In the Supreme Court of New Zealand | I Te Kōti Mana Nui
SC 158/2021

Between **Auckland Council**

Appellant

And others

And **C P Group Limited**

First respondent

And others

Submissions for the second and fourth respondents

BELL GULLY

Alan Galbraith QC / T B Fitzgerald / S R Hiebendaal
Counsel for the second and fourth respondents
argalbraith@shortlandchambers.co.nz /
tim.fitzgerald@bellgully.com / sam.hiebendaal@bellgully.com

48 Shortland Street
PO Box 4199
Auckland 1140
+64 9 916 8800

Full list of parties

Between **Auckland Council**

Appellant

And **C P Group Limited**

First respondent

And **Millennium & Copthorne Hotels New Zealand Limited**

Second respondent

And **MLC Scenic Limited**

Third respondent

And **Katalyma Hotels & Hospitality Limited (formerly known as T & T Clarry's Holdings Limited)**

Fourth respondent

May it please the Court:

1. This appeal concerns decisions by Auckland Council to impose a targeted rate on the capital value of some (but not all) properties in Auckland used for commercial accommodation, starting with the 2017/2018 rating year[1] (the "Accommodation Provider Targeted Rate" (**APTR**)).[2]

2. The APTR was an attempt to replicate a "bed tax" of the type which authorities impose in cities overseas, but which Parliament declined to permit in New Zealand. The Council believed that accommodation providers could choose to pass the cost of the APTR to guests via an increase in room rates, such that the economic burden would be met by visitors to Auckland rather than by ratepayers. The Council was wrong about this.

3. The result was a rate that imposed a very significant financial burden on a very small subset of ratepayers, suddenly, and without any meaningful consideration having been given to what benefit the funded activity would generate for the affected ratepayers. The APTR was in excess of $1 million for the second respondent's corporate group alone, in its first year. The evidence established that the commercial accommodation sector is the *fifth*-largest beneficiary of visitor spending, and yet was the only sector targeted by the rate. Within the sector, the rate applied to some providers and not to others, and to the affected ratepayers in proportions that bore no logical relationship to the activity being funded. To the best of counsel's knowledge, no local authority has previously sought to use the current legislation to impose a targeted rate as

---

1 This appeal is concerned specifically with the two rating years that preceded the High Court trial in this proceeding, i.e. the 2017/2018 rating year and the 2018/2019 rating year.

2 The APTR was intended to fund 50% of the visitor attraction and major events expenditure of Auckland Tourism, Events and Economic Development (**ATEED**). ATEED was the Council Controlled Organisation responsible for Auckland's economic development. On 1 December 2020, Auckland Council merged ATEED with Regional Facilities Auckland. The Council suspended the APTR due to COVID-19 as part of its Emergency Budget on 30 July 2020. As a result of the Court of Appeal's decision in this proceeding the APTR was not included in the 2022/2023 budget. Rather than fund the activity from general rates, the Council reduced the relevant expenditure by the amount it would have recovered from the APTR. Its Annual Budget 2022/2023 records: "We had planned to restart the APTR in 2022/2023, which would have generated around $14.8 million of additional funding for visitor attraction and major events. A recent court ruling on the APTR means we are unable to charge the rate for 2022/2023. We do not know how long the disruption to Auckland's visitor economy caused by COVID-19 will last. Given the current financial pressures we are facing, we do not consider investment in visitor and event activities to be a priority. As such, we have decided to reduce the budget for visitor attraction and major events to $19.9 million for 2022/2023. This reflects the reduction in revenue from the APTR."

selectively, on as small a subset of ratepayers, with such limited identification of benefit.

4. The second and fourth respondents in this appeal are ratepayers subject to the APTR. Their application is supported by affidavit evidence from 13 ratepayers or groups of ratepayers, reflecting a broad cross-section of the industry. They respectfully agree with the unanimous conclusion of the Court of Appeal that the Decisions were unlawful in two ways:

   (a) The Council failed adequately to consider the mandatory relevant considerations prescribed by section 101(3) of the Local Government Act 2002 (the **LGA**). That issue is addressed in more detail in the first and third respondents' written submissions; and

   (b) The Decisions were unreasonable in an administrative law sense. These submissions address that issue.

5. The submissions in favour of the appeal spend very little time in explaining why the Council's Decisions were reasonable, or addressing the effect of the rate on the affected ratepayers. Those are difficult justifications to defend. Instead, the appellant and Local Government New Zealand (**LGNZ**) emphasise that rating decisions are made by elected persons. They contend that it follows that the Court of Appeal misinterpreted the requirements of section 101(3), and the approach to be taken to reasonableness challenges to targeted rates.

6. The second and fourth respondents disagree. The consequence of the appellant's approach would be that the catch cry of democracy will provide local authorities with an ability to use rating powers to impose any economic burden on any wealthy or chosen minority, without anything other than an opaque (at best) foundation, and without any rigor to an analysis considering the benefits (or relative benefits) to the community or to the targeted ratepayers of the funded activity. This is not justified either as a matter of principle or precedent, and is not mandated by the existing law on general (much less targeted) rates.

7. Modern administrative law is capable of both respecting the democratic context of rating decisions and providing meaningful controls over how local authorities exercise their statutory powers to target minorities for the benefit of majority approval. The second and fourth respondents respectfully support the approach taken by the Court of Appeal.

The Decisions

8. The APTR had its origins in Auckland's 2016 mayoral election.[3] As a candidate, Mr Phil Goff promised to limit rate rises to 2.5%,[4] and to "investigate a fair level of user-pays where there are demonstrable private benefits generated from CCO operations".[5] Mr Goff cited ATEED as an example where user-pays could be appropriate, stating that ATEED "generates benefits for the city as a whole, but it also generates benefits for specific industries, such as tourism and hospitality providers".[6] Since then, the Council's case has denied a need meaningfully to assess "demonstrable private benefits", or to measure a "fair level" of "user pays".

9. Mr Goff was elected and took office on 1 November 2016.
On 28 November 2016, a Council publication quoted the Mayor's reasoning for imposing what would become known as the APTR:[7]

> Accommodation providers and other businesses benefit most directly from the funding the council puts into attracting visitors to the city and supporting major events. That is why I am proposing a new visitor levy to be collected by hotels, motels and B&Bs to replace ratepayer spending by ATEED in this area. [Emphasis added]

10. The Mayor said that accommodation providers could "easily recover costs", and providers would "see the benefits of the tax without paying the levy".[8]

11. While the phrasing later used by the Council to describe the APTR changed, the essential reasoning for it never did. In particular:

    (a) The APTR was imposed solely on accommodation providers *not* because they benefited the most from ATEED's activities (they did not), but because they were thought to benefit "most directly" from ATEED's activities (i.e., they received a higher proportion of their income from visitors, as compared to other sectors).

    (b) The APTR was intended to operate as a "visitor levy". The Council assumed (incorrectly) that the APTR would not ultimately be borne by accommodation providers; they would "collect" it from their

---

3 Court of Appeal judgment at [23] [pleadings, tab 12, 102.0257].
4 Luxon 1 at [8] [evidence vol 1, tab 7, 201.0119].
5 Wood 1 at [16] [evidence vol 2, tab 3, 202.0325]; and [DW-1] [exhibits vol 3, tab 4, 303.0545].
6 [DW-1] [exhibits vol 3, tab 4, 303.0545].
7 [KL-04] [exhibits vol 3, tab 13, 303.0673].
8 Luxon 1 at [12] [evidence vol 1, tab 7, 201.0119 – 201.0120]; [KL-03] [exhibits vol 3, tab 12, 303.0670].

patrons. In other words, accommodation providers would "pass on" the APTR to visitors (the **pass-through assumption**).

12. These justifications for the APTR, which persisted throughout the Council's decision-making process, were fundamentally flawed:

    (a) The accommodation sector receives (at very best) around 10% of tourism revenue.[9] It ranks *fifth* on the list of tourism spending recipients, lower than retail (42%), other passenger transport (17%), food and beverage (16%), and other tourism (13%).[10] The retail industry alone receives four times the tourism spend of the accommodation sector. None of these other sectors was subject to the APTR.

