft landing limits for the Ngapunatoru Plateau will result in a substantial drop in business for the concessionaires.
33. The Department commented that if I proceeded with this recommendation, it would advise the concessionaires that it would undertake a landing allocation process for the limited aircraft landing opportunities on the Ngapunatoru Plateau; and it would advise me of this action within 20 working days of the date of my finalised opinion.
34. Concerning my proposed recommendation that the Department formulate a detailed strategy for the allocation of limited aircraft landing opportunities on the Ngapunatoru Plateau, it advised that it would be able to complete a detailed allocation strategy within 60 working days of the date of my finalised opinion. Implementation of the allocation process could take six months or longer. The Department offered to provide me with monthly updates on progress.
35. In response to my proposed recommendation that the Department commence a formal review of the Plan's aircraft landing limits to address the impact of tourism growth, the Department advised that a partial review of the Plan could take from nine to twelve months to complete (and would need the support of the Conservation Board and Ngāi Tahu). The Department's preference is to run a full review of the Plan, which will take two to three years to complete.
36. The Department noted that monitoring and compliance will be critical to successfully implementing my proposed recommendations.

Concessionaires' comments on my Provisional Opinion

37. The Department met with all nine concessionaires that are permitted to land at the Ngapunatoru Plateau, provided them with a copy of my proposed recommendations, and asked for their feedback in writing.⁴ At that meeting, the Department also informed the concessionaires that I might publish my finalised opinion. The Department has informed me that the concessionaires expected that my finalised opinion would be published.

⁴ Following the meeting, the Department reminded all concessionaires by email to respond. Written comments were received from: Milford Helicopters Limited, The Alpine Group, The Helicopter Line Limited, Over the Top Helicopters Limited, Southern Lakes Helicopters Limited (whose comments cover South West Helicopters Limited), Heliworks Queenstown Helicopters Limited, and Helicopters Queenstown Limited. Comment was not received from Fiordland Helicopters.

38. I have reviewed and considered each of the written submissions in full. It is appropriate to summarise the key points of these comments.
39. Two concessionaires accepted the findings outlined in my Provisional Opinion. All of the concessionaires are concerned that ending the trial will have a significant adverse impact on their businesses activities and relationships.
40. Three concessionaires acknowledged that aircraft activity can cause adverse social impacts. However, they noted that these effects can be mitigated through improved technology and certain aircraft practices. All of the concessionaires commented that the trial is gathering important data that can be used to set informed aircraft landing limits in the next management plan. They would like the trial to continue until a review of the Plan is completed.
41. Four concessionaires requested that I recommend that a clause be included in the Plan that permits aircraft landing limits to be tested and adjusted. Three concessionaires requested that if I recommend that the trial be cancelled, I recommend that a partial review of the Plan's aircraft landing limits be undertaken.
42. One concessionaire suggested a meeting to discuss the issues. In light of the comprehensive comments I have received from the Department and the concessionaires, I do not consider that a further meeting is required.

Analysis and findings

43. The Department's decision to raise the daily aircraft landing limits on the Ngapunatoru Plateau comprises three elements, which are set out below under the headings: not to implement the Plateau's aircraft landing limits; to raise the Plateau's daily aircraft landing limit; and to vary the existing concessions.
44. By way of context, I first need to explain why the Plan prescribes limits to the number of daily and annual aircraft landings that can occur at the Ngapunatoru Plateau.
45. The Ngapunatoru Plateau is an aircraft landing site on a glacier in the Darran Remote Setting in the Fiordland National Park. The Plan explains that the majority of Fiordland National Park is managed to maintain and protect its remote recreation experiences, as the large expansive remote experiences are what make Fiordland unique among other national parks in New Zealand.⁵
46. The Plan defines visitors to remote settings as *'Remoteness Seekers'* who are *'self-reliant trampers, hunters and mountaineers who want a true wilderness experience with very*

⁵ The Plan, at 124.

