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IN THE SUPREME COURT OF NEW ZEALAND SC 158/2021

I TE KŌTI MANA NUI O AOTEAROA [2022] NZSC Trans 15

BETWEEN **AUCKLAND COUNCIL**

Appellant

AND **C P GROUP LIMITED**

First Respondent

MILLENNIUM & COPTHORNE HOTELS NEW ZEALAND LIMITED

Second Respondent

M L C SCENIC LIMITED

Third Respondent

KATALYMA HOTELS & HOSPITALITY LIMITED (FORMERLY KNOWN AS T & T CLARRY'S HOLDINGS LIMITED)

Fourth Respondent

Hearing: 20 July 2022

Court:	Winkelmann CJ Glazebrook J O'Regan J Ellen France J Williams J
Counsel:	J E Hodder QC, J W S Baigent, G D Palmer and O J Maassen for the Appellant J B M Smith QC, M C Smith and R A D'Silva for the First Respondent A R Galbraith QC, T B Fitzgerald and S R Hiebendaal for the Second Respondent J B M Smith QC, M C Smith and R A D'Silva for the Third Respondent A R Galbraith QC, T B Fitzgerald and S R Hiebendaal for the Fourth Respondent T D Smith and G K Rippingale for Local Government New Zealand as the Intervener

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CIVIL APPEAL

MR HODDER QC:

May it please the Court. Hodder for the Auckland Council appearing with Ms Baigent, Mr Palmer and Mr Maassen.

WINKELMANN CJ:

Tēnā koutou.

MR J SMITH QC:

May it please your Honours, Smith for the first and third respondents, together with Mr Martin Smith and also Ms D'Silva.

WINKELMANN CJ:

Tēnā koutou.

MR GALBRAITH QC:

If the Court pleases, Galbraith for the second and fourth respondents, with Mr Fitzgerald and Mr Hiebendaal.

WINKELMANN CJ:

Tēnā koutou.

MR T SMITH:

E ngā Kaiwhakawā, tena koutou. Ko Tim Smith tōku ingoa, kei kōnei māua Rippingale mō Te Kahui Kaunihera ō Aotearoa.

WINKELMANN CJ:

Tena korua. We have a smattering of Smiths today. Mr Hodder?

MR HODDER QC:

Good morning your Honour. The first matter is a request, which I understand to be supported by my friends, which is in terms of a document the Court provided a few days ago. There was a suggestion that you, your Honour, as the judge presiding may permit a mask to be removed by counsel to enable effective communication. I think I, and my colleagues, are of the view that effective communication may be enhanced if we were able to take our masks off while presenting to the Court, but that's…

WINKELMANN CJ:

Yes, I'm content for you to do so Mr Hodder. Nobody else is objecting.

MR HODDER QC:

I should say that the last time I appeared in front of the Court in February I was fogging up, it was cutting into my face, and I was having great difficulty following my place before, so I am extremely grateful for that indulgence.

So the Court will have our written submissions, are able to have our chronology and I trust it has our road map from yesterday, and I propose to speak really to the road map to a large extent, as a way of trying to traverse the issues before us. I should say that in terms of that road map towards the end when we get to the questions of error in law, there will be a significant contribution made by my learned friend Ms Baigent, not entirely unrelated to the Court's protocol, but encouraged by that as well.

In terms of the road map, it starts off with a passage that says "introductory" and "themes" and I've mentioned there a few of the issues that arise. There are a number of issues which the Court will be well familiar with but have to be considered here. At one level there are two different approaches between the High Court judgment and the Court of Appeal judgment. To a significant extent the High Court judgment takes, as a starting point the general approach explained by the Court of Appeal in the *Wellington City Council v Woolworths New Zealand Ltd (No 2)* 1996 2 NZLR 537 (CA) case. In the Court of Appeal that approach has no particular role to play in the reasoning that leads to the result and obviously enough the appellant's position is that the High Court approach is to be preferred.

The question also goes on to that of justification for having the accommodation providers targeted rate, or the APTR, the essential justification for that must be practically self-evident. There is a view that it is, there are private as well as public benefits from the activities of the CCO called ATEED, and that commercial accommodation providers have the most direct benefit from those activities and therefore the Council has determined it is appropriate that the cost of ATEED in a general sense be shared with the general ratepayers. That's what the case, in a sense, is about, and responses to that are what carried the day in the Court of Appeal, and which we are resisting, of course, in terms of this appeal.

So clearly enough it isn't a question of, is it a good idea, or is it in the common good that ATEED activities either occur or that they be part funded by a targeted rate based on commercial accommodation providers. Good idea isn't a legal

yardstick. The question is whether there has been a justiciable error of law, including for these purposes the slightly amorphous concept of unreasonableness.

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Also, as part of the mix, we will point to the fact that it's not unknown for unhappy ratepayers to come to court on judicial review to attempt to reverse the decision of a council on rating matters. That's what happened in *Wednesbury*. It's what happened in *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA). It's what happened in the Queensland cases we referred to in our written submissions. It happened in at least some of the Canadian cases we refer to and, in our submission, it's happened here.

One of the dichotomies again in the cases that the argument for the Council is that there is a theme of democratic accountability that runs through the local government legislation, and that means that accountability provides legitimacy and it also provides an area of, as it were, a margin of appreciation in public law terms for Council decisions involving either allocation of resources or how to pay for resources that are being used to provide services to the community, and that is what has happened here. There has been a decision by an elected body to impose this particular targeted rate. Those to whom the rate applies say that it is unfair and disproportionate and should not occur, and they say the democracy point, the catch cry of democracy is one of the submissions where our friends uses it, is beside the point and the point really is the one made by the Court of Appeal they say which is that there was no other recourse for the respondents than judicial review. In our respectful submission, that doesn't really carry weight in the context of local government in New Zealand, given the steer in the legislation. This is not a case of the tyranny of the majority.

So those are the kinds of themes that I anticipate that the Court will be addressing as it goes through. More specifically, the error of law, as I understand it, boils down to an argument that says that there wasn't enough analysis, there wasn't that meaningful assessment done in relation to the rate and in particular the terms of section 101 of the Local Government Act 2002

and the unreasonableness argument boils down to a combination of perhaps the pass-through point and more disproportionality which may be roughly related to that.

So if it's convenient for that for the Court then let me turn to section 2 of our road map which takes us to the funding decisions, what actually happened in this case, and, as we say in section 2, a number of things happened for 2017 and I'm focusing mostly on 2017 because I don't understand there'd be an argument to say that if the 2017 rate was valid the 2018 rate was not, and so that's the focus of the 2017 decision which is the same as in the judgments in the Courts below.

But what, as we'll come to, the legislation later on – and I should say this just an introduction to the factual sequence. The way in which the submissions will flow, as the Court will have seen from the outline, is to address the funding decisions initially at first and briefly and then go to the statutory framework in some detail, then go back and look at what the Council actually did to get to the decision it did.

So in terms of the funding decisions, the start –

WILLIAMS J:
Wouldn't you say though, Mr Hodder, that the 2018 decision, being an amendment or an adaptation of the 2017 decision, is relevant to the 2017 decision itself, that it wasn't the end-point?

MR HODDER QC:
Well, what we say about the 2018 decision is it had a couple of refinements on the 2017 decision but the essential reasoning was unchanged. There's nothing –

WILLIAMS J:
Yes, but those refinements were in response to issues raised by objecting ratepayers.

MR HODDER QC:

But the 20 – well, the point I'll be coming to, Sir, is that the 2017 decision is itself majorly modified from the starting point by virtue of the representations. Those representations –

WILLIAMS J:

Yes, I agree but I was just wondering whether it's in your interests to say the 2018 version is not relevant in terms of the issues that you want to run, given that it's itself a response to 2017 objections.

1010

MR HODDER QC:

I'm not sure quite how far it's in my interests your Honour, but the point that I (**inaudible** 10:10:01) accept is that the 2017 and 2018 decisions are linked closely. That some of the matters that were raised in 2017 were carried forward and resolved further in the 2018 decision, and that is part of their response as to what was going on. The simple point is that trying to extend the rate to informal providers was hard, for a whole lot of logistical and practical reasons. It took time to do. Beyond that there's no particular fundamental change that takes place –

WILLIAMS J:

I'm not suggesting there was. I thought you were saying that you won't be talking about the 2018 rate.

MR HODDER QC:

Only briefly.

WILLIAMS J:

Okay.

MR HODDER QC:

Because essentially the same point is this, that, well as I apprehend it the argument is the one that says there shouldn't be a rate in the first place, of this

kind, and there was not greater analysis of the idea that there shouldn't be a rate at all in 2018 and there was in 2017.

MR HODDER QC:

As is clear from, as we'll get to in the legislation, but also in our note in paragraph 2 and 2.1, what happens is not just the adoption of a targeting rate but the Governing Body of the Auckland Council adopts an annual plan, an annual budget, a revenue and financing policy and sets rates across the board including the particular rate that's now in question. So if we can start, please, at 310.2151, which is the agenda for the Auckland Council's meeting on 29 June 2017. Then at .2159 we see there the report that explains the basis for the adoption of the annual budget and there's an executive summary, and this particular document goes on for four or five pages, explains the process that had been gone through in some detail, and it is a useful document. In the time that there is I just really want to draw attention to the fact it exists, rather than spend too much time on its detail. But the executive summary is helpful in setting the scene. Perhaps I should just step back once to say that one of the things that we are critical of in both the Court of Appeal judgment, and in our learned friends' submissions, is a very narrow focus on one element of section 101 of the Local Government Act in relation to this particular rate, and as has been said often, context matters, and the context that's explained for the funding decisions in 2017 is, in part, explained in this executive summary, and in the rest of the document that I have taken the Court too.

WINKELMANN CJ:

What do you mean "is a narrow focus". Narrow in that it excludes what?

MR HODDER QC:

The focus in the Court of Appeal judgment and, as you apprehend, in the submissions for the respondents, focuses on one paragraph in section 101(3)(a), which talks about benefits, but that is, as it were, one of the half lines in a major statutory context which needs to be understood, and which is why we propose to take the Court's time to go through that in sections 4 and following, or sections 3 and following of our outline, and it depends, if you start

at the narrow end and work backwards, it's harder to keep the context in mind if you start with the wider context and work down to where that particular line and a half fits into the entire framework. That isn't to say that we don't acknowledgement the line and half matters, we do, and I'll come back to that later on, but that's the point.

So the next document I can take you to is at 310.2191, which are the minutes of the meeting whose agenda I just took you to. So 310.2191. For our purposes if we can go to .2199, what we have there are the full rate setting resolution, starting about two-thirds of the way down on the page. It's a repetition, you can see the note there that says, "for clarity it's set out below." To a large extent it's in this series of pages that precede it. In any event the point is that what the Governing Body does is to go through and do a series of things. So (a) is a uniform charge. (a)(i) a uniform general charge; (ii) a general rate for a different category, across seven or eight different categories. Little Roman (iii) a transport targeted rate; (iv) a waste management targeted rate; (v) a city centre targeted rate; (vii) a business improvement district targeted rates and then (viii) and (ix) are specific to the particular areas. (x) is a flood gate restoration; (xi), (xii) et cetera. (xiii) and then through until one gets to, a late stage in the process we get to the rate that we are concerned with, and so if one counts up one finds that there is, in fact, 11 targeted rates determined by the Council at this time, of which the accommodation providers targeted rate is one of those, and it was dealt with as being number (vi) in the particular document you're looking at, at the moment. It was dealt with separately in the debate, as you can see at page .2199 at the top, and then it's put in order as (vi) in the document that follows in the pages after .2199, and you'll see there that there is an accommodation provider targeted rate depending on land in zone A and B, and used for tier 1 or tier 2 commercial accommodation, so there are a series of permutations, and those permutations have different rates in the dollar of capital value.

So that, in a sense, is what this case is about. It's about the striking of the item that's set at (vi) in the context of the rest of the rating decisions made and effectively finally signed off on the 29th of June 2017.

WILLIAMS J:

Are there any other business focused targeted rates?

MR HODDER QC:

It depends if you focus on, call that, at number (v) there's a centre city targeted rate, or (vii) there's a business improvement district targeted rates. In terms of a particular specific occupational activity, no.

ELLEN FRANCE J:

So what do you say is the significance of the fact this is one of a number of rates being dealt with at the time?

MR HODDER QC:

The significance is it demonstrates the kind of range of considerations that a council has to take into account when it is setting rates. It's given wide and flexible rating powers. These are illustrations of wide and flexible rating powers being used. Uniform charges, a general rate, and a series of targeted rates which cover a wide range of matter or activities, and the point of me referring to that is that one wouldn't appreciate that from our friends' submissions, or indeed from the Court of Appeal judgment, and so our point is that what we're talking about, the process of doing here is the process of funding the Auckland Council's expenditure. Part of that process is by obtaining money to pay for the activities, and part of that activity is identifying where there can be rates imposed, and that is what it does.

So it isn't, as tends to happen with any litigation, and judicial review is not immune, there tends to be a kind of a tunnel vision risk of focusing on the particular matter at issue, without recognising that this was part of a wider scheme of things that are going on, and this is an event that happens every year, and this is actually done by a range of, every council in the country does something like this, not quite with the same numbers involved, and perhaps not in the same range of activities as Auckland Council does, but every council in the country goes through a rating exercise because rates must be set annually and funding must be determined annually, and –

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WINKELMANN CJ:

And as a general theme that emerges from these targeted rates that are set out in this document, is there a theme that it's where, in terms of section 101(3), there's more benefit for the people who it's been targeted at than the general ratepayers? So, for instance, you couldn't say that the business improvement of the Avondale business district didn't benefit the people in Avondale but it benefits more particularly the Avondale businesses, so there's targeted rating there.

MR HODDER QC:

The point that we would make, your Honour, is that all of these rates are undertaken within the framework of the Local Government (Rating) Act 2002, particularly schedules 2 and 3. They all fit within the wide range and potential permutations of the factors listed in those two schedules, and they can be different kinds. So who are the beneficiaries of a city-centred targeted rate? Well, they may be all the people in Auckland who enjoy the city centre, or there may be people who have – it may be designed to improve access to aspects of the central city which helps the service industries. There are a whole range of considerations at play.

Going back to page 310.2094, and just a brief introduction at this stage to the 1 June meeting of the Governing Body which preceded the ones we've been looking at. The ones we're looking at are the ones that do the final setting but some of the policy decisions were effectively made on 1 June and the minutes of that are set out commencing at, well, the agenda at 310.2094, and then within that there's a discussion of what's going on but the particular discussion of the rate we're concerned with is then set out in a bit more detail than you saw before at pages 2101. Again, this is the resolution. We can go towards the top, thank you. So we see there moved by the Mayor "that the Governing Body," and then (c), all of (c) which goes for this page and the next page is the resolution about the targeted rate for commercial accommodation providers, and I draw attention to it to show that it's a complex matter. It reflects a number

of moving parts, if I can put it that way, including the tier 1, 2, 3, zone A, B, C, et cetera, and then it goes on to explain how the differential works in the table at the bottom of that page. You get those permutations as to different ways in which it works, and then over the page we see at (v), little Roman (v), the question of remissions under the existing rate remission scheme. Rate remission schemes are part of the Local Government Act framework. (vi), Staff will report back on the development of a more targeted remission scheme as part of the long-term plan for 2018 and 2028, and that is in part of the response to Justice William's question that that was one of the things that was carried over until the next year, and likewise at (vii) the question of inclusion of informal accommodation providers. They weren't ignored but they were to be carried over, and then also alternative governance arrangements for ATEED, Auckland Tourism, Events and Economic Development.

So at little (ix) and (x) we see what's to be raised is 13.45 million of general ratepayer funding, which sounds like a large number at first sight but it's in the context of a close to $2 billion operating budget that has to be funded for Auckland Council.

The other aspect which – well, all those aspects are there, including the Mayor being open to discussion, proposals the industry may want to have, there's an ongoing dialogue about that.
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But the other point is to note that at the end of this page we see that, if we go to the bottom, on the basis of a list, the motion was carried by 10 votes to seven, and we see this as a theme going through these decisions. These are split votes by the Governing Body. So some councillors were persuaded by matters put forward by accommodation providers, as they did, and as I will come to, during the course of the consultation processes, but the others were not, and according to the Local Government Act, schedule 7 I think it is, if there is a decision to be made by a governing body, it is made by a majority vote. That's what the statute provides for. So 10/seven is the decision of the Council. What it demonstrates is that notwithstanding that the number of affected ratepayers

was modest in the scheme of the Auckland Council rating numbers as a whole, there was traction for their complaints, but in the end the majority prevailed. There were differences of view. It's not as if there was an ignoring of the fact.

Then in terms of what happens in 2018 we briefly mention that at paragraph 2.3. the reference items is at 321.4561, and if we turn to page .4565, this is the minutes of the meeting of 28 June 2018. Then at .4565 we have the rates setting resolutions. This is setting out the rates for the year and again there's a wide range of rates. If we go through to .4567 we find the accommodation provider targeted rates. On the table we see a wide range of permutations and different rates in the dollar of capital value.

There's another series of targeted rates on the following pages, we don't need to worry about, and then in relation to that at the bottom of .4571 we see again that there were dissenters among the Governing Body. Those who were not happy with item little Roman (vii), were unhappy with the accommodation provider targeted rate for 2018.

So that's all I was proposing to say at this stage about the core decisions that are really being reviewed in, were reviewed in the proceedings brough by the respondents.

I now wish to turn and spend some time on the rating context provided by the legislation. Just in terms of acronyms, I'm sure the Court appreciates, AWS is our written submissions, and LGA is Local Government Act, and the version that we have in the bundle of authorities is the version from 2017. There were changes in 2018 and there was a bit of toing and froing about whether local bodies were concerned with wellbeing or not, with different governments, but that's not relevant to our purposes. If I could run through this quickly. No doubt the Court will have to look at the Local Government Act, if it hasn't already done so, or members of the Court haven't already done so, I suspect they have. But the basic proposition is that local authorities are there to provide services and undertake activities on behalf of their districts. That's reasonably straightforward, but section 10 makes that absolutely clear.

The purpose of local government is the defining part of this Act. It's also the point of local authorities. Their objective is to give effect to the purpose of local government as stated in section 10, that comes from section 11. The purpose is "to enable democratic or local decision-making and action by, and on behalf of, communities" and meet the current and future needs of communities "for good quality local infrastructure, local public services, and performance of regulatory functions," in a way that is most cost effective for households and businesses.

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So the proposition is there have to be services. That's the point of local authorities. They're providing services and they're providing facilities and they're undertaking activities. It has to be paid for, and that's really what this case is about, and in terms of paying for it they're required, as section 100 states in the heading a "Balanced budget requirement" has to be satisfied. So borrow and hope is not the, is not an acceptable answer in terms of the statutory balance.

In terms of the sources that can be used to fund those matters, and if we can go to 101 for the moment please, I'll come back to it but just a first encounter with section 101 for the day. So the focus, as the Court knows, is 101(3)(a)(ii). That's where the Court of Appeal finds an error of law. For my present purposes I'm looking at the preface to those paragraphs. "The funding needs of a local authority must be met from those sources that the local authority determines to be appropriate, following consideration of…" and the funding sources that are permissible, so that's funding sources are referred to, 101(3), and the sources themselves are set out in section 103. So in "revenue and financing policy" provision (1)(b) says the policy must state, the policy in relation to the "sources listed in subsection (2)." Then subsection (2) lists the series of sources in fairly broad terms, but you'll recognise the pattern of it when it refers – if we can get to 103(2) please. General rates, targeted rates, lump sum contributions, fees and charges et cetera et cetera, and then at the bottom "(j) any other source."

But clearly the intention must be that the primary range of sources are the ones that are identified, as opposed to the wrap up (j).

Then turning to the Local Government (Rating) Act, which is LGRA in our acronym matters. Then the general idea of those is that there are to be flexible rating powers for local authorities. The point is made explicit in the purpose provision, which is section 3 of the LGRA. So the purpose of the Act is to: "(a) promote the purpose of local government set out in the Local Government Act 2002," and the Court will recall that's section 10 of the LGA that is talking about providing services, activities et cetera, and how does it do that? It does that by: "(i) providing local authorities with flexible powers to set, assess and collect rates to fund local government activities: (ii) ensuring that rates are set in accordance with decisions that are made in a transparent and consultative manner: (iii) providing for processes and information to enable ratepayers to identify and understand their liability…"

So unsurprisingly we say that's precisely what happened here. The Council has used flexible powers to assess and collect rates and the decisions have been made in a transparent and consultative manner. There's no subterfuge here, it's been absolutely clear what's going on. There was explicit consultation and detail, which I'll come to, and that's where one gets to.

WILLIAMS J:

What do you say to Mr Galbraith's point that flexibility that's woven into the statute was, according to the speech of the Minister, subject to heightened accountability, and that section 101(a) – sorry, 101, reflected that. That with the heightened accountability it contained constraints that weren't in the original LGA.

MR HODDER QC:

I'll come to that, but the changes to the legislation in 1996, which carried forward into 2002, the accountability was by making transparent what was going on. That is to say, that people could see what was going on. So that was introduced as the idea of plans and statements and so on and so forth. So there was no

doubt about what way the Council could be judged. The judgment that was contemplated wasn't a judgment by the Court, it was a judgment by the electorate at re-election.

WILLIAMS J:

Right, democratic accountability, you say.

MR HODDER QC:

Yes, and I'll come to that, but that's what the Minister says.

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WILLIAMS J:

Well, what about 101 though because there was no equivalent, I understand, in the old LGA?

MR HODDER QC:

Well, there was. I'll come to that as well, but in the 1970, 1996 Act they were introducing a series of – I think under section 121 with alphabet following – provisions that –

WILLIAMS J:

121I I think they refer to.

MR HODDER QC:

And they were streamlined down into 101(3) but the essence doesn't change. The essence of it doesn't change, as we say, and I'll come back to that in due course.

So we say when the word "flexible" is used in section 3 of the LGRA, along with the word "transparent", what is being referred to, it means, "flexible" means flexible, to put it as simply as that, and "transparent" means that it's available to the citizens and ratepayers of the district to know what is being done with the money and how the money is being collected and that those proposals are able to be consulted on, both in terms of the planning regime that's set up, and the

plan has to include various provisions which go towards rating, and then the rates that are actually set. So as I'll come to, that's exactly what happens here. There's a transparent and consultative process. That enables scrutiny of the work of the Council by the people who live in the area and pay the rates. It doesn't mean that it enables a higher degree of judicial scrutiny. There's no suggestion of that in anything in the parliamentary materials.

The powers to impose targeted rates is where you'd think we'd be spending most of our time but we're not, at least in terms of the Court of Appeal judgment and the respondent's submissions, and it's because there is no ultra vires argument here that's being advanced.

But anyway, we go to section 16 of the LGRA, and we see section 16: "… may set a targeted rate for 1 or more activities or groups of activities if those activities are identified in its funding impact statement as the activities or groups of activities for which the targeted rate is to be set." Now that's somewhat circular and it also means that the Council decides what goes into the funding impact statement and that is what provides the boundary of the targeted rate. Then at 16(3), a targeted rate may be set in relation to all rateable land or one or more categories, and it may be set under subsection (4) uniformly or differentially. So again these are indicators of flexibility. It may be thought that at one stage the standard approach was to have a single rate in the dollar for all, say, the land value in the district. What this is indicating is that's by no means what's going on in the rating world to a whole range of possibilities.

