IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 158/2021

BETWEEN	**AUCKLAND COUNCIL**
	Appellant
AND	**C P GROUP LIMITED**
	First Respondent
AND	**MILLENIUM & 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

SUBMISSIONS ON BEHALF OF APPELLANT

20 June 2022

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1. INTRODUCTION

1.1 On this appeal against the Court of Appeal's judgment of 10 November 2021 (**Judgment**),[1] the appellant's essential submission is that the Judgment was founded on a failure to consider fully and respect the legislative framework within which the relevant rate was set, and the democratic dynamics of setting local authority rates.

1.2 In short, the appellant submits that there was no error of law in its deciding in June 2017, as part of the choice of funding mechanism for its visitor attraction and major events activities carried out by ATEED,[2] to set the Accommodation Providers Targeted Rate (**APTR**) to cover 50% of that expenditure requirement (**Decision**).[3] Nor was the Decision "unreasonable" in the relevant public law sense. Rather, the Judgment erroneously accepted the respondents' invitation for judicial intervention into the political area of rating where very broad powers are conferred on local authorities under legislation founded on the importance of democratically accountable local decision-making.

1.3 More particularly, the Judgment focused narrowly on s 101(3)(a)(ii) of the Local Government Act 2002 (**LGA**), and the asserted "pass through" assumption, without meaningful discussion of the taxing and quasi-legislative nature of the rating decision, the wider statutory context (including the breadth of relevant considerations and of the discretion to quantify or calibrate different rates and their impacts), and the relevant jurisprudence (in particular, the leading and longstanding *Woolworths*[4] analysis).

1.4 In jurisprudential terms, the appellant submits that the Judgment erred in failing to treat the Decision as well within the scope of the longstanding *Woolworths* approach.[5]

> Rating is essentially a matter for decision by elected representatives following the statutory process and exercising the choices available to them. The breadth and generality of the empowering provisions applying to territorial authorities and

1 C P *Group Ltd v Auckland Council* [2021] NZCA 587 (**Judgment**) [[**102.0257**]].
2 Auckland Tourism, Events and Economic Development Limited, a Council controlled organisation (**CCO**). For the purpose of these submissions the activities are referred to as "visitor attraction" activities.
3 The Decision was made in two rating years: 2017/2018 and 2018/2019.
4 *Wellington City Council v Woolworths New Zealand Ltd (No 2)* 1996 2 NZLR 537 (CA) (***Woolworths***).
5 At 552, lines 28 – 36.

> affecting the general rate and differential rating (in contrast with user charges and special purposes authorities), make it clear that rating was not intended to be a calculation of benefits and allocation of the incidence of rates by reference to the outcome. The very complexity and inherent subjectivity of any benefit allocation for these specified outputs points away from using relative benefit as a definitive criterion.

1.5 "Decision by elected representatives" has been a feature of New Zealand local government since the 19th century. It is the most prominent feature of the LGA.[6] For example, the purpose of local government explicitly refers to enabling "democratic local decision-making and action by, and on behalf of, communities;" and democratic accountability is a key principle.[7]

1.6 The topic of democratic governance is profoundly connected with that of the exercise of public powers. Democracy means, in particular, that those expected to respect such powers are entitled to participate in determining the identity of those who are responsible for their exercise. Put another way, elections reflect the free choices of those subject to public powers, and confer democratic legitimacy on election winners as those entitled to exercise (and to be responsible for the exercise of) public powers.[8]

1.7 In the local government context, and as illustrated by this case, the other very important element of participatory democracy is the opportunity for the public to have a say on, and seek to influence, forthcoming decisions by elected representatives, through consultation processes and similar mechanisms.

2. OUTLINE OF THE JUNE 2017 DECISION

2.1 The effect of the visitor attraction funding Decision in June 2017 was as follows:[9]

(a) 50% of the sum (ie $13.45M) would be recovered from all ratepayers through the general rate;

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6 It is understood that these topics will be addressed in more detail in the submissions of Local Government New Zealand.

7 Local Government Act (as at 1 March 2017) (**LGA**) ss 10(1)(a) and 14(1)(a)(i). Unless otherwise stated, all statutory references are to the legislation as it existed at the time of the Decision.

8 See Andrew Geddis *Electoral Law in New Zealand* (LexisNexis, Wellington, 2007) ch 1; Allan Ryan *On Politics* (Penguin, London, 2012), Introduction at xvii on "the ability to vote against" incumbents. The principles in s 4 of the Local Electoral Act 2001 also refer to fair and effective representation for individuals and communities.

9 The Finance and Performance Committee's (**FPC**) recommendations to the Governing Body (**GB**) were accepted by the GB on 1 June 2017. FPC Meeting Minutes [[**310.2073**]] – [[**310.2074**]]. GB Meeting Minutes [[**310.2096**]] – [[**310.2097**]]. (NB: The FPC comprises all the members of this Governing Body.)

(b) the balance of 50% (ie $13.45M) would be recovered through a targeted rate on commercial accommodation providers;

(c) the targeted rate would be differentiated based on (i) type of accommodation (hotels and serviced apartments; motels, lodges and motel-like accommodation in campgrounds; others – eg backpackers, hostels); and (ii) location of the accommodation (three geographical zones). This produced nine differential categories, five of which were rated zero;

(d) affected providers could apply for remission of the APTR under the existing rate remission scheme.[10]

2.2 The Governing Body also resolved that:[11]

(a) Council staff would report back on the proposal to include within the APTR informal accommodation providers (currently rated as residential);

(b) there would be work on a more targeted remission scheme;

(c) staff should investigate proposed alternative governance arrangements for ATEED, including greater participation for accommodation providers;

(d) the "saving" of $13.45M in general ratepayer funding of ATEED's expenditure (because of the APTR) would be used to fund transport infrastructure projects.

2.3 The broader context for this particular decision is explained in detail in the evidence of Mr Walker.[12] That evidence demonstrates the complexity and interrelationship of the various funding decisions before the elected members, both within and outside the formal annual plan process. These proceedings focus on the ATPR, but that that was just one of many matters – large and small – on the Council's plate. The appellant faced significant budgetary constraints, and this

10 This had the effect of shifting expenditure to the general rate, as rates remissions are funded out of the general rate.
11 GB Meeting Minutes [[**310.2096**]] – [[**310.2097**]].
12 Walker 1 [35] – [44] [[**202.0238**]] – [[**202.0240**]].

contextual evidence shows the political trade-offs at play in considering and making funding decisions.

2.4 The process of developing the proposed rate, engaging with the community and then setting the APTR took approximately 12 months: July 2016 – June 2017. Unsurprisingly, there were a number of stages: initial policy idea; internal discussions and refinement of the idea into a draft targeted rate; consideration by the Finance and Performance Committee (**FPC**) and the Governing Body at workshops; then formal adoption as proposed policy for consultation; consultation on the draft APTR; detailed internal consideration of the matters raised in the public feedback; material modifications to the APTR proposal; and further consideration and debate by the FPC and the Governing Body, leading to the Decision (on a 10:7 divided vote).

2.5 The APTR was just part of the Council's overall rates package, to raise $1.7 billion out of an operating funding budget of $3.6 billion.[13]

2.6 Prior to the 2016 local elections, the Council had prepared and published a "pre-election report" which explained the growth challenge facing Auckland and the Council's plan for responding to it. In that context, the Council's Finance Team had begun looking at sources of alternative funding (ie, other than general rates), including from the commercial accommodation sector, in July 2016.[14]

2.7 The Mayor's August 2016 election campaign policy document included a discussion of limiting average annual rate rises to 2.5%, and investigating user-pays in relation to private benefits generated from CCO operations, with ATEED given as the example.[15] (To the extent that there is a critical flavour in the Judgment about the Decision originating from a Mayoral campaign policy, it is appropriate to emphasise that this was democratic local government in action, and in accordance with the Mayor's leadership role).[16]

13 Walker 1 at [40] [[**202.0239**]] referring to an estimated operating budget of $3.8 billion; by June 2017 the Prospective Consolidated Funding Impact Statement recorded an operating budget of $3.6 billion [[**310.2239**]].
14 Walker 1 at [45] – [49] [[**202.0240**]] - [[**202.0242**]].
15 Judgment at [23] [[**102.0265**]].
16 Under s 9 of the Local Government (Auckland Council) Act 2009 (**LGACA**) and s 41A of the LGA.

