Before the Queenstown Lakes District Council

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|---|---|
| Under | the Resource Management Act 1991 |
| And | |
| In the matter of | **the Queenstown Lakes Proposed District Plan Stage 3 Stream 16 – Wāhi Tūpuna** |

# Legal submissions on behalf of various submitters – Wāhi Tūpuna matters

3 July 2020

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**May it please the Panel**

## Introduction

1 These legal submissions are made on behalf of the submitters listed in **Appendix A**, in regards to their submission on wāhi tūpuna matters for Stream 16 of the Proposed District Plan (**PDP**) review.

## Submitter interests

2 The submitters' key concerns with the wāhi tūpuna provisions are:

(a) That the rules should not apply to urban or developed/developable land;

(b) That the rules are inefficient and unnecessarily onerous, in particular the rules for earthworks;

(c) That the rules unnecessarily duplicate other legislation and PDP provisions;

(d) That the threats and values listed in Schedule 39.6 are identified too broadly, with no associated scale of effects to guide decision makers and plan users as to when an activity will be appropriate within a wāhi tūpuna area; and

(e) That the requirements for consultation are unclear and potentially onerous.

## Summary of legal and planning position

3 Supporting the submitters' practical concerns above, are the legal and planning deficiencies with the council's position.

4 These submissions do not contest the cultural evidence provided by Ka Rūnaka, on the basis of which the extent of the wāhi tūpuna overlay has been mapped. They do not dispute that identification of a wāhi tūpuna overlay is an appropriate mechanism to recognise the relationship of Manawhenua with the values of wāhi tūpuna.

5 It is the implementation of that overlay, and how that recognition of the relationship that is provided for, that these submissions do question.

6 The key points made in these submissions are:

(a) What is required to 'recognise **and provide for'** the relationship of Maori in accordance with s 6(e) does not extend to absolute protection. Section 6 (e) is not a directive "avoid" provision;

(b) The wāhi tūpuna provisions must achieve the purpose of the RMA, and whether they do so is a determination to be made balancing the competing factors of Part 2;

(c) The provisions go significantly further than what is required to give effect to the partially operative Otago Regional Policy Statement **(RPS),** and what is required in accordance with section 6**.** What is required to give effect to the RPS, in particular policy 2.2.2, is not the same as the degree of regulation promoted by council;

(d) The council has not completed an adequate s 32 evaluation report, in particular failing to sufficiently consider the receiving environment, quantitative costs and benefits, and reasonably practicable alternatives;

(e) Implementation of these requirements should have been an integrated part of the architecture of the PDP in Stage 1, not tacked on in a manner that does not integrate, and that fundamentally changes implementation of the plan, 5 years later.

(f) The council has not considered the relevance of the NPS-UDC and consequently failed to give effect to it;

(g) The wāhi tūpuna provisions unnecessarily duplicate other legislation and provisions of the PDP, being the Heritage New Zealand Pouhere Taonga Act 2014, Ngai Tahu Claims Settlement Act 1998, and provisions of Chapter 25 of the PDP;

(h) The policies regarding consultation and Cultural Impact Assessments are unnecessary and potentially in conflict with s 36A RMA; and

(i) Permitted activity status is an appropriate alternative to the requirement to obtain consent where the criteria set out in s 87BB RMA are met.

**Relevant legislation**

7 These submissions do not repeat the statutory provisions relevant to the assessment of Chapter 39, which are set out in the s 32 and s42A reports and adopted here.

8 This is with the exception of policies PA3 and PA4[1] of the National Policy Statement on Urban Development Capacity (**NPS-UDC**), which the council does not consider are relevant to Chapter 39, however which Mr Devlin on behalf of the submitters does consider are relevant.

9 Sections 72 – 77 are relevant to the content of and changes to district plans. Of particular relevance is:

(a) S 74 RMA which requires the council to prepare and change its district plan:

(i) in accordance with a national policy statement;

(ii) having regard to any proposed regional policy statement, and any management plans and strategies prepared under other acts, and

(iii) taking into account any relevant planning document recognised by an iwi authority and lodged with the territorial authority, to the extent that its content has a bearing on the resource management issues of the district;

(b) S 75(3) RMA which requires that a district plan must give effect to any national policy statement and any regional policy statement.