    (b) The Council assumed that accommodation providers could directly pass the cost of the rate to their guests because the APTR was economically similar to "bed taxes" or "visitor levies" that are applied overseas. As both parties' experts accepted (though contrary to the Council's submissions at trial), the pass-through assumption is incorrect. But that incorrect assumption meant the Council avoided necessary rigour in its assessment of benefit, fairness, and consequences to accommodation providers as ratepayers.

13. The pass-through assumption was repeated in the first formal proposal for the rate, in the Mayoral Proposal for the 2017/2018 annual budget.[11] It carried through to the preliminary consultation on the APTR,[12] and in the formal consultation on the 2017/2018 Annual Plan, including the written material made available to the public (the **Consultation Document** and **Supporting Information**).[13]

---

9 Mr Hamilton's assessment is that accommodation providers' actual share is closer to 6 – 6.5%: at [59] [evidence vol 1, tab 5, 201.0091 – 201.0092].

10 [MW3-224] at [78] [exhibits vol 10, tab 1, 310.2066].

11 [MW1-55] at [34] [exhibits vol 3, tab 16, 303.0720]: "Indicative council analysis suggests the levy would translate into a 3-4% surcharge on a typical tariff for a 4-5 star hotel – in the order of $6-10 per night. Municipal charges of this nature are common practice in OECD countries."

12 The Council insisted that "[a]ccommodation providers may be able to pass the costs on as a purchaser, similar to how bed night taxes are applied in other jurisdictions". [TC-06] [exhibits vol 4, tab 24, 304.0959]. See also [DW-7] [exhibits vol 4, tab 17, 304.0891 and 304.0893], which lists various parts of the tourism sector by the share of their total revenue they receive from visitors, and says that "[a]ny costs passed on to visitors instead of residents".

13 [MW1-213] [exhibits vol 5, tab 2, 305.1043]. [MW1-169] [exhibits vol 5, tab 1, 305.0999] ("If charges were passed on to visitors, it is likely to be $6 - $10 per night on the average hotel room rate"). [MW1-156] [exhibits vol 4, tab 27, 304.0986]. [MW1-217] [exhibits vol 5, tab 2, 305.1047] ("Costs can be managed by passing them on to guests, as occurs with bed night taxes in most other international cities"), [MW1-228]

14. It was repeated clearly in other public material from the Council describing the APTR in March 2017:[14]

> We propose to replace this general rates funding with a targeted rate on accommodation providers, as the connection between visitor attraction and their customer base is strongest.
> We are not proposing to charge other businesses that benefit, such as restaurants, cafes and taxis, because most of their customers are Auckland residents.

15. The pass-through assumption was the sole distinguishing factor in the Supporting Information between imposing the APTR and imposing a targeted rate on the tourism sector more generally.[15]

16. The proposed APTR was included in the Final Annual Budget Mayoral Proposal on 1 June 2017 (the **Revised Mayoral Proposal**).[16] This drew on the staff report entitled "Annual Budget 2017/2018 – Key Budget and Rating Issues" (the **Staff Report**).[17] The APTR was imposed on 29 June 2017 (the **2017/18 Decision**). Some changes had been made to the consultation version, but the fundamental problems with the rate remained.[18]

17. When it made the 2017/18 Decision, the Council anticipated that some relief for affected ratepayers would be possible under the Council's Miscellaneous Purposes Scheme for rates remissions. In July 2017, it published applicable criteria, which included situations were pass-through was legally impossible. At the time of the 2017/18 Decision, the Council had no sense of how many ratepayers were in that category. In the event, in the 2017/2018 year, 50% of all APTR ratepayers applied for a remission, and 35% had their application granted in full or in part. The total amount of remissions granted in the first year was

---

[exhibits vol 5, tab 2, 305.1058] (the Council's "calculation of impact on tourist spending" was based on a report that PwC prepared for ATEED in 2011, which was concerned with bed taxes and airport departure charges, rather than a rate. As a result, the report was directed at the effect increased costs for visitors would have on the number of visitors to the city. This says nothing at all about what effect the APTR will have – unless it is assumed that the cost will be wholly transferred to visitors).

14 [KL-09] [exhibits vol 6, tab 3, 306.1260]

15 [MW1-216]-[MW1-217] [exhibits vol 2, tab 3, 305.1046 – 305.1047]

16 Wood 1 at [79] – [80] [evidence vol 2, tab 3, 202.0342]; and [MW3-1] [exhibits vol 9, tab 1, 309.1817].

17 [MW3-210] [exhibits vol 10, tab 1, 310.2052].

18 Most significantly, the rate changed so that it applied only to some of the accommodation providers, and recovered only 50% of ATEED's relevant costs. In the Revised Mayoral Proposal, the Mayor said that "this 50/50 apportionment is a political judgment applying a "stand back" evaluation". The evidence does not disclose any reasoned basis for the judgment on this issue: Wood 1 at [71]—[72] [evidence vol 2, tab 3, 202.0337 – 202.0338].

$2,589.608.31.[19] The most common reason was that the ratepayer had no ability to pass on the cost of the APTR.[20]

18. The APTR was renewed for 2018/2019 (the **2018/2019 Decision**, together with the 2017/2018 Decision, the **Decisions**).[21] In most ways this was simply an extension of the 2017/18 APTR. It did not correct the fundamental flaws in the 2017/2018 Decision, but there were four key differences:

    (a) The Destination Committee: ATEED established a "Destination Committee", which allowed industry representatives to give feedback and some input into ATEED's spending, but no decision-making power.[22]

    (b) The amount of the APTR: Because of changes to the capital value in properties, the quantum of the rate changed significantly. For rating units that were owned freehold, the rate usually slightly reduced in absolute terms. For those owned in strata titles, the rate tended to go up. These changes bore no relationship to the purpose of the rate, nor any benefit derived from the APTR.

    (c) Informal accommodation providers: A significant inequity with the 2017/2018 rate was that it did not apply to the informal accommodation sector (e.g. properties let on www.airbnb.com). In 2018/19 the Council expanded the APTR to include some informal accommodation providers, depending on how frequently the property was used for that purpose.[23] The expansion was too little and too late, and in any event it was ineffective: at the time the Council made its decision for 2018/2019, it could identify only a small fraction of the informal accommodation providers.[24]

    (d) The remissions policy: The Council resolved to adopt the APTR remission policy on 31 May 2018, which would apply only to ratepayers who owned 1 or 2 rating units,[25] and who had a contract

---

19 Acott at [56] [evidence vol 2, tab 4, 202.0359 – 202.0360].
20 Acott at [56] [evidence vol 2, tab 4, 202.0359 – 202.0360].
21 [KL-37] [evidence vol 21, tab 9, 321.4517].
22 Clarry 2 at [13] [evidence vol 3, tab 5, 203.0546].
23 [MW4-191] [exhibits vol 21, tab 8, 321.4495].
24 Heath at [28] [evidence vol 3, tab 8, 203.0585].
25 The Council said that there would be a "significant risk to APTR funding" if the remission policy were applied to "large investors" (by which it meant anybody that owned more than 2 units).

with an accommodation operator that (among other things) did not allow the ratepayer to pass on the cost of the rate.[26]

The law: statutory context of the Decisions

19. The Decisions were governed by the Local Government (Rating) Act 2002 (**LGRA**) and the LGA.

20. Part 1 of the LGRA provides local authorities with the power to set rates. Section 13 contains the general rating power. Section 13(1) provides that a local authority may set a general rate "for all rateable land within its district" (i.e., a general rate applies to all rateable land, or none).

21. The general rate may be set at a "uniform rate in the dollar of rateable value", or at "different rates in the dollar of rateable value" for different categories of rateable land (section 13(2)). The "rateable value" is either the annual value, capital value, or land value of the land (section 13(3)). The categories of rateable land for differential rates must be set by taking account of the matters in schedule 2 (section 14(b)), which include "the provision or availability to the land of a service provided by, or on behalf of, the local authority" (i.e., whether or not a service is provided to the land) (clause 5 of schedule 2).