*few interactions with other visitors, and no facilities.*⁶ Accordingly, the Plan states that the following key attributes of remote settings will be protected:⁷

- a. a predominance towards self-reliance;
 - b. few encounters with other visitors (not more than one encounter with other visitor groups per day) and small group sizes;
 - c. relatively free of recreation facilities;
 - d. access is generally non-mechanised; and
 - e. visitors expect to be away from sights and sounds of human influence.
47. In particular, the Plan emphasises that the Darran Remote Setting should be managed to protect its remote rock climbing and alpine climbing opportunities that are world renowned; and its quiet atmosphere and wilderness characteristics.⁸ In order for visitor experiences to be maintained for this area, the Plan states that visitors should not experience more than a certain number of aircraft landings at any one site during a given time period.⁹
48. For this reason, all aircraft landings in remote areas are to be managed in accordance with the Tables in Part Five of the Plan. These Tables set limits to the number of aircraft landings that can occur at specific sites within the Park, and were set through a process of consultation when the Plan was originally being developed. They were based on aircraft activity data over a five-year period commencing in 1999; existing concession aircraft activity; and consultation to determine where potential growth or activities required higher levels of aircraft landings.¹⁰
49. Table Eight prescribes the following aircraft landing limits for the Ngapunatoru Plateau:
- a. a combined total of up to 10 helicopter landings per day inclusive of all concessions;
 - b. available for up to five concessions; and
 - c. an annual maximum of 500 helicopter landings per year.
50. In summary, the Plan is clear that aircraft landings on the Ngapunatoru Plateau are limited to 10 per day, and 500 per annum (the Plateau's aircraft landing limits).
51. The Plan also prescribes that the total number of helicopter landings for all regular aircraft operators across the whole Fiordland National Park cannot exceed 5493 per annum (the Park's annual aircraft landing limit).

⁶ The Plan, at 112.

⁷ The Plan, at 124.

⁸ The Plan, at 125-126.

⁹ The Plan, at 207.

¹⁰ Ibid.

52. I have set out the details of the relevant aircraft concessions for the Ngapunatoru Plateau in Appendix 2. The concessions stipulate for each aircraft operator: the number of aircraft landings they are permitted on the Ngapunatoru Plateau on a daily basis; and the total number of aircraft landings they are permitted, across the entire Fiordland National Park, on an annual basis.

Not to implement the Plateau's aircraft landing limits

53. In my opinion, the Department's decision not to implement the Plateau's aircraft landing limits appears to have been contrary to law.
54. The Department has explained that over the last 10 years, its various decision makers agreed not to implement the Plateau's aircraft landing limits, until a way to manage the allocation of those concessions was developed. I acknowledge that the Department considers that there would be significant difficulties in designing a fair process to allocate the limited aircraft landing opportunities for this site. However, that is not the issue in this complaint. Rather, the issue is that the Plan prescribed both daily and annual aircraft landing limits for the Ngapunatoru Plateau, and the Department decided not to apply those limits.
55. In the DDG Operations Report, the Department explained the most recent rationale for this decision:

Concessionaires have asked the Department to lift the daily/weekly limits, to better meet the market demands for snow and glacier landings. To enable this, a decision should first be made that the limits in the [Plan] will not be applied. This decision could be made pursuant to s17ZG(2)(a) of the Conservation Act 1987.

56. Further in the DDG Operations Report, it was recommended that 'under s17ZG(2)(a) of the Conservation Act 1987, the [Plan's] Aircraft Landing allocation process not be implemented.' A landing allocation process is designed to manage applications for a concession, where there are a limited number of aircraft landing opportunities available for a particular site.
57. From my review of the DDG Operations Report, it is not entirely clear whether the Department relied on section 17ZG(2)(a) to not apply the Plateau's aircraft landing limits, or as a basis for not implementing a landing allocation process. Whatever the Department's intent may have been, in my opinion, the result is the same. Ultimately, the Department decided not to implement the Plateau's aircraft landing limits.
58. The National Parks Act, and Part 3B of the Conservation Act, are relevant to this decision.¹¹ Section 49(1) of the National Parks Act sets out the Minister of Conservation's

¹¹ I note one concessionaire's comment that the Department's decision was consistent with sections 6(a) and 6(e) of the Conservation Act. However, this complaint concerns a 'national park' and not a 'conservation area', which are defined separately in the legislation. The governing legislation in this case is the National Parks Act.

power to grant a concession in respect of a national park, in accordance with Part 3B of the Conservation Act, which *'shall apply as if references in that Part to a conservation area were references to a park.'* The Department exercises the Minister's power under delegated authority.