**Requirements under s 6(e) RMA**

10 S 6(e) RMA requires that decision makers recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> (e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:

[1] Set out at pages 8 and 9 of Mr Devlin's evidence in chief dated 19 June 2020.

*'Recognise and provide for' not 'protect'*

11 The s 6(e) requirement to 'recognise and provide for' is a requirement that there is explicit recognition of the relationship of Maori with their ancestral lands, waters, site, waahi tapu and taonga in regional and district plans. However, it is not a requirement for absolute protection of that relationship.

12 The s 6(e) requirement exists in light of the overall Part 2 concept of sustainable management. This approach was discussed by the Supreme Court in *King Salmon*[2]:

> … As between ss 6 and 7, the stronger direction is given by s 6 — decision-makers "shall recognise and provide for" what are described as "matters of national importance", whereas s 7 requires decision-makers to "have particular regard to" the specified matters. **The matters set out in s 6 fall naturally within the concept of sustainable management in a New Zealand context.** The requirement to "recognise and provide for" the specified matters as "matters of national importance" identifies the nature of the obligation that decision-makers have in relation to those matters when implementing the principle of sustainable management.
>
> [**emphasis added**]

13 Regarding ss 6(a) and (b) RMA the Court in *King Salmon* considered there would be circumstances where use and development within or in relation to a matter of national importance might be appropriate, despite there being adverse effects. Whether or not a particular use is appropriate is a question to be considered in light of the purpose of the RMA, s 5:[3]

> As a matter of logic, areas of outstanding natural character **do not require protection from activities which will have no adverse effects**. To put this in a different way, the drafting of ss 6(a) and (b) seems to me to leave open **the possibility that a use or development might be appropriate despite having adverse effects** on areas of outstanding natural character.
>
> Whether a particular use is "inappropriate" or, alternatively, "appropriate" for the purposes of ss 6(a) and (b) may be **considered in light of the purpose of the RMA. and thus in terms of s 5**. It thus follows that the NZCPS must have been prepared so as to be consistent with, and give effect to, s 5. For this reason, I consider that those charged with the interpretation or application of the NZCPS are entitled to have regard to s 5.

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[2] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [26].

[3] At [179]-[180].

[**emphasis added**]

14 While *King Salmon* concerned ss 6(a) and (b) it is submitted the same approach can be applied to s 6(e). In fact, more leniency would be expected in regards to s 6(e), given that ss 6(a) and (b) use the terms 'preservation' and 'protection' (respectively) while s 6(e) does not.

15 In *Glendon Trust Partnership* the Court held that recognition under s 6(e) is not synonymous with prohibition of development.[4] At appeal the High Court disagreed with the submission that identification of a site as wāhi tapu creates a duty to ensure no further development occurs on that site:[5]

> [31] This ground of appeal seems to come down to a proposition that if a site is waahi tapu and an important heritage resource then the Environment Court is under a duty to ensure that there is no further development of the site. I do not believe that that this rigid proposition accurately reflects the requirements of the Resource Management Act or the District Plan.
>
> [32]… It can be seen that **the use and development of resources is contemplated so long as that use or development is consistent with the concept of sustainable management** (or is otherwise permitted under the Act or legitimately permitted under the relevant Plan). **When there is an issue about whether the use or development is compatible with sustainable management those required to exercise functions or powers under the Act have to evaluate all relevant matters and undertake the balancing exercise contemplated by [s 5] subs (2).** In situations involving Maori spiritual and cultural values ss 6, 7 and 8 will also come into play.
>
> [**emphasis added**]
>
> [33] Section 6 requires the decision maker to "recognise and provide for" specified matters of national importance. For present purposes that section relevantly provides:
>
> …
>
> As indicated by the Planning Tribunal in *Haddon v Auckland Regional Council* [1994] NZRMA 49 at p58, s 6 requires two steps: first, recognition of the relationship; and, secondly, provision for that relationship. Once the relationship of Maori with their ancestral lands or waahi tapu has been established and recognised the decision maker must then decide how to provide for the relationship. **It follows that even if s 6 applies in a given situation, an application for resource consent is not**

[4] *Glendon Trust Partnership v Carterton DC EnvC W097/00* at [50].