Then 17 goes on to say that things are defined in terms of the matters listed in schedule 2, and then at 18 says that the calculation of liability includes factors that are listed in schedule 3.

So if we turn to schedule 2 and schedule 3 of the LGRA, recalling these could be one or more of these matters, in our submission they contribute to the overall flexibility. There are a range of matters that are used to define the categories of rateable land in schedule 2, following on from section 14. The use to the land, the activities that are permitted, the activities proposed to be permitted,

the area of land, the availability of a service, the location, the annual value and the capital value, et cetera, of the land. What this goes to show is you can't take something completely extraneous, like you don't like the person or the person happens to come from a particular background, let us say they're a European multimillionaire, you don't get to rate them separately for that, but subject to that, in terms of a general range or a propriety, these are very flexible criteria. They're not highly prescriptive.

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Likewise we go to schedule 3, these are the factors to be used in calculating liability. We look through again we see annual value, capital value, land value, improvement value, area of land within the rating unit, area of land that's sealed, paved, or built on, number of parts of the rating unit that are inhabited, provision of any service, number of connections, area of land, et cetera. So probably 1 through 6 and maybe 11 and maybe others are not related to benefit in any direct or obvious sense. They're objective criteria. Well, I suppose "valuation" could to be said to be valuation on a valuation record, it's a, can be treated for those purposes. So again what we say is there's nothing prescriptive here and so the argument that says you must have a close correlation between a benefit and a rate, gets no support from the LGRA's text or instruction. It just doesn't work that way. Now one of the things that is said is that – I'll have to go back two steps on this – there is a difference, it is said, between targeted rates and general rates, and that's said that that's one of the ways that you can distinguish *Woolworths*. *Woolworths*, it's said, was about general rates. Well actually *Woolworths* is about differential rates not general rates and *Woolworths*, as we've said in our submissions, involves a minority of ratepayers. It involves about 400 commercial ratepayers in Wellington when no doubt there were many, many thousands of ratepayers, and so again a small minority. Targeted rates have the same degree of flexibility, pretty much, as general rates do because the rating provisions in the Local Government (Rating) Act for general rates are also very flexible. They can be based on a series of different criteria in relation to differentiation between them. The flexibility is apparent throughout the statute.

One of the things that is said in relation to *Woolworths* is that there's a phrase which we set out at the beginning of our submission at paragraph 1.4, we quote a passage from *Woolworths* where Justice Richardson for the full court said: "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 affecting the general rate and differential rating…" and I'll come back to the words in brackets, "… 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."

Now we say that's that case here, and we say those phrases "breadth and generality" capture both the legislation that we have concerning both general rates and targeted rates.

WILLIAMS J:
What do you make of the reference in the authorities to "fiduciary relations."

MR HODDER QC:
Sorry?

WILLIAMS J:
Fiduciary obligations of a council vis-à-vis ratepayers?

MR HODDER QC:
They are limited. I can come back to it later, but the short point is that it's discussed usefully by Justice Richardson again in the *Lovelock* case saying it's not a basis to open up a rating decisions at large where you have –

WILLIAMS J:
What is it a basis for, is what I was trying to work out.

MR HODDER QC:

I think the idea was that it's really this, it's the extreme form of discrimination. So my example of the European multimillionaire would be one form, if you could do that, and you probably can't, but likewise when they were treating Electricity Corp as a sort of a cash cow in the *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] NZLR 41 (CA) case. That's the extreme example and it's described that way in both *Woolworths* and in *Waitakere* or *Lovelock*.

WILLIAMS J:

It's hard to see why you need to deploy fiduciary obligations to get to that point.

MR HODDER QC:

Well I think it's kind of a, if I can put it this way, I'm putting words in Justice Richardson's mouth as it were, it's backstop to the general provisions that one gets at public law, but the idea is that if you disregard entirely the position of a new ratepayer coming in and treat them as funding massive surpluses, what's happening in the *Mackenzie* case, then you have forgotten that you need to have regard to ratepayers in a way that means you're responsible for all ratepayers. Now you can't be responsible for all ratepayers on a detailed one by one basis across umpteen thousand ratepayers, but when you have one or a very small number who have then used to disregard expectations there are no surpluses, which is what *Mackenzie* was about, then it's a case where the fiduciary obligation can come in. Beyond that, the role has been limited for that particular concept partly because when it was originally used in the United Kingdom cases it was politically controversial because it was thought to be a way of avoiding left-wing councils from doing things that left-wing councils wanted to do.

WILLIAMS J:

Yes, like reducing bus fares.

MR HODDER QC:

Yes, the early cases. So all I can say to your Honour really is that it has a constrained role. It was mentioned in, as part of the reasoning in *Mackenzie* and it was constrained by the reasoning and the express discussion of if by Justice Richardson in the *Lovelock* or *Waitakere* case.

WILLIAMS J:

So it bites for ECNZ, because that's one. It doesn't bite in *Woolworths* because that's too many, what's in the middle and are your facts in the middle?

MR HODDER QC:

Well in the middle it's difficult, I think the general theme of *Woolworths* is it's not a place, and of *Lovelock*, it's not a place where the Courts get involved. The extreme case is one where you can, that's the kind of consistent line of authority that one gets.

WILLIAMS J:

You said there were more ratepayers affected in this case than were in *Woolworths*.

MR HODDER QC:

I think the total, I think we said somewhere was a couple of thousand, yes.

WILLIAMS J:

In this case?

MR HODDER QC:

In this case.

WILLIAMS J:

Versus 400 ratepayers in the Wellington CBD?

MR HODDER QC:

Yes.

WINKELMANN CJ:

Well wasn't that just people who were protesting in the Wellington CBD?

MR HODDER QC:

I'm sorry your Honour, I can't…

WINKELMANN CJ:

Wasn't that just the people who were taking issue in the Wellington CBD, 402, or whatever it was.

MR HODDER QC:

Well it said there were five applicants and they were on behalf of themselves and 405 others. I didn't understand it to be a class action on this, I assume from reading the judgment that those 405 were the affected ratepayers.

WINKELMANN CJ:

One would imagine it was a larger number if it was the Wellington CBD.

O'REGAN J:

Was it just the Wellington CBD as well, it was commercial, generally, wasn't it?

MR HODDER QC:

Well there was an issue about suburban ratepayers as well. Suburban commercial activities.

O'REGAN J:

Yes, I think it would be a bigger number than that.

MR HODDER QC:

But a case of, there may be more, I'm just simply not sure of that, but even if there were 400 the same points apply. It's really a question of whether you can say somebody has been singled out in a way that's improper, and in the case of *Mackenzie* the signs of impropriety were included and in particular the idea that it was going to pay virtually all the rates and produce a handsome profit, surplus for Mackenzie District. That was just several –

WILLIAMS J:

So we get the impression that that was an important factor.

MR HODDER QC:

It was, in our submission, yes.

WINKELMANN CJ:

I mean notion of fiduciary doesn't sit all that comfortably, does it?

WILLIAMS J:

No.

WINKELMANN CJ:

You know, act in best interests and don't self-deal.

MR HODDER QC:

Again, this comes back to the heart of the jurisprudential aspect of this case. What Justice Richardson and his colleagues in the series of Court of Appeal decisions are saying is on the whole we don't get involved in this stuff because Parliament has said this is for ratepayers and ratepayers are democratically accountable. If we get something that's completely extreme and clearly shows that they haven't done any analysis, and they are going to finish up with a surplus, then we'll step in, and they did in *Mackenzie*. But they didn't in *Woolworths*, they didn't in *Lovelock* and in our submission they shouldn't have done so here. The fact that there is a small number of ratepayers isn't the answer to the question. One ratepayer that is being used as a sort of a cash cow for everybody else, that is the extreme case.

WILLIAMS J:

There is authority about, like ratepayers being treated alike, or at least it's not about ratepayers, it's a more general public law principle. How do you walk yourself away from that?

MR HODDER QC:

That's really difficult in the rating scenario, this is why we have drawn attention to the idea that rating is a tax, essentially, and there's plenty of authority on that basis we've provided. It's not a fee for service. I can't go and say, I only kind of, I only use recyclables and therefore I don't need your general rate collection matter, therefore I shouldn't be paying for it, it doesn't work that way, and all sorts of anomalies arise. I happen to have a particularly – I have a harbour view. Should I be paying more for my water services, et cetera, in my residential area –

WILLIAMS J:

You should probably be paying a window tax.

MR HODDER QC:

Well that's – again I'm not sure that's a criteria that's in schedules 2 or schedule 3 of the local government –

WILLIAMS J:

So would you say that under the LGA and LGRA some forms of discrimination are acceptable?

MR HODDER QC:

Some form of discrimination, depending at what level you take it, is inevitable.

WILLIAMS J:

Yes, but you wouldn't support, for example, the imposition of an accommodation tax north of Queen Street but not south of Queen Street. I mean you couldn't, could you, because that would be arbitrary discrimination.

MR HODDER QC:

Yes it would be. If it was completely arbitrary then you couldn't accept that.

WILLIAMS J:

So that takes you to the reasoning, there's got to be sufficient reasoning –

MR HODDER QC:

Well there has to be a demonstration that it is completely arbitrary, that there's no doubt about it, we say, and so what you get in this case is not north of Queen Street or south of Queen Street, you've got a series of zones which are dealt by reference to the CBD, so it's been thought through. It's not arbitrary, it's reasoned and as we'll see –

WILLIAMS J:

So the point is that some discrimination, reasoned discrimination in accordance with 101(3) is acceptable, you say?

MR HODDER QC:

I think we'd go the other way, with respect your Honour. We'd say that it's in inevitable there's going to be, in any waking scenario there's going to be something that isn't going to be entirely equitable, entirely reasonable, at least as seen by the ratepayer, because for some reason they're not getting as many services from the local authority as somebody else is, but they're paying the same level of rates in the dollar per value –

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WINKELMANN CJ:

Rating is inherently discriminatory.

MR HODDER QC:

Yes. Well, it's a tax. I mean it's –

WILLIAMS J:

Well, differential rating is.

WINKELMANN CJ:

No, rating is inherently discriminatory.

MR HODDER QC:

Any rating. Land value is discriminatory in itself, depending on the location of it, whatever it might be and what you're using it, and so, if you have maybe different zonings to it, what you can do with the land or different views, different subdivisional potential, whatever it might be, there may be ways in which two sections that look identical are going to have pay more, different levels of rates.

WINKELMANN CJ:

So where are we at with your submissions, Mr Hodder? I've lost our point.

MR HODDER QC:

Well, the point that I effectively was about to make is that in relation to the quote from Justice Richardson at 1.4 of our written submissions, what I was going to come back to is the passage in brackets at the top of our page 2 which says: "…(in contrast with user charges and special purposes authorities)," so user charges are not taxes. They are directly related to the concept of use, and I should say that in relation to this case the APTR is not a user charge in that sense. It's based on relation – to other criteria, and then it refers to "special purposes authorities" and it's clear enough from the rest of the judgment that "special purposes authorities", what's being referred to is what existed more in the time that we are talking about when we had the age of Rabbit Boards and Catchment Boards and various other kinds of special authorities. Their particular rating powers which vary from statute to statute were being excluded from what Justice Richardson was saying. He was talking about local councils. He wasn't talking about special purpose authorities like Catchment Boards or Rabbit Boards or any other kind of – that category of proposition.

So we say there's nothing in what he says that isn't applicable to the rating process that Auckland Council has gone through.

The other thing that perhaps is just worthwhile mentioning in terms of – and isn't noted in my road map – is around about 3.5, rates setting requires an annual resolution. It has various requirements. You can have a remission policy. Also says you can't delegate the rating power. That's in, I haven't got it in my notes,

but in Local Government Act schedule 7, which we've added to the bundle of authorities yesterday, at clause 32. There are a series of matters that cannot be delegated by a Governing Body and that is one of them, which emphasises the point that the elected members of the Governing Body have to stand up and say: "Yes, we did vote for this rate," or in the case of this particular rate seven can stand up and say: "We didn't vote for it." But that's of some relevance.

In terms of the decision-making, we talk in section 4 about the local government purpose. I discuss section 3. It also carries through into section 16 of the LGA. The reference to Professor Palmer's local government text, which is at tab 35 of our bundle of materials, is really just to pick up the reference he has at 37.23.8. I won't spend any time on this, your Honours, but there was a useful discussion about what local government is for in both the United Kingdom Commissions 1969 and the Widdicombe report of 1986, and those paragraphs, 37.23.8.2 and 8.3 explain that local government is not merely as a provider of services – this is the first quote from Lord Redcliffe-Maud's report – and then the next two sentences: "The importance of local government lies in the fact that it is the means by which people can provide services for themselves; can take an active and constructive part in the business of government; and can decide for themselves, within the limits of what national policies and local resources allow, what kind of services they want and what kind of environment they prefer," and then the services or the value and attributes are set out towards the end of 28.3 onto the next page, I think, where there's a quote from 3.11 of the Widdicombe report, thank you, concerning the value of local government, the comment was that local government has three attributes of pluralism, participation and responsiveness, and so in terms of the idea of democratic accountability that we find in the Local Government Act I draw these to the Court's attention simply to indicate that it's a form of elaboration of that idea, which we say Professor Palmer has rightly drawn attention to in his text.

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I've drawn attention in the road map to various provisions in the balance of section 4. The only thing, perhaps, to say is in relation to the Mayor's position, which is – and the Auckland Council's position, there are references there to,

or there should be references there in section 6 in fact to the Local Government Council Act, LGLCA, and they indicate that there is a role for the Mayor, which is a leadership role. So when the Mayor goes out in 2016, or goes out as a candidate and says "I think there should be some sort of charge to cover tourism promotion." There's nothing wrong in any sense with that. That's what he's effectively trying to do, is to achieve the position as Mayor, to take leadership in various matters including activities that Council engage in, and how funding can be provided for them across the whole of the Auckland area. So we say that that particular recognition of his Mayoral role, as we refer to in our paragraph 4.4 notes, in sections 15 – section 9 for the Mayor and section 15 for the Governing Body – confirm that Auckland Council was at least as much involved in these roles for governing bodies and mayors as the rest of the councils in the country.

The decision-making requirements are set out in the Local Government Act at sections 76 to 81. There are a range of provisions there which go to the point that decision-making by local authorities is subject to a variety of statutory provisions, which goes to the idea of transparency. In broad terms what the Act is doing it's providing for procedural expectations, it's providing for consultation expectations, and it's recognising electoral expectations in the electoral factor in all of this. I won't' spend time on this now, because the Court will or can see the detail about consultation principles, and the detail about the decision-making requirements.

I draw attention briefly to sections 76 and 81 of the LGA. So it will be seen that the legislation draws particular attention to decision-making as a concept, and that's obviously a vital concept, to be undertaken on behalf of the people of a particular district, and the point about the decisions is that, as it says in, for example, 78, community views are being sought, and 79, there is to be a discretion and judgements to be made about how to achieve compliance with those procedures. Again not inconsistent with the general approach that we find in *Woolworths*. Section 80 requires "Identification of inconsistent decisions" they must be spelled out, that goes to the general concept of accountability, and then it goes on at 82 to discuss "Principles of consultation".

Now coming to the question of what existed before, if we can go, please, to the Local Government New Zealand, the Intervener's bundle of authorities, and to tab 5, and with apologies from stealing Mr Tim Smith's thunder, if I am, then this should be Hansard from 1996, which in part cropped up in the dialogue I had with his Honour, Justice Williams, a little earlier.

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So this is the third reading of the Local Government Amendment Bill in 1996 and it's quite an interesting passage in various ways, and this is the third reading speech by the Acting Minister of Local Government. At the bottom of the first page it points out: "The Bill has two overall objectives: better financial management by local government, and more flexible and modern borrowing powers for local government."

Then the next paragraph: "To achieve the objective of better financial management, local authorities will be required to prepare a framework of financial management strategies and policies that will govern all financial decisions. That framework will be subject to extensive consultation requirements and will provide a clear basis against which specific expenditure, investment, rating, and borrowing proposals can be considered. These…have a clear and simple purpose—enhanced transparency and accountability in local authority financial decisions," and so in terms of Justice Williams' point I read that as being accountability to the people in the electorate, not by way of some judicial review scenario, and the point being that if you have this framework of policies and strategies which are also now in the current regime then that enhances those propositions.

Moving on to the paragraph beginning: "Much interest and debate is centred on the provisions relating to funding and rating…" "Each local authority will be required to prepare a funding policy at least every 3 years, … This Bill does not take away responsibility for funding decisions from locally elected councils. It prescribes a process they must follow in making funding decisions. This is intended to make the reasons and judgments … explicit and clear. The Bill

makes it clear that these assessments and judgments are the prerogative of each local authority and it is up to them to determine what weight should be given to each factor." So pausing there. This is again the same theme that comes through from the *Woolworths* case which gets mentioned explicitly shortly and is what we say is relevant here. "Members of the public will be in a better position to make submissions supporting or opposing these proposals, which should lead to decisions that more accurately reflect the values and priorities of residents and ratepayers. After all, that is what local government is all about." Now again, that is not promising ground for judicial review, we say.

"Concern has been expressed at the possible effect this legislation will have on the principles established by the recent Court of Appeal decision" in *Woolworths*. "That decision is important for the clarity it brings to the role of the courts in respect of those decisions. I believe that the concerns about the effect of this Bill are misplaced. The Bill has certainly changed the statutory environment …, but it does not detract from the prerogative of elected councils to make political assessments and judgments in funding decisions. In fact, the Bill contains provisions … that expressly recognise this principle," and goes on to say there were direct quotations from some of the language.

And by way of example, if we were to go to item 2 of the Local Government New Zealand bundle of authorities, which is an extract from the 1974 Local Government Act as amended, and turn to section 122I, these were more detailed provisions. They've been streamlined in various sections, including sections 76 to 81 and 101 of the current legislation. But in the Compliance section 122I, the extent and detail of information, the degree to which they are quantified, the extent to which options are considered, are such as the local authority considers on reasonable grounds to be appropriate.

Then subsection (4). Without limiting the generality of subsection (3), it shall be the responsibility of each local authority, having regard to any relevant submissions received, to make judgments about fairness and equity, and so on and so forth, and those judgments "reflect the complexity and inherent subjectivity of any benefit allocation for the specified outputs and the complexity

of the economic, social, and political assessments required in the exercise of political judgment concerning rating."

So the language and the thought process behind the *Woolworths* decision is endorsed by the legislature in 1996 and we say it hasn't changed; it's simply been streamlined down. There are different approaches, more outcomes-based in a sense, but that's an indication that the *Woolworths* approach was perfectly in line with the statutory intentions in relation to how local government works.

1105

Financial management I deal with at section 5 of the synopsis. To some extent we've partly touched on this. There is a balanced budget requirement. Section 101 I'm proposing to come back to in more detail at part 9 of this framework. Sections 102 and 3 talk about revenue and financing policies, and we've looked at the provisions about funding sources and how they are determined, ie, they're determined as appropriate by the local authority.

Democratic accountability. I wasn't proposing to make kind of a soap-box statement about democracy but it's not to be underestimated, and so we've listed at 6.1 in the references a whole series of parts of the LGA which make it clear that the core theme of that Act is accountability to local communities, and the democratic underpinning, of course, is the idea that there are elected bodies. That is what is expected and it's explicit in the provisions we've given from the Local Government Act that what's contemplated are elected bodies making the decision, and those people are up for regular re-election, and we've also given a reference to the Local Electoral Act 2001. That again is about making sure that people who live in districts are able to get representation and in that way have a voice and an influence on the matters that affect them, and then that's repeated again in relation to the Auckland Council specific legislation, the LGACA. We have discussed some aspects of this in our written synopsis. At paragraph 1.6 we talk about the idea of democratic governance. We cite Andrew Geddis' book on electoral law and we also cite from Professor Ryan's book *On Politics*. The reason for that is they are useful

discussions of the idea of legitimacy coming from elections and the sanction being re-election on the basis that elections are regular and there is sufficient expectation of seeking re-election but that provides the accountability and the legitimacy for decisions that they acquire from a democratic process as opposed to bodies that are simply appointed by somebody in terms of the standard administrative decisions that are the normal diet of judicial review.

GLAZEBROOK J:

And the concern that's raised by the respondents is the minority concern.

MR HODDER QC:

Yes. That would be true of probably almost any complaint about rating. So every rate will annoy somebody but the idea that –

GLAZEBROOK J:

It's not so much annoy because these are targeted rates, I think that's the point made, and targeted on a proportion of the ratepayers, or a particular proportion of the ratepayers.

MR HODDER QC:

Yes, that's true, but if one goes back to that range of targeted rates we saw earlier on that the Auckland Council has engaged in, some of those relate to specific facilities. If the Council didn't choose to impose a targeted rate related to particular infrastructure facilities, in our submission it couldn't be reviewed for not doing so and each of those targeted rates will deal with the people who are a very small number of people, and if they look and say, well, someone else in the district is not paying for that particular facility for whatever reason, we say that doesn't give a basis for judicial review. So counting heads, in our respectful submission, doesn't take us anywhere. So is it the case –

GLAZEBROOK J:

So you say it has to be an extreme case where they either say: "Well, this group of ratepayers benefit from it but we'll actually charge these other group of ratepayers because they've got more money," or something along those lines?

MR HODDER QC:

Yes, well…

GLAZEBROOK J:

So what link do you say there has to be when there is a differential rate between the people who it's imposed on and what it's supposedly funding?

MR HODDER QC:

Well, on differential rates there can be any number of things. I mean what was an issue, of course, in *Woolworths* was a differential rate, and so here we have a differential targeted rate, but to the extent we're talking about a targeted rate then the nature of the targeted rate is it's targeted towards an activity. It's not targeted towards individuals, but yes, there would need to be something that says that there is a connection of some sort that justifies this particular rate. It can't be completely abstract. So you couldn't target a combination of providers for something that had no relationship whatsoever to tourism or travel. I'm not quite sure how that would work. It just wouldn't work that way. It would be something that had lacked a rational link.

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GLAZEBROOK J:

So you say a rational link is it?

MR HODDER QC:

Well the rational link is that there are public and private benefits from expenditure on promoting –

GLAZEBROOK J:

No, I wanted the test, not the reason. I can see –

MR HODDER QC:

Well the test is there has to be some rational connection.

WINKELMANN CJ:

Wouldn’t you say that section 101 is the framework for that in a way.

MR HODDER QC:

Section 101 applies across the board, not just at targeted rates –

WINKELMANN CJ:

I know that, but that does give you the parameters of the kind of considerations, doesn’t it, as do the schedules.

MR HODDER QC:

Yes.

WINKELMANN CJ:

Those which are relevant and not collateral or irrelevant.

MR HODDER QC:

Yes, and that I think is kind of where the Courts below differ and where we agree with the High Court. That that isn't the stringent test. The test is one where the Court has to be – sorry, where the local authority is satisfied and the, and has to take it into account. One of the criticisms I think made in *Mackenzie* is that no effort had been made to take these things into account, they just simply decided that Electricorp had turned up as a new ratepayer and they’d be able to milk it. That isn't the scenario we’re talking about here and it wouldn’t be permissible under section 101 for the reasons that have been indicated. But Justice Glazebrook’s point about the numbers, is there a risk of a tyranny of the majority? Well the way that risk is – well I suppose it always is – partly the answer is electoral. That is to say that there is a political cost to behaving badly, if I can put it simply like that, and if you finish up with enough councillors who are unhappy with that, then you lose, you don’t get the rate through and that, as I say, came to a 10/7 vote, or 10/8 vote in relation to this particular matter. But that then is the end of it. Those votes, we would suggest, reflected a whole range of factors, not the legal position.