22. The authorities that the Council relies upon, including *Woolworths*, relate to the general rating power or its predecessors. However, a defining feature of this case is that the APTR was imposed under the targeted rating power.

23. Section 16 of the LGRA provides for targeted rates. Targeted rates may be set in relation to all rateable land, or only one or more categories of rateable land. Those categories are to be set by reference to schedule 2 of LGRA.

24. Different factors apply when setting the quantum of a targeted rate from those that apply when setting a general rate. Schedule 3 sets out the list of relevant factors that can be used to calculate the targeted rate, which includes annual value, capital value, or land value (as with general rates), and also includes "*the extent of* provision of any service to the rating unit by the local authority, including any limits or conditions that apply to the provision of the service" (emphasis added). Schedule 3 further provides

[26] The remission scheme for serviced apartments would expire on 30 June 2028, with the amount of rate remitted declining in equal steps each year.

that "the extent of provision of a service to the land must be measured objectively and be able to be verified".

25. These factors are notable for two reasons. First, they emphasise that the key purpose of a targeted rate is "to allow councils to align the nature of a service provided more closely with the manner of rating for that service",[27] and that the quantum of a targeted rate should be "approximate to the extent the service is used".[28]

26. The Council's own plans and procedures acknowledge that targeted rates differ from general rates on the basis that targeted rates contemplate a more direct connection between the activity being funded and the ratepayer who is required to fund it. For example, the Council's Long-term Plan for 2012-2022 provided that targeted rates may be used "where there is a clearly identifiable group benefiting from a specific council activity"[29] and that targeted rates were appropriate to fund an activity that "mainly benefits a specific group of ratepayers or where… the benefit of an activity fell on an identifiable subset of ratepayers".[30]

27. Targeted rates are still rates. They are neither a fee nor a tax. Moreover, and contrary to the appellant's characterisation of the Court of Appeal's judgment, there is no suggestion that the benefit to be provided by the funded activity is the "determining factor" in assessing the rate. The respondents do not say that a perfect cost-benefit assessment is required to justify the rate. However, the fact that a targeted rate is characterised by a connection between the rate and the funded benefit, and affects a small subset of individuals, is relevant both to the interpretation of section 101(3) (addressed by the first and third respondents) and to the approach to be taken to the reasonableness review, as set out in more detail below.

28. Second, the legislative history of schedule 3 discloses Parliament's clear intent that section 16 cannot be used to impose a bed tax. The Select Committee for the LGRA recommended amending schedule 3 to permit local authorities to impose a bed tax, but the Government rejected that recommendation.[31] The APTR is the Council's attempt to circumvent Parliament's intent.

---

27 Local Government (Rating) Bill (149-2) (Select Committee Report) at 10.
28 Local Government (Rating) Bill (149-2) (Select Committee Report) at 11.
29 [JS-09] [exhibits vol 1, tab 16, 301.0232].
30 [MW4-100]-[MW4-101] [exhibits vol 10, tab 12, 310.2267 – 310.2268].
31 When the LGRA was before its Select Committee, the Committee recommended that the "number of visitor stay units within the rating unit" be added as a factor that could

Mandatory relevant considerations under the LGA

29. Targeted rates can only be imposed in compliance with the LGA. Part 6 of the LGA contains the Council's planning, decision-making, and accountability obligations. Subpart 3 contains the Council's financial management obligations. Section 101(3) prescribes mandatory considerations for local authorities when choosing its funding sources. These include, in section 101(3)(a)(iii), the "distribution of benefits between the community as a whole, any identifiable part of the community, and individuals".

30. Section 101(3) is a departure from the previous legislative regime. As the intervener notes, Parliament did not include wording from section 122I(4) of the Local Government Act 1974, which had conferred a broader discretion on local authorities following *Woolworths.* This was despite the Opposition noting that failing to do so would broaden the ability to bring an action for judicial review.[32] Indeed, in introducing the LGA, the Minister of Local Government said that the LGA would require "greater responsibility from elected members in return for increased legislative flexibility".[33] This suggests greater scrutiny is required when applying section 101 than under the previous legislative regime.[34]

31. As to what section 101 requires, it is well-established that consideration of a mandatory consideration requires "genuine and not merely token or…

---

be used in calculating liability for targeted rates: (Local Government (Rating) Bill (149-2) (Select Committee Report) at 11. The Government rejected that recommendation, because it could have "negative consequences for the continuing development of the tourism industry" ((26 February 2002) 598 NZPD 14627).

32 (17 December 2002) 605 NZPD 2970: "there is one significant omission that I want to put into Hansard, and that is that section 122I recognises the inherently political nature of council judgments. It states: ". . .judgments may reflect the complexity and inherent subjectivity of any benefit allocation for specified outputs and the complexity of the economic, social and political assessments required in the exercise of political judgment concerning rating." That is a direct quotation from the case of *Wellington City v Woolworths*, and its removal from this bill suggests that the Government intends to limit the effectiveness of the discretion of councils ... it shows that this Government believes that resorting to the courts through judicial review should be seen as the mechanism to restrain local government decision-making".

33 (18 December 2001) 597 NZPD 14127.

34 See also *Whakatane District Council v Bay of Plenty Regional Council* [2010] NZCA 346, [2010] 3 NZLR 826 at [17]-[21], where the Court of Appeal canvassed Hansard and the legislative history to the LGA, and stated "while the narrow constraints of the former legislation were abandoned they were not replaced by a simple power in the elected local authority to do what it thought best in the interests of its community … The background of a prescriptive regime replaced by one subject to elaborate conditions does not suggest that the prescription of s 78 may be read down because compliance would be overdemanding". The facts of the case are notable; the Council was held to have failed to comply with mandatory decision-making requirements of the LGA when it had made a decision in principle before carrying out any consultation (even where that decision was based on independent, expert advice).

superficial regard".[35] Failing to take account of a mandatory consideration is a ground for review.[36] The Council was therefore required to inform itself adequately regarding mandatory considerations (and will have failed properly to take account of it if it did not obtain that information).[37] As Heron J held in a rating case under the previous regime, the Council cannot "shut its mind to attempting to apportion and value services that it rendered".[38] Lip service is not enough.

32. The second and fourth respondents respectfully agree with the Court of Appeal's conclusion that the Council failed to comply with this section, because it failed to give any meaningful consideration to the benefits to the affected ratepayers of the activity funded by the APTR. This is addressed in more detail in the first and third respondents' submissions.

The law: unreasonableness

33. 26 years ago, the Court of Appeal applied the deferential and dated approach in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 to a challenge to general rates in *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537. It held that a deferential approach to general rate-setting decisions was justified by the legislative scheme then in force, and the political nature of the general rating power. In the course of that judgment, Richardson P made wide-ranging (partly obiter) observations, on which the Council places heavy reliance on in this case. The second and fourth respondents submit that this reliance is unjustified. They respectfully submit that *Woolworths* must be understood in context, and considered now in light of more relevant legal principles and differences in fact between the two cases. The Court of Appeal was correct to not dogmatically apply *Woolworths* to this proceeding simply because the decision involved the setting of a rate.

---

35 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA). See also Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, 2018) at [15.56]; and Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters, 2016) at [63.1.2].

36 *Berryman v Solicitor-General* [2008] 2 NZLR 772 (HC) at [84].

37 Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, 2018) at [15.53] - [15.54].

38 *South Waikato District Council v Electricity Corporation of New Zealand* HC Wellington CP 16-93, 18 August 1994 at 33.

Woolworths in context

34. *Woolworths* followed a series of decisions in which the Electricity Corporation of New Zealand (**ECNZ**) successfully challenged general rating decisions. Those cases better recognised that, even applying a *Wednesbury* test, local authorities owed fiduciary duties to all of their ratepayers when setting rates to be "fair and reasonable when considering whether to introduce a differential rate and if so, on what basis and in what amount".[39] In *MacKenzie District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 41 at 47, the Court of Appeal held that a council's fiduciary obligations included the requirement to consider "the relationship between the prospective incidence of rates on that ratepayer and the benefits that ratepayer could be expected to derive as a member of the community." In *South Waikato District Council v Electricity Corporation of New Zealand* HC Wellington CP 16-93, 18 August 1994 at 33, the Council was said to have "shut its mind to attempting to apportion and value services that it rendered" and failed to consider differential rating "in any quantitative way."

