QUEENSTOWN LAKES DISTRICT COUNCIL

DECISION OF THE QUEENSTOWN-LAKES DISTRICT COUNCIL

RESOURCE MANAGEMENT ACT 1991

Applicant:	Queenstown Water Taxis Ltd
RM reference:	RM120646
Location:	Surface of Lake Wakatipu, Shotover and Kawarau Rivers, Queenstown
Proposal:	Applications under s127 and s88 for an adventure jet boating activity on the surface of Lake Wakatipu, the Kawarau River and the Lower Shotover River.
Type of Consent:	Land Use
Legal Description:	N/A
Valuation Number:	N/A
Zoning:	Queenstown Town Centre – Waterfront Zone and Rural General Zone
Activity Status:	**Discretionary**
Notification:	Publicly Notified
Commissioner:	Commissioners J Milligan and L Overton
Date Issued:	2 December 2013
Decision:	**s127 is approved and the s88 application is GRANTED**

THE RESOURCE MANAGEMENT ACT 1991

APPLICANT:	**QUEENSTOWN WATER TAXIS LTD**
LOCAL AUTHORITY:	**QUEENSTOWN LAKES DISTRICT COUNCIL**
SUBJECT MATTER:	Applications under s127 and s88 – adventure jet boating activity on the surface of Lake Wakatipu, the Kawarau River and the Lower Shotover River
REFERENCE:	**RM120646**
HEARING DATE:	**5th and 6th November 3013: Applicant's reply received 12th November 3013**

Appearances:

- Pru Steven for the Applicant, **Queenstown Water Taxis Ltd**
- Graeme Todd for **Kawarau Jet Services Holdings Ltd**, to oppose

Lucy Millton and Marty Black to present s42A reports

SUMMARY OF DECISION: The s127 application is approved, the s88 application is granted

DECISION OF THE COMMISIONERS

PRELIMINARY

In October 2012 **Queenstown Water Taxis Ltd** (tracing as 'Thunder Jet' applied

(a) Pursuant to s127 of the Act, for a variation to the conditions of its existing consents (RM060468 and RM090051) enabling an increase in the boat capacity authorised by those consents to 34 passengers/trip (the maximum contemplated by Maritime New Zealand Rules); and

(b) Pursuant to s88 of the Act, for a land use consent, intended to operate in conjunction with the earlier consents, as varied, enabling one boat (on up to four trips/day – already authorised by RM060468) and three boats (on up to ten trips per day per boat – already authorised by RM090051) to use the stretch of the Lower Shotover River from its confluence with the Kawarau River to Tucker Beach as an alternative to the (presently consented) turning point at the confluence of the aand Arrow Rivers.

It is intended that this consent should be subject to the same conditions as those attached to the earlier consents "with necessary minor alterations to reflect the different route only". Following receipt of the application the applicant confirmed that it would accept a condition requiring its operations on the Lower Shotover River to cease when the flow in that river was at 15 cumecs or lower as measured at the Bowens Peak recording station.

Written approvals to the applications were provided from the following, as (potentially) affected persons:

- Te Runanga o Ngai Tahu;
- Kai Tahu ki Otago Ltd on behalf of Kati Huirapa Runanga and Te Runanga o Otakou;
- The Department of Conservation; and
- Fish and Game Otago

The applications were publicly notified in November 2012. One submission was received – from Kawarau Jet Services Holdings Ltd (in opposition), part of which the applicant sought to have struck out. This application was rejected by Commissioners Nugent and Overton in their decision of 29th May 3013, which also imposed timetabling directions and required the provision (by the applicant) of further information.

We – J Milligan and L Overton – have been appointed as independent Commissioners to hear and determine these applications. Our decision follows.

Section 113(1) of the Act identifies matters that must be set out in a decision, amongst them being"

(ac) the principal issues that were in contention; and

(ad) a summary of the evidence heard; and
(ae) the main findings on the principal issues that were in contention;

A summary of evidence will be found attached to this decision as Appendix A. Where greater detail is required it will be found within the body of this decision, as will the other matters required by s113.

BACKGROUND – AND THE DECISION IN *CASH*

This application concerns activities carried out on the surface of Lake Wakatipu and of the Kawarau and Lower Shotover rivers. It is common ground that the bed of each of these features is vested in the Crown, that the waters are 'navigable' and that, at common law, public rights of navigation exist in relation to each. Commercial activities on the surface of those waters are, however, controlled by provisions in the Queenstown Lakes District Plan.

Queenstown Water Taxis Ltd (ThunderJet) currently has two resource consents (RM060468 and RM090051) authorizing the operation of adventure/sightseeing trips on the surface of Lake Wakatipu and of the upper Kawarau River. RM060468 authorises one jet boat to carry up to19 passengers (including the driver) for up to 4 trips per day; RM090051 authorises 3 boats of up to 23 passengers (again including the driver) for up to 10 trips per day per boat. In each case trips depart from Queenstown Bay and/or the Frankton marina, and continue along the length of the Frankton Arm and the Kawarau River to its confluence with the Arrow River. While passenger numbers are restricted it does not appear that that there is any identification of (or restriction applicable to) the boats that may be used – that is, nothing that would prevent Thunder Jet from replacing all or any of its fleet with other vessels. Accordingly: 4 boats, 34 trips per day (in total); varying passenger numbers; a limited activity range.