So in the end we say there's nothing more than the Act's own provisions. The Act contemplates that there will be targeted rates, which could be imposed on a whole range of quite different factors under schedules 2 and 3 of the LGRA. Section 101 provides a whole series of matters that have to be taken into account, but the core provision in section 101, we would say, is one at section 101(3)(b), which is: "The overall impact of any allocation… on the current and future social, economic…" et cetera "… well-being of the community."

So 101(1) requires prudence. Again, prudence is a difficult concept to review, and focus on the future interests of the community. (2) is about provision in the plan to meet the plans. (3) is about determining appropriate funding sources, and that's where the particular line and a half we're concerned with comes from – two lines – comes from in subparagraph (ii), all of which is in the mix by virtue of (3)(b) which is the overall impact across the board on revenue needs.

So it's our submission that, and it's probably useful to deal with it now, is the issue has been raised. What section 101 doesn't say is that there has to be a cost benefit analysis. There are some statutory provisions that especially require that, but what this Act says in places like section 79 is the degree of investigation you do is up to the local authority, and its not like, say, the Electricity Act which has a provision that says there has to be a cost benefit –

WINKELMANN CJ:
Sorry, did you just say section 89 says that, the degree of…

MR HODDER QC:
I'm sorry your Honour?

WINKELMANN CJ:
The degree of investigation is up to the local authority, which section reference is that?

MR HODDER QC:

Section 79. It's sort of, it's implicit elsewhere but it's touched on in 79, and makes general provisions about decision-making. So it doesn't say it only happens following a cost benefit analysis, or you're giving effect to a cost benefit analysis. This is a matter that has to be considered before the appropriate decision is made. Now it's part of the overall mix to determine what is appropriate. It doesn't say that it has to be satisfied that benefits are being correctly calibrated to particular services. It doesn't say that it has to be incapable of further improvement, which is what happened between 2017 and 2018. What it says is that before the local authority determines what's appropriate, it must have given consideration to all of the matters set out in (a) including outcomes, distribution of benefits, periods and contribution to needs, and then costs and benefits of funding, and then the overall impact. There's no waiting, there's no indication otherwise, and we say this is consistent with making sure, as *Woolworths* contemplated, that the local authority takes into account all considerations in some way. That it draws its mind to them, and in this particular case, as we'll see, the staff report in particular draws attention specifically to all these provisions.

WILLIAMS J:

So you'd agree, wouldn't you, that that requires, first of all, a reasonable assessment of the facts. That is where the benefits are distributed, correct, otherwise you're not complying?

MR HODDER QC:

I had the impression your Honour was going to give me a list, but in terms of an appreciation of the –

WILLIAMS J:

I was, that's the first part of the list.

MR HODDER QC:

They have to be informed insofar as is practicable.

WILLIAMS J:

So if there's a mistake of fact, or a failure to establish the facts to a reasonable level of resourcing, then paragraph 2 would be breached?

MR HODDER QC:

That would depend on the particular issue. I mean this is assuming it applies to all funding decisions for every council in the country.

WILLIAMS J:

But it would be, wouldn't it, of course it would depend on context, but if the facts hadn't been established to a reasonable level, given the nature of the decisions being made, paragraph 2 would be breached?

MR HODDER QC:

Well, I think I maybe anticipating too hard where you're going, but it depends what you mean by "fact". If the question is one of opinion –

WILLIAMS J:

Well the distribution of benefits from ATEED's work.

MR HODDER QC:

That maybe a question of opinion as opposed to fact. So the proposition we've got here is the Council saying we think there are private benefits that arise from the tourism activities and visitor attraction activities of ATEED. Is that a fact or an opinion? We say there is some material to support it, but it's a view. Is it an empirical fact? That's hard to judge.

WILLIAMS J:

Yes, of course, but isn't that a little too relativistic?

MR HODDER QC:

Well it maybe but what you can do –

WILLIAMS J:

You've got to get some facts right first. I mean that shouldn't be that hard to agree with that, and then you can build some opinions on that, if the opinions are rationally connected to the facts, then they're probably supportable and no judicial review court would touch them.

MR HODDER QC:

Well I think where I go, which may help get us to an agreement your Honour, is if there was something reasonable available then, yes, you'd have a look at it, and that's what –

WILLIAMS J:

If what's reasonably available?

MR HODDER QC:

Anything that goes – information.

WILLIAMS J:

Information, yes, well, all of this is within the bounds of reasonable efforts and resources, right, it's got to be?

MR HODDER QC:

It is.

WILLIAMS J:

Right, so that's, we can nail that as the first tangible point.

MR HODDER QC:

Well can I just add one more thing before we get to the next one, which is that the main information gathering process that the Act contemplates is the consultation process.

WINKELMANN CJ:

I just wondering if you were coming on to these points that you're going through with Justice Williams, or is this something you don't cover?

MR HODDER QC:

Well, the point I was simply going to make is that his Honour, your Honour, has been using the word “fact”, when I think the word “information”, without trying to distinguish –

WILLIAMS J:

What you have to establish is the distribution of benefits. You have to be aware of the distribution of benefits of, in this case, ATEED’s work, right?

MR HODDER QC:

You have to be informed about matters that are available that relate to benefits, and the primary way of being informed is by the consultation process where you get told by the people whether they think they’ve got a benefit or not.

WILLIAMS J:

Well you have to have an idea to start with, and that has to be supported by some information, then you go out and your view gets adapted and modified.

MR HODDER QC:

But that’s an important point. That process evolves.

WILLIAMS J:

I agree, I agree, I'm not trying to trick you, I'm just trying to –

WINKELMANN CJ:

No, it does seem to me important. I mean it’s kind of central to the case, actually, isn't it, the point that Justice Williams is going through now?

MR HODDER QC:

Again, the reason that I'm cavilling, and I don’t mean to do so unnecessarily, is that what I'm contending for is an information gathering process as opposed to a defined fact.

WILLIAMS J:

Yes, well you're not suggesting that benefit distribution under paragraph 2 is entirely a matter of opinion.

MR HODDER QC:

There has to be something –

WILLIAMS J:

There has to be a factual basis.

MR HODDER QC:

Some information that supports it.

WILLIAMS J:

Right, so the Council would have to establish that it's taken reasonable lengths to provide the factual platform upon which the opinions and –

MR HODDER QC:

It can show a rational connection, yes.

WILLIAMS J:

Well a rational connection on the basis of evidence is my point. I'm trying to nail you to something tangible.

MR HODDER QC:

And I'm saying the information that you get through the whole process they go through.

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WILLIAMS J:

Yes, okay, so once you have reasonably sufficient information –

MR HODDER QC:

Yes.

WILLIAMS J:

– to know or have a reasonable opinion about the distribution of benefits from ATEED's activity, you're then in terms of paragraph 2 ready to make a decision. There are other factors as well but we're focused on this one.

MR HODDER QC:

You have to be able to have considered it yes. You have enough information to take it into account.

WILLIAMS J:

Right. So the first burden is collect a reasonable quantity of information, develop your opinions on the basis of that information, following consultation amend if necessary in your view.

MR HODDER QC:

I think that captures it but I…

WILLIAMS J:

Good, that's what I was looking for.

MR HODDER QC:

All right, well, in that case I think we're there.

WILLIAMS J:

So you say you've done that?

MR HODDER QC:

Yes.

WILLIAMS J:

All right, good, thank you.

MR HODDER QC:

And I may be – perhaps I'll just leave it. I'm coming back to section 101 a bit later on as well, but I think that captures it...

WINKELMANN CJ:

So you're coming back to this point, aren't you – yes.

MR HODDER QC:

For my present purposes.

Perhaps I should just say one more thing, and I'm sorry to do this, but we agree with the approach taken by the High Court Judge that says that some of these things simply can't be nailed down, which is why I've been using the words "information" rather than "fact". There's some things you just don't know for sure. They're not directly visible, sometimes they're not directly provable by evidence, but there can be a reasonable inference about them.

GLAZEBROOK J:

I think also one of the points you make in your submissions is that this was a future assessment in any event.

MR HODDER QC:

Yes, you'd…

GLAZEBROOK J:

And so facts in terms of a future assessment, I can see why you're cavilling at the fact description.

MR HODDER QC:

Yes, they're intangible, rather intangible concepts. But the basic proposition we say isn't that hard in the sense if you were attracting visitors to Auckland by expenditure of ratepayers' money through the ATEED's activities and you're attracting extra visitors, which is the assumption, then that is a private benefit. The question then has somebody else beyond the general ratepayer paid for it, that's this case in a nutshell. And what does the Council have to do to get to that view? It has to have a view, after taking into account all the aspects set out in sections 101(3)(a) and (b). But what we resist is what we say happened in the Court of Appeal, is there is an entirely focus on section 101(3)(ii) as if it

was some kind of standard criteria for an administrative decision-maker who had to give exhaustive reasons after doing a cost benefit analysis, and we simply say that's wrong. And the point is in part covered by the range of epithets that we get in relation to that. So from our friends' submissions the idea is that there wasn't, it's not a denial there wasn't consideration, because there clearly was. But what they say is it wasn't meaningful, it wasn't adequate, it was inappropriately light, it was compromised or it was superficial. All of these are value judgements about how you go about this, that's the criticism being made, not that there wasn't consideration of the point but that there should have been some greater level of analysis. I know my friend, Ms Baigent, will touch on aspects of that when she discusses ATEED at a later stage in this hearing.

That takes me to section 7 on the road map. The processes that led to the 2017 budget and the targeted rate. We've set out there that this proposal developed from about July 2016, it was Mr Walker's evidence we say is particularly helpful for explaining the context, it's long but it's directly on point in terms of the process that was followed by somebody with quite impressive, I think the extensive experience in these sorts of processes. And then part of that process is the…

1125

Could we bring up, please, 303.0543? So I am at 7.2 and there's reference in our friends' submissions to the Mayor's 2016 election campaign. It may not have been a re-election. I can't remember that far back at the moment, but in any event his election campaign and he produced in August 2016 a document headed "Fiscal – Doing more with less" and that document runs for about three and a half pages, of the kind we're looking at here, describing various aspects of how on his watch during the next period of local government if he were to be elected Mayor things would happen and then, after discussing rates in general terms, at the bottom of the first page which we've got there, and then discussing operating expenditure in some detail, then goes on and discusses "Council Controlled Organisations" at the bottom of that and in the course of discussing council-controlled organisations, going on to the next page, at the third bullet point under that heading, he has the paragraph that gets some attention from

our friends in their submissions, and is also mentioned in the Court of Appeal judgment, that – going to "investigate adopting a fair level of user-pays where there are demonstrable private benefits generated from CCO operations. For example, ATEED, a CCO with expenditure of around $70 million a year, generates benefits for the city as a whole, but it also generates benefits for specific industries, such as tourism and hospitality providers. This could generate savings and better focused programmes more responsive to businesses."

Now that gets mentioned more than once in both sets of submissions for the respondents and we say that is an entirely legitimate thing for the Mayor to say. He has an idea that council-controlled organisations that generate private benefits should not be wholly funded by the public, the general ratepayers. There's nothing untoward about that. The use of user-pays is probably not an accurate or entirely accurate phrase but that's the concept. That's the concept in August 2016, and there are times, with respect, in reading our friends' submissions, it looks as if that proposition is what's then judicially reviewed. What is being judicially reviewed is the decision I started my submissions with which is the end of June 2017 by which time there has been a major exercise of consultation. That's the purpose of our discussion in section 7 of our road map. As we say at around 7.4, February 2017, the development of consultation materials. Before that I should draw attention, although it's not on my road map, but Mr Wood's evidence at 202.0321 – I don't need to take the Court there – but Wood's evidence is of setting up a sector steering group as early as December 2016. That is they invited people from the accommodation sector to come in and meet with them. He discusses that between paragraphs 31 and 54, and they get some useful information about it, including about the idea of "pass through" which we'll be coming to in due course.

WINKELMANN CJ:

Just taking you back to the Mayor's statement earlier –

MR HODDER QC:

Yes.

WINKELMANN CJ:

– I think he refers to something about it giving the business owners more representation on the issue. So the notion of targeting rating is tied to the notion of greater representation and the way the money's spent?

MR HODDER QC:

At various points he certainly tried to do that and there were attempts to do so, including the steering group I'm just talking about. But as discussed by Mr Wood's evidence, that wasn't a straightforward matter. It wasn't an entirely receptive audience in terms of participation and then the question (**inaudible** 11:30:07) was how much power was there involved in this representation exercise, and that wasn't really resolved in 2017 or subsequently.

WINKELMANN CJ:

Shall we take the morning adjournment there, Mr Hodder?

MR HODDER QC:

That's convenient, your Honour.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.49 AM

MR HODDER QC:

Your Honour, I'm in section 7 of our road map and i do want to emphasise that this section we see as particularly important, largely because of the core of the exchange that I was have with his Honour Justice Williams before the break.

So these processes that start from really December 2016 with that steering group, and perhaps a little earlier according to Mr Walker's evidence, is the development of the consultation processes and, as I said, it's the consultation processes which were designed to be exhaustive, as I'll come to, as they could be, and which then provide the information from those affected, who are the

ones you can be expected to have the views that need to be taken into account, and that's of course consistent with what the Local Government Act says about decision-making.

So I have just been giving the Court the reference to the Wood affidavit, I'm at 7.4, and when I have references to the AC chronology I'm talking about our chronology dated 20 June and it's a convenient way of referring to various documents that are in that document itself, which in turn includes references to the common bundle.

Can I draw attention though and can we indeed go to 304.0984, this is the second item on the 9 February 27th part of the chronology, if it matters, but if we just go to the document 304.0984, this is 9 February 2017 and its governing body, the meeting on that date 9 February, and if we go to page 0987, go to the top of that please, halfway down, the resolution beginning: "That the Governing Body adopt the consultation document for the Annual Plan," I'll come to those documents in a moment. But at paragraph e), if we can just focus on paragraph e), the public consultation approach for the Plan is then set out and, as you'll see, it involved running for a month, feedback in various channels, "Have Your Say" events, sometimes acronymised to "HYS" events, "regional and local briefing reports", "joint deliberations with Tūpuna Maunga Authority" and "a summary of the final decisions prepared in July and widely communicated". As we'll see, that got carried through and Mr Walker explains it was intended to be a more comprehensive consultation process than normal and there were particular efforts made to deal with the position of accommodation providers.

To those consultation documents, the first one is the shorter consultation document which runs to perhaps 30 pages, and that is at 305.0991, and if we turn to the second page, please, 992, and just focus on the contents, you'll see the way that that was structured, there's a background and then a question, what feedback is wanted on. The first issue was rates increases generally and there were options given in relation to that, possible no change or small increases, the second issue is rating stability over a period of time, and the third issue was paying for tourism promotion, and that's the issue of course that this

particular, is a particular concern for present purposes. There were other issues as well that were specifically consulted on: paying for housing infrastructure and paying a living wage to Council staff. And that document in terms of talking about paying for tourism promotion, that follows a discussion of how much rates is required, discussions of growth, the whole thing is of interest and quite short. But the particular page that is concerned with the ATEED expenditure is at page 0999. Now I don't want the Court, well, I'm not taking the Court, to glance at this, but just in terms of, for reference, this is the particular page, it's a one-page short summary, among other things, as you can see, it sets out both options. Option A is to continue to fund out of general rates, option B is a targeted rate on accommodation providers, and then the preferred option is option B, as it says below those two particular propositions. It goes on below that, if we just move down a bit further, outlines having explored a range of other possible funders "While businesses such as restaurants, cafes and taxis also benefit from visitors, the majority of their revenue comes from Auckland residents. A targeted rate on accommodation providers ensures that very little of the cost of visitor attraction falls on Auckland residents as nearly all the sector's revenue is from visitors." It then goes on to describe reference to the consultation document.

1155

Now there's a hint, no more than that, in the Court of Appeal judgment, that this was an illegitimate idea, that this was an attempt to, as it were, rate non-ratepayers, and in our submission that has no basis in the legislative framework or anywhere else. Each local authority is supposed to look after its own district. If there is public expenditure that provides benefits more widely then that is an entirely legitimate consideration, we say, and as we've said in our written submissions. But that's the point that seems to have attracted at least disapproval, if not necessarily a legal hook on which the judicial review and the Court of Appeal judgment hangs particularly.

Turning then to the second document which is at 305.1027. These are the references at my paragraph 7.4, and I should say that the first document and the first bullet point at 7.4 should be "Consultation Document", not "Consultation

Assessment". That's a slip. So this is a much more substantial document. It runs to, I suppose, 160 pages, and the parts that deal in particular with what's called issue 3 commences at page 1041.

So this section runs from page 1041 to 1060, so it's about 20 pages of discussion on this particular matter, setting out a whole range of matters. I obviously can't make any serious summary of it for these purposes but it does go through and set out the core (**inaudible** 11:57:20) between that. But you'll see in the second paragraph apropos of some of the discussion beforehand, there's the paragraph beginning: "Funding visitor attraction". "Funding visitor attraction and major events expenditure from a targeted rate on accommodation providers establishes a clear link between the sector that is the most immediate direct beneficiary of expenditure to raise visitor numbers and those who are paying. While other sectors benefit … they also have a substantial local customer base," and goes on, so on and so forth.

So that is the link that is asserted in that particular basis. It was a link, a core upfront proposition, transparent, if you like to use that phrase as the legislation does, on which parties could make submissions and they had ample scope for understanding what this was all about.

If we turn then to Mr Walker's evidence at 202.0230, and pick it up at page 0256, paragraph 108. At 107 he explains that this consultation process as we saw it in the resolution was going to run over a period of a month from the end of February to the end of March. A specific focus was on ensuring the involvement of a wide cross-section of Aucklanders, particularly people from ethnic communities who did not often participate.

Then: "The main elements of the consultation were as follows," and I again have to make the obvious point, this consultation wasn't just about the APTR. It was about the entire rates package that we started off in our submissions with, and so it covered a whole range of matters, including rates levels and rates increases and various other matters as well.

1200

So the consultation document was delivered to 540,000 Auckland letterboxes, or a summary of it was. Advertisements were carried out throughout that period. (c), the website was used as a main engagements hub. (d) 70 public events were held including 25 Have Your Say events, which enabled the public to engage directly with the Council, they took on various forms, and there was an offer to talk about particular topics being consulted on with a group of community groups or organisations on request, and also the use of social media referred to in (f).

Then in relation to the APTR specifically Mr Walker goes on to explain that in the subsequent paragraphs 109 through to 113. So the Council rights in the beginning of March to commercial accommodation providers, that explains what the position was. There's a key stakeholder Have Your Say event, which included presentations from representatives of the accommodation industry, and they're identified in paragraph 111. Seventeen councillors attended this event, including the Mayor and Deputy Mayor, and then there was a lot of correspondence, he says at 112, plus the call centre, he says, was referred to at 113 that was briefed.

There was then analysis of the feedback and that analysis is picked up at 308.1741. So this is, again, is another substantial document which brings together a summary in the feedback received, and this material, along with all the submissions in their raw form were available to councillors, as Mr Walker explains, but this is the summary in a slightly more user-friendly from, even though it's a substantial document. For our purposes the discussion of the relevant of the APTR starts at page .1769. So we say this is important because the Council has gone to some trouble to consult. It goes to some trouble to summarise, I understand, the feedback, and as we'll see, and as the Court knows, it modifies substantially the proposal before it goes for consideration in June.

So in this particular document it's starts off by having a feedback of responses about support and non-support from the local board areas, and the local board areas support this exercise. One of the reasons that's done is because under

the Local Government (Auckland Council) Act 2009 the local boards are a major party of the democratic process, and their views are given weight in the process. But for our purposes we don't need to spend time on that.

On the next page, page .1770, half way down the page there's the beginning of the section described as "Industry Feedback". This is the commercial accommodation industry and this goes on for some considerable length and it goes through and identifies a number of responses that were received: 72 hotels, 13 hostels, 19 business groups, 10 tourism or accommodation industry organisations. So in terms of being informed about the problems that were seen, or the unfairness that was felt by the accommodation industry, there's not question but that the Council was being informed by that level of response. So again transparency, we say, or being done in something that wasn't well-known is not an issue in this case in any sense, and isn't suggested.

1205

At the bottom of the page is the heading "Fairness of targeted rate" and it goes on. This is a discussion of the key reasons for opposing the rate then discussed under the headings of "Fairness of targeted rate" and that goes on to the next page in some detail. "Benefits to accommodation sector" then discussed in the middle of the next page. The "Impact on owners" is described in various summary at the bottom of that page. Over the next page there's a question of "Passing on" and then the first point talks about contracted rooms "can't be passed on" and various points in relation to that. Now we'll come to this shortly, but the point that I would make about this document and the reference to "passing on" is contrary to what was put in evidence when this judicial review proceeding was based with Dr Small's evidence saying: "You can't do it, it's an impossibility, it's a matter of economics." That wasn't what was said by all of the providers who responded in this way, and that's one of the reasons, in our submission, why the High Court's, quote "real world", close quotes, approach, also based on Mr Mellsop's evidence, has merit.

Then the last of the headings is "Reinvestment and new investment". Then there's a table which indicates key points made out of the industry people. Now

many of the people said: “We can’t pass it on, it’s too expensive, it’s not fair, it’s inequitable,” there’s no doubt about that. But there are a significant number who did not say: “We can’t pass it on.” They said: “It will be difficult, we don’t like it,” but they don’t say that. So for example Accor, which I imagine the Court is aware is a major provider, says in the very first item in the third bullet point: “Potential impact is $3.8 million, an average increase of 271% on current Council rates. To pass this on to the customers would be an average of $16 to $20 per room per night.” It doesn’t say that it can’t pass on, it says that’s what it would cost to do so to customers.

We go on to page 1774, the reference there is to Jet Park, or a number of references. The first one is to the Jet Park Hotel, the last bullet point: “Increasing room rates in order to pass on the cost will push customers towards Airbnb-type accommodation or out of Auckland.” Again, it doesn’t say it can’t be done, it says there will be consequences and it’s not attractive to do so. Mount Richmond Hotel, a couple of items down: “We have contracts in place,” it says, the second bullet point, “for nearly two-thirds of the business,” so it “cannot be passed on to guests,” that we read as saying can’t be passed on to those where there are contracted rates. Likewise, New Bay Investment, Rydges Hotel, at the bottom of that page, nearly 50% of a projected business “is already secured at contracted rates” and to pass on would mean a rate of, some increase of, explained there.

Now there are a number of these provisions that go through there and, for example, the Stamford Plaza at the top of page 1776, in the days before it was a MIQ facility: “Already have 70,000 room nights booked for 2017 to ’19 that cannot have their rate increased.”, and concern about the cost of passing this on is given by for example Clarks Beach Holiday Park on page 1777. At the fifth bullet point: “To recover the extra cost we would need to increase our tariff by $5 per guest per night,” that’s a 22% increase and it will divert people elsewhere, could divert people elsewhere.

So the industry bodies’ view of life starts at page 1778…

WINKELMANN CJ:

So when you go to the bottom of that chart there was however a considerable level of support for the proposal. I assume that's from the general population, general public?

MR HODDER QC:

The general public, not from the industry itself. The industry is –

WINKELMANN CJ:

Is a hundred per cent against it.

