BEFORE COMMISSIONERS APPOINTED BY QUEENSTOWN LAKES DISTRICT COUNCIL

IN THE MATTER	of Resource Management Act 1991
AND	
IN THE MATTER	of submission of **Jeremy Bell Investments Limited** and Submission 782/784 and FS1030/1091

SUBMISSIONS OF COUNSEL FOR JEREMY BELL INVESTMENTS LIMITED

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MAY IT PLEASE THE COMMISSIONERS:

1. The indigenous vegetation provisions as they relate to land outside of SNA's or below 1070m do not achieve the purpose of the Act. In particular the obligation to safeguard the life supporting capacity of soils.

2. These two methods address the "significance" element of section 6(c) and meet the Council's "protection" obligations.

3. The remaining submissions address:

   (a) The inclusion of irrigation in the definition of "Clearance of Vegetation".

   (b) The inconsistency between the indigenous vegetation provisions and

The Queenstown Lakes District Council does not have jurisdiction to control the use of water. The definition of vegetation clearance purports to control the use of water. Control of the use of water is not a function held by a territorial authority under section 31.

Section 30 defines the functions of Regional Councils.

(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

(a) the establishment, implementation, and review of <u>objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region</u>:

(b) the preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:

....

(e) <u>the control of the taking, use, damming, and diversion of water,</u> and the control of the quantity, level, and flow of water in any water body, including—

(i) the setting of any maximum or minimum levels or flows of water:

(ii) the control of the range, or rate of change, of levels or flows of water:

(iii) the control of the taking or use of geothermal energy:

(f) the control of discharges of contaminants into or onto land, air, or water and discharges of water into water:

4. Water is a contaminant if its discharge to land changes the biological condition of the land. That is the case for the Council. What this does is make clear that controlling the discharge of water by way of spray irrigation is a Regional Council matter.

Section 31(1)(b) gives Territorial Authorities these functions:

> *(b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—*
>
> *(i) the avoidance or mitigation of natural hazards; and*
>
> *(ii) the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances; and*
>
> *(iia) the prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land:*
>
> *(iii) the maintenance of indigenous biological diversity:*

5. Regional and Territorial functions can and do overlap. Territorial rules which overlap regional functions are permissible provided that they are for the purpose of carrying out their own functions (Canterbury Regional Council v Banks Peninsula DC [1995] NZRMA 452 (CA)).

6. The Canterbury case dealt with the direct control over the use of land for the avoidance of the effects of natural hazards. So the overlap in functions is clear and obvious. Here, undoubtedly QLDC has functions concerned with managing the use of land to maintain indigenous biodiversity (the first paragraph of the definition of Clearance of Vegetation contains examples). But there are no relevant Territorial functions in relation to the use and discharge of water to land. Managing the effects of Irrigation on the biological conditions of the land is squarely and uniquely a Regional Council matter.

7. If there is a need for the better integration of the use of water and the use of land, then that integration falls more logically to the Regional Council under section 30(1)(a).

The indigenous vegetation and rural provisions do not give effect to the National Policy Statement for Freshwater Management or the Operative Otago Regional Policy Statement

8. This submission again relates to the control of irrigation by way of the vegetation clearance definition.

9. The NPS (FWM) 2014 has as an objective to improve and maximise the efficient allocation and efficient use of water (objective B3, implemented by Policy B4).

10. The operative Regional Policy Statement contains a similar theme in policy 6.5.3. There is nothing in Chapter 10 (Biota) that suggests support for withholding irrigation water on the basis of competitive exclusion. Indigenous species displacement is referred to in the context of pest species only ((issues 10.3.2 and 10.3.3 and related objectives and policies

11. The Otago Regional Plan: Water similarly has water use efficiency provisions (Issue 6.2.3, objective 6.3.2 and related policies).

12. The practical expression of this national and regional policy framework is that consents to take and use water are required to demonstrated high water use efficiency (i.e. that the water applied to plants generates the maximum growth potential from the volume applied). This means spray. There is a deliberate and overt goal of progressively replacing flood/border dyke irrigation with spray over time. This is becoming more keenly felt as we get closer to the 2021 expiry of the deemed permits that were the basis for a substantial proportion of the water takes and race networks throughout Central Otago. Yet this transition to spray driven by national and regional instruments is the exact phenomenon that the Clearance of Vegetation definition seeks to control. There is an acute need for better policy integration.