Parenthetically, we can see no RMA purpose behind the 'passenger' limitations. We surmise that these have come about because boats answering to those *capacity* limitations were, at the time of the respective applications, those that the applicant(s) then had or were intending to acquire and were accordingly so described in the relevant applications. This seems consistent with that part of the present application which seeks an increase in passenger numbers (across the board) to 34. The rationale for this number seems to be that Thunder Jet now has new boats with that capacity, such a size being the present maximum for qualification as a 'commercial jet boat' for the purposes of Maritime New Zealand Rules.

A more significant matter is the applicant's proposal to extend its activities to the Lower Shotover River – the stretch from Tucker(s) Beach to the junction of the Shotover and the Kawarau Rivers. The Applicant's intention is to create an alternative route within its existing consent structure so that (depending on demand) some of its consented trips should, instead of proceeding down the Kawarau River to the Arrow River confluence, go up the Lower Shotover River to Tucker Beach. Thus: the same number of boats, the same number of trips (in total), but the option of two routes.

The Shotover part of this 'option' has given rise to controversy. Over the years a number of consents have been issued enabling commercial jet-boating on this stretch of the river; all are now controlled by Kawarau Services Holdings Ltd (KJet), a trade competitor of the present

applicant. The evidence suggests that this consolidation of control has occurred, at least in part, from a desire on the part of KJet (or its predecessors) to exclude commercial competition. This is, of course, a recognised – and reasonably common – business objective. In the context of the RMA however, such a motive faces something of a hurdle – s104 (3) (a) prevents us from having regard to "trade competition or the effects of trade competition".

The submission by KJet raises the following as two of its grounds of opposition to the present application:

> That to grant consent would result in adverse safety effects which may be of low probability but have high potential impact in terms of injury or death to passengers. [and]
>
> That to grant consent would be contrary to the findings of the Planning Tribunal (as it then was and now the Environment Court) in *M Cash v the Queenstown Lakes District Council* (Decision A3/93) ("*Cash*")

The facts in *Cash* are remarkably similar to those of the present case, as the following passage in the decision makes clear:

> The appellant is an established operator (trading as Alpine Jet, Queenstown) … who has been accustomed to take his customers down the Kawarau River to the conference with the Arrow River. He wishes to offer another trip going up the Lower Shotover. …One of his competitors … lodged a submission in opposition to his using the Lower Shotover. The objection was based on concerns for safety due to the numbers of jet-boat operators on that stretch of the river. [p2]

In the event the appeal failed, despite a finding that the "effect on the environment of one additional jet-boat … would only be minor." What appeared to have swayed the Tribunal was evidence given by another of the appellant's competitors who:

> … insisted that there is a real potential danger from the number of boats using that stretch of the river, particularly in summer, and gave the opinion that the total that it can take safely at any one time would be about half a dozen. [p4][1]

This, the Tribunal recognised, was a matter going to the first part of s 5(2)[2]. At that time, s104 required "the consent authority [to] have regard to any actual and potential effects of allowing the activity." On that basis the Tribunal considered that the "adverse cumulative effects of low probability of reducing the safety of passengers on the Lower Shotover River" to be sufficient in itself to justify refusal of consent, adding that:

> [t]he number of users should be restricted unless a new plan is developed which would control use of that stretch of the river based on appropriate studies of the safety question, which could give the public assurance of safety. [pp5-6]

[1] In context, this seems to mean "boats actually going up or down the Lower Shotover River at the same time." At that time (on the evidence) the *actual* maximum number was 12, seemingly without notable incident – see p3 of the decision.
[2] *Cash*, p5

That was in January 1993. Since then, significant changes to the legislation – and, in particular, to s104, suggest that the same conclusion could not now be reached, at least through that route.[3] Further, what was then a non-complying activity in terms of the Transitional Plan is now discretionary in terms of the presently operative document.

We should add that, in the course of the hearing, we were told of other (potential) applicants 'waiting in the wings' or with applications before the Council. Whether or not the same stretch(es) of water are involved or the (potential) applications are otherwise relevantly similar is unclear

STATUS / PLAN PROVISIONS

Cash was decided at a time in which the relevant planning document was a Transitional District Plan, initially formulated under the provisions of the Town and Country Planning Act 1977. A consequence of s373 (1) of the RMA then was that the activity in question was deemed to be 'non-complying'.[4] In terms of the current Plan – made fully operative on the 16th December 2009 – the river reaches with which we are now concerned are contained within the "Rural General' Zone, and the activities of relevance are categorised as discretionary, under the description "commercial boating activities".

Section 127 provides (ss3) that, in the case of applications made under it:

> Sections 88 to 121 apply, with all necessary modifications, as if—
>
> (a) the application were an application for a resource consent for a discretionary activity; and
>
> (b) the references to a resource consent and to the activity were references only to the change or cancellation of a condition and the effects of the change or cancellation

We were told that, in the lead-up to the present Plan, at least some consideration was given the issue raised in *Cash*[5], and that when notified the then Proposed Plan contained provisions which might have been seen as addressing it. Those provisions – so we were also told – were removed by consent order of the Environment Court following objection from commercial jet boat interests.