MR HODDER QC:

Well, yes, the general term is they disagree. The point I'm focusing on at the end they would say that, we would all say that, if we're facing a substantial increase in our expenditure that we hadn't planned to do and we don't want to have. That's one of the reasons why these judicial reviews take place. But this is, as we will see, an effective organisation or effective industry, and it achieves very substantial changes to this proposal arising out of this process.

So, yes, they all disagree. The reason I'm focused on the particular parts I have is that I'm responding to the suggestion that that they all said: "You can't have pass through, they don't all say that. They say it will be difficult, it will be expensive or "We can't do it where we have contracts in place," they don't say more than that. Now that –

WINKELMANN CJ:

Well, I suppose it's how you put, what, you can't do it, because saying…

MR HODDER QC:

Yes.

1210

WINKELMANN CJ:

You might say that saying, that Jetpark Hotel saying it will push people towards to Airbnb means that they can't do it, but an economist would say, well that's not so.

MR HODDER QC:

An economist, but there was no economist that gave any feedback in this process. This is the key process that the Council had.

WINKELMANN CJ:

And the Council didn't summon economists, and neither did the accommodation providers.

MR HODDER QC:

No, I don't understand that it did do an economic analysis or a cost benefit analysis. It didn't retain Dr Small or Mr Mellsop. That only becomes a factor when you get to the judicial review proceeding and there's a sort of a retrospective exercise undertaken.

So just to be clear, there are a number of people who say we can't pass it on, but there are a number who say it will be painful to pass it on, it's a different proposition. So that's, in a sense, only one aspect of it, but the – and then the final point which goes through the Chief Justice's point a moment or two ago, perhaps is on page .1783 from the "Event feedback". We see that that produces more support than the alternative of leaving it with general ratepayers.

So my point in relation to this for the Council is that there was no question but that the Council did have regard to the feedback where people talked about, the accommodation industry talked about pass through, it talked about the benefits, it did a whole series of things. It did consider all those matters. The fact that it didn't agree with them entirely is not to the point, and as we will see what did happen is that they agreed to the point that there were substantial changes to what happened.

So that, I think, usefully takes us to what's described as the staff report, that is at page 310.2052 and I am at paragraph 7.7 of the road map. To provide this in its context, this goes through a series of workshopping matters, and they're described in the chronology and in Mr Walker's evidence, in the period from the end of consultation through April and May in particular. There's internal work being done, there's workshopping going on, and so on and so forth, and there's the development of what's called the staff report. The staff report forms part of what's called the revised Mayoral proposal. I've given a reference to that. This is effectively an attachment to that revised Mayoral proposal, but the revisions include the matters that are discussed in this particular staff report. So this staff report is addressing, of course, not just the APTR, it's addressing across the board the entire budget for 2017/2018 and its dealing with the key budget and rating issues, and so of course it is dealing with the APTR and its sensible to pick it up from around page .2062 and paragraph 57.

1215

As you see at 56 this is being considered in the context of three specific rating issues. Proposed accommodation provider targeted rate, rating stability and paying for housing infrastructure. Those issues relate to the overall budget considerations addressed in the report and need to be considered in that context. It then goes through and discussed what the proposal was, what the consultation material provided. Over the page at paragraph 61 there's a commencement of a discussion on the feedback, and in particular paragraph 61 refers to the report that we've just been looking at, which is the full report on feedback, then there's a summary of what that's going on. Paragraph 63, the main themes of the submissions from the accommodation providers is re-summarised, there's reference to the local Board feedback on the next page, 2064, at paragraph 64, for the reasons I mentioned earlier, and then there's the consideration of the statutory criteria and in particular section 101(3) of the Local Government Act. And so this is again to the point that there has to be consideration of the matters in section 101(3), then this goes through and discusses each of the items. It doesn't discuss them at encyclopaedic length but it does discuss them, they are brought to the mind of the audience for this or the primary audience for which is the governing body and the members of it.

ELLEN FRANCE J:

In this context in terms of this rate, would you agree that some of those factors should be given more attention or weight than others, or do maintain the submission that there's no weighting?

MR HODDER QC:

The basic submission remains there's no weighting indicated by the legislation. The question of weight is a matter for the Council. Now you would expect, as a matter of ordinary course, that they would in different cases, in different circumstances, they might give more weight than one to the other. But in terms of that being a reviewable error, we would say no, that's not indicated from the legislative framework in any way, and the alternative is that the Court becomes the assessor of benefits or the weighting of factors which isn't contemplated by the legislation, we say, or by the general theme of the approach from *Woolworths*, which in turn works its way into the legislation.

So paragraph 67 we say is sound, this reflects of course what section 101(3)(b) says: "Having considered these matters, the Council must stand back and consider the overall impact," and that's set out, and I don't understand that proposition to be challenged as wrong.

So then there's a discussion which goes on a number of pages. This is an important document and I do invite the Court to read it, it's central in terms of distilling the information that the Council had obtained from the process, consultative process, and in working through some changes to what had happened. But there's then a discussion that follows, at 68: "The community outcomes to which the activity primarily relates," goes on and discusses at paragraph 71 or the heading: "The distribution of benefits between the community as a whole, any identifiable part of the community and individuals," and that discussion runs from paragraph 71 through to paragraph 84, a couple of pages on. Somewhere in the submissions from our friends it says: "Well, it's only two pages," and, with respect, that really doesn't come anywhere near what the issue is. The question is was it considered, are the points made

sufficiently so the governing body members were informed of matters that they needed to do, so, matters they needed to be informed about.

So again in terms of this heading there's a discussion about the intent of the proposal, there's a discussion about –

WINKELMANN CJ:
So what paragraph are you at?

MR HODDER QC:
I'm at paragraph 71, Ma'am, on page 2065.

"Submitters in support" referred to direct benefit, at paragraph 72, accommodation providers' feedback, different views at 73, 74 talks about "increased number of visits to Auckland" and "visitor nights" in terms of ATEED. There'll be more from that, as I mentioned, from Ms Baigent later. Has a range of sources it refers to, "data collected by ATEED", "figures quote by Tourism Industry Aotearoa", data is drawn from the Ministry of Business, Innovation and Employment, which we see in the footnote 1 on page 310.2066, which explains paragraph 78, that in paragraph 78 the data comes from MBIE. The paragraph 79 data, which is another table, comes from the Statistics. So – and I'm sorry, perhaps to go back to the exchange I had with his Honour, Justice Williams, before, but this is information, to the extent that we can call it fact, and it's fact, but it's information being gathered in the process and which we say was appropriately done to get them as formed as they sensibly could be in the circumstances, albeit we maintain the point that Justice Glazebrook mentioned earlier in the day that this is all projecting forward from the past as opposed to being a factual, direct, immediate connection.
1220

Then the key paragraph perhaps for our present purposes, which no doubt, well, has and will receive more attention, at paragraph 84: "In terms of the distribution of benefits factor it is clear that commercial accommodation providers receive an immediate direct benefit from ATEED's expenditure in

attracting visitors to Auckland, but also other businesses benefit, as does the wider community." Then, as I say, we'll come to that question through Ms Baigent a bit more.

It goes on to discuss –

WILLIAMS J:
Did you get your head around these numbers at all, Mr Hodder, the 10% and 22%?

MR HODDER QC:
Ms Baigent has her head much better round them than I do. I'd like to say that I do but I think I'm better to leave it to her.

WILLIAMS J:
Very wise.

MR HODDER QC:
She's been with the case since the beginning and her head is much more firmly wrapped around them than mine.

Then it goes on to discuss these other elements, again from section 101, costs and benefits, and then the overall impact is considered, starting at the bottom of 2067 and onto the next page at paragraph 90, and then at paragraph 90: "Having considered the above criteria, the council needs to consider the proposal in terms of the overall impact on the community. This involves elected members exercising their judgement and considering the proposal in the context of the council's funding decisions as a whole, not just in relation to this activity." In our respectful submission, that's right. That's what the statute contemplates. That's a purpose of general framework of the legislation and in particular it's what section 101(3)(b) is about.

Then matters for the Council to consider as part of this overall political judgment are then set out in paragraph 91, and that carries on through over onto the next

page, and then we come to the part which is where the industry is successful in its representations because at paragraph 92 we see modifications, where it says in 92: “There are five aspects of the preferred option that could be modified in response to feedback.” Now those are in fact modifications that are reflected in the resolutions as passed, and this is the process working the way the legislation contemplates. There is a proposal. There is consultation. There is consideration. There is a response. There may be modifications, and these are the modifications that are contemplated.

So a), reducing the amount that is collected, and it goes through and discusses some of the points being raised in opposition, and it reads, finishes up, at the end of 92a): “Accordingly, staff recommend that the council sets the amount of the targeted rate at a level materially less than the 27.8 million originally proposed, which recognises those factors,” and as we know that turned out to be half. It’s 50/50. There’s no particular science in it because there can’t be any science in it, but as we also know, when in doubt, division into halves is often a convenient pragmatic way to deal with things.

b): “Recognition that some providers are less able to pass on cost increases than others.” Then goes on to say that there’s been a change in the perception about the understanding. Again, that’s what the process is supposed to do as that first paragraph sets out. “Feedback through the submission process has raised concerns that the ability to pass on costs may differ for some categories of provider,” and it goes on to discuss those.

Paragraph c), some geographical locations get different benefits. That leads to the differential geographical matters and the rate that’s finally passed.

Recognition, d), of the inability of some to pass on the cost due to contractual commitments. Again, it’s recognised.

Then e): “Applying the targeted rate to informal providers,” another consistent theme. Staff agree that that would be addressed for 2018/2019 and the reason

why is because it's hard to have to identify who is offering B&B and services in their spare bedroom.

Then there's a discussion about "Governance" at 93 and 94, and that is the end of that particular discussion.

1225

So as I understand it, our friends say: "Well, that's not adequate. That's not sufficient. That was superficial. It's not good enough. Could have done better. It should have been more," and the Court of Appeal agreed with them, and we respectfully say there's no basis for saying that. The criterion in the statute had clearly been addressed. Information has clearly been obtained. Information has clearly been taken into account. Modifications are clearly made in the scheme of things, and that, we say, is exactly how the legislation is supposed to work.

Now that then goes into, as I said, the revised Mayoral proposal. Those modifications form part of the resolution that then goes through the process and into the material at 7.8, 7.9, 7.10, which I've largely addressed, which I wasn't proposing to go back to again, but I stress that divided vote. That is the way in which democratic accountability is an indication of democratic ability at work. It was close to the point where it didn't get through because there was a divided vote, but the legislation provides there is to be a majority vote.

ELLEN FRANCE J:

Just going back to paragraph 91, where the report is talking about matters for the Council to consider as part of overall political judgment.

MR HODDER QC:

Yes.

ELLEN FRANCE J:

In terms of the accommodation providers, that's limited there to the impact on investment, is that right? So in terms of that group's particular concerns under that heading, the focus is on investment?

MR HODDER QC:

That's an aspect of it, yes, I mean it's because the previous parts under, in relation to section 101(3)(a) have discussed the position of the accommodation providers and their concerns.

ELLEN FRANCE J:

Right, so there's no sort of –

MR HODDER QC:

It's not repeated.

ELLEN FRANCE J:

– gathering together in terms of a fairness minority type perspective? I'm not –

MR HODDER QC:

No, I don't believe there is an explicit aspect of that in this particular paragraph, or elsewhere in this report.

There's one matter to deal with before I leave the statutory framework and if I can pick it up, this is in addition to our road map by the way at, to follow effectively 7.10. If we can go, please, to the Local Government (Rating) Bill from 2001. I think it's at the respondent's bundle of authorities at tab 2, but I think that's the part that doesn't have the text itself, and then we have added the text. The first thing, if we can just deal with this, so there's a proposition that's put in our friends' submissions that what the Council was doing was circumventing Parliament's intent and that proposition relates to the 2001 Local Government (Rating) Bill where the select committee had contemplated rates based on visitor units and what I'd like to do is if we could is go back to the explanatory, or the select committee report, which is the respondent's bundle

at tab 2, item 2. So if we can go to page 11 of that document, this is the select committee's report back.

1230

Now at the top of the page there's a heading "Factors for determining liability for targeted rates" recording that factors for liability, this is schedule 3 of the LRGA, this is the proposed equivalent, or a change to it, and then the last paragraph it says: "We are aware that many small councils face difficulties in funding facilities required by tourists and visitors to the district." Pausing there, as I understand it this is the freedom camper problem affecting small low population council districts in the South Island, and having to build expensive sets of public toilets that they weren't planning on doing. In any event: "We consider they should have the option of meeting such costs through rates on hotels, motels and other forms of visitor accommodation according to the number of rooms or units they provided. We therefore recommend a new clause 14 be added to the schedule to allow liability to be calculated on this basis."

The point made by our friends is that doesn't happen, that is actually dropped, notwithstanding the select committee's recommendation of it. When we look at the provision that was contemplated, that's in our materials at our tab 31, and if we turn to pages 93 and 94 of that document, this is schedule 3 that you'll recognise the broad terms and some of the changes that were contemplated, these are the select committee's proposed changes. So 3A survives and exists in the current legislation but if we go down to 14 we see that what was contemplated was a new factor being: "The number of visitor stay units within the rating unit." Then if we go down to the notes we see that at note 5 what a "visitor unit" means and a "visitor unit" means, in effect, a room, which is a factor don't find currently in clause 3. So that's what Parliament didn't enact in 2001. That's what our friends are saying is an indication of what the Council did in this case is circumventing Parliament's intent, and that's in the submissions in particular on behalf of the second and fourth respondents at paragraphs 2 and 28. In our respectful submission there's no relationship to what was before Parliament at that time, but just to make sure I've dealt with the point.

I then turn to judicial review principles –

GLAZEBROOK J:

Why do you say there's no relationship, sorry, I probably just missed that last bit?

MR HODDER QC:

Because what was contemplated there was a very specific proposition in relation to the number of units, or number of rooms in a particular building, or on a particular site of land. That's not the basis on which this has been, the Council is operating at all. the Council is doing a general rate on land values. It's a very bespoke proposition, as I say, as the explanatory note indicates, a particular problem for small councils. It isn't the issue that we're talking about here.

WILLIAMS J:

But it's still dealing with visitors. It's dealing with the same subject, although dealing with it differently.

MR HODDER QC:

It's dealing with visitors in a particular way, in a specific way, and –

GLAZEBROOK J:

I don't quite see how it relates to freedom campers because toilets aren't rooms but…

MR HODDER QC:

But I think the idea was that you pay for them by virtue of the – the traffic count, is where the foot traffic count through the hotels and motels. That seems to be what the explanatory note is saying. But it, I mean I dealt with this, I guess an inference on my part that that's what the small councils are facing and there has been ongoing issues around that.

GLAZEBROOK J:

I'm sure they are but the point about freedom campers is they aren't paying for rooms or going into rooms.

MR HODDER QC:

That's the chicken and egg problem, they aren't there, that's why they say they're not going into them. That's why there aren't public toilets there. That's the problem.

WILLIAMS J:

So am I getting this right, perhaps I'm not understanding this, but the suggestion was that the room providers fund facilities for the people that do not use their services?

MR HODDER QC:

Yes.

WILLIAMS J:

Parliament thought that was mad, no doubt.

MR HODDER QC:

Well that was the proposal.

WILLIAMS J:

Right, okay. So there's no controversy about this being a freedom camper issue, and not a broader issue?

MR HODDER QC:

I'm the one who's saying it's about freedom campers, that's my inference from it. I'm not taking it any further. I'm not attributing that to our friends –

WILLIAMS J:

Well there's nothing in here that we would infer that from, so you must know about another document that we don't know about.

MR HODDER QC:

No, it's not a document, it's general knowledge. That's been a problem in the South Island for years.

WILLIAMS J:

Oh I see.

1235

MR HODDER QC:

The complaint is the freedom campers don't use public toilets so freedom campers say there are no public toilets.

WILLIAMS J:

I understand the freedom campers' problem.

MR HODDER QC:

And therefore it should be paid by somebody.

WILLIAMS J:

It's a bit leap to say that this was about freedom campers though…

MR HODDER QC:

But that's what…

WILLIAMS J:

Given the relevant, the apparent irrationality of that answer.

WINKELMANN CJ:

Well, it doesn't really matter, does it? Anyway, I think Mr Hodder's told us he thinks from his general knowledge it was about freedom campers.

MR HODDER QC:

That's all I'm saying.

WINKELMANN CJ:

But the point is, your point is that it's –

MR HODDER QC:

It was about small councils with a particular problem and, yes, the proposal was that they would be building those facilities, that is the council would be building facilities which would be paid for on the basis of the rooms in a motel or hotel. It has nothing to do with, no relationship to what's being done here, we say.

WINKELMANN CJ:

And this is a capital value.

ELLEN FRANCE J:

Well, it's just that the way it's put in those paragraphs in the submissions for the second and fourth respondents is that this is a bed tax, which I understood –

WILLIAMS J:

It is.

ELLEN FRANCE J:

– rightly or wrongly, to be something other than what you're talking about in terms of the freedom campers.

MR HODDER QC:

Well, the visitor unit is a bed tax, there's no question about that, that on the reference to the campers, who are getting a prominence out of proportion to their role or importance, was that they were creating a problem that required to be funded by Council. The question was how will the Council pay for those resources and facilities.

WINKELMANN CJ:

But there's no evidence they took into account the freedom campers, they were just saying: "We're not going to do this, allow you to charge on the basis of a per room basis."

MR HODDER QC:

Correct, and that's not what the Council was doing.

WINKELMANN CJ:

And this is not a per room basis is your point.

MR HODDER QC:

Yes.

O'REGAN J:

But a genuine bed tax is based on the beds that are actually occupied, isn't it, not just the number of beds in the institution?

MR HODDER QC:

Well, there are range of factors that can be used and were used in this case, which are R in schedules 2 and 3. Activities is the principle one and use of the facilities are the key ones that we find –

O'REGAN J:

But are you saying that the Select Committee report and the 2001 Bill wasn't suggesting a bed tax as understood, where you actually charge each person who occupies a bed a fixed amount of money and pass it on to the local authority?

MR HODDER QC:

It seemed to contemplate that.

O'REGAN J:

It did.

MR HODDER QC:

Anyway, that's ben a rather long-winded way of us saying we don't agree that this was circumventing Parliament's intent. What's been done is squarely, we say, within schedules 2 and 3 of the Local Government Rating Act.

WINKELMANN CJ:

Well, the argument in circumventing Parliament's intent must be an argument that it's ultra vires?

MR HODDER QC:

Yes, and there is no such argument and hasn't been in this Court.

But that is sort of part of the issue here, most of the arguments you might expect that say: "You can't do this because it's outside your powers," there is no such argument. The argument is: "You didn't do enough analysis, you didn't given enough weight," or the final fallback: "It's irrational or unreasonable." But the most obvious point we think, which said: "They can't do this, that argument isn't available," that isn't being pursued.

WILLIAMS J:

Well, aren't the respondents just picking up and running with the Court of Appeal's analysis, which was this really was a bed tax by stealth and the pass through problem proves that.

MR HODDER QC:

Part 3 problem – sorry?

WILLIAMS J:

Pass through.

MR HODDER QC:

Oh, pass through. Yes, well, that again goes to the point that I was making earlier that if one had, for example goes back to the language at the beginning of the process, perhaps in 2016, late 2016, there might be references to visitor levies or bed taxes. The process has an evolution, if you like, self-correcting, better informing process. At the end of it what we finish up with is a rate on land and land values of various kinds, differential, and activities and uses. So we say it's, and particularly given section 101, the critical decision is the one where the Council finds it's satisfied to use this as a funding source, having

considered that it gets to that point in June 2017. We're not reviewing what happened in late 2016 and we resist the proposition that it was the same thing, it simply wasn't, that's why it was modified substantially and had been properly informed by the consultation processes. I'll come to pass through separately, but we say that's…

1240

WILLIAMS J:

Well, I think the argument is – because there is a vires argument here, it is that what was really going on was B, not A, and B is ultra vires in this context.

MR HODDER QC:

Well, all I can say is it –

WILLIAMS J:

And you say: "No, no, nothing to see here. It's A," and one of you is right.

MR HODDER QC:

Actually –

GLAZEBROOK J:

Isn't it slightly difficult to argue from something that wasn't passed that that means that because it wasn't passed it actually constrains the powers to rate and to have differential rates?

WILLIAMS J:

Yes.

GLAZEBROOK J:

It's a slightly odd argument.

MR HODDER QC:

It is, but we're meeting it.

GLAZEBROOK J:

No, I understand that. But I'm just indicating that it is a slightly odd argument to say something wasn't passed and therefore that, the fact it wasn't passed, actually constrains what are general rating powers, including the ability to have differential rates.

MR HODDER QC:

So there's a degree of, as you'd expect, a degree of trying to find any argument that works but what we don't find is a consistent argument of ultra vires outside the powers in the Local Government (Rating) Act in relation to this matter. The legal issue that we're confronting within the finding made in the Court of Appeal is solely that there wasn't sufficient consideration of the benefits issue, if I can call it that, by reference to section 101(3)(a)(ii). That's it. That was the error of law that the Court of Appeal finds, and then on top of that it says: "Had we had to, we would have found unreasonableness as well," for a range of reasons. But the primary and essential finding of it is that it's an error of law in terms of understanding and applying section 101(3), not that it's ultra vires the Local Government (Rating) Act which was where, we say, the focus really should be, and that all that section 101(3) is doing is marshalling a range of general considerations which are properly to be taken notice of, and they did. After that, it's a question of weight and political judgement, and there was.

WINKELMANN CJ:

Subject to, you would agree, an exceptional case carve-out, something where they've…

MR HODDER QC:

Yes, yes. Something extreme as *Woolworths* would have it.

So on judicial review principles, I don't need to tell this Court about judicial review principles. The point that perhaps doesn't crop up so often is the idea that rates are a tax. We have raised that point in our submissions and I've identified the parts of our submissions that deal with that. That's 3.9 to 3.12. We place some weight on Queensland Court of Appeal, among other things, in

our written submissions, and the fact that both the Court in the *Island Resorts (Apartments) Pty Ltd v Gold Coast City Council* [2021] QCA 19, [2021] 7 QR 86 case that we discuss at our 3.11 considers it a tax and also it considers it reflects a quasi-legislative function that councils have and in a sense we say both of those points are right. That is what happens. People don't like to pay money if they're not obliged to and they don't agree to it. The exception to that is either a fine or a tax, and this is a taxing power. You don't have a choice but you do pay rates.

1245

So the response to that is to say, well, there are Queensland cases that deal with special rates, not separate but special rates, and that's done by reference to the *Leagrove Pty Ltd v Gold Coast City Council* [2010] QSC 370 case which is in our friends' bundle. It's the respondents' bundle of authorities at tab 12. It's true that the cases that we cited, they were talking about general but differential rates, and indeed the *Island Resorts* case was about tourism levies or tourism funding. The *Leagrove* case, which is the one that we have here, was somewhat different but in a sense it was dealt with by reference to a different provision of the Queensland rating legislation and if we turn to paragraph 9 we see there set out section 971 of the Queensland Local Government Act: "Special rates and charges". A local government may make and levy a special rate if the rate is for a service, facility or activity, and in the local government's opinion the land, or the occupier, has or will specially benefit from, or has a special access to the service or facility, et cetera, and it's that which has got a line of authority behind it which is summarised by the Judge in this case at paragraph 36. This is at paragraph 36, there's a summary onto the next page, page 22, it sets out a summary in points 1 through to 8 and describes how that must be done. That is to say whether it specially benefits, it's the opinion of the Council, but there are criteria as to what that opinion must say. The criteria is "specially benefits". No such phrase is found in the Local Government (Rating) Act. No such phrase is found in section 101(3) and so we say it's a different category.

