

Commercial access

Purpose

1. The attached paper from the Scottish Rural Property & Business Association (SRPBA) highlights a number of issues relating to commercial access.

Action

2. **Members are invited to discuss this paper and consider whether further action is needed to help address these concerns.**

Background

3. Previous discussions at the Forum have touched on some issues relating to commercial access to inland water, including the relationship between this type of use and other interests. The attached paper has been brought forward by SRPBA and considers commercial access, in various settings, in more detail.
4. This paper has been prepared by Anne Gray of SRPBA.

Mark Wrightham
Secretary

Access taking by commercial operators

Under Part 1 of the Land Reform (Scotland) Act 2003 (LR(S)A), access rights can be exercised for recreational purposes; for the purpose of carrying on a relevant educational activity; or for the purposes of carrying on, commercial or for profit, an activity which the person exercising the right could carry on other wise than commercially or for profit. Access rights only exist if they are exercised responsibly, i.e. so as not to cause unreasonable interference with the rights of any other person.

Evidence is increasing of growing pressure on certain areas by commercial outdoor activity operators. The type of access-taking being carried out by these operators is access which on the face of it would be permitted under the LR(S)A but which, because of frequency of use and/or weight of numbers, is in some cases causing unreasonable interference with the rights of others and undue pressure on the environment used. Some examples are provided at Appendix A to illustrate the nature of the problem.

Although problems associated with frequency of use and/or weight of numbers is by no means restricted to commercial operators, it is often in the nature of such commercial businesses to use the same routes or areas regularly and to do so with as many people as is feasible on each trip. Commercial businesses are understandably driven to meet demand from their clients. A factor which can further compound the issue therefore, is that clients will wish to be in one of the “best” areas for a particular activity. It does not follow however that the area is environmentally robust enough to absorb such numbers without progressive degradation or that there is only reasonable impact on other interests such as land management activities.

The Scottish Rural Property and Business Association (SRPBA) accept and support the right of commercial outdoor experience operators to carry on their businesses responsibly. They give a great many visitors a memorable outdoor experience, promote enthusiasm for the value of these special areas and encourage return visits. However, there are some aspects of running a commercial business which present particular challenges in terms of behaving responsibly as defined by the LR(S)A. Commercial operators arguably have a greater responsibility to provide leadership in best practice in responsible access in the same way as they should for safety. In practice they have more difficult decisions to make than recreational users as their judgement on responsible access and ability to change routes can be, often unconsciously, influenced by commercial factors which do not affect recreational users. This is one factor that increases the opportunity for conflict with land management and recreational users. For example, commercial operators are often less flexible about altering plans on the day to accommodate land management because their clients are paying for a very particular experience which they wish to deliver. Commercial businesses also seek to keep costs down and outdoor experience operators can be reluctant to acknowledge the need for restoration works or other actions to mitigate the impact of their access-taking.

Commercial access use occurs widely throughout Scotland and results in specific pressure in some places and/or at some times when certain conditions are prevalent. As an example, commercial rafting activity occurs on a number of stretches of river throughout Scotland, but pressure is increased on some of the bigger rivers at times of year when water levels are low and smaller rivers become temporarily unavailable for this activity. Although there are therefore specific places which encounter pressure from commercial activity, these places have a geographic spread which suggests this issue warrants consideration at a national level.

Guidance: the current position

Section 2 of the LR(S)A sets out that access rights are to be conducted responsibly, defines responsible behaviour, and advises that the Access Code should be taken into account in determining whether access is or is not being taken responsibly..

The Scottish Outdoor Access Code (SOAC) at paragraph 3.4 advises all access users that they need to be aware of the cumulative effects of access taking on land managers and the environment. The SOAC goes on, at paragraph 3.62, to provide specific advice to those running a business to help them decide whether they can conduct that business utilising access rights. This advice is as follows:-

“If you instruct, guide or lead people in recreational or educational activities, either commercially or for profit, take extra care to minimise any adverse effects that you might have on the interests of other businesses, such as a farm or an estate, and on the environment. Doing a full risk assessment of your activities will provide a good starting point and you can show extra care by:

- Planning your activities in ways that minimise possible impacts on land management and the interests of others should you wish to use a particular place regularly or if your visit might cause any particular concerns about safety or the environment;
- Talking to the land managers who are responsible for places that you use regularly or intensively; and by
- Obtaining the permission of the relevant land manager(s) if you wish to use a facility or service provided for another business by the land manager (such as an equestrian facility);
- If you are running a business that utilises access rights consider assisting with care of the resource used by your business.”