Counsel were able to identify for us those provisions in the present Plan which, in the view of either or both of them, were of relevance in the present case. These are:

- Issue 4.4.2, which notes "the positive and adverse effects on the amenities" of recreational activities "on their surrounding environments", including those on "public health".

[3] The 'effects' to which regard must be had are now confined to "effects *on the environment"* – s104 (1)a; (our emphasis).
[4] *Cash*, p2 of the decision
[5] Particularly in a 'Waterways' report prepared by Davie Lovell Smith and Partners Ltd in 1993

- Objective 3 and Policy 3.1, the latter of which seeks "{t}o recognise and avoid, remedy or mitigate conflicts between different types of recreational activities" while at the same time encouraging multiple use;

- Section 4.6, dealing with the Surface of Lakes and Rivers which, at Issue 4.6.1, notes the possibility of a reduction in navigational safety as a consequence of "water based recreational activities"; and, under the heading 'iv Navigational Safety', says:

> The relationship between navigational safety and resource management matters is close. These measures need to [be] read in conjunction with the relevant legislation, e.g. Harbours Act, Maritime Safety Act and Council By-laws.

  and notes – issue vii – a predominance of commercial operators (over private jet boat users) on the Kawarau, Shotover and Dart Rivers;

- Objective 4.6.3: "Recreational activities undertaken in a manner which avoids, remedies or mitigates their effects on … public health and safety …" and subsequent policies, particularly:

> 2. To enable people to have access to a wide range of recreation experiences on the lakes and rivers, based on the identified characteristics and environmental limits of the various parts of each lake and river.
> …
> 12. To avoid adverse effects on the public availability and enjoyment of the margins of lakes and rivers;
> …
> 14. To ensure the availability of the Lower Shotover river for private craft with regard to commercial operations and safety issues; [and]
> …
> 17. To ensure that the number of commercial boating operators and/or boats on waterbodies does not exceed levels where the safety of passengers cannot be assured.

- An 'issues' passage, which says that "[p]ublic safety may also be compromised by a number of boating operators and/or boats using the same waterbody where it is confined or has visibility limitations";

- The discretionary activity specification previously referred to; and

- A set of 'assessment matters', including

> (a) The extent to which the water-based activity will adversely affect the range of recreational opportunities available …
> (d) The extent to which the water-based activity will compromise levels of public safety …
> (e) Any adverse effects of the activity in terms of:
> …
> iv. levels of congestion or reduction in levels of lake or river safety, which are unacceptable to the nature of the lake or river;
> …

vii. any cumulative effect from the activity in conjunction with other activities in the vicinity.

THE APPLICANT'S EVIDENCE

At an early stage in her opening submissions for the Applicant – presented in written form – Ms Steven noted that

> KJet's Counsel has advised that its involvement at this hearing will be confined to matters of safety. [and]
>
> On that basis, the case for QWT will be limited to addressing issues in contention between all parties – safety. QWT agrees with and adopts all aspects of the Planner's report save on matters of safety. Related to safety, aspects of the Planner's report that address the future environment (KJet's unimplemented consents) will be challenged, along with the majority of Mr Black's safety report.

The evidence that she then called established a number of factual propositions, in respect of which there was no essential dispute:

- In combination, consents now under the control of KJet authorises the operation of a greater number of jet-boat trips on the Kawarau River than that enterprise currently conducts. (These are the "unimplemented consents" of Ms Steven's opening, the actual number of which is in dispute – an issue that we cannot resolve);

- Jet-boat operations on the lower Shotover River (and its junction with the Kawarau River) have at times been carried out by competing operators and varying numbers of boats, without, it seems, serious incident. The only boat accident discussed before us was a single-boat event occurring at the river junction, the nature of which has since been altered through the construction of a training wall;

- Radio communication facilities have improved over recent years. There is now a repeater station using channel E119 which provides clear coverage for all of the waters of present concern, and enables all commercial drivers to communicate with each other;

- Radio protocols have improved;

- There have been significant changes in recent years to the Lower Shotover river and its environs – in particular: the construction of a permanent diversion at its confluence with the Kawarau; the removal of trees near the confluence area (thus improving visibility); and the removal of hazards from the river itself;

- There are now several regulatory frameworks directed to ensuring the safety of commercial jet-boat operations. In particular, and since 1999, Maritime New Zealand (formerly the Maritime Safety Authority) has exercised control through what is now Maritime Rule Part 82 which, amongst other things, requires each commercial jet-boat operator to conduct its operations in terms of an approved Safe Operational Plan. One such Plan has been approved for the operations now proposed. We will later refer to the current regulatory frameworks in greater detail.