2.8 Following the Mayor's election and formal briefing on the Council's financial position, the Mayoral Proposal for the 2017/18 Annual Plan was released. It included a proposal to consult, as part of the annual budget 2017/2018, on funding ATEED's visitor related expenditure through a targeted rate on accommodation providers.[17] This was also referred to as a "visitor levy".

2.9 In December 2016, the FPC, which is made up of all Councillors, and then the Governing Body, resolved to include a visitor levy (via a targeted rate) in the Annual Plan 2017/18 consultation document.[18] After further work by Council staff, the final version was adopted by the Governing Body in February 2017,[19] and released publicly. Consultation ran from 27 February to 27 March 2017. The consultation material included specific and detailed reference to the APTR, as one of the key issues (see Section 4 of these submissions).

2.10 Following the consultation period, matters raised by submitters were considered and possible responses were developed by staff and elected members through workshops. This culminated in the Mayor presenting a revised Mayoral Proposal to the FPC on 1 June 2017; in respect of the APTR proposal, there were five substantial changes, most significantly a halving of the amount to be collected.[20]

2.11 The FPC recommended approval of the revised Mayoral Proposal, and the Governing Body resolved to approve it (by a 10:7 vote) – also on 1 June 2017.[21] Subsequently, on 29 June 2017, the APTR was set by the Governing Body.[22]

2.12 The APTR was also set in the following year (2018/2019), with 2 main changes: it now included online accommodation providers; and it was combined with a bespoke APTR rates remission scheme.[23]

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17 Walker 1 at [50] - [62] [[**202.0242**]] – [[**202.0244**]]; Mayoral Proposal at [[**304.0751**]].
18 Walker 1 [65] – [72] [[**202.0245**]] – [[**202.0248**]].
19 Consultation Document [[**305.0991**]] and Supporting Information [[**305.1027**]].
20 Walker 1 [137] – [138] [[**202.0264**]] – [[**202.0265**]]; [169] – [182] [[**202.0275**]] – [[**202.0278**]]. Revised Mayoral Proposal at [[**309.2040**]]. The other reports prepared post consultation are referred in section 4 below.
21 Minutes of GB meeting 1 June 2017 [[**310.2094**]].
22 Walker 1 [205] – [206] [[**202.0282**]].
23 Minutes of GB meeting 28 June 2018 [[**321.4561**]]. The GB adopted the Rates Remission and Postponement Policy (including remission scheme for APTR) on 31 May 2018. Minutes of GB meeting [[**320.4398**]]; Rates Remission and Postponement Policy [[**320.4379**]]. The inclusion of online accommodation providers (treated as a business rather than residential use) was not to increase the revenue from the APTR but rather to spread the revenue requirement over a broader ratepayer base.

3. THE SETTING OF LOCAL AUTHORITY RATES

3.1 The starting point is the purpose of local government, which includes the provision by local authorities of infrastructure and services.[24]

3.2 To meet the costs of such infrastructure and services, councils must obtain revenues sufficient to meet expenses (funding needs).[25]

3.3 Those funding needs must be met from "those sources that the local authority considers to be appropriate".[26] But those sources must be stated in the local authority's revenue and financing policy[27] and within the list of sources in s 103(2) of the LGA. That list includes, relevantly, general rates and targeted rates.

3.4 The available rating mechanisms are provided for in detail in the Local Government (Rating) Act 2002 (**LGRA**), the purpose of which is to promote the purpose of local government (set out in the LGA) by (amongst other things) "providing local authorities with flexible powers to set, assess, and collect rates to fund local government activities".[28] This is while "ensuring that rates are set in accordance with decisions that are made in a transparent and consultative manner"[29] ie confirming, in the rates context, the importance of consultation as a feature of the democratic representation and accountability described above.

3.5 The "flexible powers" relating to general rates, based on rateable value, include the choice of valuation system – capital, land or annual value - and the use of differentials: different rates in the dollar for different categories of rateable land.[30]

24 LGA, ss 3, 10, 11, 11A; Local Government (Rating) Act 2002 (**LGRA**), s 3.
25 LGA, s 100.
26 LGA, s 101(3).
27 LGA, s 103(1).
28 LGRA, s 3. The history of statutory rating powers demonstrates a steady increase in their breadth and flexibility. It is understood that this will be addressed in Local Government New Zealand's submissions.
29 LGRA, s 3, and the LGRA and LGA provisions which legislate for that consultation.
30 LGRA, ss 13, 14.

3.6 There are also very "flexible powers" relating to targeted rates:

(a) the "target" may be one or more activities or groups of activities, for which the rate is to be set;[31]

(b) a targeted rate may be set in relation to all rateable land in the district, or for one or more categories of rateable land;[32]

(c) a targeted rate may be set on a uniform basis, or differentially for different categories of rateable land.[33]

(d) such differentiation may be based on any one or more of a range of matters: use; RMA activity status; land area; provision or availability of a service; location of land;[34]

(e) a range of factors may be used (again either individually or in combination) to calculate liability (and different factors may be used for different categories of land), including land value, value of improvements, land area, or building floor space.[35]

3.7 There is nothing in the LGRA which prescribes what type of rate or charge is (or is not) appropriate for any particular funding need.[36] That is a discretionary decision for the local authority which is made under the LGA.

3.8 In particular, there is nothing in the LGRA which makes benefit a relevant determinant in the choice of rates. Many of the attributes which may be used to determine or differentiate rating liability – whether the land is liable at all as well as the extent of any liability – are unrelated to benefit.

31 LGRA, s 16(1). The word "targeted" refers to the particular activity being funded (and the proceeds are ring-fenced for that purpose), not the ratepayer who will pay; targeted rates may be (and frequently are) assessed against all rateable property in the district. "Activity" imports the broad definition of local authority/CCO provided goods or services in the LGA. See LGA s 5(1).
32 LGA, s 5(1).
33 LGRA, ss 16(3), 17.
34 LGRA, ss 16, 17, sch 2.
35 LGRA, s 18, sch 3.
36 With the possible exception of water rates based on quantity supplied in s 17, although councils are not required to use that mechanism to fund the costs of water supply.

Rates as a tax

3.9 It has long been recognised that rates are essentially a tax: "a rating system in its diversity remains principally a taxation system".[37] In that context, the "diversity" reference covered general and separate (now "targeted") rates. The same recognition is found in the Queensland case law on legislation fairly similar to ours.[38]

3.10 Similarly, recognition of a "property tax" as a tax, not a fee, may be found in Canada. As the Supreme Court of Canada explained in *Catalyst Paper*:[39]

> The distinguishing feature between the two [ie, a tax and a fee] is that a tax need bear no relationship to the costs of the service being provided, while the opposite is true for a fee.

3.11 Related to the "tax" point is recognition that local government rate setting is quasi-legislative in nature. As was said in *Island Resorts* by Jackson J for the Queensland Court of Appeal:[40]

> The elected councillors and mayor are … responsible for their votes [at council meetings] to the electors in a form of responsible government at the local level. The taxation power itself is limited, but the power to levy differential general rates conforms broadly to the model of the power of a superior legislative body politic to exercise a taxation power to raise money for the general purposes of executive government.

3.12 The point of current relevance is not that rate setting decisions are beyond the scope of judicial review, but that the nature of the decision-making provides strong indications that such review must be cautious, reflecting the range of factors involved in, and the democratic accountability for, such decisions.

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37 *Woolworths*, above n 4, at 544. See also C Mitchell and D Knight *Laws of New Zealand* Local Government (online ed) at [157]. For a recent High Court authority, see *Meridian Energy Company v Wellington City Council* [2017] NZHC 48 at [7], [145].

38 Local Government Act 2009 (Qld). See, for example, *Ostwald Accommodation Pty Ltd v Western Downs Regional Council* [2015] QSC 210, [2015] 2 QdR 14 at [29]; *Island Resorts (Apartments) Pty Ltd v Gold Coast City Council* [2021] QCA 19, [2021] 7 QR 86 at [22], [37].

39 *Catalyst Paper Corporation v North Cowichan (District)* 2012 SCC 2, [2012] 1 SCR 5 at [27].

40 *Island Resorts,* above n 38, at [22]. See also *Ostwald Accommodation Pty Ltd v Western Downs Regional* Council, above n 38, at [62] and in Canada *Catalyst Paper Corporation v North Cowichan (District),* above n 39, at [21].