59. Under Part 3B of the Conservation Act, section 17R provides that any person may apply to the Minister for a concession, unless the Minister has exercised a power under section 17ZG(2)(a), and the application would be inconsistent with that process.
60. Section 17ZG(2)(a) provides that the Minister may *'tender the right to make an application, invite applications, or carry out other actions that may encourage specific applications.'* This section allows the Minister to implement a tender process for applications for a concession, during which individual applications outside of that process might not be considered.¹²
61. In essence, section 17ZG(2)(a) provides the Department with an option to introduce a particular process for managing applications for concessions where there are limited aircraft landing opportunities available. The Department decided not to undertake such a process in this case. In my opinion, irrespective of whether this process is undertaken, section 17ZG(2)(a) does not authorise the Department to choose not to implement the Plateau's aircraft landing limits.
62. Moreover, by virtue of section 43 of the National Parks Act, the Department is positively required to administer the Fiordland National Park in accordance with its management plan, *'in such a manner as to secure to the public the fullest proper use and enjoyment of the parks consistent with the preservation of their natural and historic features and the protection and well-being of their native plants and animals.'* This means implementing, managing and adhering to the Plateau's aircraft landing limits.
63. From my review of the DDG Operations Report, it is clear that the Department did not see compliance in respect of concessions as priority work. The Department has also explained that it chose not to enforce the Plateau's aircraft landing limits as it was not aware of any evidence of significant adverse effects on other users of the park. In light of the Department's obligation set out in section 43 of the National Parks Act, I do not consider this was a choice it was authorised to make.
64. As a result of not implementing the Plateau's aircraft landing limits since the Plan came into force in 2007, the concessions issued under the previous management plan have been 'rolling on' beyond the term of their permit (which the Department refers to as the status quo in operation before the trial commenced). As such, the 'rolling on' concessions for the Ngapunatoru Plateau, have continued to exceed the Plateau's aircraft landing limits:

¹² See *Alpine Choppers Limited v Minister of Conservation* HC WN CIV 2007 425 437 [17 March 2008] at [59].

- a. There are nine concessions that permit aircraft landings on the Ngapunatoru Plateau.¹³ This is 80 percent above the Plan's limit.
 - b. In total, the concessions permit 15 daily aircraft landings on the Ngapunatoru Plateau. This is 50 percent above the Plateau's daily aircraft landing limit.
 - c. The concession for Milford Helicopters Limited permits 730 annual aircraft landings on the Ngapunatoru Plateau. This concession alone is 45 percent above the Plateau's annual aircraft landing limit.
 - d. The concession for Fiordland Helicopters permits 'unlimited' aircraft landings at the Ngapunatoru Plateau. A permission for 'unlimited' aircraft landings is wholly inconsistent with the Plateau's aircraft landing limits.
65. In my opinion, by allowing this state of affairs to arise, the Department has failed to act in accordance with its statutory obligation set out under section 43 of the National Parks Act, to administer the Fiordland National Park in accordance with its management plan—specifically, the part of the Plan that prescribes daily and annual limits for aircraft landings on the Ngapunatoru Plateau.
66. For completeness, I note that section 17Z(2) of the Conservation Act provides that the term of a permit may not exceed 10 years and shall not be renewable. There does not appear to be any basis in law that permits the Department to 'roll on' a concession in these circumstances. I recognise that section 17ZAA of the Conservation Act allows a concessionaire to continue to operate under an existing concession after it has expired, when they have applied for a new concession for the same activity, and meet certain other requirements. However, as new concessions have not been applied for, this section does not apply.
67. In my opinion, for the reasons given, the decision not to implement the Plateau's aircraft landing limits appears to have been contrary to law.

To raise the Plateau's daily aircraft landing limit

68. In my opinion, the Department's decision to raise the Plateau's daily aircraft landing limit as a 'trial' was unreasonable. I will explain my opinion under three sub headings: raising the limits; the trial; and reviewing the Plan.

Raising the limits

69. Section 4(2)(e) of the National Parks Act provides that:

the public shall have freedom of entry and access to the parks, so that they may receive in full measure the inspiration, enjoyment, recreation, and other

¹³ I note that when the Plan came into force in 2007, there were only eight concessions for aircraft landings at the Ngapunatoru Plateau. I also note that it is intended that the concession for South West Helicopters Limited will be assigned to Southern Lakes Helicopters Limited, thereby leaving eight concessions for this site.

benefits that may be derived from mountains, forests, sounds, seacoasts, lakes, rivers, and other natural features.