If we go back to, there's a sort of a minor –

WINKELMANN CJ:

The summary, though, includes the notion not of correctness but it's an opinion reasonably open even if it's not soundly based.

MR HODDER QC:

Yes, it's a personally sensible set of propositions in relation to a special, the criteria that says you must have special benefits.

WILLIAMS J:

But the statute here does refer to benefits.

MR HODDER QC:

It doesn't, a special benefit.

WILLIAMS J:

It doesn't use "special" but obviously it allows you to discriminate on the basis of a particular benefit received by a particular ratepayer.

MR HODDER QC:

Our legislation is framed the other way round, as it were. The target, when the targeted phrase in targeted rates is targeted to an activity, the money goes to an activity. It doesn't require a benefit, of special benefit to be shown, it just says it has to be, you have to consider benefits before you both come to a landing on –

WILLIAMS J:

Well you have to consider the distribution –

MR HODDER QC:

And there has to be something –

WILLIAMS J:

– of those benefits to the ratepayers.

MR HODDER QC:

There has to be something to base it, yes.

WILLIAMS J:

So the word "special" is missing but benefits are there.

MR HODDER QC:

Well, no, we'd say that the "special" takes you up to a different level. If it just said "will benefit from" would be something different. In any event –

GLAZEBROOK J:

It is also a requirement under this legislation, if I understand it, if I read it–

MR HODDER QC:

It's the prerequisite before you can –

GLAZEBROOK J:

It's not just a consideration, it's actually a requirement. So even if it doesn't have "special" it's a requirement that there has to be that and on the basis, you form the opinion on the basis of these matters here.

MR HODDER QC:

Yes, it's a foundational vires point. If you don't have it you don't get anywhere.

WINKELMANN CJ:

So your point is that section 101(3) is a general application, there's no stipulated requirement for benefit before you can impose –

MR HODDER QC:

It is, it applies to all those funding sources, it applies to general rates as much as anything else.

GLAZEBROOK J:

Although you do accept rational connection?

MR HODDER QC:

Going back to section 971 which is at paragraph 9 on page 9 of this judgment. So we have section 971 again, and the feature, it appears, of Queensland legislation is they give examples in ratings legislation which we don't, and you'll see the second example is: "A tourism promotion charge levied on land used for businesses that would benefit from tourism promotion in the local government's area." So it was contemplated that they could create special benefits from tourism promotion.

So, again, nothing surprising about tourism promotion being part of a rating structure or something equivalent to it, but there were different criteria, and that special characterisation is simply not part of what we are dealing with.
1250

It's 8.3 and this, if I can deal with probably several shelf-fulls, in the old-fashioned measuring of law library material, I don't understand there to be any direct challenge to *Woolworths*, although it's not completely clear to me, but I don't think there is. The point is more that *Woolworths* doesn't apply here this is a targeted rate and *Woolworths* was talking about a differential general rate. But in any event to the extent that there's a proposition that says there should be some different level of intensity, a matter on which this court had a sort of a footnote on the topic in the *Ye* decision, which we haven't bothered to put in.

We say firstly that the Joseph material, Professor Joseph's texts, which we've referred to in our submissions at 5.5 and also 5.10, and they're in our authorities at tab 30, it's clear that if there was a Taggart style rainbow then local government rating is in the low end and secondly we referred to, and included in the materials firstly at tab 36, a sort of a final Taggart statement on the law in 2008, where he was in favour of bifurcation which is rights issues have higher intensity and the rest of it stays as it is, effectively *Wednesbury* and *Woolworths* because of the democratic elements of that, and the decision-making elements of it, and Varuhas is a more recent paper, really about Taggart's work in 2017,

it's in our bundle at tab 34, and it effectively agrees with Taggart, that that bifurcation is a perfectly sensible place for New Zealand law to be.

For specificity the Taggart item, pages 473 to 480, are what we would draw attention too, and for the Varuhas article, pages 101 to 111. But they're both very long pieces and that's what they effectively say.

WINKELMANN CJ:

Sorry, what was the Taggart reference?

MR HODDER QC:

The Taggart reference is at pages 473 to 480, and it's in our bundle, the revised bundle at tab 36 and Varuhas, which is at tab 34, is 101 to 111. Those are the parts that we rely on in particular.

WILLIAMS J:

Where does democratic mandate fit in the rainbow or the bifurcation, which is a key to your case I would have thought?

MR HODDER QC:

As I understand it, it pushes it to the low intensity review end. So you finish up with classic *Woolworths*.

WILLIAMS J:

So that's the Taggart view, but the bifurcation doesn't really provide for that because it's rights versus everything else, isn't it?

MR HODDER QC:

Well it accepts, I mean effectively bifurcation leaves you with a *Wednesbury* style backstop across all decisions other than rights decisions, yes, I think I'm agreeing with you your Honour.

WILLIAMS J:

Yes but your argument is that democracy here is crucial and requires deference essentially.

MR HODDER QC:

I've been avoiding that word scrupulously your Honour.

WILLIAMS J:

I know, I know.

MR HODDER QC:

No, so I'm not saying “deference”, I'm saying of the considerations the Court takes into account then they’re the democratic accountability of the statute provides for and is based on is important.

WILLIAMS J:

So you’d add that maybe it’s trifurcation.

MR HODDER QC:

I think I'm more in the, judicial review is mostly about statutory interpretation, camp.

WILLIAMS J:

Yes, me too.

MR HODDER QC:

And this one, when we look at the statute, as I pointed out earlier, the idea of democratic accountability is a leitmotif throughout the entire Act, and that’s consistent with it, but to the extent the argument against us is, no you shouldn’t be bringing variable intensity and high intensity review here because this is a minority, or whatever it might be, there are no rights in the orthodox sense that I'm aware of that they’re citing, then we say it’s in the non-rights part of the bifurcation that Taggart contemplated.

WILLIAMS J:

Okay.

WINKELMANN CJ:

And what about the essential point that the respondents' are making, which is that because this is so targeted, such a smallish group, that you can justify in a non-bifurcated world just a greater level of review, not the most intense human rights level of review, but a Court is justified in looking more closely.

MR HODDER QC:

Well just to be clear, in the non-rights part of the bifurcated concept, or construct, there is still irrationality review.

WINKELMANN CJ:

I know, I don't think the respondents' are arguing for the Taggart bifurcation?

MR HODDER QC:

I'm arguing for the bifurcation.

GLAZEBROOK J:

I think they're more arguing for the continuum aren't they?

WINKELMANN CJ:

Yes, the spectrum, so I'm just asking you to respond to this rainbow, the spectrum, which is – and the essential point is that general, or even – general rates or even the kind of rates in *Woolworths* are not like this rate which is so targeted and –

1255

MR HODDER QC:

We say for the reasons that you get from *Mackenzie*, *Woolworths* and *Lovelock* that those are areas which aren't amenable to intense judicial review. In an extreme case, like *Mackenzie*, yes. Outside that, no.

WINKELMANN CJ:

Yes, but my point is that they are saying that *Mackenzie* and *Lovelock* are distinguishable.

MR HODDER QC:

Well, there were no – I'm not quite sure how *Mackenzie* is distinguishable in the sense that *Mackenzie* is a minority. But it's really dealt with not on the basis of minority; it's dealt with on the basis of a whole series of factors that weren't taken into account. That's the real ratio of *Mackenzie*.

So we say that small numbers are going to happen. Majorities will in fact make decisions. That's the way things work, and subject to the extraordinary case like *Mackenzie* then that's what happens, and this is a tax as opposed to anything else, effectively, and so yes, there will be inequities, horizontal or otherwise.

WINKELMANN CJ:

You might say that the smaller, the more pinpoint it is, the more likely you're going to be able to make out the extraordinary case as in *Mackenzie*, you know, you exceptional case.

MR HODDER QC:

I think somebody said, and I can't think who it was, but it may be in one of the text books, that of course the Court's always going to have a hard look at any case that comes before it. It does. Nobody tosses the case out in the Courts without looking carefully at what's going on. All we say is that in these circumstances, A, they're not talking about any of the human rights that are the subject of the Bill of Rights Act, et cetera, which generally recognises the usual candidates for high intensity, whether it's on a rainbow or it's on a bifurcation basis, and, B, this is an issue where there is a democratic factor that runs as a theme through the legislation, and so the democracy implies majority decisions. It implies people won't be happy. It implies that there are a whole lot of judgements to be made that are, as they say, polycentric. I think that's not perhaps a one-sentence answer to your Honour, the Chief Justice's, question.

That's what we say to the idea that in the rainbow somewhere this gets dragged to the intense end. We say no, it really depends on the statute and the statute points us in the direction of saying this is a matter for the elected decision-makers to make.

WINKELMANN CJ:

And my point was simply a factual one, wasn't really a legal one, which is when you're in a very pinpoint situation you might stand a better chance of showing something exceptional going on when it's a very small group.

MR HODDER QC:

I'm sorry, I should have made that clearer. I'm agreeing with you in the sense that the Court is always going to look seriously at any case that's brought and isn't obviously a strike-outable case, a frivolous case, and one of the factors it will bear in mind is is this a case where there's some tyranny of the majority going on, and we say no, this is a case where in fact you had a well-resourced group or industry which turned out to make screeds of submissions, made its points well in the various submissions. They were well understood by the Council. They achieved major changes to the process. That was democracy at work. To go further and say you can't have any rate at all we say is inviting the Court to get involved in all the details about those judgements that section 101(3)(b) has left for the satisfaction of the right Governing Body.

So, your Honours, I was about to go to "Error of Law" and I want to come back to section 101 but we're getting close to the break. I should say that I am contemplating that we won't take much more than a bit over an hour after lunch. I'm conscious that there's a question mark about my learned friend, Mr Tim Smith, as opposed to the other Smiths as to whether the Court wants to hear from them. If the Court does then I will try and make more of an allowance for his time than I would otherwise do. If he's not going to be heard then I'll use up the extra few minutes.

WINKELMANN CJ:

I think we would like to hear from him, yes.

MR HODDER QC:
In that case I shall…

WINKELMANN CJ:
We can start at 2 o'clock if it assists.

MR HODDER QC:
That would be helpful for us, yes, your Honour.

WINKELMANN CJ:
Right. We'll adjourn.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.02 PM

WINKELMANN CJ:
Mr Hodder.

MR HODDER QC:
Thank you, your Honour. One follow-up to the question that Justice France asked me this morning, which was in relation to the staff report and the discussion of equities in the part where it's discussing section 101(3)(b), what I should have said and didn't was that following that section immediately afterwards from paragraph 92 there's a discussion of the reasons for the modification of the original proposal. Those reasons have a theme of equity, we would suggest, running through them and so they're picked up at that point in a way that I should have mentioned earlier in my reply. And so that's at page 310.2069 and following.

At this point we are at my road map part 9, and really I wanted to say something about section 101(3)(a)(ii), which the Court is now well familiar with. I've already said something about it, including what it doesn't say, and so in our submission what it does is create a series of considerations which must be had

regard to prior to a decision as to what is the appropriate funding source to use, that's what it's plainly telling us in the beginning of 101(3). And we say that, having given a number of factors in both (a) and (b), those are factors that have to be weighed against each other and, as we say in our submissions at 5.7 to 5.9, weight is conventionally regarded as a matter for the decision-maker, because those factors may pull in different directions and they may be given different weightings by different people, that sort of in the eye of the beholder exercise.

The other thing that might be said about this list of matters is that is should be understood, we say, in the context of the cases that came before in that area, and while *Woolworths* was mentioned specifically in the Hansard that I took the Court to earlier, when we look at for example the *Mackenzie* case – and that's in our bundle at tab 8, and it's got to be worth spending a moment on it – this is the one where there was an attempt to, because Electricorp had just become a ratepayer under legislative changes then there was the attempt to impose a substantial part of the rating revenue for the Council to come from Electricorp.

WINKELMANN CJ:

Giving them a surplus.

MR HODDER QC:

It created a surplus. If we could turn to page 51, this again was a judgment of the full Court, presiding was Justice Cooke, Justice Richardson, Hardie Boys, Gault and McKay, the judgment written by Justice Richardson, and the conclusions start at the bottom of 51, it's a re-statement of what's there and so we say is relatively helpful. But picking up what went wrong, the point to make is that it must follow the processes contemplated by the legislation, *Mackenzie* did not do either of exercising powers in accordance with statutory criteria and – I'm not sure about the word "promise" – but to enhance the policy and objectives.

So, turning to page 52, we see a series of the problems with the *Mackenzie District* approach. The first paragraph: "It failed to follow the statutory process."

Second paragraph: "The process led Mackenzie to approve a budge providing for an unallocated surplus of $1.9 million," it goes on to say that's not contemplated by the legislation. Third, the local authority didn't attempt the other possibilities, including the possibility of a differential basis of rating to recognise the circumstances. The circumstance being that the Electricorp assets had a huge capital value compared to the rest of the district's capital values.

And then finally it says, in the penultimate paragraph: "Mackenzie failed to appreciate the fiduciary duty it had to Electricorp…no contemporary evidence that it paid any regard to the level of services it was proposing to provide Electricorp," no contemporary evidence that it paid any regard. And then finally the summary: "It seems Mackenzie was mesmerised by the income it believe it could properly derive from Electricorp and by the mindset that Electricorp was like any other ratepayer, even though its situation was obviously unique." Why was it unique? Because it was a case where they had huge capital assets and in fact made very little demand at all on the services that the Council was providing.

And then over the page it repeats the point at 53: "The rating decisions were fundamentally flawed for two reasons: first in giving rise to a huge unallocated surplus and the perceived need for supplementary estimates, neither of which was allowed for by the governing legislation; and, second, in ignoring Mackenzie's fiduciary duty to Electricorp to consider its special interests as a ratepayer." Now again those special interests we say owe its huge capital value and its relatively low demand on the services.

So we say when one takes that into account, takes into account the legislative history that comes from the Hansard we looked at earlier in the 1996 legislation, what we have in section 101, which we should go back to, 101 of the LGA, is a streamlined version of the earlier legislation, that's the post-*Woolworths* legislation and post-*Mackenzie* legislation, designed to ensure that there was no doubt in local councils' mind that they couldn't do what *Mackenzie* had done and make all the errors that are set out by Justice Richardson on page 52 of

Mackenzie. And that's the exercise, there can be no excuse for saying "we didn't think about it", there can be no excuse for saying "we didn't turn our mind to it", and so those considerations are set out there, including the gel proposition that you can have regard to the overall impact under 101(3)(b). And so that, we say, is the way in which the approach should be taken to section 101 as a whole and rather, we find, with respect, in the Court of Appeal judgment the focus leaps to 101(3)(a)(ii) and doesn't really vary from that particular point, and with respect we say that's where the Court of Appeal judgment enters into error.

Then we've addressed our concerns with the Court of Appeal's approach in some detail in our written synopsis, and I won't repeat those, they are there…

WILLIAMS J:
Do you know if there is any litigation around the earlier reference to benefits in the '74 LGA?

MR HODDER QC:
No, I don't, I haven't come across any, Sir.

WILLIAMS J:
Sections 41 and 51? That's where, it seems to me that's what this provision is based on.

1410

MR HODDER QC:
Well that provision I think is in turn based on *Woolworths* itself which uses –

WILLIAMS J:
No, this is long before *Woolworths*.

MR HODDER QC:
You mean the original 1974?

WILLIAMS J:

Yes, special authorities are they, non-territorial authorities such as drainage boards and so on had a special provision requiring them to consider the benefits.

MR HODDER QC:

They did, or some of them did.

WILLIAMS J:

That's right. My question is have the Courts interpreted –

MR HODDER QC:

I don't have to hand any knowledge of any case that addresses those matters and that legislation for the special purpose authorities, no, and so – I'm sorry to kind of repeat myself, but we say that this is pretty much clearly comes from *Woolworths* including the reference to "benefits" and is meant to pick that up in the way it came through in relation to the post-*Woolworths* 1996 legislation, this has simply been streamlined down from what was a rather verbose set of provisions that were enacted in 1996 or thereabouts.

WINKELMANN CJ:

And in a sense it comes from *Woolworths* it always comes from *Mackenzie* because *Woolworths* is picking up *Mackenzie* and carrying it on, isn't it?

MR HODDER QC:

Correct. But as I said, my point is that it's open to and proper, we say, to read this as being to ensure that no counsel could plead ignorance in a way that leads us into errors of the kind that *Mackenzie* identified. So we say that's what section 101 is there to do and labouring the point no doubt, it is not specifically focused on targeted rates, it's about decision-making or the financial management of decision-making, starting with a proposition that they must be prudent, and having regard to the interests of the community, and finishing in (3)(b) with reference to the overall impact on the wellbeing of the community.

WILLIAMS J:

If you look at *Woolworths* at 542, line 20.

MR HODDER QC:

It's number 17 in our bundle, yes your Honour, 542?

WILLIAMS J:

See there are no special considerations et cetera, et cetera. "By contrast, special purpose authorities are directed to take account of the benefits that are in the opinion… likely to accrue, directly or indirectly," blah blah.

MR HODDER QC:

Yes.

WILLIAMS J:

So *Woolworths* seems to be saying that benefits is not relevant under the rating regime that it was making its decision on, because it contrasted it with the situation with respect to special purpose authorities.

MR HODDER QC:

Outside the extreme case, such as *Mackenzie*.

WILLIAMS J:

Yes, outside the extreme case such as *Mackenzie*.

MR HODDER QC:

So we say that's where *Woolworths* does contemplate that aspect of it, because –

WILLIAMS J:

Yes but doesn't the respondent have a point then that benefits generally apply is a new thing. Is a new consideration that wasn't present generally in the law as it applied in *Woolworths*.

WINKELMANN CJ:

Well wasn't it in the Rating Powers Act 1988?

WILLIAMS J:

Yes.

WINKELMANN CJ:

Separate rates from benefiting properties.

WILLIAMS J:

That's right. So in fact *Woolworths* doesn't say, benefits general things to take into account, in fact it said, unless the statute said it, benefits were not relevant. At least it seemed to imply that.

MR HODDER QC:

Well it says that benefits are for the local authority to determine.

ELLEN FRANCE J:

I think they do discuss the approach to benefits at 546.

MR HODDER QC:

Yes, line 9 and there following there's a discussion about correlation and what it says is not that there won't be benefits, or you won't think about benefits, it doesn't have to be a close relation of benefits.

WILLIAMS J:

Oh I see.

MR HODDER QC:

At 546.

GLAZEBROOK J:

And that paragraph that you were referring to it's looking at it in the round, which is what your submission is.

MR HODDER QC:

Yes.

GLAZEBROOK J:

Not that they're irrelevant but they're looked at in the context of all of the considerations is what I understand your argument to be.

MR HODDER QC:

It is and we do found ourselves on that paragraph that Justice France drew attention to, where it talks about the fact that: "Given the nature of the imponderables involved it does not call for an elusive search for a direct relationship between services and benefits." So that doesn't exclude the possibility there's relationship or something tenable but what it's trying to avoid is exactly what the respondents are trying to do. It appears to have a close correlation between benefits and the rates they're paying.

1415

So in terms of "pass through", that gets attention and we deal with that in our written submissions in some detail. For my present purposes, and conscious of time for both Ms Baigent and for Mr Smith, not to mention our friends for the respondents, our points are, firstly, that there was in the feedback, which was the primary source of information, not a unanimous proposition this simply could not be done as a matter of, as it were, economic science or practicality, just simply couldn't be done. On the contrary, as I endeavoured to show earlier, the number of the submissions indicated it would be hard, it would be difficult, it would be unpleasant, but it didn't say that it could not categorically be done. The person who says it could not categorically be done is Dr Small. He comes along with his affidavit when the judicial review proceedings are launched, and in terms of the proposition that crops up at various points that says the Council's pass-through assumptions were plainly not correct, as far as I can tell that is a paraphrase of what is said by the Court of Appeal at paragraph 110 of its judgment and what it says at 110 of its judgment was that "neither of the economists supported Council's original working assumption that the increased cost could be passed on to visitors in the same sort of way as a visitor levy …

That assumption was plainly not correct," and as the Court appreciates our argument is that things moved on through the consultative process to the point that there was no doubt in the minds of the Council and those involved that there wasn't an automatic pass through of a kind that might be contemplated with a statutory right to add on a levy. There was a question about how that could be done and that was the matter on which they were informed by, among other things, the responses they got from the industry and which I referred to in terms of the staff report.

WINKELMANN CJ:

Mr Hodder, at paragraph 118 of the Court of Appeal judgment the Court of Appeal says "four other categories of ratepayers were acknowledged to benefit more". This is in support of their unreasonableness finding.

MR HODDER QC:

Yes. We don't acknowledge that and Ms Baigent will explain why.

WINKELMANN CJ:

Okay, so Ms Baigent's – but would you say that if it was in fact the case that four categories of ratepayers benefited more, so long as – it would still not be unreasonable to nevertheless impose the rate as it was if there was some sort of rational reason for it?

MR HODDER QC:

Yes, and that may include collectability, efficiency. Those are factors that could be taken into account under the general concept of prudence and appropriate sources of funding. That indeed is the very fact which impeded the idea of applying this rate to informal providers, the Airbnb types, because it was hard to identify them, et cetera. They just weren't easily ascertainable, and so it becomes more practically difficult. Now there were attempts to address that and that turns through into the 2018 exercise.

The answer, we say, well, a number of answers of which we've given a couple, but in terms of the ultimate result we respectfully adopt the approach taken by

the High Court which says there's a "real world" component here. So there is the world of competition economics which is where Dr Small contributed his evidence, and in response to that Mr Mellsop addressed both that at one level and then address it in the "real world" level and if we can go to that briefly at 202.0291, that's where his evidence starts, there are two points effectively that are made at page or beginning at page 0310 and paragraph 62. So at paragraph 62. So he identifies the point of difference he has with Dr Small which is Dr Small saying: "The full burden of the targeted rate will fall on those paying the targeted rate, rather than visitors to Auckland," and he goes on to say he doesn't think that's correct for the long run. He also says it's worth emphasising that the APTR applies to all APs {subject to exceptions which he discusses). "The literature on pass-through finds that industry-wide cost changes will be passed through to a greater extent than firm-specific cost changes." And he cites a reference for that, and then goes onto discuss that before he turns to the second question which starts at the next page in paragraph 68: "The above discussion has been at the theoretical level. I think it is worth noting that the issues of pricing and cost pass-through are more complex in the 'real world'." This is illustrated by a series of surveys of actual pricing behaviour. Then he quotes from a paper by Pittman, which takes him through to the balance of the page through paragraphs 69 and 70.

1420

That real world approach is adopted by the High Court Judge in the paragraphs we have indicated in our note, paragraphs 195 through to 202 in a sense, and we respectfully say there's force to that, both Mellsop evidence and to, with respect, the High Court judgment. Any business will try and recover its costs if it can, and businesses are clever, they find ways of doing that. It may be that in a competitive theoretical analysis with a whiteboard it looks hard, but it's not the answer, or not the only answer. For these purposes, we say that it is not sufficient to deny the possibility of pass-through in the way that it wasn't denied in the March 27 feedback.

So if the Court pleases, that takes me to 9.3 and into the hands of Ms Baigent, who's going to address that question around ATEED and various related

matters, which will deal with some of the matters that the Court raised with me which I deferred to her. As the Court pleases.