4. CONSULTATION: ENHANCING COUNCIL DECISION-MAKING AND ACCOUNTABILITY

A strong emphasis in the LGA

4.1 Consultation with interested and affected persons is a vital part of local authority decision-making. It is a manifestation of, in particular, the principles in paragraphs (a) to (c) of s14 (1) of the LGA.[41]

4.2 The consultation requirements of the LGA not only improve the information available to the local authority (and enable the community to be heard in advance of a decision being made), but also remove the decision-makers' defence of ignorance ("no-one told us…").

4.3 The nature and requirements of local authority consultation are set out in considerable detail in ss 82 and 82A of the LGA.[42] These include obligations to encourage presentation of the views of those who will or may be affected or interested prior to a decision being made;[43] and to make publicly available material about a proposal, and analysis of the options.[44]

4.4 It is inherent in consultation that public feedback may result in changes to the proposal. The process is designed to inform (and often persuade) the decision-makers, and may result in revised thinking, including withdrawal or amendment of the initial proposal.

Consultation on the APTR proposal

4.5 The appellant's consultation on the APTR was comprehensive. The details are set out in Mr Walker's affidavit,[45] but the key features were:

(a) some pre-consultation with the accommodation sector from late 2016;

(b) preparation and publication of the consultation documents for the 2017/2018 budget. These comprised the "Consultation Document" itself (32pp) – a summary of how the proposed

41 See also LGA, s 12(4), an exercise of power for the benefit of the district; s 39 (a) - (b) on governance principles; and s 78 on community views.
42 The appellant's decision under challenge was one to which s 82A applied.
43 LGA, s 82(1)(b).
44 LGA, s 95A.
45 Walker 1 [73] – [113] [[**202.0249**]] – [[**202.0258**]]; also Wood 1 [31] – [65] [[**202.0328**]] – [[**202.0336**]].

$3.8 billion of operating expenditure would be paid for; and "Supporting Information" (149pp);[46]

(c) one of the 5 issues for specific consultation was "Paying for tourism promotion" and the proposed APTR, discussed at p 9 of the Consultation Document; and over 20 pages of the Supporting Information starting at p 15. The discussion of the proposed rate included the background and reasons for the proposal, options for funding the visitor attraction activity, options for an APTR, and an analysis of the impact of the rate on the tourism sector;

(d) a one-month consultation period, during which the appellant convened "Have Your Say" events across Auckland (spoken interaction with the decision-makers), and the use of written, in-person and digital feedback channels to encourage public participation. The level of feedback was 148% higher than the previous year; and there was a significant volume of feedback on the APTR proposal. All of the submissions were available electronically for Councillors to access and review.[47]

4.6 Staff analysed the feedback and prepared an "Overview" (7pp); and a detailed "Summary of Feedback" (75pp). The "paying for tourism promotion" issue, including the APTR proposal, was discussed in the Summary, with a more detailed analysis in Attachment 3.[48]

4.7 The Summary stated that in general there was support for the APTR proposal: majorities (between 54% and 78%) of responses in each local board area; a 66% "majority" of feedback responses received (3713 of 5726 – most from individual ratepayers not providing additional comments); the largest share (46%) of participants at "Have Your Say" events.[49]

46 Consultation Document [[**305.0991**]]; Supporting Information [[**305.1027**]].
47 Walker 1 [114] – [119] [[**202.0258**]] – [[**202.0259**]].
48 Communication and Consultation – Overview [[**308.1733**]]; Summary of Feedback at [[**308.1749**]] – [[**308.1750**]]; Attachment 3 [[**308.1769**]] – [[**308.1783**]].
49 Summary of Feedback at [[**308.1749**]], [[**308.1769**]] and [[**308.1783**]].

4.8 The reasons given for those supporting the APTR proposal were summarised briefly.[50] These referred to accommodation providers benefitting from tourism whereas general ratepayers did not. The Summary also set out in considerable detail the reasons for the accommodation industry's opposition:[51]

(a) a summary of five key reasons for the opposition;

(b) a tabular summary of 45 mostly industry submissions and the key points made by them in opposing the proposal (11pp);

(c) a summary of the reasons for disagreement taken from the "Have Your Say" events.

Modification of the APTR proposal

4.9 The results of the consultation process were used to prepare the "Staff Report" on budget and rating issues, which included recommendations to the Mayor about the APTR (amongst other matters).[52] Based on that Staff Report, the Mayor presented a revised Mayoral Proposal which was endorsed by the FPC and then the Governing Body at their meetings on 1 June 2017. The accommodation providers' feedback was plainly reflected in the Staff Report and in the following modifications to the Mayoral Proposal:[53]

(a) halving the amount of funding collected from the APTR;

(b) recognition that some providers were less able to pass on cost increases, by applying a differential to provider type;

(c) recognition of geographic variations in benefits, by applying a location differential;

(d) recognition of the impact of contractual commitments on the ability of some providers to pass through costs, by applying the existing rates remission scheme to the APTR in 2017 and developing a bespoke scheme for 2018.[54]

50 Ibid at [[**308.1749**]], [[**308.1750**]] and [[**308.1763**]].
51 Ibid at [[**308.1770**]] - [[**308.1783**]].
52 Key Budget and Rating Issues, also referred to as the "**Staff Report**" [[**310.2052**]].
53 Ibid at [[**310.2068**]] – [[**310.2069**]].
54 Also refer to other recommendations made in the revised Mayoral Proposal: see para [2.2] above.

5. JUDICIAL REVIEW: RELEVANT PRINCIPLES

5.1 In the current context of a challenge to an elected local authority's decision to set a targeted rate, the appellant says that the relevant principles of judicial review are as follows:

(a) for discretionary decisions made by a public authority, the judicial review jurisdiction does not extend to substitution of the judge's views for the primary judgment of the authority;

(b) that non-substitutionary approach on judicial review is compounded where the decision requires a political judgment for which the authority is democratically accountable;

(c) similarly, where such decisions require assessment of multiple relevant considerations, the weight given to each such consideration, and the assessment, are matters for the judgment of the authority;

(d) further, where the decision requires such a political judgment, the "unreasonableness" ground of judicial review involves the longstanding very high threshold.

5.2 These principles are orthodox and overlapping. They received minimal attention in the Judgment.

No substitution of judgment

5.3 The "no substitution" principle is succinctly described in the Fordham text in terms of the "forbidden method":[55]

> Judges will not intervene as if questions entrusted to the public authority's primary judgment were for the Court's own substitutionary judgment.

5.4 The UK authorities cited in Fordham make good the proposition. For New Zealand authority to the same effect, see *CREEDNZ*.[56]

55 Hon Sir Michael Fordham *Judicial Review Handbook* (7th ed, Bloomsbury, Oxford, 2020) at 15.1 - 15.5.
56 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 172 &198 - 199 per Richardson J and at 211 per McMullin J. See also *Waikato Regional Airport Ltd v Attorney-General* [2002] 3 NZLR 433 (CA) at [121].

Politically accountable judgments

5.5 The compounding of the non-substitutionary principle in circumstances involving democratically accountable political judgments is described as follows in the Joseph text:[57]

> The courts disclaim jurisdiction to second-guess democratically elected councils, acting on behalf of ratepayers. Councils exercise political judgment and it suffices that their decisions have a rational basis in law.

5.6 The principal authority cited is *Woolworths*,[58] covered in more detail in Section 7 of these submissions. In the UK, the position is similar.[59]

Weight is for primary decision makers

5.7 The principle that "weighing is for the public authority" is summarised in the Smith text as follows: [60]

> Provided it is genuinely considered, and subject to any statutory contra-indication, it is for the decision-maker to choose what weight to give to relevancies.

5.8 As to the qualifications in the Smith text summary, there is no suggestion in the Judgment that the relevancy in s 101(3)(a)(ii) of the LGA was not "genuinely considered", and there is no ranking of relevancies in s 101(3).

5.9 In the UK, the position is the same. The Fordham text says:[61]

> Relevance is capable of engaging a question of law. Weight engages a question of evaluative judgment, for the public authority as primary decision-maker, unless a relevant instrument prescribes otherwise.