70. Commercial aircraft activity within national parks poses a recognised challenge to the public's right of entry to national parks, so that they may '*receive in full measure the inspiration, enjoyment, recreation, and other benefits that may be derived from mountains, forests, sounds, seacoasts, lakes, rivers, and other natural features.*'
71. In my opinion, the Plan recognises that this challenge is most acute in the context of remote settings like the Darran Remote Setting in which the Ngapunatoru Plateau is situated. Aircraft activity, with its noise and visual intrusion, detracts from the values associated with remote settings such as remoteness and natural quiet, and the relatively unmodified natural environment.¹⁴ As I explained above, to protect remote settings, and the Remoteness Seeker's ability to draw inspiration and enjoyment from them, the Plan prescribes limits to the number of aircraft landings that can occur on the Ngapunatoru Plateau.
72. From the material I have reviewed, it appears that the Department was facing mounting pressure from the aviation tourism industry to offer an appropriate solution to the tourist demand for glacier landings. It is unclear whether this tourism growth was foreseen at the time of developing the Plan. The Plan itself explained that the aircraft landing limits were set with potential growth in mind.¹⁵ The Plan also noted that Fiordland National Park had experienced a steady increase in visitor numbers and this was expected to continue.¹⁶
73. Whatever the case may be about the foreseeability of the extent of the tourist demand, the Department decided to raise the Plateau's daily aircraft landing limits as a 'trial'. The trial permitted each concessionaire to increase their aircraft landings to 10 landings per day on the Ngapunatoru Plateau. One concessionaire was permitted an additional 2000 aircraft landings per annum. The trial was to be run for two years, or until such a time as a new management plan became effective. This decision was made pursuant to section 5.5.1, Implementation 23, of the Plan.
74. The Department has explained that in implementing the trial, it did not intend to exceed the Park's annual aircraft landing limits, but rather how those landings occur within the Park. Frankly, I find it difficult to understand this rationale when the Plan clearly prescribes daily and annual aircraft landing limits for the Ngapunatoru Plateau.
75. I accept that the trial may not have increased the Park's annual aircraft landing limits. However, the trial does permit an increase to the daily and annual aircraft landings at the Ngapunatoru Plateau. Those permitted increases exceed the Plateau's aircraft landing limits. The Department was aware of this issue. In the minutes of its internal workshop,

¹⁴ The Plan, at 125-126, and 201.

¹⁵ The Plan, at 207.

¹⁶ The Plan, at 97 and 103.

held in November 2015, the Department recorded that by raising the Plateau's daily aircraft landing limits *'we are ignoring the intent of the Fiordland National Park Management Plan.'*

76. The trial allows each concessionaire to increase their aircraft landings to 10 landings per day on the Ngapunatoru Plateau. There are nine concessions for aircraft landings at this site, but two of these concessions were not included in the trial. Therefore, the trial permits 70 daily aircraft landings on the Ngapunatoru Plateau. This is 600 per cent above the Plateau's daily aircraft landing limit.
77. The trial also permits the concessionaire Milford Helicopters Limited 2000 annual aircraft landings on the Ngapunatoru Plateau. This permission alone is 300 per cent above the Plateau's annual aircraft landing limit.
78. The trial increases the permissions for daily aircraft landings to 70, well above the limit of 10 daily aircraft landings prescribed in the Plan. To put this simply, the trial authorises too many aircraft landings above the Plateau's aircraft landing limits. This is not to say that those landings would occur, but the fact is that the trial permits that number of landings to occur.
79. This effect is best contextualised, in light of section 4(2)(e) of the National Parks Act, by asking what potential impact the trial could have for the Remoteness Seeker traversing the Darran Remote Setting. If the 70 daily aircraft landings were to occur on the Ngapunatoru Plateau over an eight hour period, the Remoteness Seeker could be exposed to the effects of an aircraft landing every seven minutes on average. This would detract significantly from their ability to draw inspiration and enjoyment from the Darran Remote Setting, and is contrary to the Plan's efforts to protect the Park's unique remote recreation experiences.

The trial

80. Turning to the basis for the decision to raise the Plateau's daily aircraft landing limits as a trial, the Department has explained that it made this decision pursuant to Part 5.5.1, Implementation 23 of the Plan. In my opinion, Implementation 23 requires that *before* any changes can be made to the Plateau's aircraft landing limits, those proposed changes would need to be supported by appropriate research.¹⁷
81. Implementation 23 was included as a research and modification provision, and sets out the process to be followed if changes are sought to the aircraft landing limits prescribed in the Plan. It provides:

Should changes be sought to the limits detailed in Tables 8, 9 and 10 or Implementation 12, the applicant should be required to undertake appropriate research approved by the Department of Conservation that will address issues including but not limited to physical and social carrying

¹⁷ The Plan, at 213.

capacity effects and demonstrate that no other visitor group is likely to be significantly adversely affected by landings.