Two of the witnesses called in support of the applicant's case (Messrs Kelly and Jones) were involved in its operations. The third – Mr Hamilton – was not. All could point to extensive experience in commercial jet-boating – particularly on the relevant stretch of the Lower Shotover River – and all were of the opinion that it could accommodate further commercial operations without compromising safety. These opinions were, of course, subject to the proviso that boats were properly constructed and equipped, drivers were appropriately trained, that co-operation between commercial users was maintained at all times and that all relevant rules were obeyed.

None of these witnesses made any attempt to quantify what might be called the 'carrying capacity' of the river. Likewise, it was unclear as to whether, in coming to the opinions that they expressed, they had assumed the use, by KJet, of all of the authorisations available to it to the maxima permitted by each. Our impression was that each witness took a realistic stance – the present (and likely medium-future *demand* for jet-boat trips of the kind now under discussion was well inside the carrying capacity of the resource, whatever it ultimately turned out to be. We think that Mr Hamilton, who we accept as having relevant expertise and considerable local experience, encapsulated the position taken by all three witnesses when he said (para 56)

> I find no reason, with my experience and background knowledge, that safety would be compromised by allowing another commercial operator (with noticeably smaller carrying capacity) on the Shotover River, We are talking about professionally trained commercial drivers, who should have the same understanding of rules, regulations and safety requirements as any other commercial skipper on lake, sea or river

THE SUBMITTER'S EVIDENCE

This evidence is to be contrasted by that given by Mr Cameron, called for the submitter in opposition. Like Mr Hamilton, he qualified himself as a witness having relevant – and extensive – expertise. Unlike Mr Hamilton however, he lacked significant experience on the Lower Shotover; in answer to a question from Commissioner Overton he said that his experience of that stretch was largely that of a passenger. Like the other witnesses, he did not attempt to quantify the 'carrying capacity' of the river, nor did he make it clear whether, in coming to the opinions that he gave, he had assumed some priority of use by KJet arising from the authorisations that it has. The overall thrust of his evidence is contained in his paragraphs 39 and 41:

> … it is my professional opinion, that to approve this application will result in potential overuse of the river when no independent study has been undertaken as to the river's capacity in terms of jet boating and the potential for conflict between such activity and other activities carried out on the river.
>
> …
>
> It is my considered view that before any further applications are approved, the Council should commission the independent study that was recommended by the Planning Tribunal in 1993.

Additionally, he expressed concerns about "precedent effect" given "the possibility of a potential third operator." We will discuss that matter shortly.

MR BLACK'S POSITION

We consider this part of the s42A reports at this stage in the decision because it is directly concerned with the conflict of evidence described above. Mr Black has been Harbourmaster in Queenstown for something like 27 years and has some 30 years' experience with jet-boat operations in the Queenstown Lakes area. Additionally, he holds delegations from the Minister of Marine as an 'authorised person', as a consequence of which he approves (and audits compliance with) Safe Operational Plans. In that capacity he approved the applicant's SOP for its existing and proposed operations.

After discussing his role, relevant matters of background and his views as to future demand (both for commercial and recreational jet-boaters, Mr Black concluded:

> … I strongly recommend [that] the Queenstown Water Taxi Application … be declined at least in the interim until a proper study is undertaken of this invaluable resource as to what the capacity of the river is.

This conclusion forms the basis of the recommendation in Ms Millton's report that the s88 application be refused, in the absence of "total confidence that safety effects can be addressed."

Mr Black comes to his conclusion by calculating the total number of possible *commercial* trips on the Lower Shotover, assuming that the KJet consents and those presently applied for were each utilised to their fullest consented extent. For reasons later to be discussed we do not think that this is an altogether realistic way of attempting to assess *future* traffic on the Lower Shotover.

At this point, therefore, and to the extent that it may be necessary to choose between the position taken by the experts (Messrs Hamilton and Cameron) we prefer the views of Mr Hamilton – largely because of his greater experience with the waters and operations of relevance. We find that the Lower Shotover can accommodate without difficulty or significant danger to users both the operations of KJet (both present and those likely in the mid-future) and those proposed by the applicant (again, those likely in the mid-term). The significance of this finding is, however, dependent on the outcome of issues to be discussed later in this decision, as is that of the position taken by Mr Black.

THE SUBMITTER'S CASE, AND OUR CONSIDERATION OF IT

Mr Todd's quite extensive (and oral) submissions in opening contained two main contentions:

1. Even though his client did not *raise* issues other than safety, we were required to satisfy ourselves that all 'assessment matters' could be, as it were, cleared away. This obligation came, he said, from s104; the obligation to have regard to relevant provisions of the Plan included (he said) an obligation to address specified assessment matters applicable to activities on the surface of lakes and rivers, and to come to a conclusion in relation to each. Those matters, he said, had not been addressed by the Applicant (except to the extent that they had to do with public safety), and accordingly we would be unable to make findings *of the kind that (he said) the Plan required be made.*

Contexts in which those findings were necessarily relevant included, he argued, those of the 'permitted baseline' and of the existing (and future) environment;

2. On the basis of *Cash* and *Glentanner*[6] we must consider "whether a risk remains and whether any particular accident even if improbable would have *environmental* consequences which would warrant refusal of a resource consent" (*Glentanner,* p8, our emphasis). In order to enable us to fulfill our duty in this respect – so Mr Todd argued – we needed evidence of a kind not now before us.