35. *Woolworths* was a different type of case. Unlike the ECNZ cases concerning a small subset of ratepayers being targeted by a rate, the case involved a challenge to a more generalised balancing decision: the differential to be applied to residential and commercial properties. The apparent purpose of Richardson P's extensive obiter observations in that case was to deter this type of challenge.[40] Richardson P expressly distinguished the situation for targeted (then "separate") rates.[41]

---

39 *Electricity Corporation of New Zealand Ltd v Waimate District Council* HC Christchurch CP 47-90, 27 March 1992 at 36.

40 Richardson P repeated similar comments in *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (a one-sided decision which is of more interest for the prescient observations of Thomas J about the need for the courts' approach to judicial review to develop beyond *Wednesbury*). Following a settlement between the parties, the Court of Appeal heard argument only from the appellant. In the High Court, where the matter had been fully argued, the ratepayers had succeeded in challenging a general rate as being unreasonable: *Lovelock v Waitakere City Council* [1996] 3 NZLR 310.

41 At 542: "By contrast, special purpose authorities are directed to take account of the benefits that are in the opinion of the authority likely to accrue, directly or indirectly, to any property from the work or service in respect of the separate rate in respect of which the separate rate is to be made … The legislature did not see the same need to link the differential power of territorial authorities to consideration of relative user benefits …". Richardson P also noted at 542 that, unlike the current position under section 101(3) of the LGA, the general rating power was expressed "in the broadest terms and without any direction as to purposes or factors for consideration".

36. It is submitted that Graham Taylor was correct to identify *Woolworths* as a hard case making bad law.[42] However, in any event, it does not (or ought not) to bear the weight that the appellant would place on it.[43] There is a question as to whether *Woolworths* would be resolved the same way today, in light of more recent developments in administrative law (as set out below). But even if the case is accepted on its terms then the Court of Appeal in this proceeding was correct to conclude that the considerations relevant to the Court of Appeal in *Woolworths* do not apply with equal force to decisions affecting small groups of targeted ratepayers. Those ratepayers are entitled to all of the usual modern administrative law protections against administrative measures which bear unjustifiably on their rights. *Woolworths* was not a controlling authority for the Court of Appeal in this proceeding, and of course does not bind this Court.

Unreasonableness review since 1996

37. The 26 years since *Woolworths* has seen significant development in the law relating to unreasonableness review. At the heart of that development is the recognition that unreasonableness review requires a fact-specific inquiry into context. As Lord Mance said in *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455 at [51]:[44]

> [T]he common law no longer insists on the uniform application of the rigid irrationality once thought applicable under the so-called *Wednesbury* principle… The nature of judicial review in every case depends on the context.

38. The High Court of Australia affirmed a similar approach at around the same time, observing that the strict approach sometimes attributed to *Wednesbury* is not found in the case itself. In *Minister for Immigration v Li*

---

42 Graham Taylor *Judicial Review A New Zealand Perspective* (4th ed, LexisNexis, 2018) at [14.42].

43 For the same reason, the second and fourth respondents respectfully disagree with how *Woolworths* has sometimes been referred to by the High Court, more often than not in passing, and without reference to the obiter nature of much of Richardson P's observations or the significant changes in law and the LGA since then. See in the rating context *Meridian Energy Company v Wellington City Council* [2017] NZHC 48 and *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437 (CA), and more detailed consideration in *Kidd v Southland District Council* [2019] NZHC 1947. It is respectfully submitted that the Court of Appeal was correct not to adopt the reasoning in *Kidd*.

44 Lords Neuberger of Abbotsbury and Clarke of Stone-cum-Ebony agreed with Lord Mance.

(2013) 249 CLR 332 at [68], a plurality of the High Court of Australia[45] (Hayne, Kiefel, Bell JJ) said of the *Wednesbury* test that:

> Lord Greene MR's oft-quoted formulation of unreasonableness in *Wednesbury* has been criticised for "circularity and vagueness", as have subsequent attempts to clarify it. However, as has been noted, *Wednesbury* is not the starting point for the standard of reasonableness, nor should it be considered the end point. The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in *Wednesbury*. This aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified. This is recognised by the principles governing the review of a judicial discretion, which, it may be observed, were settled in *Australia by House v The King*, before *Wednesbury* was decided.

39. These decisions reflect the fact that unreasonableness in administrative law is a relative concept. When an administrative action affects important rights, reasonableness demands a sufficient justification (or, to put it another way, it is unreasonable to interfere with a fundamental right without a compelling justification). Cases that involve a potential abuse of important personal rights therefore merit closer scrutiny than cases that do not. In such cases the Court should more willing to require cogent evidence to demonstrate that the decision was one that a reasonable authority could reach.[46]

40. This has, in practice, been the position adopted in New Zealand for some time. These policy considerations are sometimes discussed in terms of the intensity of the review to be applied by the Court, or the extent of deference it should show to the decision-maker's conclusion. In New Zealand, it tends to be discussed in terms of the importance of context to assessing the reasonableness of a decision. By 2004, Wild J confirmed that the *Wednesbury* is not the invariable or universal test of unreasonableness; rather, the reasonableness of a decision will depend on the nature of the decision, who made it, by what process, its subject-

---

[45] See also Paul Daly "The *Vavilov* Framework and the Future of Canadian Administrative Law" (2020) 33 Can J Admin L & Prac 111 for a summary of the Canadian position.

[46] The appellant emphasises that the role of the Court in judicial review is not to substitute its own judgment for that of the decision-maker. That is true. Even at its most exacting, an unreasonableness review does not call for substituted decision-making in that sense. What it does call for is inquiry as to the adequacy of the decision-maker's reasoning and the reasonableness of its conclusion. The Council's submission blurs these two issues. It implicitly suggests that the Court cannot exercise effective controls on abuses of local authorities' rate-setting powers without substituting its judgment for that of the local authorities. That is incorrect.

matter and policy content, and the importance of the decision to those affected.[47] Other examples include:

(a) *Watson v CE of Department of Corrections* [2015] NZAR 1049 at [25]:

> [T]he Courts "now adopt a somewhat lower standard of unreasonableness than 'irrationality' in the strict sense", and "the New Zealand Courts had loosened the bounds well beyond *Wednesbury* unreasonableness" …

(b) *Hu v Immigration and Protection Tribunal* [2017] NZAR 508 at [27], in which the Court held that *Wednesbury* was overly restrictive and agreed with Lord Cooke that *Wednesbury* was:

> an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation.

(c) *Joseph on Constitutional and Administrative Law*, which states that:[48]

> the sliding threshold and variable intensity of unreasonableness review are now thoroughly orthodox. In reality, there has never been a single, universal standard of unreasonableness. The narrow definitions of Lord Green (*Wednesbury*) and Lord Diplock (*Council of Civil Service Unions v Minister for the Civil Service*) distorted the legal focus. As early as 1598, it was established that the ground might be invoked according to what is fair and reasonable. … The law did not require manifest absurdity.

(d) *De Smith's Judicial Review*, which notes that "the intensity of review will differ, for the reason that 'in public law', context is all'".[49]

41. Particular deference may be justified when the decision involves matters that the Court is ill-equipped substantively to consider. For example, the Court may defer to decision-makers who are vested with the decision-making power because they have particular expertise that others, including the Court, do not. The Court may also tend to defer to elected officials on issues such as national security, or on moral issues. However, even in those cases, contextual inquiry is important. The fact that it is

---

47 *Wolf v Minister of Immigration* [2004] NZAR 414 (HC), approved by the Court of Appeal in *Quake Outcasts v Minister of Canterbury Earthquake Recovery* [2017] 3 NZLR 486 (CA).

48 Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, 2021) at 1074.