82. For additional context, it should be read alongside Implementation 22 of the Plan, which recognises that the Park should be managed to protect its unique remote recreation experiences.¹⁸ Implementation 22 emphasises the importance of monitoring the level of aircraft use and its effects in Fiordland National Park; and requires research to be undertaken to understand the effects of aircraft activity, particularly in remote areas and on remote visitors.
83. In my opinion, Implementation 23 does not provide the Department with licence to increase the Plateau's aircraft landing limits and then monitor the effects of that increase. Rather, it directs that the potential adverse effects of aircraft activity must be appropriately researched, and understood, before any changes to the Plateau's aircraft landing limits can be made.
84. Implementation 23 expresses a responsibility to anticipate, through appropriate research, particular harm before it occurs. The research must demonstrate that no other visitor group is likely to be significantly adversely affected by aircraft landings. This serves to protect Remoteness Seekers against the adverse effects of aircraft activity, and thus preserve their ability to draw inspiration and enjoyment from remote settings like the Darran Remote Setting.
85. In light of my opinion expressed so far, it is not necessary for me to consider whether the Department's trial constitutes a valid programme of research under Implementation 23 of the Plan.

Reviewing the Plan

86. If the Department had correctly followed the process required by Implementation 23, and then sought changes to the Plateau's aircraft landing limits, it would still be required to make those changes through sections 46 to 48 of the National Parks Act.
87. As noted in the preface to the Plan, where there is increased knowledge or changing circumstances, section 46(1) of the National Parks Act requires the Department to amend or review the Plan, in whole or in part, to take account of this. The demand for glacier landings, as a result of the tourism growth which the Department describes, appears to be a change in circumstances that would necessitate a formal review of the Plan.
88. I note that the Department did consider undertaking a formal review of the Plan, but chose not to as it considered that *'the management of aircraft is integral to the overall framework of [the Plan].'* In my opinion, this comment highlights why the Department should have undertaken a review: aircraft landings affect the overall management of the Fiordland National Park. Changes should not be made to the Plateau's aircraft landing limits unless the potential impact of those changes on the overall management of the

¹⁸ Ibid.

Park are also assessed. A formal review of the Plan would have provided the Department with the opportunity to undertake this assessment.

89. When a review is needed, section 47 of the National Parks Act requires the Department to undertake an appropriate process of consultation. Consultation is an important procedural aspect for managing national parks, to ensure that broad community views and interests are taken into account.¹⁹
90. To illustrate my point, public consultation was undertaken when the Plan was being developed. Over 2100 submissions were received from individuals and organisations, all of which were taken into account in the Plan's development.²⁰ It follows that the same opportunity for consultation should occur when changes to the Plan's finalised content are later sought. This opportunity is provided for in section 47 of the National Parks Act.
91. By raising the Plateau's daily aircraft landing limits as a trial, the Department has bypassed the prescribed statutory review process for reviewing a management plan. This has circumvented the process of consultation that ought to occur when changes of this nature are sought.

Summary

92. Overall, the Department's decision to raise the Plateau's daily aircraft landing limits as a 'trial' had three distinct impacts. First, such was the size of the increase above the Plateau's aircraft landing limits, that it had the potential to detract significantly from the Remoteness Seeker's ability to draw inspiration and enjoyment from the Darran Remote Setting.
93. Second, Implementation 23 did not provide the Department with licence to increase the Plateau's aircraft landing limits. The Department's interpretation of Implementation 23 undermines its *raison d'être*: to ensure that the adverse effects of aircraft activity are clearly researched and understood *before* changes to the Plateau's aircraft landing limits can be made.
94. Third, the National Parks Act sets out the process that must be followed to take account of a change in circumstances, such as the tourism growth described. The Department ought to have reviewed the Plateau's aircraft landing limits in accordance with sections 46 to 48 of the National Parks Act. By not undertaking this review process, the Department has circumvented both its statutory responsibilities and the process of consultation that ought to occur when changes of this nature are sought.

¹⁹ I note that when the 'trial' was proposed, the Department provided FMC with an opportunity to comment, and consulted with Ngāi Tahu. The Department does not submit, and nor do I consider, that these discussions were undertaken in order to fulfil the process of consultation as provided for under section 47 of the National Parks Act.

²⁰ The Plan, at 14.