[5] *Ngai Tumapuhiaarangi Hapu Me Ona Hapu Karanga v Carterton DC* HC Wellington AP6/01, 25 June 2001.

> **necessarily doomed to failure.** This can be illustrated by reference to *Mahuta v Waikato Regional Council* (EnvC A91/98, 29 July 1998) which has some parallels with the situation under consideration...

16 Essentially, the Panel is required to make a balanced assessment in light of the overarching purpose of sustainable management, to determine whether the District Plan gives effect to s 6(e) and/or whether it goes beyond what is required by s 6(e) to such an extent that the purpose of the RMA is not achieved.

**Inadequate s 32 assessment**

17 These submissions do not contest the cultural evidence submitted by Ka Rūnaka, and accept that mapping of the wāhi tūpuna overlay is an appropriate method to give effect to s 6(e) RMA and objective 2.2 of the PORPS in terms of the requirements to "recognise".

18 The existence and extent of the wāhi tūpuna overlay and the values associated with wāhi tūpuna areas are findings of fact. However, the objectives, policies and rules proposed in Chapter 39 are planning considerations required not only to meet the requirements of s 6(e) to recognise and provide for the relationship of Maori, but also required to achieve the purpose of the RMA to promote sustainable management and give effect to the RPS and relevant NPS.

19 It is submitted that the council has carried out an inadequate s 32 assessment which does not accurately assess whether the objectives of the proposal are the most appropriate way to achieve the purpose of the RMA, and in particular does not sufficiently consider:

(a) The receiving environment;

(b) A costs and benefits analysis of the effects anticipated from implementation of the proposed provisions; and

(c) Reasonably practicable alternatives.

20 S 32 RMA requires the council to produce an evaluation report which:

(a) examines the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and

(b) examines whether the provisions in the proposal are the most appropriate way to achieve the objectives by—

(i) identifying other reasonably practicable options for achieving the objectives; and

(ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and

(iii) summarising the reasons for deciding on the provisions; and

(c) contains a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.

21 The s 32 evaluation report must:

(a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—

(i) economic growth that are anticipated to be provided or reduced; and

(ii) employment that are anticipated to be provided or reduced; and

(b) if practicable, quantify the benefits and costs referred to in paragraph (a); and

(c) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

*The receiving environment*

22 While the existence and extent of the wāhi tūpuna overlay and associated values are findings of fact, the council has discretion to develop the objectives, policies, and rules to apply to the overlay within reference to the broader planning context.

23 An assessment should include consideration of the activities and development existing, enabled, or otherwise anticipated on that land that will be within the wāhi tūpuna overlay.

24 Mr Devlin discusses this matter in more detail in Topic 5 of his evidence.

25 The principle concern is that the Chapter 39 provisions, in particular the rules, undermine and are contrary to land uses otherwise existing or anticipated in underlying zones.

26 While Chapter 39 provides consenting pathways for most activities (i.e. few activities in wāhi tūpuna areas are actually prohibited), the very broad recognition of threats within wāhi tūpuna areas (i.e. 'subdivision and development') coupled with the restricted discretionary activity status for most activities with matters of discretion limited to 'effects on values of Manawhenua', leaves genuine uncertainty as to whether and to what extent development previously anticipated will be able to occur.

*Costs and benefits analysis*

27 When preparing its District Plan the council is required to prepare an evaluation report in accordance with s 32.[6] The s 32 evaluation report is a mandatory process obligation.

28 Ms Picard submitted to the Panel that because it is impractical to quantify benefits to Manawhenua gained from the proposed Chapter 39 provisions, the council had decided not to quantify costs to plan users.