Very high "unreasonableness" threshold

5.10 Based on *Woolworths,* in particular, the Joseph text refers to a spectrum of different standards of review for unreasonableness and concludes:[62]

> In the rating cases, the courts have emphasised the democratic decisions of elected councils and their accountability to ratepayers, and have insisted on the

57 Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, 2021) at 22.5.3(2); see also Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington) at [40.1], p 537.
58 *Woolworths*, above n 4.
59 See for example, *R (on the application of Ahmad) v Newham London Borough Council* [2009] UKHL 14, [2009] 3 All ER 755 at [46] per Lord Neuberger; Fordham, above n 55, chapter 13; Halsbury's Laws of England "Local Government" (Vol 68, 2018, online ed) at [863], note 5.
60 Smith, above n 57, ch 69 "principle", 69.1 - 69.3. The authorities cited in the Smith text include *New Zealand Fishing Industry Association v Ministry of Agriculture and Fisheries* [1998] INZER 544 and *Waitakere City Council v Estate Holmes Ltd* [2005] NZSC 112, [2007] INZLR 149 at [66] per McGrath J. A similar analysis is to be found in the Joseph text, above n 57, at 23.2.3(5).
61 Fordham, above n 55, at 56.3; citing among other authorities, *Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Co Ltd* [2017] UKSC 66 [2017] PTSR 1413.
62 Joseph, above n 57, at 24.2.

strict *Wednesbury* standard. The courts will intervene only in a "clear and extreme case."

5.11 Other than in the Judgment under appeal, this approach in *Woolworths* has been applied consistently in several Court of Appeal decisions[63] and in numerous High Court decisions.[64] A similar consistent approach is found in the Queensland case law[65] and in British Columbia.[66]

6. THE "ERROR OF LAW" FINDING

6.1 Against the contextual background outlined in the Sections above, this section of the submissions responds to the six core elements of reasoning in the Judgment which led to the conclusion that the appellant's June 2017 and 2018 Decisions were invalidated by an error of law.[67]

(1) Narrow focus on s 101(3)(a)(ii)

6.2 The Judgment was very much focused on s 101(3)(a)(ii) and the existence and distribution of benefits – ie, the benefits from ATEED's visitor attraction activities: "the heart of the case".[68] It also provided the basis for the Court's "unreasonableness" conclusion – discussed in Section 7 of these submissions.[69]

- *Wider legislative Context*

6.3 The appellant submits first, that the "error of law" assessment failed to reflect the wider legislative context, and especially the broad and flexible taxing powers conferred on local authorities. The Judgment's discussion of "the scheme of the legislation" was remarkably brief,[70] containing little of the context set out in Section 3 of these submissions or in the High Court Judgment.

63 See, for example, *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA); and *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2016] 2 NZLR 437 (CA) at [101].
64 Recently, for example, see *Kidd v Southland District Council* [2019] NZHC 1947 at [11] – [14] and *New Zealand Forest Owners Association Inc v Wairoa District Council* [2022] NZHC 761.
65 *Ostwald Accommodation Pty Ltd v Western Downs Regional* Council, above n 38, at [75]
66 *Catalyst Paper Corporation v North Cowichan (District)*, above n 39, at [24].
67 Judgment at [124] [[**102.0303**]]. The same reasoning was applied to the [June] 2018 APTR decision: Judgment at [122] [[**102.0303**]].
68 Judgment at [85], also see [99] - [124] but in particular [99], [113], [116], [123] [[**102.0290**]] – [[**102.0303**]].
69 Judgment at [141] [[**102.0310**]], in contrast to the High Court Judgment.
70 Judgment at [85] - [88] [[**102.0290**]] - [[**102.0291**]].

6.4 The brevity of that discussion omitted mention of important and relevant matters, including that:

(a) the LGA has a principal purpose of enabling "democratic and effective local government", "democratic local decision-making", and democratic accountability on the part of local authorities, to their communities;[71]

(b) the LGRA has the express purpose of promoting the LGA "purpose of local government" by providing flexible powers to set, assess and collect rates.[72] The power to set, assess and enforce collection of rates explains why rates are often and appropriately described as a "tax";[73]

(c) the LGA and LGRA both emphasise the importance of council decision-making being transparent and consultative.[74]

(d) the LGA also recognises that local authority decision-making involves numerous and wide ranging judgments and discretions, which may be informed, quantified or assessed to varying degrees.[75]

6.5 The Judgment's discussion of the relevant provisions of the LGRA was also very brief, and did not acknowledge that under the LGRA:

(a) local authorities may use a wide range of matters to define categories of rateable land for differential rating (eg by use, activities, location, value or service provided);[76]

(b) local authorities may use a wide range of factors in calculating liability for targeted rates;[77]

(c) many of these rating tools are based on features of the property which are unrelated to benefit received. The LGRA is not prescriptive as to what rates should be (or may not be) used for any particular activity or funding requirement.

71 LGA, ss3, 10, 11, 12, 14, 39, s 41(3).
72 LGRA, s3.
73 See section 3 of these submissions above.
74 LGA, ss 3, 14, 39, 76 – 79, 82; LGRA, s 3.
75 LGA, ss 76 - 79.
76 LGRA, ss 14, 17, sch 2.
77 LGRA, s 18, sch 3.

- *LGA decision-making sequence*

6.6 The LGA's requirements for transparency and consultation in decision-making, together with the elected nature of decision makers,[78] are reflected in local authority annual and triennial planning cycles (the annual plan and long-term plan).

6.7 By way of relevant illustration, a candidate for mayor or councillor may campaign based on a particular policy idea; if elected, the idea may be shaped (by some degree of information gathering and analysis) into a proposal for a council decision; the proposal may require consultation, involving explanatory material and the invitation and consideration of responses; the proposal may be abandoned, modified or maintained in the light of the consultation; and the proposal may then be voted on – and passed or defeated. And for completeness, if the vote has electoral resonance, the mayor and/or relevant councillors will have to account for their position on the proposal and vote if they seek re-election.

6.8 This evolving sequence - "policy idea: proposal: consultation: revised proposal: vote" - is central to the LGA's purpose of democratic, effective, transparent and accountable local government.[79] It explains references to local authority decision-making as "quasi-legislative".[80] But recognition of the reasons for, and the nature and importance of, this decision-making sequence is conspicuously absent from the Judgment's assessment.[81]

- *Decision-making procedures, discretion*

6.9 The Judgment's discussion of the scheme of the legislation omits reference to the general decision-making principles in Part 6(1), especially ss 76 - 81, of the LGA. These principles reinforce the New Zealand model of democratic, representative, effective and accountable local government, by:

78 LGA ss 39, 41, 41A.
79 Uniquely in Auckland, the Mayor's role in this process is explicit in the legislation. Auckland's Mayor has the statutory role of leading development of Council plans including the long-term plan and annual plan, policies and budgets: Local Government (Auckland Council) Act 2009 s 9(2)(a). This is illustrated by the APTR proposal itself, led by the Mayor. See Wood [11] and [12] [[**202.0324**]].
80 See section 3 of these submissions above.
81 The only challenge to the process followed was unsuccessful in the High Court and then abandoned.

(a) establishing basic standards for sound decision-making;[82]

(b) requiring community views to be taken into account;[83]

(c) providing, however, that compliance with these requirements (including the extent to which options are identified and assessed; the degree to which benefits and costs are quantified; and the extent and detail of the information to be considered) is a matter for the local authority's discretion.[84]

- *Financial management*

6.10 Part 6(3) (ie, ss 100 - 111) of the LGA contains a range of provisions relating to financial management by local authorities.

6.11 Section 100 prescribes a "balanced budget requirement": annual operating revenues must meet projected annual operating expenses.

6.12 Section 102 requires a local authorities to adopt (following a public consultation process) funding and financial policies. These include a revenue and financing policy which must state policies in respect of the "sources" for funding their expenses, which include general and targeted rates.[85]

6.13 Also within Part 6, s 101(1) of the LGA requires that local authorities manage their finances "prudently and in a manner that promotes the current and future interests of the community". This is (again) language which connotes discretion and democratic accountability.

- *Section 101(3)*

6.14 Section 101(3) applies to the decision as to how intended expenditure needs will be met. The language of s 101(3) as a whole (yet again) connotes discretion and democratic accountability:[86]

(a) the funding source is that "determined to be appropriate by the local authority" – which means the elected governing body;[87]

82 LGA, ss 76, 77.
83 LGA, ss 76, 78.
84 LGA, ss 76(2), 77(2), 78(4), 79.
85 LGA, s103.
86 This interpretation is supported by the statutory history of s 101(3). We understand this will be addressed in Local Government New Zealand's submissions.
87 LGA, ss 41, 48J. In Auckland, this function must be performed by the Governing Body (and not local boards): s 15(1)(d) LGACA.