49 Harry Woolf et al *De Smith's Judicial Review* (8th ed, Thomson Reuters, 2018) at [11-024] and [11-087].

made by elected members of the Governing Body of Auckland Council cannot make an unreasonable decision reasonable.[50]

42. A decision to impose a targeted rate does not call for special deference. Targeted rates differ from other types of decisions by local authorities, including general rating decisions.[51] In particular:

(a) Unlike general rating decisions (which fund the myriad services and activities that local authorities perform), or broad resource allocation decisions, the Decisions in this case directly affect the rights of a small and identifiable group of people and were made to fund a specific and identified activity. Although not of the same type as fundamental human rights or rights to liberty, the sudden imposition of rates of the magnitude of the APTR (which amounts to more than a million dollars per year for some of the ratepayers who pay the majority of it) is a very significant intrusion that ought to attract scrutiny from the Court.

(b) Against that, the democratic protections relied on by the appellants have less purchase when the rights of a small minority are involved. The fact that the majority wish to confiscate the property of a minority is not itself enough to justify special deference from the Court; rather, that is precisely when administrative law should require justification for the exercise of the decision-making power. That is not to say that the Court ought to replace its own judgment with that of the decision-maker, because the decision rests squarely with the local authority, but it is to say that the Court ought to be

---

50 See *De Smith's Judicial Review* at [11-010 – 11-011] for a discussion of the relevance that a decision is made or approved by an elected body, or forms part of a political manifesto: "…the courts should not automatically defer to the legislature as they would thus be abdicating their own fundamental responsibility to determine whether the matter in question is lawful… A manifesto commitment may be relevant evidence of the reasonableness of a decision which permits a range of lawful causes of action. It should never, however, be taken as conclusive proof of reasonableness, as other factors may be weighed against it".

51 This is consistent with the approach now taken in England, where the courts have shown decreased deference for public authorities, and an increased willingness to engage in heightened scrutiny (including of any supporting scientific evidence) even of "administrative decisions that involve discretionary allocative choice". See Daniel Wang "From Wednesbury unreasonableness to accountability for reasonableness" [2017] 76 CLJ 642 at 643: "This case law actually shows a judiciary that, although still sensitive to the financial and distributive issues facing policymakers, is not easily impressed by their constitutional authority and expertise, and that is willing to scrutinise procedural fairness, policy considerations and scientific evidence of rationing decisions".

ready and willing to assess substantively whether the power has been exercised in a reasonable way.[52]

43. In terms of the content of the Court's review, it is submitted that the law has generally returned to the position long advocated by Lord Cooke, i.e. that assessment of reasonableness does not benefit from adding epithets like "perverse".[53] Without detracting from that over-arching proposition, of particular relevance to this case are the well-established principles that:

(a) A decision will be unreasonable if the facts cannot support it, as in *Lewis v Wilson & Horton* [2000] 3 NZLR 546 (CA) at [63]. Similarly, as the High Court concluded in *Kim v Minister of Justice* [2017] 3 NZLR 823 (HC) at [17], it is necessary for a decision to be supported by sufficient information, the absence of which may be treated as a matter of reasonableness, or as error of law.

(b) A decision will be unreasonable if it is arbitrary. For example, in *Wellington City Council v Minotaur Custodians Ltd* [2017] 3 NZLR 464 (CA) at [55] the Court of Appeal held that "those exercising statutory discretions must exercise them consistently, treating like-cases alike. This is usually framed as an aspect of rationality".[54] If the Council failed to obtain the information rationally required to support its decision, unreasonably failed reasonably to treat like cases alike,[55] or generated unreasonable outcomes for the targeted ratepayers (accepting the ordinary vicissitudes of rating outcomes), then the Decisions were unreasonable. The Court of Appeal also confirmed that the requirement that the Council act rationally is inherent in the LGA. To the extent that the Council submits that the

---

[52] See, for example, Harry Woolf et al *De Smith's Judicial Review* (8th ed, Thomson Reuters, 2018) at [11-007]: "even where the courts recognise their lack of relative capacity or expertise to make the primary decision, they should nevertheless not easily relinquish their secondary function of probing the quality of the reasoning and ensuring that assertions are properly justified".

[53] Robin Cooke "The Struggle for Simplicity in Administrative Law" *Victoria University of Wellington Legal Research Paper Series*, Cooke Paper No. 34/2016 at 14. See also *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 at 403 per Thomas J: "Epithets designed to import a spurious veil of objectivity into the exercise will obscure rather than advance the true operation of the Court's function".

[54] See also *Matadeen v Pointu* [1998] UKPC 9, [1999] 1 AC 98, 109 per Lord Hoffmann "treating like cases alike…. is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review ...".

[55] The appellants submit that this principle has particular purchase in tax cases. As the Court of Appeal held in *Reckitt and Colman (New Zealand) Ltd v Taxation Board of Review* [1966] NZLR 1032 (CA) at 1042: "… It is of the highest public importance that in the administration of [revenue] statutes every taxpayer shall be treated exactly alike, no concession being made to one to which another is not equally entitled."

breadth or context of its rate-setting power excludes or limits the usual duty to exercise power reasonably (and the associated judicial oversight by way of judicial review), that is impossible to reconcile with either statute or recent Court of Appeal authority.

44. Similarly, the authors *De Smith's Judicial Review* elaborate on three categories of unreasonableness: a material defect in the decision-making process (which includes where the decision is based on considerations that have been afforded manifestly inappropriate weight, or where the decision is supported by inadequate reasons or evidence, or where a material fact has been disregarded);[56] violations of common law rights or constitutional principles; and oppressive decisions. The authors give a notable example of a decision[57] that was held to be oppressive and unreasonable because it required the owners of a seven acre plot of land to pay for public services that also benefited a broader group of landowners, who collectively owned 800 acres of nearby land.[58]

45. Other "indicia of unreasonableness"[59] include illogicality, disproportionality (in the sense that the means to achieve an object imposes costs on an individual that substantially outweigh the benefits), inconsistency with the terms, purpose of policy of the statute, differential treatment (in the sense of similar circumstances producing inconsistent results), and unjustifiable changes in policy. The second and fourth respondents respectfully submit that all the APTR bears all five of these indicia.

The Queensland cases cited by Auckland Council

46. In its submission, the Council refers to cases from Queensland in support of its submission that the Court ought to be especially deferential to rating decisions. It refers particularly to the judgment of Jackson J in *Island Resorts (Apartments) Pty Ltd v Gold Coast City Council* [2021] QCA 19*,* in respect of the asserted similarity between rating powers and taxation powers.

---

56 Harry Woolf et al *De Smith's Judicial Review* (8th ed, Thomson Reuters, 2018) at [11-024] and [11-051].

57 Also referred to in Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, 2021) at 1074.

58 Harry Woolf et al *De Smith's Judicial Review* (8th ed, Thomson Reuters, 2018) at [11-071]: "Imposing an uneven burden. A very early case involved the Commissioner of Sewers imposing on one landowner alone charges for repairs to a river bank from which other riparian owners had also benefited. This decision was held to be contrary to the law and reason", referring to *Rooke's case* (1598) 5 Co Rep 99b.

59 Paul Daly, "Wednesbury's Reason and Structure" 2011 PL 238 at 254.

47. Those Queensland cases ought to be distinguished. There are significant differences between the LGA and the Local Government Act 2009 (Qld), and the facts of those cases and this one. In particular, those cases concern general differential rates, as in *Woolworths*. There is no analogue of section 101 in the Australian legislation, and very little constraint at all on the imposition of general (including differential) rates. The Court in *Ostwald Accommodation Pty Ltd v Western Downs Regional Council* [2015] QSC 210 emphasised that there was *no* statutory constraint on the power to decide rating categories (at [59], [61], and [75]). In *Island Resorts*, the Queensland Court of Appeal questioned whether rating decisions should even be subject to judicial review under the applicable legislation (at [21] and [22]). That is not the approach taken to judicial review of rate-setting cases in New Zealand.