   As we understand it, this argument *does* assume a priority of use – that there has, in virtue of consents now under the control of KJet, been an effective allocation of a significant part of the 'capacity' of the Lower Shotover. The fact that these consents were not *presently* utilised to their fullest consent was, he argued, of no relevance – a consent holder was entitled so to choose from time to time. Accordingly, and before we could grant consent, it was necessary for us to be satisfied that the 'carrying capacity' of the river was sufficient to accommodate both the KJet and the ThunderJet operations, each at maximum consent level. We had, he said, no evidence that would enable us to come to that conclusion.

We do not accept either of these submissions. Our reasons follow:

'Assessment matters' of the kind now under consideration are not criteria. Instead, they function as aids in the decision making process, drawing the attention of decision-makers to considerations found elsewhere in the Plan (as issues, objectives and/or policies). Not all of the specified matters will be relevant in every case – indeed, it is plain on the face of the assessment matters themselves that some cannot be relevant in the present case. Whether or not a particular issue *is* relevant will always be a fact-specific question. Further, and in the present context (that of an *un-limited* discretionary activity) the provided assessment matters do not exclude other relevant considerations – see s104 (1) (c).

The Act provides processes designed to identify the issues that are of relevance in particular cases. An applicant's AEE must contain *its* assessment of the "environmental effects" of its proposal – s88 (2) (b). Public notification, the requirement that affected persons receive notice and the submission process enables the community to have input – we note that several potentially affected persons have signified their approval – and the s42A report may be a means by which Council officers (and some others) may provide information. We are not an inquisitorial body and have limited power to require further investigation.

In the light of all of this we think that we (and an applicant) are entitled to presume that, if an 'assessment matter' is not put in issue through one of the ways mentioned above (or is not in some way obviously important), it is not a matter about which we will require evidence before proceeding to a decision. It is, we think, inappropriate for a submitter to decline to raise an issue and then require that we confront it.

In any event, we think that there *is* evidence in respect to these (non-safety-related) issues upon which we may rely. Ms Millton, in her s42A report, addresses each of the assessment matters and comes to a view with regard to it. With the exception of safety related matters she

[6] *Glentanner Park (Mt Cook) Ltd v The Helicopter Line (and others)* 15th June 1994, Decision W50/94

concludes, on balance and in each case, *either* that the result is neutral *or* that it assists the applicant. Notably, and while in coming to the conclusions that she does in respect to matters of safety she relies on Mr Black, she appears to treat the safety effects under consideration as *effects on the environment*.

The second submission calls for a more complex response. We think that it raises two distinct issues:

(i) Is the detrimental 'effect' now under consideration – an (arguably) increased risk of injury-causing accident – an effect *on the environment*?

(ii) Do consents of the kind now under the control of KJet enable it to sequester unused parts of their authorisations to the exclusion of later applicants? – the assertion of priority of use, capable (as in the present case) of supporting a conclusion which hovers somewhere between a monopoly and a moratorium.

We will discuss these in turn.

The categorisation of effects

Not all effects relevant under the RMA are 'effects on the environment'. The Act specifically refers to 'effects on the environment' and 'effects on persons'.[7] Section 308B makes it clear that the relationship between these two is not a necessary one: an effect may be on the environment, on persons, or on both (although in the last case a better description may well be that they are different effects of the same cause).

We have already remarked that *Cash* was decided when s104 was other than it now is. Changes to the legislation that have occurred since that case was decided (particularly that in 1993) indicate that it is no longer appropriate to consider all effects within a single calculus. Something of a two-step process is required – (i) categorisation of the 'effect' in question, and (ii) an identification of the statutory obligations relating to effects of that category.

According to Mr Cameron – the only witness called by KJet – the effects *feared* are that greater activity on the Lower Shotover River could increase the risk of personal-injury accident; what in the language of s3 might be seen as an effect of low probability but high potential impact. So stated, we think that he may well be right[8] – on the road, congestion, driver distraction, poor visibility, the nature of vehicles used and so on (all matters to which he referred) are at times implicated in traffic accidents that cause injury. Plainly, environmental conditions may well play a part – as in the case of decreased visibility or increased congestion, giving rise to an obligation to drive to the conditions – but in that event effects of the kind presently feared are *of* the environment, not *on* it.

But are the others – and is the heightened risk to which he referred – effects *on the environment?* In the present case we think not. We think that the feared 'effect', if and when it occurs, will be

[7] Conceivably there could be other kinds – effects on future generations come to mind
[8] He could not help us in *quantifying* this increased level of risk

an effect of activities *on people*. We are comforted in this conclusion by the knowledge that the Tribunal in *Cash* took a similar view. [9]

One consequence of this conclusion is that we do not need to address issues like 'the existing environment' or the 'permitted baseline', particularly where they lead (or seem to lead) to the inclusion of existing, but unimplemented, consents. A further consequence is that the effect under consideration (albeit adverse) is not something that s5 requires be avoided, remedied or mitigated. Instead it goes, we think, to the first part of s5 (2) – what it is to "enable people and communities to provide for their own …safety…" We note that this is not the same thing as an obligation to provide for the health and safety of people and communities.