WINKELMANN CJ:

Thank you, Mr Hodder.

MR HODDER QC:

But I should say, just so there's no surprises, I'm coming back to deal with their unreasonableness, but briefly.

WINKELMANN CJ:

You're coming back?

O'REGAN J:

We have been warned.

WILLIAMS J:

Yes, he'll be back.

MR HODDER QC:

Well the protocol did contemplate that happening so I'm taking advantage of that.

WINKELMANN CJ:

Yes, no, that is fine. I just thought we were just about done. Oh, you're coming back to unreasonableness again? Right, got it.

MR HODDER QC:

Thank you.

MS BAIGENT:

Thank you, your Honours. The Court of Appeal relating to benefits was repeatedly critical of the assessment of ATEED's benefits undertaken by the Council, naming it very limited, not a real attempt, a complete contrast to the High Court judgment who found their Council's engagement with section 101(3)

was entirely sufficient, “comprehensive, detailed, and where relevant and available, supported by statistical evidence”, and that was at 295 of the High Court judgment.

You’ve heard from my friend, Mr Hodder, that the appellant says those findings by the Court of Appeal were based on an incorrect interpretation of the section, and also that in the statutory context described, it is for the local authority to determine how much analysis is enough. But the appellant also says that the Court of Appeal finding overlooks the evidence of ATEED’s activities and benefits included in both the staff report and the attachment A4. It also overlooks the evidence of Mr Armitage and is founded on some inaccurate factual assumptions, and this part of the submission addresses the consideration of benefits undertaken in those factual assumptions.

Could we please start briefly with the evidence of Mr Armitage, if we could bring that up please? He gives evidence of ATEED’s role, objectives, its involvement in the lead up to the APTR, and in particular for our purposes, the information that ATEED had that was relevant to the APTR and upon which the Council relied. If we could just go briefly to 13, paragraph 13 please.

Paragraph 13 to 15 just sets out as an overview the documents and accountability processes for ATEED as a CCO. Paragraph 13, it had to file an annual statement of intent. That included some performance measures, KPIs and targets.

1425

Paragraph 14, it publishes an annual report each year in which it measures itself against the KPIs, and that is audited. It also has quarterly reports on the its performance to the Council, and paragraph 15 sets out other expectations set out in the CCO accountability policy. I refer to this as it shows the AT already had formal KPI and audited reporting in place, and this is the very information that the Council drew on for its consideration of the level and sources of funding which is then recorded in the staff report, and the submitted that the Council

was entitled to assume ATEED would perform in accordance with its accountability measures.

If we move on to paragraph 28, please. Here Mr Armitage explains the reporting actually undertaken to consider ATEED's performance as audited and reported on, and in paragraph 28 some statistics are given as reported in its annual report, come of this information being drawn from Ministry of Business, Innovation and Employment statistics, others by some specific studies commissioned. So in 28(a) it tracks visitor in spend in Auckland against a target, and that's from MBIE statistics. Paragraph (b) it tracks how many major international business event bids that were submitted or supported by ATEED against a target. 28(c), it refers to a contribution of $75.9 million to regional GDP from the major events part of their portfolio, and that information, a lot of that information is being provided by independent consultants, Fresh Info, which ATEED specifically commissions as part of its performance measures and reporting. Similarly, (d), the generation of 400,000 visitor nights by major events invested in by ATEED against a much lower target, and that again is based on MBIE statistics and the reviews by the independent consultants, Fresh Information.

If we turn down to paragraph 31, please. Here Mr Armitage talks about, goes through some of the categories of the different activities in the visitor attraction activity bucket and talks about the reporting and performance undertaken. 31(a), this is just in relation to the Major Events programme, just one of the programmes it conducts, and here it again refers to the Fresh Information studies that are commissioned and reported on each year, and they are attached if your Honours would like to see them later, I'm not intending to take you to them under those SA-11 and SA-12. They report on all of the events that ATEED supports and invests in and you can see at the bottom of 31(a) the 2016-2017 Evaluation found that there were 168,000 visitors caused by the Event Portfolio and that constituted 544 visitor nights. Then in (b) they also communication event-specific evaluations to have a look at the economic impact of major events. Again, these are conducted by Fresh Information independent evaluators. Some examples are exhibited at SA-13 and 14, and

there are two particular ones Mr Armitage refers to which are also referred to in the staff report eventually. These are evaluations of the ITM Auckland Supersprint and the Auckland Nines in 2017. It gives you some visitor nights and some GDP contribution from those.

1430

Now if we drop down to paragraph 32, that was the major events part of the activity. Further examples in the other buckets of activities are then given by Mr Armitage. At 32(a) it talks about ATEED's Auckland Convention Bureau and in conjunction that's where ATEED teams up with other partners, members and industry partners to try and win big conventions, business conventions, into New Zealand, into Auckland, sorry. Under that KPI ATEED that year won $45 million-worth of business events for the year, and it gives some description there as to what it exactly does as part of that activity.

If we could scroll to the next page, please. Then under subparagraph (b) it turns to its tourism activity. This is partnerships and promotion to get international leisure visitors into New Zealand. Had some specific examples under this category, the ATEED investment of more than a million dollars in a partnership with Flight Centre Australia across four years, and under subparagraph (c) it reports Flight Centre details, to assess that partnership, has meant customers coming to Auckland grew by $31 million over that period and that's just the increase in visitors.

Next page, please. Then at paragraph 33 Mr Armitage acknowledges that it can be inherently difficult, if not impossible, to show a direct cause and effect relationship from its spending or promoting and that's just as logic when you're trying to promote New Zealand to tourists. However, he does say there's a very strong correlation between the visitor nights that he's reported on.

This part of the evidence goes directly to one of the challenges made by the respondents, being to what extent the events in the major events part of the portfolio would have proceeded without ATEED's involvement.

If we could scroll to 36, please, where Mr Armitage answers this and gives some strong evidence. At 36 he says: "We know if ATEED did not invest in a particular event, it would but unlikely to come to Auckland and so no visitor nights would be generated." Paragraph 37 he gives a list of events that would not have come to Auckland without ATEED's investment, and in 38 he gives evidence that ATEED also contributes in less obvious ways by leveraging events into shoulder seasons and across the region. So there are a number of ways that ATEED's activities contribute to the visitor economy, not all of which are easy to quantify, but there is some strong evidence there.

Like to turn now to the staff report because a lot of the empirical data referred to by Mr Armitage and in the underlying reports was discussed and reported on, first in the supporting information document that went for consultation, and then in much greater detail in the staff report, and in that document the Council broadly assessed the benefits and made explicit reference and consideration of issues raised by the industry.

So if we start at the staff report, paragraph – at 310.2062, and then go to paragraph 57. Sorry, 310.2062. Just scroll up to the "Accommodation Provider Targeted Rate" which Mr Hodder's already taken to you this section. If we just scroll through quite quickly, paragraph 63, onto the next page, refers to specific feedback from industry. Scroll through, please, to 71 where we turn to the distribution of benefits, and under that section there's another reference to feedback from the accommodation providers at paragraph 73, so feedback specific to benefit is expressly acknowledged. This reflects the main objections of industry and in fact a lot of the main objections that are still being subject to the submissions in the Court today.

1435

Down at 76 the report refers to data collected by ATEED that supports the proposition that it's activities are in fact attracting visitors to Auckland and it refers to the discussion in attachment A4, which I'd like to take you to now because it's a five-page attachment of details – that's at 310.2069.10, please.

WINKELMANN CJ:

What was the attachment, A4?

MS BAIGENT:

Attachment A4. It's in the same document but just further down.

WINKELMANN CJ:

Yes.

MS BAIGENT:

It should be .10, please, it's 10 pages further on. So here's attachment A4, ATEED visitor attraction and major events expenditure. So the first page is a table setting out the various buckets of activities under the visitor economy and major events activity that has been under consideration. As you can see, there's the tourism, we've discussed some of that, included the Flight Centre and advertising campaigns. There's i-SITEs, which aren't referred to so much, and we'll come to that later on. The "Major Events" is a major bucket that the Fresh Information reports directly relate to. "Auckland Convention Bureau" is another bucket, sub-bucket of activity, bringing in business conventions and conferences, and then down a bit lower there's the "Brand and Marketing" bucket, which again is the slightly more elusive promotion still getting people into New Zealand but harder to measure or directly quantify in any way.

If we turn to the next page, please. In this attachment then each of those activity buckets is broken down with a fair amount of detail referring to evidence where it's available. For example, the first heading, "Auckland Convention Bureau", it refers to the business opportunities won by the Convention Bureau in that year and provides the visitor nights, 107,000, and estimated tourism spend of 41 million from that. Again, those figures directly come from the studies that Mr Armitage gave evidence on. Scrolling down, the "Major Events" also gets a fair amount of detail. Halfway down that section there's reference to the independent evaluations of ATEED's event portfolio with the outcomes in visitor numbers and additional GDP.

If you go onto the next page, please – actually, drop down to the next page or get to the "Tourism" heading. And when tourism is spoken of on that page, I mean, this part of the ATEED's activities such as tourism promotion are more difficult to quantify by reference to increased visitor nights but there is still information within this schedule demonstrating benefit. First under "Tourism" there is the reference to the Flight Centre partnership that Mr Armitage had referred to and that does have some sort of information on the $30 million increase in visitor spending.

The next paragraphs also refer to activity in the US with partnerships and other overseas jurisdiction, China – onto the next page – Australia, Japan and Korea, and there's information there saying the ATEED's programmes contributed to an increased number of visitors to Auckland, with some percentage terms. So they are not direct numbers of figures but it is evidence that's been, it is information that's been provided of actual benefits coming in from the activities. 1440

If we then just turn back to the main part of the staff report, please, 310.2062, at 2063 where we were up to. So we've just gone through paragraph 76 showing the evidence from ATEED and then on the following page there's further information which directly responds to the industry's complaints and issues raised during consultation. One of the first points, under paragraph 78, refers to the Court of Appeal's factual finding that accommodation providers only receive 10% of the spend of all visitors, the least of five categories, and that particular finding from the Court of Appeal has become quite a repeated tagline in the submissions of the respondents, but in the Council's submission, it is inaccurate and does not reflect the contents of this staff report. So in paragraph 78 there is the graph there that the 10% figure came from, and you can see in paragraph 78 it refers to – that data was in the consultation material and feedback arose as a result of it.

79 states that those statistics, the 10% statistic, includes visits for all reasons so all visitors who are coming to Auckland, whether for business, holidays, education, visiting friends or relatives, and it goes on to say: "Business and

leisure travellers are the primary targets of ATEED's visitor attraction and major events expenditure." So there, there are more relevant information to look at. Then there's some historical data from Statistics New Zealand on overnight domestic visitors to Auckland, and that breaks it up into visitors who are coming for business, education, holiday, other, or visiting friends and families. And if you look at the business and holiday columns in that, the accommodation spend by them is roughly 22% by each as opposed to those who are visiting friends or relatives, and they have some accommodation spend but significantly less.

The other information on this table that's very relevant goes to the point as to whether there are five categories who will all get a greater proportion of spend than the accommodation providers, and again, if you look at what we would say the more relevant figures, being those visitors attracted by ATEED, the business and holiday travellers, the proportion is much different. In fact, most spend goes on transport, after that accommodation is a second significant proportion of spend. So if you look at the holiday visitors 22, well, 28% on transport but then 22% on accommodation, followed by food and beverage, followed by other, which I take to include retail.

That data, if you look down at footnote 2, it comes from Statistics New Zealand, a travel survey, and that some of the Statistics New Zealand survey is in the case on appeal. I don't intend to take you to it but it's at document 301.0229. It is also referred to in Mr Duncan's affidavit.

The other point that the Court of Appeal held when it was discussing the statistic is that it made a comment at the APTR excluded all other groups and it's submitted that that ignores that 50% of activities are actually funded by the general ratepayers, so other ratepayers aren't excluded. And of course the status quo was for 100% of the visitor promotion activities to be funded by the general rate, despite the special benefit that accommodation providers obtain from those activities.

The second factual issue is the extent to which visitors stay in commercial accommodation, and the respondents tried to diminish the benefit that they

receive from ATEED's visitors by noting that only 25% of total visitors stay in hotels and motels, and that again was reflected in the feedback and reported in the staff report. But again, that is a general figure relating to total visitors and the Council reflected in this report more relevant information on visitors attracted by ATEED's activities.

If we could go to paragraph 81, please. In this document, 81 talks about two fresh information reports on specific major events, the NRL Auckland Nines and the ITM Supersprint, and those studies suggested that 40 or 50% of visitors stayed in commercial accommodation, and a breakdown of those figures was included in that. Should be attachment A4, there's a typo in the staff report there that we were just with earlier.

ELLEN FRANCE J:

Sorry, if we go back to the 10%, do you say the better figure is roughly in the order of 40% or a little bit over 40%?

MS BAIGENT:

It depends which bucket of travellers you're looking at, but 22% would be a better figure. I don't think we can add those percentages –

ELLEN FRANCE J:

You can't combine, right?

MS BAIGENT:

No.

WILLIAMS J:

That's 22% of your target market. ATEED's target market, you say? Business and visitors who aren't staying.

MS BAIGENT:

No, ATEED's target market would be primarily business and holiday travellers. Those –

WILLIAMS J:

Correct, which is around 22% each, is that what you're –

MS BAIGENT:

I don't think that those figures conveniently add up to 100% along the top row, so I don't think we can necessarily take that –

WILLIAMS J:

No you didn't – I don't think you're understanding me.

MS BAIGENT:

Sorry.

WILLIAMS J:

In each case, the rough figure is 22%?

MS BAIGENT:

Yes.

WINKELMANN CJ:

That's the spend, not the people.

WILLIAMS J:

So overall, your target market is 22%.

MS BAIGENT:

Sorry, I just –

WILLIAMS J:

Overall your target market, your achieved target market, what your spend is on is 22% of their spend?

MS BAIGENT:

Yes. That's what this suggests as opposed to the 10%.

WILLIAMS J:

Yes.

O'REGAN J:

22% of the benefit goes to accommodation providers, is that right?

WILLIAMS J:

Of the spend.

MS BAIGENT:

Of the spend.

O'REGAN J:

Of the money spent, yes.

MS BAIGENT:

More than those other categories, other than transport.

WILLIAMS J:

If transport is so high, why not rental car companies?

MS BAIGENT:

Rental car companies don't have a good connection when you're thinking about a rate on a capital value of land. The car itself couldn't be rated. The lots that the cars sit on, is not a good –

WILLIAMS J:

Well the beds can't be rated either, but.

MS BAIGENT:

It's not a – but it doesn't have a significant connection with benefit coming in.

WINKELMANN CJ:

They're small.

WILLIAMS J:
That's your point?

MS BAIGENT:
Yes.

WILLIAMS JL
The land area taken up by car rental outfits is too small, so you'd need a target target rate if you were going to – a special target for rental car companies to catch that.

MS BAIGENT:
The rental car companies were considered along with other categories in the tourism sector in the supporting information when they were talking about what could be an appropriate base to rate on and the rental car companies were, or suggested that the capital – a property tax does not sit well with a rental car or a rental car lot.

WILLIAMS J:
Right. You –

MS BAIGENT:
If you think of Uber drivers at the moment there is no rental car lot, it's a car. It's a very difficult thing to do a property tax on.
1450

WILLIAMS J:
I understand. So where is that? Well, if you're going, you know, if it's not in your head right now, can you just at some time over the next couple of days remember where that's referred to so that I can tag it?

MS BAIGENT:
Yes. It's in the supporting information but I can give you a page number.

WILLIAMS J:

Yes, but that's 150 pages, so, yes, thanks.

GLAZEBROOK J:

I'm assuming the transport would include all types of transport anyway, it's not just rental cars, it's – is that right?

WILLIAMS J:

Aeroplanes.

MS BAIGENT:

Yes. It's not clear unfortunately from these statistics exactly the nature of the breakdown of each category, and again it's apparent that they're not quite like-for-like, the two tables. But I agree with you, it must include all.

GLAZEBROOK J:

How they get there?

MS BAIGENT:

Yes.

WINKELMANN CJ:

So that the was the point that Mr Hodder was making when he said it wouldn't necessarily be unreasonable if someone, if an entity or businesses that were getting as much or more benefit were not subject to differential rating because another consideration for the Council is recoverability, mechanism cost recovery, and rating methodology, because your point is there's really not a rating mechanism to be used that's appropriate.

MS BAIGENT:

For the cars. The other consideration that the Council took into account is of course the particular nature of benefits that the accommodation providers were receiving from the attracted visitors, and this was referred to in the documents as the "direct benefit", and again the Court of Appeal criticised the Council's

consideration of what was called “directness of benefit” in the judgment. That wording arose in the supporting information originally when there was a table saying 99% of the revenue obtained by accommodation providers come from visitors to Auckland, so their reason for being, all of their income, comes from visitors. That figure has been trimmed back in the staff report at paragraph 77 to reflect information provided by Tourism Industry Aotearoa in their submission during the consultation and it reflects their, the quote from Tourism Industry Aotearoa being 87% of accommodation provider revenue from visitors or over 90% when camp grounds are excluded. And I do just note I noted in some reply affidavit evidence filed on behalf of the respondent by Mr Roberts, he gave evidence that only 7% of visitors were from Auckland, which would suggest another alternative figure of 95%, and that’s at paragraph 28 of Mr Roberts’ reply affidavit. I don’t intend to take you there because I think the point is most, a very, very large proportion of the revenue from accommodation providers comes from the attracted visitors out of Auckland.

WINKELMANN CJ:

But that's not the case for the retail sectors or the dining, et cetera?

MS BAIGENT:

Correct. And that was a significant reason behind the Council’s decision to look at the accommodation providers as receiving a particular, a special type of benefit from these attracted visitors, that really was their reason for being, to have attracted visitors, and it’s reflected in the fact also the importance of these activities, it’s reflected in the fact that they have discussed having voluntary levies for visitor attraction activities. They invest themselves in visitor attraction activities, that is a particularly important thing for them, to attract visitors in. And it’s submitted that that significant proportion of accommodation provide revenue that’s obtained from visitors is a rational justification for the Council concluding that the distribution of benefits particularly favoured accommodation providers, and Mr Mellsop in this report agrees with that as a proposition and says that that's a very rational justification from an economic perspective, and I have in the outline provided a reference to his evidence, I wasn’t intending to go there just in the interests of time, but it’s very supportive.

1455

I'd just like to turn now to the inequity point that the Court of Appeal raised. The Court of Appeal was critical of the inequity, as they put it, in applying the rate to a small group of ratepayers, and my friend Mr Hodder has already provided submissions on this, I just wanted to address some of the factual aspects as to what was taken into account. And it's submitted that that finding really distorts the –

WINKELMANN CJ:

What paragraph is it in the Court of Appeal?

MS BAIGENT:

It's in our written submissions at footnote 116, there are a number of paragraphs.

WINKELMANN CJ:

Okay, thank you.

MS BAIGENT:

Shall I read out the paragraphs?

WINKELMANN CJ:

No that's all right.

MS BAIGENT:

It's submitted that it distorts the consideration of relative distribution of benefits that was actually taking place, because the alternative to the APTR, which was consulted on, was for the general ratepayer to continue to fund 100% of these activities specifically designed to attract visitors. But instead, commercial accommodation rate payers who numbered 2,921 rating units in the first year and around 3,500 rating units in the second year, they were contribute to 50% of the cost, the other 50% to be funded generally. And affordability considerations were taken into account as appropriate under the

section 101(3)(b) consideration along with the impact on other sectors, and that again reflects the political trade-offs at play under section 101(3)(b), and it becomes apparent in the staff report, if we can scroll down to paragraph 91, please.

These were matters that the Council considered as part of the overall political judgment, part of that in subparagraph (b) was the affordability of the proposed rate for the accommodation providers, and you can see as part of that, the third paragraph down under (b), refers to statistics and future forecasts showing strong growth in visitor numbers, occupancy rates and revenue.

If we turn to the next page, it also had to weigh up "the impact of the proposal on the general ratepayer", because this was all about shifting the burden of the funding of this particular activity. And also, under subparagraph (d), it talked about the impact on investment in accommodation and again referred to, at that stage, the market for accommodation being strong, and I have referenced in the oral handout some evidence from Mr Duncan. He just provides evidence of these revenue forecasts at the time. He talks about the APTR at the 50% level was about going to amount to approximately 2% of accommodation provider revenue, and he also talks about the general economic forecast in the sector with nine new hotel projects recently being announced.

He also refers to Ms Acott's evidence about the actual APTR assessed on various of the respondents in comparison to the capital value. The respondents have said in their submissions that some of them, particularly the very large ones, faced a significant assessment in relation to the APTR and submitted that that should be seen in context of their very significant capital values that those large groups of hotels held.

1500

Just before we leave the staff report, the position of other business benefitting from tourism and informal providers was raised during consultation, and also expressly considered by the Council in the staff report using a number of different lenses. So if we could just go back to paragraph 89. This here talks

about – paragraph 89 is under the section: “The costs and benefits including consequences for transparency”. This is the section 101(3)(a)(v) consideration, and again they’re considering tourism, other tourism providers, under this section, and it reflects here that it would have administrative challenges, wouldn't be practically possible to identify all businesses in the tourism sector, it would require arbitrary geographic and economic distinctions between the food and beverage industries, some of which would benefit more and others less, and an extreme example would be a suburban takeaway.

If we then scroll through to 91, yes, 91, and then we turn to the position of informal providers, which are also specifically looked at. The informal providers have had quite a lot of attention in the respondents’ submissions, but it’s submitted they were in quite a different situation from commercial providers at the time that this was under consideration. They were fundamentally residential properties at that stage rather than commercial, often the great majority of their property would have been used for residential purposes almost all of the time. So a lot of practical issues had to be worked through, most fundamentally identifying who they were and to what extent they were involved in the provision of commercial accommodation, and then also whether it was, how the rate could be applied to them considering that many of them would only use their properties for commercial accommodation on an intermittent basis. Because of those considerations the Council decided to investigate further and it introduced accommodation providers, the informal sector, the following year, and it’s submitted that they weren’t required to hold back on the whole APTR while it investigated that small sector.

Also at that stage it was very apparent to the Council that the informal accommodation sector was only a small proportion of the overall accommodation sector anyway, when you take into account capital values, and that again was referred to in the supporting information document, it was estimated at less than 5% at that stage, and that was before the APTR was reduced to 50% as well.

WILLIAMS J:

Five per cent in terms of capital value or visitors?

MS BAIGENT:

It was thought that the assessment of APTR, the quantum assessment when addressed across the capital value, the informal would be less than 5%, and in fact I think it was well less than that in the first year.

WILLIAMS J:

But despite its proportion, its visitor numbers proportion of the market being much greater than 5%, isn't that so?

MS BAIGENT:

It was assessed on an estimation of the capital value.

WILLIAMS J:

I know the rate was assessed, but we're talking about the purpose. My question relates to the size of the visitor market the online accommodation providers catered for, and my recollection from the documents was it was in the 20, 20s per cent? I might be wrong.

MS BAIGENT:

I just don't have that information in my head at the moment but I could come back to that if you need…

GLAZEBROOK J:

I think you were saying they weren't actually sure at this stage what the extent of the market was in any event, were they? Because it wasn't part of the idea that you had to work out how many of these people there were and the extent to which they were acting commercially?