48. The Queensland legislative provisions and cases on "special rates" (the Queensland equivalent to targeted rates) are more in point. Under those provisions, a special rate can only be imposed if the land or its occupier specially benefit from the activity to be funded.[60] The drafting of those provisions is similar to section 16 of the Rating Powers Act 1988, the predecessor to section 16 of the LGRA.[61]

49. Rates have been challenged in Australia on the basis that they fall outside of the special rating power. The law applicable to judicial review of special rating decisions was summarised by the Queensland Supreme Court in *Leagrove Pty Ltd v Gold Coast City Council* [2010] QSC 370, a case involving an unsuccessful judicial review of special rating decisions in circumstances where the Council had engaged two independent consultants to assess the extent to which certain rateable land received a special benefit from the activity being funded.

50. The Court noted at [10] that "the principle of requiring owners of land benefited by works carried out by public authorities to pay for the special benefit to the land originated in the Sewers Act passed in England in 1427 in the time of Henry VI ...". It then outlined the relevant High Court of

---

[60] See section 92 of the Local Government Act 2009 (Qld) and its predecessor in relation to special rates, section 971 of the Local Government Act 1993 (Qld).

[61] Section 16 of the Rating Powers Act 1988 provided that a territorial authority could impose a separate rate to fund a "specified function or work" or "specified service" that was "for the benefit of all or part of the district". Separate rates had to be imposed on every rateable property that benefited from the "function or work or service".

Australia and Privy Council authorities on special rates and charges, and summarised the principles to be taken from these authorities at [36]:

1. The relevant opinion[62] as to whether or not a service, facility or activity specially benefits the land or the occupier of the land, the subject of the special rate, is the opinion of council;
2. The opinion must in fact be held;
3. The opinion need not be sound but must be reasonably open;
4. To be reasonably open, the opinion must be reasonably formed;
5. The opinion cannot be reasonably formed if some land is included where the land or its occupier does not specially benefit;
6. The opinion cannot be reasonably formed if some land is excluded where the land, or its occupier, specially benefits to a similar extent as included land: the council cannot pick and choose among lands that would be specially benefited;
7. The opinion cannot be reasonably formed if the council has taken into account irrelevant considerations or failed to take into account relevant considerations;
8. The opinion cannot be reasonably formed if it is so unreasonable no reasonable council could have formed that opinion.

51. Neither *Leagrove* nor any of the authorities on special rates that it discussed were cited in *Ostwald* or *Island Resorts*, because the principles that apply to challenges to general rates are different from those that apply to challenges to special rates.

52. *Leagrove* and the authorities cited in that judgment demonstrate that, even where judicial review legislation enshrines the *Wednesbury* test as the test of reasonableness,[63] compliance with the legislative requirements is assessed robustly and factually. The Court is able to be respectful of policy-based decisions by elected officials while also complying with its duty to ensure that powers are exercised lawfully according to the empowering legislation.[64] In the case of a special rate, this includes

---

62 This case was decided under section 971 of the Local Government Act 1993 (Qld), which required only that there be a special benefit "in the local government's opinion". Section 92(3) of the Local Government Act 2009 (Qld) no longer refers to the opinion of the local government. Section 92(3)(a)(i) provides that "special rates and charges are for services, facilities and activities that have a special association with particular land because …the land or its occupier specially benefits from the service, facility or activity…".

63 Section 20(2)(e) of the Judicial Review Act 1991 (Qld) provides that an application for judicial review can be made where "the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made", and section 23(g) provides that a reference to "and improper exercise of a power" includes "an exercise of a power that is so unreasonable that no reasonable person could so exercise the power".

64 See, for example, *Parramatta City Council v Pestell* (1972) 128 CLR 305 at 322-323 per Menzies J: "The section does not authorize a council to pick and choose among lands that would be specially benefited"; *Western Stores Ltd v Council of the City of Orange* [1973] AC 774 at 783: "What is essential … is a correlation in the opinion of the council between the portion benefited and the portion rated, a correlation which, as

analysing whether the local authority properly considered whether those targeted by the special rate actually benefit from the activity being funded.

The Decisions were unreasonable

53. The second and fourth respondents submit that the Decisions bear the hallmarks of unreasonableness identified in the authorities above. There are six considerations which, individually and collectively lead to the conclusion that the Decisions were unreasonable. In summary, the Council failed to appreciate or fulfil its fiduciary obligation when it targeted a rate at a small subset of its ratepayers without any meaningful attempt to objectively identify any benefit to those ratepayers from the activity being funded, and without regard to the disproportionality and inequity of the impact of the rate on that subset.

54. First consideration: Pass-through. The second and fourth respondents say that the Decisions were unreasonable in relying on the false "pass-through assumption". That error compromised Council's proper consideration of basic elements of cause/benefit/proportionality and its fiduciary obligations. As Dr Small explained in his evidence, because the APTR is a fixed cost, the economic cost will fall with the business, not the guest.[65] Commercial accommodation providers are already optimising the prices charged for their rooms; layering on a new fixed cost will not affect what prices are achievable in the market.[66] He contrasts this to a bed tax, which, as a variable cost, can be passed to consumers. Dr Small explained that this is uncontroversial from an economic perspective. This conclusion was supported by evidence from an industry expert, Mr Stephen Hamilton.[67] He explained that prices are influenced by what matters to guests, direct and indirect competition, and the level of demand. Pricing in this market is particularly sophisticated, dependent on algorithms, and revenue managers are now one of the most business-critical roles in the hotel industry. Mr Hamilton illustrates the point with market data, which confirms that the price of accommodation is *not* sensitive to the cost of owning the accommodation assets. It is not a cost-

---

appears from both cases, is to be judged according to the nature of the benefit alleged".

65 Dr Small explains that fixed costs may affect shut-down and investment decisions, because they contribute to the overall viability of a business, but they do not affect what prices a business is able to charge in a competitive market: see Small 1 at [35]-[36] [evidence vol 1, tab 4, 201.0043-201.0044].

66 Small 1 at [42] [evidence vol 1, tab 4, 201.0045].

67 Hamilton 1 at [30] [evidence vol 1, tab 5, 201.0081].

plus exercise. This was supported by extensive factual evidence from accommodation providers.[68]

55. The flaw in the pass-through assumption, and the unreasonableness of the result, is vividly illustrated by the COVID crisis. When tourist numbers fall, accommodation businesses cannot raise prices and recoup the APTR from the remaining visitors, any more than they could raise prices to recoup the new APTR in 2017. Unlike a bed tax or visitor levy, the APTR is insensitive to the occupancy of the business. It is set by reference to a metric (capital value) that has nothing to do with benefit generated by the activity it funds. If the pass-through assumption were correct, this would matter much less because the hotel would collect the rate, not pay it (which is precisely how it was referred to in some Council documents). But this is simply not the case.

56. Second consideration: The overall contribution that accommodation providers make to tourism promotion and major events activity. Unlike other parts of the tourism sector, accommodation providers already make significant contributions to the outcomes that the funded activity is intended to promote.[69] Council failed to identify the extent of this contribution to the stimulation of room nights also pursued by ATEED. When considered together with the APTR, this highlights the unreasonable outcome for accommodation providers.

57. Third consideration: The actual and measurable benefits of ATEED's activities to commercial accommodation providers. As the first and third respondents' submissions outline in more detail, the Council failed to analyse the actual and measurable benefits to accommodation providers of the funded activity. A reasonable decision to impose a targeted rate requires a reasonable justification in terms of the benefit vs. the cost to the targeted ratepayer. This does not require precision, but it does require a sufficiently objective foundation to justify singling out a small subset of ratepayers for the imposition of a very substantial cost, especially when the decision is not primarily conducted for their benefit. The fact that the allocation involved "policy" or "political" judgement does not make it reasonable, nor does it provide the necessary foundation of reasonableness for a targeted rate decision. The evidence is that the

---

[68] See, for example, Luxon 1 at [107] [evidence vol 1, tab 7, 201.0142 – 201.0143]; Fisher 1 at [20]-[25] [evidence vol 1, tab 6, 201.0112 – 201.113]; and Clarry 1 at [37] [evidence vol 1, tab 1, 201.0010 – 201.0011]. There are many other examples.

[69] See, for example, Luxon 1 at [72]-[92] [evidence vol 1, tab 7, 201.0135 – 201.0138].