29 While it is accepted that benefits to Manawhenua are difficult to quantify, it is submitted that costs to plan users can easily be quantified and there is no authority for Ms Picard's proposition. A s 32 evaluation helps the council's and decision maker's exercise of judgement, and the costs and benefits analysis is an important consideration. It would have been possible to quantify the costs both monetary and time, of the proposed framework – costs of consent council fees, costs of obtaining CIAs, cost of the significant time incurred in respect of the same (particularly taking into account the inevitable bottleneck). If quantified economic evidence could have been provided to inform the s 32 analysis it should have been. The fact that the council did not have quantified data on the benefits to Manawhenua before it to 'balance out' the quantified costs was not justification for not completing a cost and benefits analysis to the extent possible. That is not what is required by section 32.

30 While not a complete s 32 evaluation, Mr Devlin has provided a basic breakdown of minimum anticipated consenting costs at [6.9] of his evidence.

[6] S 74(1)(d) RMA.

*Reasonably practicable alternatives*

31 The s 32 evaluation report also does not include an adequate consideration of reasonably practicable alternatives. S 32 does not require a detailed assessment of the efficiency and effectiveness of various alternatives against one another, or an assessment of every option, however it is considered good practice to undertake an evaluation of a sufficient selection of alternatives, including distinctive alternatives where they exist[7].

32 The s 32 evaluation report focuses on two options: the status quo and the proposed Chapter 39 provisions. As evidenced by the planning evidence on behalf of various submitters, there are numerous planning approaches to consider which may achieve the requirements of s 6(e) RMA. Mr Devlin suggests other reasonably practicable options in his s 32AA assessment, summarised at page 37 of his evidence:

33 Overall, it is submitted the proposed Chapter 39 rules and consultation requirements are onerous and their implementation will be timely, costly and inefficient. In particular, requiring consultation with Kai Tahu on what is likely to be numerous minor consents will result in unreasonable delays in the consenting process.

**Lack of integration with the PDP in Stage 1**

34 Implementation of s 6(e) requirements should have been integrated into the PDP framework in Stage 1 at the same time as the strategic chapters, in particular chapter 5. Having left integration of s 6(e) requirements until this late stage of the PDP review has resulted in poor planning outcomes whereby the provisions of Chapter 39 do not integrate well with the rest of the PDP, do not sit logically within the PDP chapters, and duplicate existing provisions.

35 In any event, this issue can be resolved by deleting Chapter 39 and integrating its provisions seamlessly throughout the PDP where they sit more naturally and will not be overlooked:

(a) The relevant policies of Chapter 39[8] required to give effect to the RPS are duplications of policies which already exist in Chapter 3[9] and

[7] Ministry for the Environment, 2013, A guide to s 32 of the RMA 1991; *Incorporating changes as a result of the Resource Management Amendment Act 2013, Interim Guidance*, Wellington, p33.

[8] 39.2.1.3 and 39.2.1.4.

[9] 3.3.33, 3.3.34, and 3.3.35.

Chapter 5[10]. The policies of Chapter 39 can be deleted, as policy direction on all Tangata Whenua matters sits more appropriately in the strategic direction chapters;

(b) The rules proposed to sit in Chapter 39 can be shifted into the relevant zone chapters, in particular:

(i) The rules and standards regarding farm buildings would sit logically in Chapter 21 Rural; and

(ii) The rules regarding setback of buildings and structures from waterbodies would sit logically in the relevant zone chapter, and should be integrated with existing rules for setbacks from waterbodies so as to avoid duplication;

(c) Alternatively or additionally, restricted discretionary rules can be replaced with additional matters of discretion regarding effects on cultural values of Manawhenua inserted into existing rules – for example in regards to subdivision.

**Relevance of NPS-UDC**

36 Mr Devlin considers the National Policy Statement on Urban Development Capacity 2016 (**NPS-UDC**) is relevant to an assessment of the appropriateness of the proposed Chapter 39 provisions.

37 S 74(1)(ea) RMA states that a territorial authority must prepare and change its district plan **in accordance with** a national policy statement.

38 S 75(3)(a) states that a district plan **must give effect to any** national policy statement.

39 Regarding the wording of s 75(3)(a) the court in *King Salmon* determined:[11]

> [77] …"Give effect to" simply means "implement". On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it. As the Environment Court said in *Clevedon Cares Inc v Manukau City Council:*
>
> > [51] The phrase "give effect to" is a strong direction. This is understandably so for two reasons:

[10] 5.3.5 and 5.3.5.1 – 5.3.5.5.