95. In my opinion, for the reasons given, the decision to raise the Plateau's daily aircraft landing limit as a 'trial' was unreasonable.

To vary the existing concessions

96. In my opinion, the Department's decision to incorporate the increase to the Plateau's daily aircraft landing limit, by varying the existing concessions, appears to have been contrary to law.
97. At the outset, it is important to recognise that section 17W(1) of the Conservation Act provides that a concession shall not be granted unless it is consistent with a park's management plan. In light of this, I first note that the Department should not have allowed the existing concessions to continue 'rolling on', as they exceeded the Plateau's aircraft landing limits, and were therefore inconsistent with the Plan. Second, the Department should not have authorised variations to those concessions that permitted aircraft landings that exceeded, or had the potential to exceed, the Plateau's aircraft landing limits.
98. The Department explained that it relied on section 17ZC(1)(a) of the Conservation Act to vary the concessions. That section provides that the Minister may vary any condition in a concession where:
- The variation is of a minor and technical nature and does not materially increase the adverse effects of the activity or the term of the activity or materially change the location of the activity.*
99. To rely on this section, the variation must be both minor and technical. These are words of limitation to emphasise the nature of the variation allowed. A minor variation is one without significance or importance. A technical variation relates to the functional or practical aspects of the concession. Therefore, the variation must, I believe, be without significance and only about the functional aspects of the concession.
100. In the present case, the concessions permit a certain number of aircraft landings, at certain times, on the Ngapunatoru Plateau. Changes to those conditions are significant, as they constitute a change to the permission itself.
101. The Department's decision to vary the concessions to reflect the increase to the Plateau's daily aircraft landing limits (and the additional annual landings for one concession), was a change to the conditions of the permission. In my opinion, this was not a variation of a minor and technical nature.
102. What is more, section 17ZC(1)(a) of the Conservation Act is only applicable where the variation does not materially increase the adverse effects of the activity. Notably, the Department described the 'trial' as an experiment to monitor the effects of the increased aircraft activity. It appears that the Department had no real assurance that a variation of this nature would not materially increase the adverse effects of the increased aircraft

landings. This is a further reason why I do not consider that it was open to the Department to rely on this section to vary the existing concessions.

103. If changes sought to the concession are more than minor and technical, section 17ZC(2) of the Conservation Act makes it clear that those changes must be treated as a new application for a concession. As the Plan explains, individual concession applications cannot be considered in isolation, but must be assessed in the context of all other visitor use in the area. The Department is required to ensure that new applications are consistent with the Plan, and the overall management of the park.²¹
104. Furthermore, section 17SC(3) of the Conservation Act requires the Minister to publicly notify an application for a permit if, having regard to the effects of the permit, they consider it appropriate to do so. Given the size of the increase above the Plateau's aircraft landings limits, and the potential to significantly detract from the Remoteness Seeker's ability to draw inspiration and enjoyment from the Darran Remote Setting, the Department should have publicly notified these applications for a variation.
105. In summary, the variations made by the Department significantly increased the number of aircraft landings permitted for each concession. This was a change to the permission itself, and not of a minor and technical nature. Furthermore, the Department had no assurance that these variations would not materially increase the adverse effects of the aircraft activity. If these variations were consistent with the Plan, the Department should have treated them as new applications for a concession. However, what I see as being most critical in this complaint is that the Department should not have authorised variations to any concession that permitted aircraft landings that exceeded, or had the potential to exceed, the Plateau's aircraft landing limits.
106. In my opinion, for the reasons given, the decision to incorporate the increase to the Plateau's daily aircraft landing limits, by varying the existing concessions, appears to have been contrary to law.

Ombudsman's opinion

107. For the reasons set out above, I have formed the opinion that the Department has acted unreasonably, and that aspects of its decision appear to have been contrary to law.

Recommendations

108. I have considered the concessionaires' concern that cancelling the trial will adversely affect their business activities and relationships. I note that the Department's preference is to return to the status quo in operation before the trial commenced. However, in light of my findings and the opinion that I have formed, I do not consider that the situation

²¹ See *Alpine Choppers Limited v Minister of Conservation*, above n9, at [23] to [26].

that has arisen from the Department's administrative shortcomings can be allowed to continue – neither the trial nor the status quo that was in operation before the trial commenced.