We will come back to this point again. For the moment we turn to the second issue – the assumption (in Mr Todd's submissions and Mr Cameron's evidence) that all of the activities authorised in the KJet 'suite' of consents have priority in use.

Broadly speaking the Act does not 'allocate' resources – in the sense of determining *who* might use them to the exclusion of others. What the Act does – through its mandated processes – is determine how or for what purposes they may be used by those who would otherwise have the right to do so. On examination, the two apparent exceptions to this proposition turn out to be limited in their application.

The first relates to the taking of water; but here (i) private rights to water have been extinguished by arrogation to the Crown (apart from uses of the 'domestic' or 'livestock' kind), and (ii) multiple and/or sequential uses are encouraged. Further, and importantly, takings of water actually *diminish* the resource, leaving only a remnant for others.

The second is concerned with occupation of parts of the coastal marine area, but even there the mark of occupation – exclusivity – is exercisable only against those not holding a similar authorisation.[10] Both the first and second case relate to activities the exercise of which is not, in its foundation, a matter of 'right' – the statutory position is that they are proscribed in the absence of RMA authorisation.

The present case, however, has to do with a *limitation* of pre-existing rights, in much the same way as ordinary land use rules constrain the exercise, by landowners, of their "ancient rights" as owners. Common Law rights of navigation, which Mr Todd accepts exist in respect of the relevant stretches of water, are conceptually similar to rights of passage along roads. These are *public* rights which, when exercised by individuals, must be exercised in a way that does not unreasonably interfere with the exercise by others of like rights. It seems to us that the relevant Plan Rules operate further to constrain the exercise of navigational rights by *some* persons (commercial operators) but do not alter the *nature* of the rights themselves.

This provides, we think, a very poor foundation for that part of Mr Todd's second argument which leads either to a monopoly or a moratorium; we can see no basis in the Act for either (or for something that looks very like them). Both routes offend against what has been called the 'formal requirement of justice' – that similar cases be treated in similar ways, and that no-one be

[9] *Glentanner* seems ambivalent on this point, factoring in the risk and potential consequences of accident through alternative routes – see pp12-18

[10] Definition of 'occupy', s2.

privileged. This is the extent of the 'precedent effect' of which Mr Cameron was concerned, and it is not the granting of further consents but the fact of those granted earlier which gives rise to it.

We think, therefore, that Ms Steven is right when she says that, given that the activities in question are 'conditional', the applicant is entitled to have its application determined on its merits. We add that we can see no basis for accepting Mr Cameron's "considered view that before any further applications are approved the council should commission the independent study that was recommended by the Planning Tribunal in 1993." For us to do so would, we think, involve improper exercise of the discretion implicit in the consideration of applications for consent to discretionary activities.

In the end, we think, the number of commercial trips on the Lower Shotover will be a function of demand and the economics of supply. The fact that KJet has 'chosen' not to utilize the whole of its consent suite suggests that the grant of consent to the present application is unlikely to produce an immediate 'spike' in boat numbers. If, and when, those numbers increase to the point at which adventure tourism on the Lower Shotover no longer has 'enabling' consequences of the kind to which the Act is directed, it may be that some alteration to the District Plan will be required.

THE QUESTION OF SAFETY

Until that occurs, the issue of safety remains – but for the purposes of the present application in the context of what it is to enable "people and communities to provide for their … health and safety…" [s5].

If the citations of Counsel are any guide, there has been little judicial consideration of what our obligations in this regard (and in the present context) might consist in. There has, it appears from Ms Steven's written submissions, been something of a flurry of judicial comment as to the significance of other regulatory mechanisms in the consideration of this issue, and the question of whether reliance on the Maritime Rules involves an unauthorized delegation of the judicial function. In the event we were told (again by Ms Steven) that Justice Pankhurst, after referring to:

> … the problem that, unless the [decision-maker] has before it safe operational plans, approved by the Harbourmaster and which provide assurance as to passenger safety, its overarching judicial responsibility is incapable of fulfillment.

went on to say that:

> [The Environment Court] was wrong in holding … that it was bound … to hold as a matter of law that resort to the Maritime Rules and the Harbourmaster would entail delegation … Provided [The Environment Court] confronts its responsibility in relation to safety … so that it can bring to account the proposed safe operating plans, delegation of the judicial function will not occur.

We face some uncertainties here:

(a) We were not provided with a copy of this decision and are thus unclear as to the context in which these remarks were made;

(b) Nothing in the information given to us informs an understanding of what our "responsibility in relation to safety" is, or as to what might be required for its discharge; but nevertheless

(c) It appears that we may take in to account other safety-ensuring mechanisms – that is, those deriving from sources outside the RMA – in the fulfillment of our "overarching … responsibility", whatever that turns out to be.