[11] *Environmental Defence Society Inc. v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [77] and [80].

> [a] The hierarchy of plans makes it important that objectives and policies at the regional level are given effect to at the district level; and
>
> [b] The Regional Policy Statement, having passed through the [RMA] process, is deemed to give effect to Part 2 matters.
>
> …
>
> [80] We have said that the "give effect to" requirement is a strong directive, particularly when viewed against the background that it replaced the previous "not inconsistent with" requirement. There is a caveat, however. The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction– king salmon.

40 The council considers the NPS-UDC is not relevant to Chapter 39 but has not provided an explanation for this position.

41 Relevance is a question of interpretation. Mr Devlin's evidence is that the NPS-UDC is relevant, and his reasoning is set out at [4.10]-[4.17] of his evidence.

**Partially Operative Regional Policy Statement for Otago**

42 The relevant provisions of the RPS are:

> *Objective 2.2 Kāi Tahu values, interests and customary resources are recognised and provided for.*
>
> *Policy 2.2.1 – Kai Tahu wellbeing*
>
> *Manage the natural environment to support Kai Tahu wellbeing by all of the following:*
>
> *a) Recognising and providing for their customary uses and cultural values in Schedules 1A and B; and*
>
> *b) Safe guarding the life supporting capacity of natural resources.*
>
> *Policy 2.2.2 – Recognising sites of cultural significance*
>
> *Recognise and provide for the protection of wāhi tūpuna, by all of the following:*
>
> *a) Avoiding <u>significant</u> adverse effects on those values that contribute to the identified wāhi tūpuna being significant;*

*b) Avoiding, remedying, or mitigating other adverse effects on the identified wāhi tūpuna;*

*c) Managing the identified wāhi tūpuna sites in a culturally appropriate manner. (underlining added)*

43 As notified, the policies of Chapter 39 are inconsistent with the RPS.

44 As per the s42A version of Chapter 39, or with some amendments as proposed by Mr Devlin in his evidence policies 39.2.1.3 and 39.2.1.4 are considered to be consistent with and give effect to the RPS.

45 However, there is a disconnect between these policies and the other provisions of Chapter 39, which go significantly further than what is required to give effect to the RPS.

**Duplication with other legislation and PDP provisions**

46 Mr Devlin's evidence is that the proposed Chapter 39 provisions duplicate provisions in other legislation and other chapters of the PDP, including:

(a) The Heritage New Zealand Pouhere Taonga Act 2014, which applies to all archeological material predating 1900;

(b) The Ngai Tahu Claims Settlement Act 1998 (**NTCSA**), which sets requirements for consultation with Manawhenua where an activity is on or adjacent to or may affect a Statutory Acknowledgement Area;

(c) Chapter 25 earthworks provisions:

(i) Rule 25.4.6 – earthworks within Statutory Acknowledgement Areas, Tōpuni or Nohoanga;

(ii) Standard 25.5.14 – earthworks that discover kōiwi tangata (human skeletal remains), wāhi taoka (resources of importance), wāhi tapu (places or features of special significance) or other Māori artefact material, or any feature or archaeological material that predates 1900;

(iii) Rule 25.5.19 – earthworks within setback from waterbodies; and

(d) Various zone provisions – setback from waterbodies for structures and buildings.

47 There is no statutory bar on council's introducing provisions to their district plan to manage activities which are managed under alternative legislation,

and as long as the relevant statutory provisions are not in conflict they can co-exist.

48 However, it is not an efficient planning outcome to introduce provisions to a district plan to manage activities that are already sufficiently regulated under more specialised legislation.