13. The use of the LENZ classification system to drive standards and assessment is another example: the very land that is most capable of efficient irrigation and efficient production (all policy priorities at eh Regional level) have the lowest thresholds for clearance because the

least indigenous vegetation exists in those areas. The incongruity is startling.

The section 32 analysis fails to recognise or asses the economic cost of restricting the use of spray irrigation through the definition of "Clearance of Vegetation".

14. The definition is a provision for the purposes of section 32(1)(b)(ii), because in defines the reach of the rules. I attach the relevant extract from the section 32 report. There is no evidence in that report that there may be an economic cost associated with introducing the application of water to the definition of Clearance of Vegetation, despite the acknowledgement that this is a new feature of the definition.

The indigenous vegetation provisions do not achieve the objectives and policies of the Strategic Directions section and preclude the objectives of the Rural Zone being achieved that promote farming as the predominant land use in the Rural Zone.

15. Evidence of Allan Cubitt.

There is no reason to single out irrigation as a form of vegetation clearance through competitive exclusion when the same phenomenon occurs in dry land farming.

16. Evidence of Dr Peter Espie.

LENZ Classification is a surrogate indicia that is not an appropriate basis for restricting the use of land for farming.

17. The LENZ classification system is concerned with habitat for indigenous vegetation between flora and fauna. Habitat protection is provided for fauna only (section 6(c). The adaptation of the LENZ classification system would be a misapplication of section 6(c).

The rules are difficult to interpret and unclear. This makes them inefficient and ineffective.

18. Some of the drafting criticism from *Innes* has been helpfully removed. But it has been replaced by other sources of uncertainty and difficulty:

19. Rules 33.3.3.2, and 33.3.3.3. How can a threshold percentage of "area to be cleared" be sensibly understood in the context of competitive exclusion? If 100 Ha is put under pivot, what does 20% of the "area to be cleared" refer to? Is it 20ha (i.e. 20% of 100Ha); or does the rule only apply when more than 20% of the indigenous vegetation expected to be excluded exceeds the area threshold in table 2?

20. If rule 33.3.3.3 applies, how does one sensibly calculate whether tiny species such as moss (non-vascular plants); or seasonal species (such as in the *Innes* case) contribute to the total area to be cleared? Does one have to wait until Spring? Or can the assessment be carried out when the native vegetation is entirely underground?

21. If that was not bad enough, Rules 33.3.3.2 and 33.3.3.3 have disjunctive clauses "...or total number of species present of the total area to be cleared."

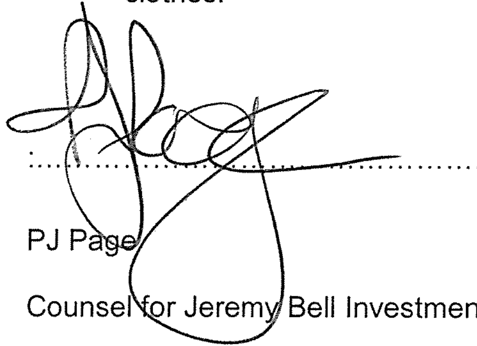
22. How does this work? Again, under a pasture regime, it is very likely that any remnant indigenous species make up all of the "number of species present of the total area to be cleared" since the remainder present will be the pasture species (as the LENZ classifications actually indicate).

23. Rule 33.5.6 suffers similar problems to *Innes*. Many of the scheduled species are tiny, cryptic, and utterly invisible to all but expert eyes.. Liability is strict under the RMA: knowledge and intention are irrelevant. If the Council puts it citizens in jeopardy of criminal sanction, it behoves the Council to be clear about where the rules apply and where they don't. The SNA rules achieve that, rule 33.5.6 does not. It is a minefield.

24. In *Sandstad v Cheyne Developments Limited* (1986) 11 NZTPA 250 the Court of Appeal said:

> *"It is desirable that those who administer or are affected by or have to advise on the restrictions prescribed by a town planning ordinance should be able to identify without difficulty the properties to which it relates" (Page 253).*

25. This was the fundamental failure in *Innes*. Rules 33.3.3.2, 33.3.3.3, and 33.5.6 deliver up the same failure again but dressed in different clothes.