(b) the very broadly expressed "overall impact" of any allocation of liability for revenue needs on the community is a mandatory consideration for revenue allocation. This is legislative recognition of the broad policy judgment to be exercised;

(c) the s 101(3) decision necessarily imports the wide range of rating options in the LGRA,[88] including those differentiated by value, use, activities, location and services provided, or any combination of these.[89]

6.15 Section 101(3)(a) requires consideration of five matters related to each activity to be funded, and then one overall consideration in subs (3)(b). "Activity" is broadly defined in s 5(1) of the LGA in terms of goods or services provided, facilities and amenities provided, and regulatory and other governmental functions undertaken, by or on behalf of a local authority.

6.16 "Consideration" must have its ordinary (and public law) meaning: something thought about (or had regard or attention paid to) in the course of making a [discretionary] decision. Conversely, it does not mean "determinative" or “dictated by”.

6.17 Further, the language of s 101(3) is "*following* consideration". In other words, the considerations must receive thought (or regard or attention) *before* the funding decision is made. The section does not require this specific consideration at any earlier point in time.

6.18 The considerations related to each funded activity, listed in s 101(3)(a), are not ranked or prioritised in any way. Rather, they indicate relevant elements within a holistic decision-making exercise.

6.19 While the listed items are important, and are mandated for consideration, the appellant submits that "inadequate consideration" of any of them is an unlikely foundation for a finding of error of law. This point is developed further below.

6.20 Importantly, the outcome of the activity-by-activity consideration under paragraph (a) is not itself determinative: it is subject to the

88 Through s 103(3), and the list of funding sources in s 103(2).
89 LGRA, ss 14, 17, 18, schs 2, 3.

consideration under paragraph s 101(3)(b). Although the matters in (a) also involve policy choices and assessments, the consideration in (b) of the "overall impact of any allocation of liability…on the community" is the clearest recognition of the overall policy judgment when it comes to funding (including rating) decisions.

- *Section 101(3)(a)(ii) in particular*

6.21 All expenditure must be funded. Rates funding is a zero sum game: if a funding need is not met through one rate, then it must be met through another rate (normally the general rate, as the default). As such, it is not possible to consider the effect of a particular proposed rate without also considering the alternative (if that rate does not proceed). This dynamic is inherent in s 101(3)(a)(ii).

6.22 Contrary to the approach in the Judgment, consideration of "the distribution of benefits" does not involve a unilateral evaluation of the extent of benefit to a particular ratepayer group and then a comparison against the rates which they will pay. That treats rates as a quasi-fee for services received and also ignores the effect on other ratepayers in the counter-scenario if that rate is not set.

6.23 Rather, the question (as applied to this case) is how the benefits of ATEED's visitor attraction activity are distributed amongst the community, so that (subject to the other s 101(3) considerations) a particular part should contribute a particular proportion (**not** a particular amount) of the overall total revenue need. Once the fair proportion is determined, in the Council's discretion, then that is applied to the settled expenditure requirement to produce the rate. This is what the appellant did.[90]

6.24 The Judgment's implicit focus on actual tangible and quantifiable benefits to accommodation providers (eg through increased hotel nights) also means that what is being assessed is how *successful* ATEED is in providing its functions ie attracting visitors and filling hotel rooms. Again, this is not how rates or council funding works.

90 The question of what that benefit is in this case is addressed below.

6.25 The Council funding decision was to allocate $27M to the visitor attraction and major events activities, to be undertaken by ATEED, which would be split 50/50 between general rates and a targeted rate. The Council was not deciding whether or not to carry out, or how to fund, this or that particular visitor attraction initiative; these are operational decisions for ATEED (for which it may be accountable to the Council in the normal way). Rather, the s 101(3)(a)(ii) question at the funding decision stage is what the general distribution of benefits for the overall activity is, in the abstract. It is not a question as to what was, as a fact, the specific tangible benefits in past years.

6.26 Section 101(3)(a)(ii) does not therefore require a calculation or quantification of actual benefits to the ratepayer (even if that were possible). If it did, any council activity which does not produce actual benefits (either inherently or because in the particular case it was not successful) would logically not be able to be funded at all. But all expenditure must be funded to produce a balanced budget.[91]

6.27 The Judgment's focus on quantification of actual benefits to accommodation providers and comparison with the rates assessed therefore misconstrues s 101(3)(a)(ii). While the appellant broadly assessed a level of benefits to accommodation providers, this was as an aid in determining the overall distribution of benefits from the activity to be funded rather than as a yardstick for the rate.

(2) The initial language of "visitor levy"

6.28 The Judgment was plainly critical of the appellant on the basis that an initial idea of a "visitor levy" influenced the APTR. In other words, the criticism was that the initial idea and language was illegitimate insofar as it sought to have ATEED's visitor attraction activities funded by non-ratepayers, rather than by general ratepayers.[92]

6.29 The appellant says, first, that there has been no allegation or finding of improper purpose or ultra vires in relation to the APTR decision-

91 LGA, s 100.
92 Judgment, [99], [100], [115], [119], [123], [141] [[**102.0295**]] - [[**102.0310**]].

making. The APTR is a targeted rate, within the scope of the LGRA, imposed on ratepayers.

6.30 Second, the Judgment's emphasis on the "visitor levy" terminology overstates, with respect, its substantive relevance and significance for the decision-making. The use of "visitor levy" terminology at the early stages of the process did not mean the appellant did not understand that it was a targeted rate.[93] Moreover, as the Judgment recognised, by the time of public consultation, the language of visitor levy had gone, and the APTR was proposed irrespective of whether the costs could be passed on to guests.[94] It is clear beyond any doubt that the appellant knew it was not able to set a bed tax or visitor levy and it was not purporting to do so.

6.31 Third, the Judgment's focus on the initial thinking and language disregards the sequence and evolution of decision-making outlined above. The internal work and the external consultation resulted in important changes to the initial idea. The final form of the APTR adopted in June 2017 followed consideration of all s 101(3) matters.

6.32 Relatedly, the Judgment's complaint that the justification for the APTR had been "reverse engineered", when the original idea had not been focused on s 101(3)(a)(ii), is itself irrelevant. The s 101(3) requirement is that consideration of the listed matters *precede* the determination – and it did (albeit not with an outcome acceptable to the respondents, subsequently criticised in the language of "adequacy" of consideration). The Judgment omits mention in its s 101(3) assessment of the detailed information and submissions by accommodation providers which were received and considered and relied on (in part) by the appellant before making the APTR determination.[95]

6.33 Fourth, the Judgment's focus on the evolution of "the language" used in the APTR proposal diverted attention from the evolution of the substantive changes. For example, the change to 50:50

93 Wood 1 at [28] - [30] [[**202.0327**]] – [[**202.0328**]]; Walker 1 at [61], [69] [[**202.0244**]], [[**202.0246**]].
94 Judgment at [107] [[**102.0298**]].
95 Summarised in the Staff Report at [73] [[**310.2065**]]; and the Summary of Feedback [[**308.1770**]] – [[**308.1783**]].

general/targeted funding, and the application of a remission policy, receive minimal mention in the Judgment, but these were central to the overall funding decision.

(3) The "pass through assumption"

6.34 The Judgment included a strongly critical focus on what was described as a "pass through assumption" – ie that a rate assessed on accommodation providers could be expected to be fully passed on to visitors, many of whom would not be Auckland ratepayers, and thus reduce the costs to be met by Auckland general ratepayers. The pass through assumption was described in the Judgment as irrelevant, corrupting the APTR analysis, “plainly not correct” (at least as initially understood), "improper", and remaining as the desired allocative outcome.[96]

- *"Irrelevant"?*

6.35 The Judgment was evidently founded on a concern that the APTR was intended to indirectly require non-ratepayers (and not, ultimately, ratepayers) to meet the costs of ATEED's visitor attraction activities;[97] and on a view that seeking revenue from non-ratepayers was not a relevant consideration.[98]

6.36 This irrelevancy view is, with respect, unsound. The appellant's statutory focus is "local" on its region and its community.[99] If its activities have dual benefits – to Aucklanders and to others – there is nothing in the LGA which makes it illegitimate or irrelevant to seek some sharing of the relevant costs. Further, if the ultimate incidence of a rate is borne by someone other than the ratepayer, it is more affordable for the ratepayer, which is clearly a relevant consideration when setting rates.[100] Conversely, local authorities are required to consider a range of questions in their decision-making, as well as their

96 Judgment at [100], [108], [111] & [141] [[**102.0296**]] - [[**102.0310**]].
97 Judgment at [115] & [123] [[**102.0301**]] & [[**102.0303**]].
98 Judgment at [100] [[**102.0296**]].
99 LGA, ss 3, 10, 11, 21(4).
100 See most recently *New Zealand Forest Owners Association Inc v Wairoa District Council*, above n 64.

own resources.[101] Section 101(3)(b) requires consideration of the impact on the local community of allocations of funding liabilities.