49 As part of the 2017 amendments to the RMA the Ministry for the Environment released a series of fact sheets providing guidance on implementing and understanding the Resource Legislation Amendments Act 2017. In relation to provisions which duplicate other legislation the Ministry noted[12]:

> **Plans and policy statements are only to address matters relevant to the RMA**
>
> When developing and considering new or revised objectives, policies and rules in RMA documents, **policy and decision-makers should consider what controls already exist in other legislation** (for example, the Building Act 2004, Hazardous Substances and New Organisms Act 1996, and Health and Safety at Work Act 2016). **Regulatory duplication should be avoided**. Any additional controls proposed under the RMA should be justified in relation to the purpose of the RMA, and **considered through an assessment under section 32.**
>
> [**emphasis added**]

50 The s 32 evaluation report notes the existence and relevance of these other statutory provisions and provisions of the PDP but does not assess whether the duplication is necessary or appropriate.

**Consultation and Cultural Impact Assessment requirements**

51 Proposed policy 39.2.1.5 encourages consultation with Manawhenua as the most appropriate way to obtain an understanding of the potential effects of an activity on wāhi tūpuna areas.

52 Proposed policy 39.2.1.6 recognises that an application which does not include details of consultation with Manawhenua may require a Cultural Impact Assessment (**CIA**) as part of the AEE so that adverse effects of the activity on wāhi tūpuna can be understood.

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[12] Ministry for the Environment *Resource Legislation Amendments 2017 – Fact Sheet 2: Revised functions for Resource Management Act 1991 decision-makers* (April 2017) at 2.

53 Mr Devlin is concerned that a policy framework that suggests consultation is required otherwise a CIA may be necessary is at odds with s 36A RMA.

54 S 36A clarifies there is no obligation for an applicant or local authority to consult with any party under the RMA, but that any obligation to consult under any other enactment must be complied with:

> **36A No duty under this Act to consult about resource consent applications and notices of requirement**
>
> (1) The following apply to an applicant for a resource consent and the local authority:
>
> (a) neither has a duty under this Act to consult any person about the application; and
>
> (b) each must comply with a duty under any other enactment to consult any person about the application; and
>
> (c) each may consult any person about the application.

55 The proposed policy framework does not explicitly require consultation so is not technically inconsistent with s 36A. However, there is a risk the policy framework will be interpreted by decision makers to require consultation in all circumstances, which would be inconsistent with s 36A. This is because, due to the broad definitions of threats and values identified in Schedule 39.6, decision makers may consider the only way potential effects of an activity on a wāhi tūpuna area can be assessed is through consultation. If this approach is taken policy 39.2.1.5 and 39.2.1.6 become a default requirement to consult. Chapter 39 also does not include any indication of what scale of activity or threshold of effects require consultation.

56 Mr Devlin considers policy 39.2.1.6 is unnecessary because s 92(2) enables the council to commission Ka Rūnaka to prepare a report on the application as it relates to Manawhenua values. Further, clause 7(1)(a) and (d) of the Fourth Schedule directs that an AEE must address any effects of the proposed activity on the wider community, including cultural effects, and any effects on natural and physical resources having cultural value. These requirements under the RMA also sit separately to requirements under the NTCSA to consult where an activity may affect a Statutory Acknowledgement Area.

57 It is submitted that the requirements under s92(2) and the Fourth Schedule RMA are sufficiently directive in requiring effects on values of Manawhenua to be taken into consideration in a consent application, and in enabling the council to obtain further information from Manawhenua where necessary. As such, policies 39.2.1.5 and 39.2.1.6 can be deleted.

58 This approach would be in line with the approach taken in relation to the Auckland Unitary Plan, which deleted the requirement for CIAs from the Plan, on the basis that requirement is adequately covered in s92(2) and the Fourth Schedule:[13]

> … The Panel recommends retention of express provisions addressing resource management issues relating to Māori and both their ancestral and their on-going relationships with natural and physical resources in accordance with sections 6(e), 7(a) and 8 (as well as other enabling provisions) of the Resource Management Act 1991. Some distinctions, such **as provisions for cultural impact assessments and consideration of cultural landscapes, are deleted as being unnecessary given that the former is already part of the required content of assessments of environmental effects (see clause 7(1)(a) of Schedule 4 to the Resource Management Act 1991)…**
>
> [**emphasis added**]

**Permitted activity status for certain activities**

59 An additional mechanism to give effect to s 6(e) while not requiring unreasonable and inefficient consenting and consultation processes is to make clear an alternative pathway whereby an activity requiring consent will have permitted activity status if non-compliance with the provisions of wahi tupuna are 'marginal' or 'temporary' in nature and do not result in adverse effects that are minor or more than minor.