MS BAIGENT:

Correct, because at that stage they were rated as residential properties, so there was no information readily apparent on the rating information database as to the use of the property at the time.

WILLIAMS J:

I thought there was. I'm not talking about proportionate use of particular properties but actual absolute visitor numbers using the informal accommodation market. I thought there was a number for that.

MS BAIGENT:

Sorry, your Honour, I just don't have that number to hand.

WILLIAMS J:

Okay.

GLAZEBROOK J:

It also, well, I mean it depends how you define it, doesn't it, because, and it depends why they were coming. So the extent to which business and tourism were using the informal market as against family and friends. I don't know what information there was on that.

1505

MS BAIGENT:

The informal market needed a lot of investigation which is what occurred the following year.

I'd just like to turn to the last section in that staff report relating to the modifications which my friend, Mr Hodder, has already taken you to, but the consideration of the distribution of benefits of activities continues to be reflected under this section in terms of modifications, and you can see this immediately in paragraph 92(a) when they do the first significant modification to reduce the amount collected to 50% and part of that is to recognise the general economic benefits of ATEED's visitor attraction activities and the benefits going to other

sectors. They also have had a further look of the particular activities that ATEED has been involved in and there are four particular subsets of activities listed there – international education, external relations, Auckland festivals and i-sites – that they recognise that although there is some benefit to accommodation providers from those components, they're probably more suitable to be expected to be funded from the general rate as the judgement call was that the benefits flow through to the general Auckland ratepayers.

If we go to the next page, the other modifications also relate directly to the assessment and consideration of distribution of benefits, the differentiation based on provided type and location, the availability of a remissions scheme, particularly to assist on a transitional basis for that first year until a more formal remissions scheme can be put in place, and then (e), the informal providers are mentioned.

If I could just now finish by referring to the High Court judgment at paragraph 35 – 235 it is, sorry, 235. The overall submission is that the result of the modifications show that the issues raised by the industry were very clearly taken into account. They were responded to by further analysis and resulted in significant modifications, and in the High Court judgment the approach to the benefit analysis, we say, is reflected well in these paragraphs.

First, at paragraph 235, there's discussion about "calculating the direct economic benefits of a targeted rate is inherently difficult. It is next to impossible to assess the benefits with anything approaching precision. In these circumstances, the Council's failure to do so can't be regarded as unreasonable. Any attempt would have been both onerous and necessarily imprecise," and "the nature of the benefit provided by the APTR will always differ from ratepayer to ratepayer, making any attempt to compare and assess the distribution inherently arbitrary," et cetera.

236 talks about "where empirical data is reasonably available, … the Council referred to it."

WINKELMANN CJ:

Can I just stop you there, because the Council didn't really try to calculate the direct benefit, did they? They just satisfied themselves there was a very substantial direct benefit. They didn't try and quantify it precisely because they weren't doing the exercise which *Woolworths* said is not required. They were not trying to link the rating to the benefit.

1510

MS BAIGENT:

I think that's an accurate way of putting it. I also think it would be almost impossible to directly calculate the precise number of visitors that came in because of the activities undertaken and have that direct link. So the Council's case is that it wasn't necessary to do so, the Council's case is that a significant amount of information was already available from ATEED itself in terms of how it performs in terms of its KPIs and the success it has in obtaining attracted visitors into Auckland, and it also looked at other information that was available to help assess the relative distribution of the benefits.

So, your Honour, our submission is that the High Court was being correct in its findings in relation to the consideration of benefits and that its engagement with each of the considerations under section 101(3) was entirely sufficient.

Those are my submissions on the factual aspects of the benefits, unless your Honours have any further questions.

WINKELMANN CJ:

Thank you, Ms Baigent.

ELLEN FRANCE J:

Sorry, could I just check one thing? Just in terms of the informal visitors and so on, the staff report at 308.1771, so page 53 of the actual report, records the feedback as talking about 20% of visitors staying in other accommodation such as Airbnb, 54% staying with friends and family, therefore the rate's only

targeting 26% of visitors to Auckland. Could I just check, do you accept broadly that figure?

MS BAIGENT:

No, your Honour. I did present some submissions on the facts that are set out at paragraph 81 of the staff report that we say attracted visitors are more likely to say in commercial accommodation as opposed to visitors who come for any purpose…

ELLEN FRANCE J:

Right.

MS BAIGENT:

And the data there was that 40 to 50% of visitors in relation to certain major events that have taken place stay with commercial accommodation providers.

WINKELMANN CJ:

Sorry, what was the original paragraph number that you referred to, Justice France?

ELLEN FRANCE J:

It's in that…

WINKELMANN CJ:

Oh, it's in the schedule, is it?

ELLEN FRANCE J:

It's, yes, it's in the appendix.

WINKELMANN CJ:

It's in the schedule.

ELLEN FRANCE J:

So it's page 53 of that, 308.1771. So you essentially rely on that distinction you were making submissions on in terms of the table that we were taken to earlier, is that right?

MS BAIGENT:

Yes, the 40 to 50%?

ELLEN FRANCE J:

Yes.

MS BAIGENT:

Yes. And again, while that isn't a very precise figure, the point is that the attracted visitors are the visitors that we need to be worried about, not just people coming up and staying with friends and family. So this is a, we would say, more relevant bit of information to take into account, which was reflected in the staff report.

Thank you, your Honour.

WINKELMANN CJ:

Mr Hodder.

MR HODDER QC:

Your Honours, I was going to address on, I'm going to address on resource very briefly if I may. We have written submissions on that and I won't repeat them, but let me make perhaps four points very quickly, I'm conscious of time.

Firstly, we are relying of course on the *Woolworths* analysis in the way that the High Court did as well essentially as the general approach. We say that that is significant. Among other things, in *Waitakere* or *Lovelock* Justice Richardson at the end of his judgment in that case made it clear that he regarded *Woolworths* as laying down the law of New Zealand through a five-judge court, effectively repeating the analysis from *Mackenzie,* and, as we saw, that has

been relied on and adopted in the legislative process as well, recalling the Hansard involving Minister McCully in the 1996 amendments. On our research there's probably the thick end of 20 High Court judgments have relied on *Woolworths* in various ways in effectively something close to rating contexts, less in the Court of Appeal, and so it's an entrenched and longstanding part of the legal landscape, and we say it's inappropriate that it continues to be that way in relation to rating decisions, and we say that the dynamics that lead to that approach are applicable across the board in relation to rating decisions. That's the way that the judgment is written in *Woolworths* and reinforced in *Waitakere*.

1515

WINKELMANN CJ:

Well if we look at the dynamics, it's policy decision for which there is no right answer.

MR HODDER QC:

Yes.

WINKELMANN CJ:

There is a heavy dose of democracy and accountability.

MR HODDER QC:

Yes.

WINKELMANN CJ:

What else would you add in?

MR HODDER QC:

What I – there's an evolutionary process in there so all the other considerations are ticked off in a sense that we would normally expect a judicial review because the statute says you must. It specifies the considerations you take into account. It gives you the criteria. It also gives you very broad indicators of their powers, so the combination of statutory broad powers and indicators of

considerations means that the role of judicial review in some senses where judges have to sort of superimpose those because the statute is skeletal isn't required in the circumstance. But the ultimate proposition is that there's a democratic component that brings with it legitimacy, it brings with it accountability, and that as we say in our note at 10.3, what the statute sets up are consultative, deliberative and electoral factors which have to be taken into account by local authorities making these kinds of decisions and that effectively distinguishes them from most other decision-makers. Related to that is, of course, the point that no one expects them to give reasons in the straightforward sense whereas if one has many decision-makers you'd expect them to provide some reasons for that, but the nature of the subject matter that they're engaged in means that that's harder to do in many cases.

WINKELMANN CJ:

And part of the reason for the lack of reasons is there is no right answer to a taxing decision.

MR HODDER QC:

Correct, correct (**inaudible** 15:16:57). So the first point was that *Woolworths* is an established part of the legal landscape in this field and should remain so. The second point is that our friends for the second and fourth respondents has set out a series of six considerations. Those considerations, as far as I can tell, largely echo those that were addressed in the High Court judgment by Justice Moore. Justice Moore's judgment addresses those from paragraphs 157 to 286 I think. Yes, 286, and then he summarises, or he gets to at 286 and declines to accept any of them in terms of his analysis of the various matters there, and given that he takes that amount of time to do that, in the time today I won't attempt to replicate or paraphrase what that's done. We adopt that analysis of what has been done.

The third point is that if there was an argument to be made for the anybody wanting to challenge a rate like this it would be that it's one of the extreme cases contemplated by *Mackenzie* or *Woolworths* or some such, and so briefly we would say that there are various reasons why this should not be thought to be

an extreme case of the *Mackenzie* kind. Firstly, there was no attempt to over-recover. What was sought to be done was to address a known and properly quantified expenditure requirement, that is ATEED's expenditure, a known quantity. Secondly, the general idea was to reduce pressure on the general rate increase. There's nothing illegitimate or unreasonable about that compared to trying to run a surplus, which the legislation doesn't contemplate. Thirdly, there was consideration of each of the relevant statutory criteria in section 101(3). It wasn't a case like *Mackenzie* where the relevant matters simply weren't addressed at all.

Fourthly, there was consideration of the issues raised in the feedback from accommodation providers, which was an important information gathering process, and all sides of the issues were presented to the decision maker in the summaries of that feedback. As Mr Walker explains, the submissions themselves were available as were the summaries that I have taken the Court to.

Further, the Council did seek to identify what the distribution of benefits was to the extent it was available, as Ms Baigent has been discussing just now, and we say there was a rational basis for the conclusion that accommodation providers particularly benefited from ATEED's promotional activities in attracting visitors that might otherwise not be in Auckland and that was from data from past experience and as a matter of logical inference. But nothing in the section 101(3) or in the LGRA requires a quantification of that exercise or a higher level of proof in some sort of legal sense.

Further, there was an acknowledgement that other sectors benefited and that the reasons for those being excluded were stated and they weren't irrational, and the other side of the coin was that it was from a conclusion that it was fairer for accommodation providers to pay more than for general ratepayers to pick up the gap that would otherwise occur.

1520

Further, the 50/50 split between general ratepayers and accommodation providers wasn't irrational or perverse; it was a response to the information properly and well put forward by the accommodation providers.

Next, while there were some rate increases which were high, but as Ms Baigent says, you have to take into account a million-dollar increase might be 150 or $200 million portfolio of property, the question then becomes whether or not the previous year's rates were too low or not. So it all depends where you start, and then further we would say the exercise is of unfairness or horizontal inequities or whatever you might do, call it, where, to a large extent, the most difficult forms of that were picked up by way of the remission policy and various adjustments that were made.

So for all those reasons we say this isn't an extreme case of the kind that *Mackenzie* is indicative of. There's no issue of a kind that enables a fiduciary duty concept in *Mackenzie* that was somewhat qualified in *Woolworths* and *Lovelock* to be taken into account.

The final point I think I make is to draw attention – two more points. One is your attention to *Lovelock*. I've given a mention to it at 10.2. I draw attention to President Richardson's at 396 to 397, and also to Justice Blanchard at 419 to 420 where he sort of explains in reasonably plain language: "Rate-fixing is a peculiarly inappropriate area for the involvement of Judges, as a consideration of the rating problem confronting the local authority in the Wellington case amply revealed to us."

Finally, the point is that the democratic component necessarily involves an act of faith we have in a system that is a free and democratic society, that's an act of faith in relation to democratic processes and accountabilities. That's why the Local Government Act, we say, has democratic accountability running through it as a continuing theme. It's not just about voting out at the next election, although that's one of the primary methods of accountability. There's the expansion of that through the consultative and deliberative requirements that I

discussed and which were articulated, we say well, by the Minister in the Hansard from 1996 that I took the Court to.

At the bottom then we say that what *Woolworths* was doing was confirming what in fact you can find in *Wednesbury*. Going back and reading *Wednesbury* is always sort of a blast from the past, but in any event the point in *Wednesbury* that's made, and I refer the Court to it – it's in the respondent's bundle at volume 5 at page 230 – the point that's really being made is it's a separation of powers point. Parliament has conferred powers on the local authority to do things. In relation to that the Court's role is properly limited because, as the Chief Justice has said, it involves a series of intangibles and imponderables, in Justice Richardson's words, quite often. So while the principle of legality remains true and real, and we're not saying there's no judicial review in relation to these matters, we say that the *Woolworths* approach is what is appropriate in the context that we have.

I have cited the *R (Alconbury Ltd) v Secretary of State for the Environment* [2001] UKHL 23 [2003] 2 AC 295 decision and the *R (SC and others) v Secretary of State for Work and Pensions* [2021] UKSC 26 [2022] AC 223 decision from the United Kingdom Supreme Court really on the point of that legality and separation of powers aspects. So it's Lord Slynn and Lord Hoffmann in *Alconbury* and Lord Reed for a Court of seven in the *SC and others* case summarising the position in the UK in the context of discussing the position from Europe.

So if your Honours please, those are our submissions in support of the appeal. Thank you.

WINKELMANN CJ:

Thank you, Mr Hodder. So Mr Smith next, I imagine.

MR T SMITH:

May it please the Court, Local Government New Zealand is very grateful for the opportunity to address your Honour briefly on this important appeal. Much of

the ground has been covered by the appellant and so I don't propose to rehearse our written submissions. I just propose to address briefly one or two points that have come up in the course of this morning's discussion and then some of the matters raised by my friend's submissions for the respondents on the issues of principle that Local Government New Zealand engages on.
1525

Before doing that though, it's perhaps worthwhile just reflecting one introductory remark which is why this appeal matters to Local Government New Zealand, and that is that while this case involves New Zealand's largest local authority by some measure and a particular decision, section 101 of the Local Government Act must be applied by local authorities of a wide range of sizes and in a lot of different contexts and with different resources, and in some cases a difference including of information that is available. And so in our submission that is part of the relevant context that this Court should be conscious of when it comes to both the question of interpretation of section 101 as well as the standard of review.

In terms of 101, our starting point is really the same as Your Honour Justice Winkelman's, that section 101 is the framework for decisions that we are concerned with here. The Rating Powers Act, sorry, the Local Government Rating Act as it is now, provides powers but in very general terms. The criteria and framework for the funding decisions, of which rates are only one tool, is found in the Local Government Act and in particular section 101, and that is a section that applies to all funding tools, rates and otherwise.

As we've set out in our submissions, we say that the structure of 101 is important, it comprises both a primary direction in subsection (1) to promote "the current and future interests of the community" and then a requirement that funding she be met from sources that the authority considers appropriate, with that appropriateness to be considered in a two-step process in which two mandatory considerations are raised. The first is in relation to each activity, the five matters set out in 101(3)(a), and that includes obviously the distribution of benefits, but it also includes the extent to which a particular group contributes

to the need to undertake the activity. So in that sense the activity-based consideration in 101(3)(a) is inherently already polycentric. The second step is then in 101(3)(b), the overall impact of any allocation of liability of the community, and that is where in Local Government New Zealand's submission the burden element of the liability element of rating becomes primarily relevant.

In our submission that sequence of matters to be taken into account is something of a codification of the position that the Courts had reached leading up to the *Woolworths* decision, and in that sense we don't differ from my friend Mr Hodder's submissions for the appellants. In our reading the primary ratio for the *Electricity Corporation* cases, including *Mackenzie*, is that in part on the basis of a fiduciary duty concept councils are required to have genuine regard to benefits in setting or choosing to set either uniform or differential general rates, and that concept of a mandatory requirement, a mandatory relevant consideration, of having regard to benefits is what is now reflected in subsection 101(3)(a)(ii). But what then *Mackenzie* and *Woolworths* go on to say is that that consideration of benefits is not in the language of *Woolworths* – and this is at page 552 at lines 28 to 44 – is not the "definitive criterion", and we say again that that is reflected in the scheme, in particular that part of the scheme that is subsection 101(3)(b) where the second consideration is expressed as an "overall impact" on the community.

1530

Now I think your Honour Justice Williams asked the question whether *Woolworths* was, considered whether benefits were even a mandatory relevant consideration, given that they were considering general rating powers rather than special rating powers, and I agree with my friend that I think that the correct reading of that judgment is that the Court in *Woolworths* did think it was a mandatory relevant consideration, following *Mackenzie* in that regard. I take that from page 545 to just over the page in 546, where there is effectively a citation to *Mackenzie* where the Court makes that point.

I think the earlier quotation that your Honour was discussing with my friend is drawing the distinction between the special rating powers that were in the

Municipal Corporations Act 1933 and other places, where benefits was a part of the criterion of the rating power, so in other words for the special rates you could rate only part of the community if the benefit only went to that part of the community. So in that sense, the benefit language formed part of the specific criterion of the rating power, which was different from the general rating powers that were being considered not just in *Woolworths* but also in the *Electricity Corporation* cases, and so the –

WILLIAMS J:
So this is more like the Queensland cases?

MR T SMITH:
I think if it was a case about the special rating power it would be more like the Queensland cases. Where we're dealing with here is a general rating power and that is also the case for targeted rates. So the modern structure of the targeted rate provisions in the Local Government (Rating) Act is again a general power to rate in accordance with the financial management provisions of the Local Government Act, and so it's the financial management provisions of the Local Government Act, including in particular section 101, that incorporate the requirement to have regard to the distribution of benefits as a mandatory relevant consideration, rather than it being a condition on the exercise of the power.

WILLIAMS J:
So, but with respect to special authorities, what are they called? Under the old Rating Powers Act, if you wanted to rate differentially you had a threshold requirement of –

MR T SMITH:
For some of the powers, yes. Not for the differential rates that are being considered –

WILLIAMS J:
According to section 41 and 51, it was differential rates.

MR T SMITH:

Your Honour might be right that there was a requirement but I don't think it was for the case in *Woolworths.*

WILLIAMS J:

No, no, this is in respect of special purpose authorities, drainage boards and so on.

MR T SMITH:

Special purpose authorities, your Honour's right, yes.

WILLIAMS J:

But they were definitely differential rates.

MR T SMITH:

Yes.

WILLIAMS J:

But they had a threshold requirement like the Queensland cases?

MR T SMITH:

That's right, and so the proposition here is that both in the case of general rating and now targeted rating, there is no threshold, there is just a mandatory relevant consideration as part of the general financial management criteria and section 101.

WILLIAMS J:

Yes. Applicable to everybody, per *Woolworths*.

MR T SMITH:

Yes.

WILLIAMS J:

Right, thank you.

MR T SMITH:

So in our submission we also place some emphasis on the history of the development of these provisions. I've explained to your Honours the points that we draw from the *Electricity Corporation* cases and *Woolworths*, which determine benefits is a mandatory relevant consideration. The 1996 Amendment Acts that your Honours have been taken to introduce a more formalistic set of processes and your Honours have been taken to the relevance of the legislative history there.

1535

The point that I would make, which might be a slight nuance to the point that my friend Mr Hodder made, is that the 1996 Amendment Act, not only does it introduce benefits as a mandatory relevant criteria in the statutory scheme, it does so in a relatively prescriptive way. So while your Honours have been taken to 122I, in my submission the full scheme including 122E and 122F is worthy of your Honours' consideration in due course, and what your Honours will see there is a much more prescriptive and lengthy process for the local authorities to follow in relation to their financial management decisions, and the point is there is that those are still polycentric decisions that require judgements ultimately to be exercised, and that is what is reflected in my submission in the speech of the acting Minister, Mr McCully, which is to say that notwithstanding that we are setting up what in practice looks like a more complex and formalistic process. At the heart of this is still an exercise in polycentric policy judgement, and that is why we say that this is consistent with the *Woolworths* line of authority. Section 122I(4), which specifically picked up some of the language of *Woolworths,* was added, in the words of the Minister, to make doubly sure that, colloquially, "the courts got the message" on that point and that there was no suggestion from that more detailed and elaborate scheme that there was any departure from the recognition that a exercise in policy judgement was ultimately required by the councils.

Now the 2002 enactments in our submission do provide for a similar scheme but in a shorter form, and do so in a way that, at the margins at least, allow for greater flexibility rather than the two-step process that I've articulated to

your Honours as different from the more formalistic three-step process that was embedded in the previous legislation. And so in that context section 122I(4) is not replicated, but in our submission it doesn't need to be because the risk of the courts interpreting the more prescriptive 1996 provisions as constraining local authority discretion is more limited, or removed effectively, by the 101 formulation which makes it clear that these are matters that relevant considerations and then ultimately the Council then has to have regard to the overall impact of any allocation of liability on the community. And in our submission the proposition that that was thought to be consistent with the traditional views on the accountability of local government is present not only in the first reading speech of Minister Lee, which my friend has taken you to, but it also draw the Court's attention to the Select Committee report which is at tab 2 of our bundle of authorities, although I won't take your Honours to it, at pages 16 and 17, where one of the issues that they consider is whether there needs to be an additional accountability mechanism in addition to the courts supervising legality, the office of the Auditor-General supervising financial matters, and they conclude that one is not required or appropriate.

Your Honours, I'm very conscious of time and not taking too much of it, so I propose just briefly to address the question of standard review. As your Honours will appreciate, we say that *Woolworths* reflects orthodox principles applied to the funding and rating context. Your Honour the Chief Justice asked my friend sort of the list of factors that go to reflecting that orthodoxy. We've had our attempt on that at paragraph 11 of our written submissions, which I think largely mirrors the factors that my friend gave you but adds the additional accountability mechanisms, including that of the Auditor-General into the mix. There is also a further attempt in the judgment of Justice Thomas in the *Waitakere* case at pages 413 to 414 of that judgment. It's an interesting judgment in the sense that it's, A, very lengthy and reflects and slight difference in the judicial methodology from the other members of that panel, but it grapples with modern contextual approaches to judicial review and various points but, importantly, reaches the same conclusion about the level of – and Justice Thomas is less concerned about – the use of the term "deference" than other courts, so he uses the term "deference" in the context of rating

decisions. And so he ends after going through his list of the factors why in his view this is an area where deference should be shown with a summary of what he says the Court's proper role should be, and Justice Blanchard, who did form a member of the earlier *Woolworths* panel, writes a very short concurring judgment which says: "Yes, that's what we meant." So in our submission that's a helpful proposition

Now as we understand the Court of Appeal's proposition, which is at 136 of their judgment, which my friends the respondents support, it is that there is a difference where a rating decision affects a small group of ratepayers, and that proposition seems to be based, if I correctly understand the position on possibly two propositions. One is that the democratic mechanisms for ensuring accountability of local authority rating decisions will be less effective in the case of small groups of ratepayers, and in the second, which is something that's perhaps emphasised more by my friends' submissions than the Court of Appeal, is a proposition that that affects rights.

Just focusing on the second point first, the question of the protection of rights raising the question what rights? In our submission there's no right to minimum taxation or minimum payment of rates, and even the jurisprudence in the United States on regulatory takings, which is probably the more aggressive view of the limits of that doctrine, doesn't get anywhere near the proposition that rates on land are an expropriation. To the extent that the rights here are a right to equal treatment, and it extends to corporations, which must be a contestable proposition, then in our submission unless the discrimination is of a protected category that engages the Bill of Rights or the Human Rights Act, then the conventional orthodox position in New Zealand is that discrimination is permissible and – and I gratefully adopt your Honour the Chief Justice's suggestion – necessary in a rating context, so long as it is done on a rational basis linked to the relevant considerations that are set out in section 101.