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PJ Page

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during consultation undertaken in 2014 on potential changes to the provisions. The phrasing has been improved, however the parameters have not been changed. This provides a quantifiable benchmark to apply the rule, a parameter that is missing from the existing definition of indigenous vegetation.

- Note, Wetlands have not been taken forward for scheduling where they are scheduled in the Otago Regional Plan Water, as a Regionally Significant Wetland or provided for in the rules of that plan.
- Exemptions from the rule to recognise land legally protected by QE II covenants, maintenance of existing roads.
- Exemptions to allow the construction of tracks up to 1.5m wide.

Definition:

- The definition of indigenous vegetation will be changed so that it is not subjective and does not place a value on the vegetation for it to qualify under the District Plan, which is the case with the existing definition.
- The definition of clearance of vegetation has been modified to provide certainty, and to include circumstances where the deliberate application of water would result in the clearance of certain indigenous vegetation species.

Proposed provisions	***Costs***	***Benefits***	***Effectiveness & Efficiency***
Policies: *33.2.1.1 to 33.2.1.3* **Rules:** *All rules* **Definitions:** Revised definitions of 'indigenous vegetation' and 'clearance of vegetation'.	***Environmental*** • The proposed changes to the phrasing of the rule will allow indigenous vegetation to be removed where it does not meet the parameters in 33.3.3. However, this situation already exists with the existing definition and more (or less) could be removed if it is determined that the vegetation could be cleared if it is not 'important'. ***Economic*** • The rephrasing of the rule will not add any economic costs, particularly when compared to the existing provisions. ***Social & Cultural*** • None identified.	***Environmental*** • The rephrased provisions will provide certainty as to what constitutes indigenous vegetation that is subject to the rule. This would reduce the potential for the clearance of indigenous vegetation without resource consent. ***Economic*** • The rephrased provisions provide more certainty determining whether indigenous vegetation would be subject to the rule. This would remove potential significant costs associated with managing enforcement and compliance associated with unlawful indigenous vegetation clearance. • The provisions would provide more	• By including measurable parameters, the provisions will be effective at providing certainty as to what constitutes 'indigenous vegetation' that is subject to the rules that limit clearance. • The use of measurable parameters will increase efficiency associated with the regulatory process, both in terms of the Council's administrative duties and for landowners seeking compliance with or whether the indigenous vegetation on their land would be subject to the rules.

<table>
<tr><td></td><td></td><td>certainty for landowners (including their agents/ecologists) when providing advice on whether potential land cultivation or clearance would involve indigenous vegetation subject to the rules.

Social & Cultural
• Provides certainty to people which benefits social and cultural values. Both in terms of a landowner seeking certainty on the permitted standards and persons who may have an interest in the avoidance of indigenous vegetation.</td><td></td></tr>
<tr><td colspan="4">Alternative options considered less appropriate to achieve the relevant objectives and policies:</td></tr>
<tr><td colspan="2">Option 1: Utilise the definition used in other territorial authorities such as the Waitaki, Waimate and Mackenzie District Plans, as suggested by the RFBPSI and Federated Farmers.</td><td colspan="2">• The definition is:
• means a plant community in which species indigenous to that part of New Zealand are important in terms of coverage, structure and/or species diversity. For these purposes, coverage by indigenous species or number of indigenous species shall exceed 30% of the total area or total number of species present, where structural dominance is not attained. Where structural dominance occurs (that is indigenous species are in the tallest stratum and are visually conspicuous) coverage by indigenous species shall exceed 20% of the total area.
• The definition is poorly phrased and would not assist with an effective and efficient regulatory process. However, the parameters in this definition have been used in the application of the relevant rule. It is these parameters that provide the quantifiable criteria as to whether the indigenous vegetation is subject to the rule.</td></tr>
<tr><td colspan="2">Option 2: Include a simple height or area parameter to control the permitted removal of indigenous vegetation.</td><td colspan="2">• This may not recognise low growing plants such as tussock grasslands and cushion field species.
• This would capture all indigenous vegetation and would be too limiting for vegetation clearance associated with farm maintenance activities.</td></tr>
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