APTR caused real prejudice to affected ratepayers, not supported by the benefits assumed by the Council.[70]

58. Fourth consideration: Like cases are not treated alike. The Council's evidence disclosed that it took no meaningful steps to understand that the APTR would apply and did apply unfairly and arbitrarily, and that it creates real inequity for accommodation providers for the reasons outlined below.

59. *Horizontal inequity #1: Accommodation sector v other sectors:* The APTR creates a stark difference between sectors that Council asserted were benefitting from the funded activity. As the Council has acknowledged, the accommodation sector receives (at very best) around 10% of tourism revenue.[71] As already noted, it ranks *fifth* on the list of tourism spending recipients. The retail and food and beverage sectors together receive about five times the tourism spend of the accommodation sector, but do not pay a dollar towards the targeted rate. Accommodation providers have been unreasonably targeted.

60. *Horizontal inequity #2: Formal v informal accommodation providers:* In 2017/2018, the informal accommodation sector did not pay the APTR at all. The evidence filed by the appellants highlights the scale of the inequality that created, both in terms of the APTR, and also because the informal sector tends already to pay less rates, because they are rated as residential rather than commercial properties. Council undertook no analysis of the different rate burden carried by different parts of the market assumed to benefit.[72]

61. The position has been unfair in a different way since 2018/2019. The Council introduced a version of the APTR for the "online" sector.[73] This

---

70 See, for example, Fisher 1 at [26] [evidence vol 1, tab 6, 201.0113]; Clarry 1 at [37] [evidence vol 1, tab 1, 201.0010 – 201.0011]; Ranson 1 at [10] [evidence vol 1, tab 13, 201.0187].

71 Mr Hamilton's assessment is that accommodation providers' actual share is closer to 6 – 6.5%: at [59] [evidence vol 1, tab 5, 201.0091- 201.0092].

72 The most direct comparisons arise in the context of buildings used for commercial accommodation, where the units are owned in individual strata titles. For example, Mr Fisher explained that units 15C and 14D in the Pullman Residences are physically similar, and yet one paid rates of $2,889.71 and the other $15,786.34 ($7,180.70 of which was the APTR). Similarly in the Sofitel Auckland, comparable units paid in rates $1,653.09 (unit 640/21) vs. $6,390.28 (of which $2,555.84 was the APTR) (see Fisher 1 at [28] [evidence vol 1, tab 6, 201.0113 – 201.0114]).

73 The APTR did not apply if a unit was used up to 28 nights in the year, 25% of the APTR applies if the property is located within the APTR zone and used between 29 and 135 nights, 50% of the APTR applies if the property is located within the APTR zone and used between 136 and 180 nights booked, and the APTR applied in full if a unit was booked more than 180 nights in a year: [KL-37] [evidence vol 21, tab 9, 321.4517]; and MW4-201 [exhibits vol 21, tab 8, 321.4495].

new regime created two horizontal equity concerns. The first was that the Council could not collect the APTR because it did not have the information it needs to identify informal accommodation providers, or identify which band they fell into.[74] Secondly, on any basis, informal providers were treated differently. Unlike formal accommodation providers, their APTR depended in part on occupancy. As well as being inherently unfair, this also creates odd incentives.[75]

62. *Horizontal inequity #3: Freehold v strata title.* The APTR is assessed by reference to the capital value of the rating unit. That creates real inequity for properties that are divided into strata titles; the sum of the value of units owned in strata titles tends to be higher than the value of hotels owned in one title, which means that the APTR created an unjustifiable competitive disadvantage for strata-titled developments divorced from any level of benefit. The Council did not attempt any meaningful analysis of the market distortion or prejudice that the APTR would cause, in circumstances where that information was available, and so failed to consider the consequences and reasonableness of that distortion.

63. *Horizontal inequity #4: Backpacker and camping accommodation:* Backpacker and camping accommodation was excluded from the APTR, notwithstanding that they are accommodation providers in their own right and compete directly with other accommodation providers. The Council did not undertake any meaningful assessment of that effect on the market or consideration of its reasonableness.

64. *Horizontal inequity #5: Owners v operators:* The APTR applied to rating units regardless of who controlled the accommodation business operated on the property. This meant that owners that have leased their properties to a third party, or hired accommodation managers, had to pay the APTR even though they did not participate in the hotel business. There is no way that such owners can pass through the APTR. The Council attempted to address this consequence via its remissions policy, but the

---

74 Ms Heath admitted that, at the start of the rating project, the Council did not have any data on which properties were used for online accommodation (Heath at [26] [evidence vol 3, tab 8, 203.0585]). She confirms that the Council cannot identify every relevant body corporate (Heath at [20] [evidence vol 3, tab 8, 203.0583]), and it follows that the Council could not hope to identify and contact every property that did not form part of a body corporate.

75 As Dr Small explains, this both discourages supply and encourages a concentration of supply at the times when the room rates will be highest, which in turn diminishes the key benefit said to be generated by the APTR (see Small 3 at [8(b)] [evidence vol 3, tab 10, 203.0607].

number of remissions that have been granted shows the extent of the problem: in 2017/2018 around 35% of all APTR properties were granted some degree of remission. In any event, reliance on an unformed expectation of how the remissions policy might be used cannot cure the unreasonableness of the Decision, and, as it turns out, the remissions policies were inconsistently applied and not effective in addressing the issue.[76]

65. The position in 2018/2019 was slightly different, because the Council did then have a remission policy for the APTR. However, it is only available to those who own 2 units or fewer, and it phases out over 10 years. As the witnesses explained, this policy too fails to address the unfairness inherent in the rate. The 2-unit limit is arbitrary, treats competitors differently to one another, and does not even achieve its goal of excluding only sophisticated investors (because "mum-and-dad" investors who own 3 units are excluded).[77]

66. Fifth consideration: The APTR was implemented without sufficient consideration of a less discriminatory regime. No Council acting reasonably could have imposed the APTR without first adequately considering the possibility of a less discriminatory regime. The Council did not do so, likely because of the Mayor's political commitment.

67. Mr Wood explains that the Mayor pursued the APTR based on advice from ATEED that the tourism and hospitality sector "was backing away from any commitment to a voluntary (opt-in) funding option".[78] That cannot be reconciled with the evidence provided by accommodation providers, or the evidence sworn by the General Manager of ATEED for the Council. Mr Armitage says that ATEED eventually came to the view that it may be best to focus on a voluntary percentage contribution by hotels and attractions paid into an ATEED administered fund with shared governance with representatives of the business sector. This is the type of engagement that the accommodation providers sought throughout the

---

[76] Mr Russell gives an instructive example: see Russell from [25] [evidence vol 1, tab 2, 201.0019]. The Adina Hotel is operated by a third party manager. The owner bears all "fixed expenses", including rates, but control of the business stays with the manager. This is precisely the situation that the Council says can be addressed with remissions. However, the Council refused to make any remission on the basis that "the council does not consider it appropriate to require general ratepayers to subsidise these commercial decisions through a remission".

[77] Roberts 2 at [20] [evidence vol 2, tab 8, 202.0469].

[78] Wood 1 at [21] [evidence vol 2, tab 3, 202.0326].

process.[79] This option was always – and remains – open. The Council should have made a genuine attempt to explore it.

68. Sixth consideration: Inadequate information about the properties to be rated. At the time the Council made the 2017/2018 Decision and the 2018/2019 Decision, the Ratings Information Database maintained by the Council for the purposes of the LGRA did not contain the information necessary to assess the APTR. This is particularly acute for the 2018/2019 year, when the rate was intended to apply to informal accommodation providers. At the time the 2018/2019 rate was struck, the Council had only identified around 1,230 of the estimated 11,300 informal accommodation providers that ought to have been liable.[80] The absence of any realistic ability to identify and levy the rate on such a large proportion of the market: heightens the horizontal inequity outlined above; is, in any event, a substantive objection to the lawfulness of the APTR; and evidences Council's precipitous approach which denied it time to identify and sufficiently inform itself on the relevant issues.