6.37 The Judgment considered that seeking revenue (indirectly) from non-ratepayers was "beyond the proper scope of a rating mechanism" (or of Council's rating powers").[102] The appellant says that conclusion was not founded on, nor supported by, the purpose or text of the LGA, nor the flexible powers of local authorities under the LGA and/or the LGRA.

- *A "corrupted" analysis?*

6.38 As the Judgment accepted:

(a) by the time of public consultation on the APTR proposal, the language of a pass through "expectation" had disappeared; and

(b) the expert economic evidence supported the view that, at least over time, the APTR as a fixed cost would be passed through.[103]

6.39 In addition, although not addressed in any detail in the Judgment, the appellant had received a substantial body of feedback from accommodation providers, as discussed in Section 4. That feedback did not universally deny the practicality of pass through, nor frame such claims in the emphatic (but academic) manner advanced in the respondents' economic evidence in the High Court, and evidently accepted in the Judgment.[104]

6.40 Further, that feedback was consistent with the common sense view, adopted in the High Court,[105] that businesses will strive to recover their costs, including new forms of "tax". The appellant's final decision was informed by the views on the APTR in submissions received

101 LGA, ss 77, 79.
102 Judgment at [123], [141] [[**102.0303**]] - [[**102.0310**]].
103 Judgment at [107], [110] [[**102.0299**]]. Also Mellsop at [48] - [70] [[**202.0305**]] – [[**202.0311**]].
104 See summary at Judgment [39] [[**102.0271**]]; but this does not capture the significant number of industry submissions which did appear to have anticipated some pass through: Summary of Feedback [[**308.1772**]] - [[**308.1778**]].
105 High Court Judgment at [195], [197] [[**101.0196**]]; Mellsop at [68] - [70] [[**202.0311**]]. Note also that the respondents confirmed, pre-Covid, that it was not part of their case that they were unable to pay the APTR without becoming insolvent [[**321.4635]**]

including perspectives on pass through, and the Staff Report also weighed these matters.[106]

6.41 Accordingly, the appellant says that the "corrupted analysis" language in the Judgment must be primarily referable to concerns about the initial proposal and language of a "visitor levy".[107] Submissions in that regard have already been made in paras 6.28-6.33 above.

(4) Assessment of benefits

6.42 The Judgment was repeatedly critical of the assessment of the benefits of ATEED's visitor attraction activities to accommodation providers and others. The epithets deployed included "very limited", not "proper", "no real attempt", not "meaningful", required "greater attention", and not "adequate".[108] The appellant says that these criticisms were premised on an incorrect interpretation of what s 101(3)(a)(ii) actually required, in terms of the consideration of the distribution of benefits, as submitted above.

6.43 Behind the Judgment's criticism and strong language is the unarticulated premise that the Court of Appeal would have undertaken a different assessment, given different weight to the component elements of s101(3) and would have been sceptical that the accommodation providers received material benefits from ATEED's visitor attraction activities. But it is well settled that, provided mandatory considerations are taken into account, the "weight" to be given to any particular consideration, and to the overall weighing of multiple relevant considerations, is a matter for the decision-maker.[109] That is especially so when, as here, they are matters of fiscal and taxing policy for which there is democratic accountability.

6.44 Some of the grounds for the Judgment's criticism of the "adequacy" of the benefits assessment – that the assessment was not driven from the outset by the s 101(3) criteria; and that the initial "visitor levy" idea had an express expectation of "pass through" - have already been

106 See also Wood at [73] - [78] [[**202.0338**]] - [[**202.0342**]]; Duncan at [45] - [85] [[**202.0425**]] - [[**202.0435**]]
107 The topic of the suggested inadequacy of the assessment of benefits is addressed below.
108 Judgment, [100], [111], [113], [114], [115], [117], [123], [141] [[**102.0296**]] - [[**102.0310**]].
109 See section 5 of these submissions above.

addressed in this section of the submissions. The other grounds are addressed below.

- *"More analysis was required"*

6.45 The Judgment acknowledged that any assessment of the benefits of the relevant activity to the targeted group would be "necessarily … broad and imprecise", while insisting that "more analysis was required" and that showing a "connection" and "*some* benefits" could not be enough.[110]

6.46 The appellant says that, in the context of the LGA, including s 101 (in particular subs (3)) read as a whole and of a $3.6 billion operating budget, it is implicit that a local authority is entitled to exercise judgment about "how much analysis is enough" for any particular activity's funding, and the weight to be given to the numerous and varied considerations – most of them not readily quantifiable.[111]

6.47 On the evidence, as discussed earlier, there was a broad assessment of the benefits of ATEED's activities to accommodation providers, and an explicit analysis of the s 101(3) matters, in the material considered by the FPC and the Governing Body.[112]

6.48 Further, the amendments to the proposal for the APTR which resulted in the ATEED activities being funded 50% by general rates is the clearest evidence available that the appellant's APTR determination *did* follow consideration of the distribution of benefits between the community as a whole and an identifiable part of the community (ie, the relevant accommodation providers). Together with the express application of a remissions regime, there plainly was a considered and responsible assessment – albeit "broad and imprecise", and not purporting to represent any spurious precision.[113]

110 Judgment, [114] [[**102.0300**]].
111 As submitted above, this is also reflected in the LGA's general decision-making provisions, especially s 79.
112 Staff Report at paras 71 – 84 [[**310.2065**]] – [[**310.2067**]] and Attachment A4 [[**310.2069.10**]]; Summary of Feedback at [[**308.1769**]] - [[**308.1783**]]; Revised Mayoral Proposal [[**309.2048**]]; Supporting information [[**305.1041**]]; See also Armitage at [28] - [41]; [79] – [82]; [89] – [91] [[**202.0391**]] - [[**202.0408**]].
113 Judgment at [114] [[**102.0300**]]; and on "spurious precision" see *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [54], per Blanchard J.

(5) Differentiating direct and indirect benefits

6.49 The Judgment included criticism of the APTR assessment involving a differentiation and consideration of "direct" (as distinct from "indirect") benefits.[114]

6.50 That criticism is misplaced. There is no basis in the LGA to consider the term "benefits" (as used in s 101(3)(a)(ii), (iii) and (v)) as precluding a distinction between direct and indirect benefits.

6.51 More substantively, if visitor promotion and major events attract visitors who contribute to an identifiable (albeit imprecise) increase in accommodation providers' revenue, that is fairly described as a more direct benefit than the benefits to other businesses, and the community as a whole, of increased economic activity, which is the direct/indirect distinction the appellant was drawing.[115]

(6) "Inequity" in small targeted group

6.52 The Judgment was also critical of the appellant's APTR determination producing "inequity" in applying to a very small group of ratepayers and excluding other business ratepayers benefitting from ATEED's visitor attraction activities.[116]

6.53 That criticism illustrates a clear straying into "the merits". Rates are a form of taxing, and "inequity" is not a relevant yardstick for judicial review for error of law, as distinct from unreasonableness (addressed separately in Section 7 of these submissions). “Inequity” is also likely to be in the eye of the beholder: is it more or less equitable for the full costs of visitor attraction to be borne by general ratepayers rather than partly by a ratepayer group which specifically and directly benefits from visitors? This illustrates the ultimate policy nature of the decision.