As previously mentioned, there are regulatory structures lying outside the RMA which are directed towards ensuring the safe operation of boating activities (including, on occasion, specifically jet-boating activities). These include:

Bylaws made (or continued) under the Local Government Act

The Queenstown Lakes District Council administers bylaws originally promulgated by the Lakes District Waterways Authority[11] and now continued under the LGA. These appear to provide the basis for Mr Black's present appointment as Harbourmaster. Amongst other things, these bylaws:

- Control navigation through the Kawarau Falls Flood-Control Gates;
- Provide for access lanes and reserved areas;
- Create offences of nuisance in relation to the operation of vessels and of the 'reckless use' of them;
- In the case of jet-boats, require adherence to the 'navigational procedures' of Schedule VI, which contains particular reference to the Kawarau and Lower Shotover rivers;
- Require the surveying of commercial vessels and the licencing of commercial operators (now the responsibility of Maritime New Zealand).

We assume that it remains open to the Queenstown Lakes District Council to exercise its bylaw making power to regulate activities on the waterways under its control, and we observe that this is a far more flexible and responsive route than that of changes to district plans.

Part 22 of the Maritime New Zealand Rules which contains navigational rules for waterways in general – often called the Collision Regulations – having an effect equivalent to those regulating road traffic;

Part 82 of the Maritime New Zealand Rules

[11] The Lakes District Waterways Authority Control Bylaws 1989, since amended.

Amongst other things, this Part provides standards for the construction of boats, required safety equipment, communication systems, driver training and record keeping. It requires that operators have a Safe Operational Safety Plan that is approved (and periodically audited) by an 'authorised person'.

Mr Black is such a person. The applicant has such a plan, approved by Mr Black in July 2012; its compliance with respect to that plan has been audited (again by Mr Black) in July 2012 and (we think) in August 2013. As we understand it, compliance with that plan is mandatory, and alterations to safe Operating Plans may be required from time to time to meet contingencies.

The approved plan is an extensive document specifically directed to safety issues with which it deals in a far more detailed manner than could ever be achieved through conditions in a land use consent.

Part 91 of the Maritime New Zealand Rules

As it was explained to us, this Part contains specific rules relating to navigation in rivers, including one that requires a vessel travelling upstream to give way to one going downstream.

In our view this suite of legislative provisions *both* deals adequately (and comprehensively) with present issues relating to navigational safety, including those raised by the provisions of the District Plan, *and* provides a means through which future issues can be addressed. It thus meets the 'safety oriented' aspects of s5 of the Act, in that it enables *and will continue to enable* relevant people and communities to provide for their own wellbeing, health and safety. Further, controls of this sort have the advantage that they apply to all, whereas conditions on consents bind only the consent holders.

Our "responsibility in relation to safety" is, we think, sufficiently fulfilled where, as here, we are assured that a proper framework for control exists, albeit independently of the RMA. We cannot assume other than that the requirements of such a framework will be adhered to and that all those carrying out activities on the surface of waterbodies will exercise proper care.

THE STATUTORY CRITERIA

As is well known, s104 (1) (a) sets out the matters to which decision-makers must "have regard". The first of these – ss(1) – is "any actual and potential effects on the environment of allowing the activity". We have already concluded that there will be none (at least, none of any significance).

So far as s104 (1) (b) is concerned, the provisions of clauses (i), (iii), (iv) and (iv) appear presently irrelevant. We have had regard to the regulatory structure affecting navigation on waterways and can see no other regulations of relevance. Our consideration of relevant provisions of the Plan does not lead us to conclude that the present applications should be declined. We note in particular that passage in Section 4.6 which indicates that measures contained in the Plan need to be read "in conjunction with the relevant legislation…"

There are no other matters that, in our view, are relevant and reasonably necessary to the determination of this application.

Section 104 is expressly made "subject to Part 2.So far as s8 and s7 (a) are concerned, the approvals of Te Runanga o Ngai Tahu and Kai Tahu ki Otago Ltd (on behalf of Kati Huirapa Runanga and Te Runanga o Otakou) enable us to be satisfied that the requirements of those sections have been met. The other matters contained in s7 are either of no relevance or are essentially neutral in their application. We should, however, say something about clause (g) "[a]ny finite characteristics of natural and physical resources."

To the extent that the Lower Shotover is properly to be regarded as a resource for water-borne recreation (particularly that conducted by way of commercial operations), it is 'finite' in its spatial and operational limitations. What has been in contemplation since *Cash* is the establishment of limits on its *use* – a limit on the number of commercial boat trips. So long as these activities remain 'discretionary' in terms of the District Plan we do not see how this can be achieved on a consent-by-consent basis.

We have had particular regard to this issue, but are limited in what we can do about it – especially given that the absence of information as to what the limits should be or whether they were now even being approached. We do not think, however, that this subsection can be used to justify a sequestration of the resource.

Everything comes back to s5, and to an integrated judgement as to whether the purpose enunciated in that section would better be met by the grant or refusal of consent. For reasons already given we see the present issue as resting on the first part of s5 (2).

Quite plainly, aspects of that subsection tell in favour of grant – an opportunity for choice better enables people and communities to make provision for their own wellbeing. What we have concluded is that safety concerns do not, in this instance, weigh against grant. Considered as an 'enabling' issue, concerns of this sort exist on a continuum having locations that can be described as 'better enabling', 'continuing to enable' and 'reducing the ability of' relevant people and communities to make provision for themselves. The middle description is a neutral point at which we think the present proposal may properly be placed.