109. I have considered the concessionaires' comments that the trial is providing useful data and should be allowed to continue. However, I note that the trial has now been running for approximately 20 months, and the aircraft activity data that is available for that period may be utilised to inform future limits.
110. For completeness, I also note the concessionaires' request that I recommend a clause be included in the Plan that permits aircraft landing limits to be tested and adjusted. In my view, such a clause would operate similarly to Implementation 23 of the Plan. If the concessionaires consider that this provision requires amendment, then they may choose to advance this suggestion at an appropriate point in the Plan's review process.
111. Therefore, taking all matters into consideration, pursuant to section 22(3) of the OA I recommend that the Department:
 - a. Cancel its decision to increase the daily landing limits on the Ngapunatoru Plateau as a 'trial'. The Department should confirm whether this recommendation has been implemented within 20 working days of the date of my opinion.
 - b. Take appropriate action to ensure that the existing concessions are made consistent with the Plan's aircraft landing limits as soon as reasonably practicable. The Department should provide me with a report on the steps it proposes to take in this regard, and the dates by which these steps are expected to be taken, within 20 working days of the date of my opinion.
 - c. Formulate a detailed strategy for the allocation of limited aircraft landing opportunities at the Ngapunatoru Plateau and provide me, or the relevant Ombudsman, with a copy of this strategy within 60 working days of the date of my opinion.
 - d. Provide progress reports on that strategy monthly thereafter, or at such other intervals as may be agreed.
 - e. Include terms in concessions issued under this allocation process that enable the Department to monitor, at regular intervals, that the conditions of the concession are being met and apply appropriate sanctions when a condition of the concession is found to have been breached.
112. As the Department has already committed to undertake a full review of the Plan, and in light of the above recommendations, I do not consider that it is necessary for me to

recommend a partial review of the Plan's aircraft landing limits in advance of the full review.

Leo Donnelly
Ombudsman

Appendix 1. Relevant statutory provisions

Ombudsmen Act 1975

13 Functions of Ombudsmen

- (1) Subject to section 14, it shall be a function of the Ombudsmen to investigate any decision or recommendation made, or any act done or omitted, whether before or after the passing of this Act, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the departments or organisations named or specified in Parts 1 and 2 of Schedule 1, or by any committee (other than a committee of the whole) or subcommittee of any organisation named or specified in Part 3 of Schedule 1, or by any officer, employee, or member of any such department or organisation in his capacity as such officer, employee, or member.

22 Procedure after investigation

- (1) The provisions of this section shall apply in every case where, after making any investigation under this Act, an Ombudsman is of opinion that the decision, recommendation, act, or omission which was the subject matter of the investigation—
- (a) appears to have been contrary to law; or
 - (b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
 - (c) was based wholly or partly on a mistake of law or fact; or
 - (d) was wrong.
- ...
- (3) If in any case to which this section applies an Ombudsman is of opinion—
- (a) that the matter should be referred to the appropriate authority for further consideration; or
 - (b) that the omission should be rectified; or
 - (c) that the decision should be cancelled or varied; or
 - (d) that any practice on which the decision, recommendation, act, or omission was based should be altered; or
 - (e) that any law on which the decision, recommendation, act, or omission was based should be reconsidered; or

- (f) that reasons should have been given for the decision; or
- (g) that any other steps should be taken—

the Ombudsman shall report his opinion, and his reasons therefor, to the appropriate department or organisation, and may make such recommendations as he thinks fit. In any such case he may request the department or organisation to notify him, within a specified time, of the steps (if any) that it proposes to take to give effect to his recommendations. The Ombudsman shall also, in the case of an investigation relating to a department or organisation named or specified in Parts 1 and 2 of Schedule 1, send a copy of his report or recommendations to the Minister concerned, and, in the case of an investigation relating to an organisation named or specified in Part 3 of Schedule 1, send a copy of his report or recommendations to the mayor or chairperson of the organisation concerned...

National Parks Act 1980

4 Parks to be maintained in natural state, and public to have right of entry

- (1) 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.
- (2) It is hereby further declared that, having regard to the general purposes specified in subsection (1), national parks shall be so administered and maintained under the provisions of this Act that—

...

- (e) subject to the provisions of this Act and to the imposition of such conditions and restrictions as may be necessary for the preservation of the native plants and animals or for the welfare in general of the parks, the public shall have freedom of entry and access to the parks, so that they may receive in full measure the inspiration, enjoyment, recreation, and other benefits that may be derived from mountains, forests, sounds, seacoasts, lakes, rivers, and other natural features.

43 Parks to be administered by Department

The Department shall, subject to this Act, and in accordance with—

...