6.54 Insofar as a specific point in the Judgment was the exclusion of such groups as rental car companies, tourism businesses and (especially)

114 Judgment at [102], [119], [120] [[**102.0297**]] - [[**102.0302**]].
115 Staff Report at para 80 [[**310.2066**]]. Also see Mellsop: accommodation providers are direct and material beneficiaries and the case for imposing a targeted rate on other groups is much weaker: at [10], [23] - [31] [[**202.0294**]] - [[**202.0300**]].
116 Judgment at [101], [114], [119], [122], [123] [[**102.0296**]] - [[**102.0303**]].

informal accommodation providers,[117] the same responses are applicable. The position of those groups, including in comparison with accommodation providers, was the subject of consultation and submission, and of meaningful consideration by the FPC and the Governing Body. The reason for the rate not extending to these groups[118] was explicitly addressed, in s 101(3) terms, in the report to the decision-makers. The appellant's determination was clearly not that favoured by the respondents (nor by a significant minority of councillors), but the decision was one for the appellant. Neither "inequity" nor "disproportionality"[119] in this sense (even if it could be established) amounts to an error of law.

7. COURT OF APPEAL JUDGMENT – "UNREASONABLENESS"

7.1 Having reviewed the High Court decision, and found the APTR invalid on the "error of law" ground of review, the Judgment proceeded to discuss the "unreasonableness" ground.[120] It concluded:[121]

> Had it been necessary for us to determine this ground, we would have concluded that a finding of unreasonableness was inevitable given the combination of (1) the failure to consider adequately the distribution of benefits and (2) the imposition of such a disproportionate burden on the targeted group.

7.2 The appellant respectfully disagrees. As the Judgment acknowledges, the reasonableness conclusion largely followed its earlier analysis of the error of law issues: the "pass through assumption"; the attempt to achieve an outcome beyond rating powers (ie, indirectly seeking contribution from non-residents); and failure to make an "adequate assessment" of benefits. These issues are addressed in Section 6 of these submissions.

7.3 Nevertheless, the Judgment restated or developed some of those matters into a general "disproportionality" conclusion. This, together with the Judgment's novel/limiting treatment of *Woolworths,*[122] is addressed here. As the "disproportionality" point is unarguable if

117 Judgment at [119] and [122] [[**102.0302**]] - [[**102.0303**]].
118 In 2017/2018: informal accommodation providers were included in 2018/2019.
119 Judgment at [141] [[**102.0310**]].
120 Judgment at [132] - [141]. [[**102.0306**]] - [[**102.0310**]].
121 Judgment at [141] [[**102.0310**]].
122 *Woolworths*, above n 4.

Woolworths is not limited as the Judgment concluded it was, it is sensible to first consider that judgment.

Woolworths

7.4 The significance of the reasoning and conclusions in *Woolworths* is usefully considered against that in *Mackenzie DC*[123] a few years earlier. In both cases a bench of five judges sat, and a single judgment was delivered, in the Court of Appeal.

7.5 The *Mackenzie* case involved Electricorp as a new ratepayer and a general rate set across the district[124] which required Electricorp to pay some $2.8 million in rates – out of total council budgeted expenditure of $3.467 million and where an unallocated surplus of $1.9 million would be produced.

7.6 In upholding the High Court's declaration that the rate was invalid, the Court of Appeal concluded that the appellant had failed to follow the statutory process, erred in law in seeking an unallocated surplus, failed to consider other forms of rate, and had failed to appreciate its fiduciary duty to the new ratepayer. Rather, the appellant seemed "mesmerised" by the income opportunity offered by rating of Electricorp's power stations' land.[125]

7.7 On the last point, it was said:[126]

> Where, as here, a new ratepayer with land holdings dwarfing in value the total value of all other land in the district is being introduced, [the council's quasi-fiduciary] duty must in our view include consideration of the interests of that new ratepayer.

7.8 In short, as explained in *Woolworths*, "*Mackenzie* was a clear and extreme case" with an "extraordinary combination of circumstances which made [it] an exceptional case … justifying judicial intervention".[127]

7.9 The rate in issue in *Woolworths* was a differential general rate challenged by some 420 commercial ratepayers. As the Court of Appeal stated:[128]

123 *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] NZLR 41 (CA).
124 Excluding the Fairlie and Twizel communities.
125 *Mackenzie District Council v Electricity Corporation of New Zealand*, above n 123, at 52, line 49.
126 At 47, lines 36 - 46.
127 *Woolworths*, above n 4, at 546, line 42 - 548, line 2; *Waitakere City Council v* Lovelock, above n 63, at 391, line 45.
128 At 542, lines1 - 4.

> The differential rating power is a power to differentiate, to discriminate as between specified types or groups of property and achieve a different sharing of the general rate burden than would obtain under a uniform rate. It authorises a local authority to determine what in its judgment is the appropriate sharing of that burden.

7.10 Following consideration of the rating powers, local government and land valuation statutes the Court of Appeal concluded:[129]

> Reading the statutes together it is obvious that the provisions for making and reviewing rates are to enable the local authority to carry out its statutory functions and to perform the activities which it undertakes for the benefit of its community. A territorial authority has very wide rating powers. The exercise of those powers inevitably affects and is intended to affect the relative incidence of rates on properties within the district.

7.11 As is well known, in this rating context, the "stringent" test for the unreasonableness ground of judicial review was expressed in the strong language of *Wednesbury* and similar later judicial statements: a decision "outside the limits of reason".[130]

7.12 The stringency of the test was explained in part in terms of constitutional and democratic constraints on judicial involvement in wider public policy areas. In such areas, the courts were not well equipped to "reweigh [the] considerations involved".[131]

7.13 That reasoning contributed to the overall conclusion:[132]

> Rating requires the exercise of political judgment by the elected representatives of the community. The economic, social and political assessments involved are complex. The legislature has chosen not to specify the substantive criteria but rather to leave the overall judgment to be made in the round by the elected representatives. Unlike *Mackenzie* this is not one of those extreme cases meeting the stringent test for impugning the rating determinations.

7.14 As discussed in Section 5 above, that approach has been applied consistently for nearly three decades. Further, a similar approach, based on similar reasoning, may be found in Australian and Canadian cases.[133]

The CA Judgment here

7.15 The Judgment concluded that *Woolworths* was distinguishable and its authority, and the broad policy considerations emphasised there, were limited to the exercise of general and differential rating powers".[134]

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129 At 544 lines 34 - 39.
130 *Woolworths*, above n 4, at 545, lines 33 - 52.
131 At 546, lines 38 - 41.
132 At 553, lines 106.
133 See discussion of *Ostwald Accommodation* and *Catalyst Paper* in section 5 of these submissions above.
134 Judgment [136] [[**102.0308**]].

7.16 More particularly, the Judgment stated that, in contrast to the position in *Woolworths*:

(a) the APTR was a narrowly targeted rate;

(b) the APTR imposed a substantial burden on a very small subset of ratepayers; and

(c) the democratic process "offers little protection" for a small group of ratepayers.

7.17 The appellant says that each and all of those points provide no sound basis for limiting the scope and force of the *Woolworths* approach.

7.18 First, the fact that the APTR is a targeted rate (“narrowly” targeted or not) is an irrelevant difference. The decision to set a differentiated general rate (as in *Woolworths*) or a differentiated targeted rate (as in this case) is equally a decision as to how the discretion to make rating decisions is to be exercised, and involves precisely the same considerations (namely those in s 101(3)). A general rate could include a narrowly defined differential category, and the same issues would arise as for a narrowly set targeted rate. There is nothing in the LGRA which treats general rates and targeted rates any differently in this regard and there is nothing inherently different about a targeted rate which makes the *Woolworths* approach inapt.

7.19 Further, the APTR is only “narrowly” targeted against accommodation providers because of the way the rates as a whole were structured. As the required ATEED expenditure was to be funded 50% from the general ratepayer, the appellant could have achieved exactly the same outcome by setting a “visitor attraction” targeted rate across all rateable land in the district, differentiated between accommodation providers and other ratepayers. In this scenario, any challenge by the accommodation providers would have to focus on the differentiation ie precisely the same issue as in *Woolworths*.

7.20 The Judgment's reference to the APTR's imposition of a "substantial burden" on a "very small subset" of ratepayers goes in part to the topic of "disproportionality", addressed later in this section of the submissions. Otherwise, the point goes to that just discussed: rates

will be a burden; and a targeted or differential rate may apply to a small subset of ratepayers, or produce a significant difference in rating burden as between ratepayers; but subjective policy choices must be made, as is fully contemplated in the legislation.