Scottish Outdoor Access Code, Section 3.62

Land Managers must also of course manage land responsibly for all types of legitimate access use. Section 3 of the LR(S)A sets out this requirement and is supported by the advice given to land managers in the SOAC. The SOAC’s advice to land managers is not specific to commercial access activity, but such activity is covered within the wider spectrum of access rights. Paragraphs 4.18-4.22 of the SOAC are perhaps the most specifically relevant to the issue of successfully managing commercial access activity.

The SRPBA believes that insufficient weight is being given to the effect of commercial operators’ activities on existing rights. The SRPBA believes that the LR(S)A and the SOAC provide an adequate legislative framework and sufficient high level guidance for this issue to be resolved, but we would be keen to see the Code’s messages better promoted to their target audience.

There may also be a need for further detailed guidance on the matter. It is important that commercial operators realise that it will not necessarily always be possible to operate businesses utilising access rights. It may be helpful therefore if they, and others such as land managers, access authorities and local access fora, can refer to detailed guidance which assists with decision-making about whether the nature and/or frequency of the activity being undertaken can be considered to be responsible.

The SRPBA ask that the National Access Forum discuss the particular issues created by commercial access taking with a view to establishing the best ways of promoting a better understanding of these.

In order to illustrate the nature of the problem, the SRPBA have selected some examples (below), covering a range of activities, where we believe access rights are being inappropriately utilised to run a commercial operation.

1. **Findhorn:** The SRPBA were contacted by a fishing proprietor concerned that a commercial operator was incorrectly interpreting their access rights. The fishing proprietor had been advised by letter that a local commercial operator would be utilising access rights to take groups onto the river and would try to accommodate fishing interests as far as it was possible for them to do so whilst still achieving their aims. Another fishing proprietor on the Findhorn reports confirmed loss of annual repeat bookings for next year due to repeated disturbance of fishing by other commercial operators on the river.
2. **Upper Tay:** The Upper Tay Riparian Owners' Association (UTROA) has contacted the SRPBA seeking advice with regard to a new local voluntary agreement between the UTROA and commercial rafting operators. Perth and Kinross Council and the local access forum are also involved in trying to find a workable solution to sharing a stretch of river between Grandtully and Aberfeldy. The current proposal which is not being accepted by all the commercial rafters concerned is that during the fishing season, the rafters would use this stretch of river for 3 consecutive days per week (and Sundays if desired) and the anglers would have the other 3 consecutive days per week. That the days are consecutive is important to the riparian owners since they are unlikely to attract fishing clients at all if they cannot offer more than one day's fishing at a time. Outwith the fishing season, there would be no restriction put on the rafters use of this stretch of river. This agreement would not interfere with the access rights of others who are not party to the agreement. UTROA's offer not to put fishing clients on the river for 3 days per week is a considerable concession which impacts on the financial viability and value of these fishings businesses, and one which they should probably not be required to make within the terms of the Act. The SRPBA are concerned that agreement cannot be reached because some of the commercial rafting operators are misunderstanding the requirement to behave responsibly with regard to the rights of others.
3. **Kinloch Rannoch:** A stalking estate reports unreasonable disturbance to commercial stalking activity caused by a GPS/map-reading course organiser who does not contact them during the stalking season to find out where stalking is taking place and is unprepared on the day to alter routes or plans to accommodate stalking activity.
4. **Cairngorms National Park:** Landowners report concerns that commercial mountain bike operators are causing erosion to tracks through overuse, that they are deterring other recreational use of these routes, compounding issues (through pressure) to do with litter and gates being left open and disturbing their own commercial land management practices, e.g. let stalking and shooting. One operator when challenged over issues of erosion is reported to have said they will simply move elsewhere if the routes become unusable. Issues over commercial rafting have also been reported, with details similar to those issues in 1 and 2 above, although specific mention was made of rafters who usually use the Findhorn switching to the Spey when water levels become low, thus increasing the pressure on the Spey at times when fishing is also more difficult.