69. All of this has very real financial, and often personal, effects for the targeted ratepayers. The Court of Appeal observed that in the case of the second respondent and its three Auckland hotels the rates increase attributable to the APTR was in excess of $1 million in the 2017/2018 year alone.[81] In the case of the Heritage and City Life hotels, the result was that Auckland Council rates accounted for 8% of the businesses' revenue (before remissions) in the 2017/2018 year, and then in the 2018/2019 year the rates increased by *another* 41.6% (most of which was the APTR).[82] The Crowne Plaza's evidence was that the APTR alone in 2017/2018 was $461,991.69, which amounted to a 70% increase in its rates.[83]

---

79 Mr Armitage gives evidence of meetings with a range of industry stakeholders in September and October 2016 (i.e. immediately prior to Mr Goff's election to discuss a voluntary model): Armitage from [58] [evidence vol 2, tab 5, 202.0401]. There is no suggestion in Mr Armitage's evidence of advice to the Council that the sector was "backing away". See also Mr Roberts of TIA (Roberts 2 at [7]-[8] et seq [evidence vol 2, tab 8, 202.0466 – 202.0467]) and Mr Luxon of MCK (Luxon 2 at [29]-[33] et seq [evidence vol 3, tab 4, 203.0531 – 203.0532]).

80 Heath at [28] [evidence vol 3, tab 8, 203.0585]; and Hamilton 3 at [29] [evidence vol 3, tab 12, 203.0622 – 203.0623].

81 Court of Appeal judgment at [62] [pleadings, tab 12, 102.0282].

82 Yan 1 at [14]-[16] [evidence vol 1, tab 14, 203.0585]; Yan 2 at [4] – [5] [evidence vol 3, tab 3, 203.0517].

83 Pollock 1 at [12] [evidence vol 1, tab 8, 201.0153].

70. The application was also supported by evidence from smaller businesses. Wendy Ranson gave evidence on behalf of her business, which operates the Greenlane Motor Hotel. The APTR caused a 62.3% increase in her rates bill in its first year.[84] Her evidence details her explanation of why it was not possible to follow the Mayor's advice and simply raise rates: it is simply not possible for her to recover the rate that way, including because 40% of her business is from government departments and another 40% from large corporates, both of which have agreed fixed rates with her. Even once those contracts expire, competitive tensions prevent increases. It is essential for her to keep investing in the business, to remain attractive to corporate clients, but as a result of the APTR she has had to slow that programme. The APTR compromises her ability to pay a living wage (she notes that the Council itself has promoted the idea that it can do so for its staff). Ultimately, the profits from the motel are her and her husband's personal income. The APTR substantially compromises their personal financial position.

71. The Decisions to impose these rates were unreasonable, by any standard. They were made without any rational foundation; to the extent the Council had any analysis at all it was premised on a pass-through assumption that even its own expert economist does not support.[85] It was disproportionate, in the sense that imposed costs on targeted ratepayers without any meaningful attempt to assess the benefit to them. It was inconsistent with the Council's own policy on targeted rates, and the purpose and scheme of the power to impose targeted rates. And it was an justifiably large and unjustifiably sudden departure from existing policy. The second and fourth respondents do not consider that the strict *Wednesbury* standard of review applies, but, to the extent it does, the Decisions meet it. The Decisions to impose the APTR were not open to a reasonable local authority.

Conclusion

72. For these reasons, the Decisions were unreasonable. Any reasonable decision to impose a targeted rate requires a rational justification in terms of the cost it imposes and the benefit it funds. It is not sufficient to say that a rate is akin to a tax, or is a political decision, and to end the inquiry regardless of the effect of the decision on those targeted by the rate.

---

[84] Ranson at [6] [evidence vol 1, tab 13, 201.0185].
[85] See Court of Appeal judgment at [110] [pleadings, tab 12, 102.0299].

Targeted rates are not the same as general taxes. The APTR resulted from a decision to target a relatively small number of identifiable ratepayers for and because of their identifiable property, to fund an activity of widespread benefit. That is a decision that cannot reasonably be made without a sufficient objective foundation, which the Council did not have.

73. The unreasonableness of the rate is visible in its disproportionality. A subset of accommodation providers pay the rate. The evidence was that accommodation providers are the part of the tourism sector that benefits fifth-most from tourism spending. And accommodation providers pay the rate in unequal amounts, depending on whether they are part of the formal or informal sector, whether they fit the remission criteria, whether they are owned in strata-title or in one line. On any standard of review, the Decisions were unreasonable. The second and fourth respondents respectfully submit that the appeal ought to be dismissed.

A R Galbraith QC / T B Fitzgerald / S R Hiebendaal
Counsel for the second and fourth respondents
13 July 2022

List of authorities

Legislation	
1.	Local Government Act 2002
2.	Local Government (Rating) Act 2002
3.	Local Government Act 1993 (Qld)
4.	Local Government Act 2009 (Qld)
5.	Judicial Review Act 1991 (Qld)
6.	Rating Powers Act 1988
7.	Local Government (Rating) Bill (149-2) (Select Committee Report)
8.	(18 December 2001) 597 NZPD 14127, (26 February 2002) 598 NZPD 14627, (17 December 2002) 605 NZPD 2970
Cases	
9.	*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223
10.	*Berryman v Solicitor-General* [2008] 2 NZLR 772 (HC)
11.	*Electricity Corporation of New Zealand Ltd v Waimate District Council* HC Christchurch CP 47/90, 27 March 1992
12.	*Hu v Immigration and Protection Tribunal* [2017] NZAR 508
13.	*Island Resorts (Apartments) Pty Ltd v Gold Coast City Council* [2021] QCA 19
14.	*Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455
15.	*Kim v Minister of Justice* [2017] 3 NZLR 823 (HC)
16.	*Leagrove Pty Ltd v Gold Coast City Council* [2010] QSC 370
17.	*Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA)
18.	*Lovelock v Waitakere City Council* [1996] 3 NZLR 310 (HC)
19.	*MacKenzie District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 41 (CA)
20.	*Matadeen v Pointu* [1998] UKPC 9, [1999] 1 AC 98
21.	*Minister for Immigration v Li* (2013) 249 CLR 332
22.	*Ostwald Accommodation Pty Ltd v Western Downs Regional Council* [2015] QSC 210
23.	*Parramatta City Council v Pestell* (1972) 128 CLR 305
24.	*Quake Outcasts v Minister of Canterbury Earthquake Recovery* [2017] 3 NZLR 486 (CA)
25.	*Reckitt and Colman (New Zealand) Ltd v Taxation Board of Review* [1966] NZLR 1032 (CA)
26.	*Rooke's case* (1598) 5 Co Rep 99b

27.	*South Waikato District Council v Electricity Corporation of New Zealand* HC Wellington CP 16-93, 18 August 1994
28.	*Watson v CE of Department of Corrections* [2015] NZAR 1049
29.	*Wellington City Council v Minotaur Custodians Ltd* [2017] 3 NZLR 464 (CA)
30.	*Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA)
31.	*Western Stores Ltd v Council of the City of Orange* [1973] AC 774
32.	*Whakatane District Council v Bay of Plenty Regional Council* [2010] NZCA 346, [2010] 3 NZLR 826 (CA)
33.	*Wolf v Minister of Immigration* [2004] NZAR 414 (HC)
Other materials	
34.	Robin Cooke "The Struggle for Simplicity in Administrative Law" *Victoria University of Wellington Legal Research Paper Series*, Cooke Paper No. 34/2016
35.	Paul Daly "The *Vavilov* Framework and the Future of Canadian Administrative Law" (2020) 33 Can J Admin L & Prac 111
36.	Paul Daly "Wednesbury's Reason and Structure", 2011 PL 238
37.	Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, 2021)
38.	Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters, 2016)
39.	Graham Taylor *Judicial review: A New Zealand Perspective* (4th ed, LexisNexis, 2018)
40.	Daniel Wang "From Wednesbury unreasonableness to accountability for reasonableness" [2017] 76 CLJ 642
41.	Harry Woolf et al *De Smith's Judicial Review* (8th ed, Thomson Reuters, 2018)