7.21 Perhaps the most striking element of the Judgment's response to *Woolworths* is its dismissal of "democratic accountability" by stating that the democratic process offers “little protection" where a small group of ratepayers is affected.[135]

7.22 The appellants say that democratic accountability is not a question of numbers. The 2017/2018 APTR applied to approximately 3,000 ratepayers.[136] In *Woolworths* the number of disaffected commercial ratepayers was some 420.[137] Rather, the democratic accountability is found in the transparency of the decision-making process, the opportunity to influence the decision through public consultation and in the ability to object in "political" terms: that a proposed decision is unfair, discriminatory, inequitable and/or not the best option available. If objections gain traction, the politics of local government can respond by modification, councillors voting against the relevant resolutions and by the reputational impact for future debates and, ultimately, elections.

7.23 As an illustration of such democratic dynamics, the APTR resolution was passed by a 10-7 majority of councillors. That is, the APTR was controversial and a substantial minority were likely persuaded by the arguments against it; but, as is inherent in democracy, the majority carried the day.

7.24 Accordingly, the appellant submits that, together with the important modifications made to the APTR proposal in the light of consultation with (amongst others) those affected, the final APTR vote is direct and

135 Judgment [136] [[**102.0310**]].

136 In 2017/18, 2,921 rating units were assessed the APTR, with some form of remission being granted to 1,022 - see Acott at [38], [56] [[**202.0354**]] and [[**202.0359**]]. In 2018/19, 1,286 online providers and 2,169 commercial providers were assessed for the APTR, with remission being granted to 314 - see Heath at [34], [47], [49], [50], [55] [[**203.0586**]] – [[**203.0592**]].

137 In any event, focusing solely on the number of ratepayers liable for the challenged rate ignores the fact the APTR decision affects all ratepayers, because the alternative - if the APTR was not set - was continued general rate funding.

strong evidence against the Judgment's assertion that the democratic process offers little protection to a small minority group of ratepayers.

7.25 More fundamentally, the appellant says that assertion, and the assumptions underpinning it, runs directly contrary to the strong statutory theme of local democratic accountability within local government. It is not sensibly considered applicable only in the interests of majority or near-majority groups within the local authority's district.

"Disproportionate burden"

7.26 The Judgment's conclusion that the APTR imposed a "disproportionate burden on the targeted group" of ratepayers[138] runs counter to a separate albeit related aspect of the approach in *Woolworths*, which held that "rating was not intended to be a calculation of benefits and allocation of the incidence of rates by reference to the outcome".[139]

7.27 The statutory context was explained by reference to the following matters:[140]

(a) decision-making by elected representatives – exercising choices available to them

(b) following prescribed statutory choices;

(c) the breadth and generality of empowering provisions;

(d) the complexity and inherent subjectivity of any benefit allocation.

7.28 These matters are ongoing features of the LGA and LGRA. They apply equally to targeted rates as to general rates. The later enactment of the s 101(3) checklist does not change the relevance or applicability of *Woolworths*. Indeed s 101(3) and its predecessor can be seen as a form of legislative endorsement of aspects of *Woolworths*, and certainly not contrary to that decision.

138 Judgment [141] [[**102.0310**]].
139 *Woolworths*, above n 4, at 552, lines 32 – 34.
140 At 552, lines 26 - 44.

7.29 Accordingly, the Judgment's references to "disproportionate benefits" are properly understood as reflecting the respondents' claims that the benefits they receive from APTR funding are not properly correlated to the rates imposed on them under the APTR – that is, prefaced on a misconception as to the legal nature of rates, and a challenge to the merits of the APTR.

7.30 The appellant says that this approach is both wrong in principle and in direct contradiction of the *Woolworths* conclusion that rate setting:[141]

> …does not require a close correlation between benefits provided to a particular sector and rates levied on that sector. Given the nature of imponderables involved it does not call for an elusive search for a direct relationship between services and benefits.

"10 per cent or less" of supposed benefit"

7.31 The Judgment stated that, to the extent that visitor spend equates to the benefits of ATEED's activity (described as the appellant's working assumption), the targeted group of accommodation providers received "10 per cent or less of this supposed benefit".[142] And other benefitting groups were "excluded".

7.32 In response, the appellants say, first, that such a precise assessment of benefit is not required under s 101(3) – see the submissions above.

7.33 Second, although the Staff Report looked at visitor numbers and visitor spend, amongst other things, as part of considering what the distribution of benefits was, the appellant did not use visitor spend as *the* measure of benefit to accommodation providers.

7.34 The relevant activity is the promotional and other work, including supporting major events, carried out by ATEED to attract visitors to Auckland. This is inherently "forward looking" and produces an intangible benefit to accommodation providers, because it is designed/expected to produce future (tangible) benefits:

(a) increase in visitor numbers;

141 *Woolworths,* above n 4, at 546, lines 8 - 11.
142 Judgment [141] [[**102.0310**]].

(b) therefore increase in the number of additional visitor nights staying in accommodation;

(c) therefore increase in accommodation providers' revenue.

7.35 To the extent the promotional work is successful, these tangible benefits will also be enjoyed.[143] The benefit is of the same character as the benefit received from the industries' own destination marketing activities.

7.36 The presence of visitors in Auckland (which ATEED funding promotes) warrants the provision of accommodation for those visitors. Hotels etc exist precisely to fill that need. They therefore take their existence from the presence of visitors in a way that retailers, restaurants etc (as other identifiable parts of the community) do not.[144] The benefits to accommodation providers are therefore of a special or particular kind – they group as "an identifiable part of the community" for the purposes of s 101(3)(a)(ii).

7.37 Accommodation providers especially benefit, because their entire business depends on visitors to Auckland.[145] Shops for example also get more custom if there are more visitors but as patronage from visitors is not their raison d'etre (except perhaps tourist shops) then their benefit is not of the same special character.

7.38 This was a rational justification for concluding that the distribution of benefits from the activity particularly favoured accommodation providers.[146] That conclusion, together with the other s 101(3) considerations, provided a proper and rational basis for the appellant, in its discretion, to decide that there should be an APTR to recover 50% of the required expenditure.

7.39 Third, the "10% or less of visitor spend" figure was not in any event the figure used by the appellant. The only other reference to "10 per

143 See Armitage evidence of the strong correlation between ATEED activities and increases in visitor nights: [33] - [43], [79] - [82], [89] - [91], [[**202.0395**]] – [[**202.0408**]] and the Fresh Info evaluations of ATEED's event portfolios at [[**303.0523**]] and [[**311.2333**]]

144 Those sectors are also much bigger and more indeterminate than the accommodation provider sector, and the ratio of rateable asset to benefit is closer in the accommodation sector. These are relevant considerations in a taxing system. The staff report referred to some of these considerations in its discussion of section 101(3)(a)(v).

145 Supporting Information (99% of revenue from visitors) [[**305.1056**]]; Staff Report (90%) at para 77 [[**310.2066**]]

146 See also Mellsop who supports this view at [25]-[31] [[**202.0299**]] – [[**202.0301**]].

cent" in the Judgment is in a quote from the appellant's Staff Report:[147]

> One of the issues raised in feedback is that national statistics show that only 10 per cent of visitor spending is on accommodation. This feedback referred to the following statistics (which were included in the consultation materials).

7.40 This was therefore a figure relied on by submitters in the consultation process. The Report went on to take issue with the figure, pointing out that it was not limited to business and leisure travellers but visitors for all purposes. The Staff Report stated that historical data showed that the proportion of visitor spend on accommodation from these visitors was around 22%, and such visitors spent more on accommodation than anything else.[148]

7.41 Fourth, other ratepayers were not "excluded" from the required ATEED funding but contributed, as general ratepayers, towards 50% of that funding. That allocation involved a policy choice where there was no "right" answer, and "imponderables"[149] meant that any claims of precision would be unrealistic.

8. CONCLUSION

8.1 For the reasons advanced in these submissions the appellant respectfully submits that the 2017/2018 and 2018/2019 Decisions were valid; that the High Court judgment was correct in dismissing the respondents' judicial review application; and that the Court of Appeal erred in allowing the respondents' appeal.

8.2 Accordingly the appellant seeks orders as set out in paragraph [9] of the application for leave to appeal dated 8 December 2021.

Dated 20 June 2022

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Certified as suitable for publication under clause 7 of the Supreme Court Practice Note 2021.
Jania Baigent - Counsel for Auckland Council

147 Staff Report at para 78 [[**310.2066**]].
148 Staff Report at para 79 [[**310.2066**]].
149 *Woolworths*, above n 4, at 546, line 10.