FORMAL DECISION

For the foregoing reasons:

(a) Resource consents RM060468 and RM090051 are varied by replacing the 'passenger limitation' contained in Condition 1 of each consent ("23 passengers including the driver" and "19 passengers per boat including the driver" respectively) with the words '34 passengers per trip, including the driver'.

(b) Consent is granted (RM120646) to the use, by the consent holder, of that part of the surface of the Lower Shotover river lying between Tucker Beach and the confluence of the Kawarau and Lower Shotover Rivers for a 'commercial boating activity'; namely the conveyance of passengers by jet-boat on trips up and down that stretch of water,

Subject to the following conditions:

1. ***This consent is to operate in conjunction with resource consents RM060468 and RM090051 so as to enable the use of an alternative route to that authorised by those consents and without increasing the maximum number of trips that they authorise;***

2. ***There shall be no more than one boat providing 4 trips per day (authorised by RM060468) and three boats providing 10 trips per day each (authorised by RM090051) on the stretch of the Lower Shotover River to which this consent applies;***

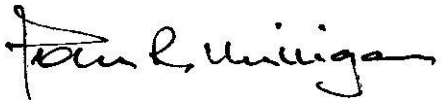
3. ***Exercises of this consent are subject to the conditions applicable to the activity in respect of which they provide an alternative route;***

4. ***Each trip is to be of approximately one hour in duration; there are to be no stoppages or landings of passengers on the river beds, except during cases of emergency;***

5. ***This consent shall not be exercised when the flow in the Lower Shotover River is less than 15 cumecs, measured at Bowens Peak.***

[Note: the attention of the consent holder is drawn to the existence of, and the need to comply with other regulatory controls, some of which may have the effect of reducing the number of trips capable of being made.]

For the Hearings Commissioners



2nd December 2013

APPENDIX A

QUEENSTOWN WATER TAXIS LTD **RM120646**
SUMMARY OF EVIDENCE HEARD Section 113, RM'91

Neville Gerald Kelly: shareholder in the applicant company

- Describes applications
- Provides his background in the industry as well as the operations of KJet and those of its predecessors – he a previous owner and later employee
- Has extensive experience in jet-boat operations on the Lower Shotover and elsewhere
- Communications have improved considerably over the years. Now good coverage of relevant area available to and used by commercial operators; backup channel 5; both monitored full time. In comparison with earlier years, now fewer operators, boats meet national standards and are safer, easier to handle and more reliable; vessel movements fewer (larger boats); navigation hazards removed; more passing points available
- Refers to 1993 waterways report: now outdated
- Believes that obedience to navigation and safety rules will obviate most problems
- Notes that the applicant proposes a 'low flow' cut-off – largely because of icing at river edges during winter
- Discusses current Maritime Rules, requirement for SOPs and current communication practice.
- Produces approved SOP

Nicholas John Hamilton:

- Confirms adherence to EC Code of Practice for expert witnesses
- Extensive experience in jet-boat operations and safety issues relating to them. Experience includes rivers having multi braids and with multiple operators
- Discusses historic jet-boat operations on the Lower Shotover; recalls a time in which at least 6 independent operators
- Company amalgamation began in mid '90's, leaving KJet as the sole operator exercising all prior consents
- Describes the Shotover trip, identifying stopping/passing areas; about ½ hr up and down, with an overall trip of about 1hr
- Discusses river characteristics (Shotover). Always has been 3 major stopping/passing points. Regards 1993 report as now outdated in many respects, in part due to flood control works by the Otago RC. Significantly improved radio communications
- Discusses regulatory framework; training standards; navigational safety requirements (including those that regulate upstream/downstream traffic
- Present radio systems make for easy communication between operators

Stan Jones:

- Experience of multi-operator use of the Lower Shotover – as an operator

- Two operators between ’97 and ’04; easy relations *on the water*; describes the then-current procedures
- Uncommon for boats to pass head-to-head at speed; usually the boat going upstream will wait at a convenient spot for boat going downstream
- ‘There is a barrel-load of un-used capacity’
- Sees no issue with larger boats

Andrew Ian Cameron: Commercial jet-boat operator in Picton. Prior experience with commercial jet-boating operations on the Waiau river (mixture of braids and canyons), has drafted a SOP and was responsible for driver and safety training. Involved in Jet-boat racing; generally involved in adventure tourism and currently deputy-chair of the NZ commercial Jet Boating Association

- Confirms adherence to EC Code of Practice for expert witnesses; says he is “an independent expert giving evidence on safety issues”
- Has read documentation relevant to the applications
- His concern is as to the possibility of conflict in the event that the applicant (and presumably KJet) operates consent to their fullest extent
- Discusses operations of KJet – 600-700 passengers/day max.
- Refers to increases in private recreational jet-boat use and problems that might arise from that
- Discusses effect of changes in boats used, saying that increased speed (etc) increases potential danger

Says that in his “professional opinion” no further consents should be granted until an “independent study” has been