- (b) any management plan for the time being in force in respect of a park—
- administer and manage all national parks in such a manner as to secure to the public the fullest proper use and enjoyment of the parks consistent with the preservation of

their natural and historic features and the protection and well-being of their native plants and animals.

46 Amendment and review of management plans

- (1) The Director-General and the Board affected shall amend or review the management plan so that it takes account of increased knowledge or changing circumstances.
- (2) A management plan may be reviewed in whole or in part.

...

47 Procedure for preparing and reviewing management plans

- (1) Before preparing or reviewing a management plan for any park, the Director-General shall consult the Board having jurisdiction over that park, and shall—
 - (a) give notice by advertisement published in a newspaper circulating in the area in which the park is situated and in daily newspapers circulating in the cities of Auckland, Hamilton, Wellington, Christchurch, and Dunedin of the intention to do so; and
 - (b) in that notice, invite persons and organisations interested to send to the Director-General written suggestions for the proposed plan within a time specified in the notice.

...

49 Concessions

- (1) The Minister may, in accordance with Part 3B of the Conservation Act 1987, grant a concession in respect of any park; and the said Part 3B shall apply as if references in that Part to a conservation area were references to a park and with any other necessary modifications.
- (2) Before granting any concession over a park, the Minister shall satisfy himself or herself that a concession—
 - (a) can be granted without permanently affecting the rights of the public in respect of the park; and
 - (b) is not inconsistent with section 4.

...

Conservation Act 1987

17R Applications for leases, licences, etc

- (1) Any person may apply to the Minister for a concession to conduct an activity in a conservation area.

- (2) However, a person must not apply to the Minister for a concession if—
- (a) the Minister has exercised a power under section 17ZG(2)(a) to initiate a process that relates to such an application for a concession; and
 - (b) the application would be inconsistent with the process.

17W Relationship between concessions and conservation management strategies and plans

- (1) Where a conservation management strategy or conservation management plan has been established for a conservation area and the strategy or plan provides for the issue of a concession, a concession shall not be granted in that case unless the concession and its granting is consistent with the strategy or plan.

...

17Z Term of concession

...

- (2) A permit may be granted for a term not exceeding 10 years but shall not be renewable.

17ZC Changing conditions

- (1) The Minister and the concessionaire may at any time, by agreement in writing and without any public notification, vary any conditions in the concession document where—
- (a) the variation is of a minor and technical nature and does not materially increase the adverse effects of the activity or the term of the activity or materially change the location of the activity; or
 - (b) the variation will result in a reduction of the adverse effects or the duration of the activity.
- (2) The concessionaire may at any time apply to the Minister for a variation or extension to the concession and such application shall be treated as if it were an application for a concession; and the provisions of sections 17S to 17ZB shall apply accordingly.

...

17ZG Management activities

...

- (2) Without limiting any power exercisable by the Minister, the Minister may—
- (a) tender the right to make an application, invite applications, or carry out other actions that may encourage specific applications: ...

Appendix 2. Concessions for the Ngapunatoru Plateau

Concessionaire	Issued	Term	Total annual aircraft landings in the Fiordland National Park	Daily landings at Ngapunatoru Plateau	'Trial' daily landings at the Ngapunatoru Plateau
Helicopters Queenstown Limited	1-Jun-04	5 years	250 landings	2 landings per day (3 per day up to 30 days per annum)	10 landings per day
Over the Top Helicopters Limited	1-Apr-05	5 years	510 landings	3 landings per week	10 landings per day
The Helicopter Line Limited	1-Nov-04	5 years	225 landings	2 landings per day	10 landings per day
Heliworks Queenstown Helicopters Limited	1-Oct-05	5 years	384 landings	1 landing per day	10 landings per day
The Alpine Group	29-Aug-13	5 years	150 landings	1 landing per day	10 landings per day
South West Helicopters Limited	1-Apr-04	5 years	479 landings	1 landing per day	1 landing per day (not included in 'trial')
Southern Lakes Helicopters Limited	1-Oct-05	5 years	1155 landings	1 landing per day	10 landings per day
Milford Helicopters Limited	1-Nov-04	5 years	1390 landings	4 landings per day (not exceeding 730 per annum)	10 landings per day + 2000 landings per annum
Fiordland Helicopters	1-May-91	18 years	Unlimited	Unlimited	Unlimited (not included in 'trial')
TOTAL:				15 per day (+ unlimited)	70 per day (+ 1 + unlimited)