60 This is in accordance with the pathway provided by s87BB RMA, which provides that activities are permitted if:

(a) The activity would be a permitted activity if not for a marginal or temporary non-compliance with requirements, conditions and permissions specified in the PDP;

(b) Any adverse effects of the activity are no different in character, intensity, or scale than they would be in the absence of the marginal or temporary non-compliance;

(c) Any adverse effects of the activity on a person are less than minor; and

[13] *Independent Maori Statutory Board v Auckland Council* [2017] NZHC 356 at [30].

(d) The consent authority, in its discretion, decides to notify the person proposing to undertake the activity that the activity is a permitted activity.

61 Clarity as to when the criteria of s 87BB are met would go some way to achieve a more efficient planning regime to the extent that landowners would not be required to obtain consent for marginal or temporary breaches that do not result in adverse effects. For example, if an Affected Party Approval is provided by Manawhenua, then the effects on Manawhenua cannot be taken into account, theoretically rendering the non compliance marginal, and effects less than minor. Clarity on an option such as this to use section 87BB would be of assistance to plan users and decision makers.

**Conclusion**

62 In summary it is submitted:

(a) The proposed provisions of Chapter 39 intended to implement the wāhi tūpuna overlay go significantly beyond what is required to give effect to s 6(e) RMA and the RPS, and do not give effect to the NPS-UDC.

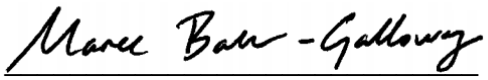
(b) The requirement to 'recognise and provide for' the relationship of Maori in accordance with s 6(e) does not extend to absolute protection and is not a directive 'avoid' provision;

(c) The s 32 evaluation report is inadequate and does not sufficiently consider whether the proposed provisions are the most appropriate way to achieve the purpose of the RMA;

(d) The proposed provisions are not appropriately integrated into the existing PDP framework to achieve good planning outcomes, and result in a stand-alone chapter that may be missed by plan users and results in unnecessary duplication of provisions in other legislation and other chapters of the PDP;

(e) There are reasonably practicable alternatives to give effect to s 6(e) which the council has not considered, including the deletion of provisions which go beyond s 6(e), the restructuring of provisions throughout the PDP chapters as appropriate, and the provisions for permitted activity status of marginal and temporary activities.

Dated this 3rd day of July 2020



Maree Baker-Galloway/Roisin Giles
Counsel for the Submitters

**Appendix A** – Submitters represented

1 LLOYD JAMES VEINT (3073)

2 ALISTER MCCRAE & DR PENNY WRIGHT (3268) - Rural zone

3 HANSEN FAMILY PARTNERSHIP (3295) – Rural land behind Queenstown Hill and surrounding Lake Johnson

4 CHARD FARM LIMITED (3299) – Kawarau River Gorge overlap with active winery

5 GLENDU BAY TRUSTEES LTD (3302) – Rural zone but consented for golf course and 42 visitor accommodation/residential buildings

6 MT CHRISTINA LTD (3303)(FS3416) – Rural Residential Zone

7 SOHO SKI AREA AND BLACKMANS CREEK NO. 1 LP (3305) (FS3419) – Rural land, base of access road to ski area, adjacent to Cardrona River

8 BALLANTYNE BARKER HOLDINGS LIMITED (3336) – Rural land – deer farming and rural living – adjacent to Cardrona River

9 CRIFFEL DEER LIMITED (3337) - Rural land – deer farming and rural living – adjacent to Cardrona River

10 FARROW FAMILY TRUST (FS3420) – Kingston Settlement Zone – residential development

11 QUEENSTOWN COMMERCIAL PARAPENTERS (FS3432) – Commercial parapenter operations on Ben Lomond

12 KELVIN CAPITAL LIMITED AS TRUSTEE FOR KELVIN GORE TRUST (FS3446) – Kelvin Peninsula – Lower Density Suburban Residential