In terms of then the question of not rights but simply minority participation, in our view that is problematic from a number of perspectives. The first is that in our submission the approach in *Woolworths* does not stand or fall on the

democratic content of decision-making. Democratic content is important, it's very significant in our submission, but there are other factors, the factors that we have set out in paragraph 11 of our submissions, and the matters that Justice Thomas identified in *Waitakere* that also support the approach in *Woolworths.*

The second proposition is that it's not clear to us that the democratic context does here fail a small group of ratepayers. Small groups of ratepayers will often be disadvantaged from their perspective in a rating context, including differential rates, and there in our submission there is a very helpful and useful judgment from Justice Grice at first instance in *New Zealand Forest Owners Association Inc v Wairoa District Council* [2022] NZHC 761 case that is in the respondents' bundle of authorities, which is again an example of a small council making difficult decisions in the context of a differential rate situation and imposing a higher differential rate on forestry owners in the region. Again, a small group of ratepayers but in our submission the democratic content of that decision remains one in which the local authorities, as democratically elected members, are entitled to have regard to the information before them and make judgments even if those judgments adversely affect those small groups.

1545

As we've said in our written submissions, we are in our submissions sceptical that the Court of Appeal's proposition that a small minority such as the respondents do not share the same protections of participation in the democratic process. We've suggested that corporations may well engage through their stakeholders, their shareholders, employees, to encourage voting as well as engagement through consultation, lobbying, shaping the discourse. Part of preparation for this hearing, we attempted to find a nice summary of a political commentary on corporate participation in local government and we couldn't find a very nice one because most of the US authorities that actually engage on the issue are concerned with the higher degree of power that corporations have on local government, not the fact that they might be small minorities.

In our submission, and this is perhaps reflected in your Honour Justice Williams' first question to my friend this morning, there is the degree into which the facts here suggests that there is effective political participation, not only through the numbers on voting but the fact that changes have been made over time to this proposal, both during the original consultation and in the subsequent 2018 rating year. But that is as far as I will trespass on the facts of this particular decision as opposed to the issues of principle.

Now I am conscious that I have sped through a lot, but unless your Honours have questions, those will be the submissions for Local Government New Zealand.

WILLIAMS J:

Just one. There seems to a long line of authorities starting in England and then coming over here about inserting the concept of fiduciary obligation into this area.

GLAZEBROOK J:

Sorry, can you perhaps speak more directly into the microphone?

WILLIAMS J:

Okay. The fiduciary point that's set out loud and clear certainly in *Woolworths,* and I think in *Mackenzie* as well, not taken up in the statute, what do you make of that?

MR T SMITH:

In our submission it is echoed in the statute.

WILLIAMS J:

How?

MR T SMITH:

It's obviously not expressly there but it's echoed in and I would say it's echoed in two ways. One is that, in my submission, the concept of a fiduciary duty is

primarily relied on by the Courts of *Mackenzie* and *Woolworths* as a basis for saying that consideration of benefits to a ratepayer is a mandatory relevant consideration. That's one of the intellectual hooks that they use to say that there has been a failure to consider a mandatory relevant consideration in that case, and that part obviously is brought into the statutory scheme. In terms of the –

WILLIAMS J:

Do you know where it – sorry, no, you keep going and then I'll ask you a supplementary.

MR T SMITH:

I suppose the second part of the echo is in my submission in section 101(1) and section 101(3)(b), so section 101 is obviously the question of prudence and the question of rating for the interests of the community. That is an important feature of the fiduciary language that is used in the old English cases. Then secondly the concept that the authority must in making a rating decision have regard to the overall impact on the community, I would say is also an echo of some of those fiduciary concepts.

WILLIAMS J:

So it's not usual to find an entity exercising statutory power being found by the courts without specific language to be subject of fiduciary obligations. There's been a bit of that litigation in the native rights area across the common law world. Can you tell me the source of that idea in the English cases?

1550

MR T SMITH:

As I read *Mackenzie*, which is the source of this, it appears that there's some, some of the statutory concepts at least at one time imposed notions of trust.

WILLIAMS J:

You don't know where it comes from in the English cases?

MR T SMITH:

Not without going back and reading *Mackenzie* jointly with you at this point, your Honour.

WILLIAMS J:

All right, fine, thanks.

MR T SMITH:

The one point I'd make in case it's helpful is that Justice Thomas in his separate judgment in *Waitakere* has a discussion of the fiduciary concept. He is more supportive of its utility than I think your Honour, the Chief Justice, was and I possibly incline to your Honour, the Chief Justice's, views on this, but what is interesting, I suppose, and probably it's all that needs to be taken from it, is that Justice Thomas, albeit prepared to recognise a greater utility to the fiduciary concept, considered that that was consistent with *Woolworths* and consistent with a more restrained approach to judicial review, having regard to the various factors that he referred to in his judgment.

WILLIAMS J:

Yes, I just wondered whether it was just a quirk of English legal history that local authorities of many hundreds of years standing are found to be trustees somewhere 300 years ago. You don't know anything about that?

MR T SMITH:

It is very tempting to – my suspicion is that you are correct, your Honour, and that the modern approach would be best to start with the statutory language and end with the statutory language.

WILLIAMS J:

Yes.

WINKELMANN CJ:

Thank you, Mr Smith.

MR T SMITH:

May it please the Court.

WINKELMANN CJ:

Mr Galbraith, it's 3.52. What is your preference?

MR GALBRAITH QC:

I obviously won't finish tonight, your Honour, so I think probably be best to start tomorrow.

WINKELMANN CJ:

We're all very disappointed.

MR GALBRAITH QC:

I could say a couple of things but…

WINKELMANN CJ:

Do you think there's enough time for the respondents tomorrow?

MR GALBRAITH QC:

Yes, yes, we'll make it, your Honour.

WINKELMANN CJ:

Good. Well, shall we then just retire since we started in a burst of enthusiasm 15 minutes earlier this afternoon? Right, we'll do that.

COURT ADJOURNS: 3.52 PM

COURT RESUMES ON THURSDAY 21 JULY 2022 AT 10.02 AM

WINKELMANN CJ:

Ms Baigent. Good morning.

MS BAIGENT:

Your Honours, at the end of yesterday I did say that I would provide a pinpoint reference in the supporting information document about the provision that analyses the considerations in relation to rental cars and the difficulties with property tax on that. The reference is 305.1057.

WINKELMANN CJ:

Thank you, Ms Baigent. Mr Galbraith.

MR GALBRAITH QC:

Thank you, your Honour. In accordance with the Court's direction, we – when I say "we" I mean between the second and fourth respondents and first and third – we attempted to focus our written submissions on, in our case, unreasonableness, and in my learned friend, Mr Smith's, case, on benefit, but as the Court will be obviously aware they are inextricably interrelated and so while I'll do my best to not trespass too much on what my learned friend, Mr Smith, wants to say, I fear I will trespass at least a little.

In our respectful submission, this isn't a case fundamentally about democracy or polycentric decision-making or what in *Woolworths* was described as the complexities of economic, social and political assessments. This is a case about a straight-line process to produce a justification to impose a charge on accommodation providers for an expenditure on an ATEED activity which Council had previously for a number of years regarded as appropriately charged for the benefit of Auckland generally which – and there was no change, going to be no change, in what ATEED was going to be doing. Instead of an Adele concert it may have a concert by somebody else but it was still going to be funding concerts and the odd special event. So the change was instead of Auckland paying, and by that I mean the general ratepayers, which, as you will

have heard from my learned friend's submissions, is what ATEED was all about, was trying to improve Auckland in general, both culturally and economically and make it an active and vibrant city, so that was the justification, of course, but these expenses were previously met by the general rate, or part of ATEED's expenses met by the general rate but particularly the ones we're talking about here, but now a change was proposed, as you will have heard, stimulated by the pre-electoral publicity by Mr Goff when he was candidate for Mayor. Council officers, quite rightly, recognised that because it was to be a change to a targeted rate then, of course, it required a justification and it required a justification in targeted rate terms and there's been some discussion already about the legal justification or the legal path through section 101 which I'll come back to but at the moment I really just want to talk about the path that was undertaken on the factual basis.

There's not, in our respectful submission, a shadow of doubt that so far as the imposition of the charge, it was the accommodation providers who were the targeted payers from day 1 or, in fact, one might say from before day 1, in the pre-election campaign. The Mayor's pre-election statement which my learned friend took you to talks about demonstrable benefits, user pays, talks about fairness, but despite those expressions it is quite clear that where this was going was the accommodation providers to be required to pay a portion of ATEED's expenses, initially 27-odd million, subsequently reduced to 13 million, which seems to have been largely derived from ATEED's expenditure on major events.

WINKELMANN CJ:

Are you saying it was pre-determined?

MR GALBRAITH QC:

No, not in any legal sense, your Honour, but it certainly wasn't going in any other direction, let's put it that way, this inquiry.

There is some evidence in the evidence in reply by one of the councillors who did form part of the minority, which again my learned friend was referring to,

and I do want to refer to his evidence a couple of times, Mr Newman. You'll find the particular paragraph I want to refer to at 203.0506 which I really can pretty quickly to your Honours because the point I want to make is very short. But I will come back to his evidence in other contexts. In paragraph 8 of 506 he read the Council's evidence which, as my learned friend said, is quite long and goes through all the appropriate considerations which Council take in considering rating, et cetera, and he's just summarising there that the driving force behind the rating programme, and there's no criticism of this, was the Mayor's desire to try and keep increase to no more than two and a half per cent. But you'll see the last three sentences: "He made it clear very early on that accommodation providers – and in particular large hotels – were to be one of those sources. As far as I could tell there was no credible consideration of whether this was justifiable on a policy basis. The only question was how much could be levied from those ratepayers," and when I take you to some of the evidence you'll see, as I submitted before, that it really was a straight-line process. How can it be justified? How much can be justified? But as I said, there was no other consideration other than that driver.

1010

GLAZEBROOK J:

It's difficult to say that, isn't it, in the context of the documents and the staff report, et cetera? I mean that might be his viewpoint but it's very difficult to say that was no consideration when you have those documents.

MR GALBRAITH QC:

Those documents, with respect your Honour, are only about getting to that conclusion, there's nothing in my respectful submission in those documents which –

GLAZEBROOK J:

Well, they certainly try and justify it on a policy basis and on a benefit basis. So I just put to you again that it's difficult to make this submission in that way unless you're saying predetermination and –

MR GALBRAITH QC:

No, no…

GLAZEBROOK J:

– wrongful consideration of keeping the rates down.

MR GALBRAITH QC:

No, no. What I'm saying, your Honour, is that because there was change it had to be justified. There was only one rational way of justifying the change, which was, as your Honours have just rightly said, was there a benefit connection? There is no other conceivable basis, or at least no other suggested by council officers, to justify the change other than they had to find a benefit connection, and that's entirely what the Minister – sorry, not the Minister – Mr Goff himself said in his pre-election statement, "demonstrable user pays", so it's a benefit connection, and after some pressure, I think from Justice Williams, I think my learned friend actually grudgingly conceded that, that there had to be a benefit connection and that's the justification for the imposition of the rate. So I agree with Justice Glazebrook that there is a deal of consideration about that in the staff paper, which we we'll have to come back to, but that was the justification which Council, rightly, set out to identify.

Just perhaps to say something about targeted rates at this stage without getting into too much detail. Certainly in the courts below it was I think agreed between us that targeted rates, the predecessor is section 16 of the Rating Powers Act, which you'll find in our first bundle of documents behind tab 3 and –

WINKELMANN CJ:

The predecessor to what, Mr Galbraith?

MR GALBRAITH QC:

The precursor to the targeted rates which we now have. Targeted rates started out in the Rating Powers Act as being separate rates. There are historical precursors going further back but this is the immediate precursor, and that was the section it was applying at the time that *Woolworths* of course was decided.

And what you'll see in section 16 was, it provided that territorial authority for "undertaking a specified function or work or for providing any specified service for the benefit of all or part of the district or contributing to that" and "make and levy a separate rate" may be made and levied where the function "will benefit the district as a whole on every separately rateable property" or "part of the district" and then that rate is made on that path or the whole of the district, that's the precursor, and I think her Honour the Chief Justice was asking about the targeted rates which Auckland Council had. And you'll find the lead to that if you go to 301.0232…

O'REGAN J:
Just before you get onto that, what is your point about section 16 of the Rating Powers Act? That it was more specific in directing, saying they had to be connected to a particular part of the community?

MR GALBRAITH QC:
Yes, that was the connection that was seen at the time, Sir. It's specific in a specific part of the district, and then you can rate for that.
1015

My learned friend took you here – this the rating policy out of the Budget I think it is and it starts at Chapter 6: Rating policy, "Policy purpose and overview", and if one goes to 232 you'll see the heading for targeted rates, "6.3.3 Targeted rates". And this is effectively the long-term plan which dictates the policies of Council, and targeted rates are described as "may be used to fund specific council activities. Targeted rates are mainly used where there is a clearly identifiable group benefiting from a specific council activity. Targeted rates will apply to properties that receive certain services, or which are located in specified areas. The council does not have a lump sum contribution policy and will not invite lump sum contributions for any targeted rate." So your Honour, Justice O'Regan, you will see the echo of section 16 in that very clearly.

Then if one looks through at the targeted rates which are identified here you will see there is a waste management targeted rate and that's because they're

changing their approach to waste management and so it's directed to a service which is provided. There's a city centre targeted rate which had been imposed way back to fund development and revitalisation of city centre. There are business improvement district targeted rates. Those generally are agreed with the business organisation in the area. There's an Araparera Forestry targeted rate. There's a Waitakere rural sewerage targeted rate. There's a flood gate restoration targeted rate. There's a Point Wells wastewater targeted rate, et cetera.

There's nothing like the rate which was intended to be imposed here in respect of a use and in respect of a grouping such as the accommodation providers. These rates are all of a character which one can see clearly falling within…

GLAZEBROOK J:

So you're saying ATEED isn't actually a specific service being provided or a specific activity because it seems to me that's a rather vain submission.

MR GALBRAITH QC:

No, I wasn't making that submission, your Honour, it undertakes an activity. The question is these others which you can see here are much more easily identifiable and the connection much more easily identifiable than in the ATEED case.

WILLIAMS J:

You've got these, the Retro-fit group, which is, of course, very different but activity based.

MR GALBRAITH QC:

Yes.

WILLIAMS J:

It seems to be the only other non-geographic targeted rate, although the benefit is direct in that case, because it's –

MR GALBRAITH QC:

Yes. It's direct because you get your home fixed or, sorry, retro-fitted.

WILLIAMS J:

Quite, yes.

MR GALBRAITH QC:

So it's pretty easy to identify benefit and rate. Now how Council –

GLAZEBROOK J:

Is the submission rather that you can't identify the benefit rather than that it's not an activity because, as I said, to say it's not an activity doesn't seem to me to be at all arguable.

MR GALBRAITH QC:

No, no. No disagreement, your Honour. The submission will be that benefit wasn't actually identified and that's part of the – one of the considerations.

GLAZEBROOK J:

But I mean, in principle, it could be identified, couldn't it?

MR GALBRAITH QC:

Yes. No, agreed. Agreed. A bit like the more extreme Retro-fit example that Justice Williams gave.

So how Council went about identifying that the benefit connection was to – it didn't attempt to identify an actual connection, and you'll recall my learned friend Ms Baigent's taking you through yesterday the reports about number of visitor nights which were identified as being generated from various activities. But there was no attempt, and those reports weren't intending to translate that into an identification of benefit to any particular sector of Auckland, including the accommodation providers. They were just generic development of how many people came to the particular event multiplied by how many days it went on for

and identifying those who came from out of Auckland as against those who were within Auckland.

1020

So there was no attempt by Council to translate that into an identification of actual benefit to accommodation providers, and it's correct, as Council's evidence said, that would be difficult, but it was an exercise that wasn't undertaken, in fact Mr Hamilton, an expert called by the accommodation providers, did undertake, as best one can from the material, that exercise, and I'll come to that.

WINKELMANN CJ:

So you're saying they didn't undertake an exercise that you say was required? So it's your particular account of what was proved, because they, the Council, does seem to have said: "There's basically an obvious line of logic here and we can pursue this obvious line of logic to conclude."

MR GALBRAITH QC:

Yes, yes, I agree.

WINKELMANN CJ:

And you're saying that's not a good enough line of logic?

MR GALBRAITH QC:

Well, no, I – that's what Council to do, and one can understand that. But even pursuing that line of logic doesn't lead to the reasonable conclusion that the accommodation providers should have imposed on them this target rate which had the effect that it did.

GLAZEBROOK J:

Can I just…

WILLIAMS J:

Isn't your case really insufficient distinct benefit? Because you can't really argue that there's no benefit in attracting visitors to Auckland for hotels.

MR GALBRAITH QC:

No, and nobody has, Sir, none of the evidence has ever said that.

WILLIAMS J:

Right.

MR GALBRAITH QC:

They've all accept ATEED's doing part of a job, which the hotels do as well and Tourism New Zealand does and Air New Zealand does and Auckland Airport does and whole swag of other people do, and everybody running one of those events which ATEED is funding, well, it's not funding, sorry, contributing to, like the New Zealand Rugby Union, are also doing their best to get people to come along to the events.

WILLIAMS J:

Yes.

MR GALBRAITH QC:

So nobody's denying ATEED have a role to play, but the question is can you translate that into a justification of a sufficient benefit connection to impose $13 million or initially $27 million on accommodation providers.

WILLIAMS J:

Yes, so sufficiency is the question.

GLAZEBROOK J:

What do you say the test is for sufficient connection? Just so that we have got that up front.

MR GALBRAITH QC:

Well, there's no bright line test, your Honour, you can't say it's got to be one-for-one, you can't possibly say that. So it's a, it's a test of reasonableness, is it reasonable or unreasonable.

GLAZEBROOK J:

Well, is it reasonable or is it – what's said against you that it has to be a rational connection. And if, just if you look at the logic is, the logic I think with the events is that if there hadn't been these events the people wouldn't have come. They translate into a certain number of hotel nights and there's splits between informal and other, but they translate into a certain number, therefore that is a rational connection because if those people wouldn't have come and they're staying in hotels, then there's a rational connection with the accommodation providers, that's my understanding of the logic.

MR GALBRAITH QC:

I think your Honour's correct…

GLAZEBROOK J:

And your friend or the appellants say that is a sufficient rational connection in terms of benefit.

MR GALBRAITH QC:

Well, it's a – as I said before, nobody's denying that ATEED, ATEED's activities aren't a contributor to visitor attraction to Auckland, nobody's denying that at all. The question though then becomes to what extent does that justify the imposition of this particular charge, the quantum of this charge, given the evidence which Council were relying on, which was the evidence which as your Honour also said correctly was that which was set out effectively in the staff report. And the particular evidence which translated or was used to translate the generality of the fact that there would be a connection was the use of the two tables, or in fact in my respectful submission really only one table, which you find at 310.2066, which starts at…

GLAZEBROOK J:

What I'd quite like you to do is to – you say it's not just rational, it's reasonable, but I want to know what you mean by "reasonable" I suppose.

MR GALBRAITH QC:

Yes, well, we'll sort of come to that…

GLAZEBROOK J:

Sure.

MR GALBRAITH QC:

That's just where I'm trying to get to. So if one goes to 310.2066, that's the start of the – sorry, that's where the two tables are that my learned friend Ms Baigent was talking about yesterday. The table in 78 was was a table about visitor spending on accommodation and other activities, and the table at 79, which we'll have to talk to a little bit more, not quite the same. So what Council did rather than trying to, as I say, do an investigation to try and bring an actual connection between what ATEED was doing and what accommodation providers were receiving by way of benefit. We're content to take the figures coming these national statistics, and that's the Council's choice and that's fine, subject to the fact that – well.

So paragraph 78, the table there is the one which shows – my learned friend said we go on and on about 10%, but that's what it shows. It shows that of the money spent when visitors come to Auckland, 10% goes to accommodation, 42% goes to retail and 17% goes to passenger transport, and you can see the figures there. So on those stats, accommodation –

GLAZEBROOK J:

But Ms Baigent says it was actually 22%, I think, on paragraph 79.

MR GALBRAITH QC:

That's right, and paragraph 79 you'll see is a different table reporting something quite different, because you'll see in the third sentence: "Historical data on

overnight domestic visitors…for the year…shows the proportion of visitor spending", et cetera, which is higher. If you look at that table you'll very quickly see why that is so, because you're talking about overnight visitors.

So what are the two high expenditures? Transport on all at 36%, because that's how they got there for overnight, and accommodation at 18 which matches with food and beverages. There's dash all for retail, whereas the other table's got retail at 4, and why is that? Because these are people coming in overnight, disappearing the next day, they haven't got time to do retail shopping, they're not the leisure travellers who you're trying to attract who are going to spend their money with other tourism et cetera et cetera. This is a snippet or a fraction of the picture which you get from the top table, which is the national statistics over time, and –

WILLIAMS J:

Does that really mean one night? Why would they have holiday in there?

MR GALBRAITH QC:

Because they've identified what they're – a lot of people might stay one night.

WILLIAMS J:

What kind of holiday is that?

MR GALBRAITH QC:

No, no, no, on their way to go on holiday, Sir. Because as you'll appreciate, Auckland is the gateway one way or the other for people coming and going to New Zealand.

WILLIAMS J:

You're sure that's what that –

MR GALBRAITH QC:

No, no, of course I'm not, Sir, because nobody has broken this down.

WILLIAMS J:

Well then how do we know we can rely on what you're saying?

MR GALBRAITH QC:

Look, all –

GLAZEBROOK J:

It does say overnight at the paragraph 79.

MR GALBRAITH QC:

It does say overnight, Sir.

WILLIAMS J:

It does, but my question is what was overnight intended to mean? Is it as clear as it needs to be that overnight is just a one night stay and nothing more?

MR GALBRAITH QC:

Well that's what I would, with respect, suggest Sir, because of what I said before. Otherwise, transport at 36% seems extraordinary if people are staying for four, five, six nights. And 36% on transport? I don't think so. Thirty-six per cent if you're flying Air New Zealand, but they're all flying from overseas, I can see that for one night. There is –

WILLIAMS J:

Any evidence from someone who actually knows what's going on here?

MR GALBRAITH QC:

The evidence I was just –

WINKELMANN CJ:

Well Mr Galbraith it must be – it's got a footnote. Someone must have followed the footnote, one assumes, because –

MR GALBRAITH QC:

Well we've tried to, your Honour, but I was just –

WINKELMANN CJ:

From Statistics New Zealand.

WILLIAMS J:

Yes.

MR GALBRAITH QC:

Yes. I was just about to say that Mr Small in his evidence tracked back, I think, 10 years and you'll see it's between 201.0055 and 57, He went back 10 years through the MBIE statistics et cetera and he came up with a figure of 5.8% over 10 years for accommodation. Now –

WILLIAMS J:

That's on the wider study though, isn't it?

MR GALBRAITH QC:

That's on the wider.

WILLIAMS J:

Yes.

MR GALBRAITH QC:

That's a national stat, as I understand.

WILLIAMS J:

But I'm trying to get, I mean, because the Council's relying very heavily on that second table as indicating that the Court of Appeal had got it completely wrong, in fact it was 22, you're saying that's wrong, it would be nice to have someone who understands this business confirming what you've got to say or suggestion that you may have made a mistake.

MR GALBRAITH QC:

Well, all the evidence, Sir, on our side from Mr Hamilton, from Dr Small and from the table at 78 is, we're talking about something below 10%.

GLAZEBROOK J:

Well, even if you are talking about 10%, would you accept that compared to Mr Smith who lives at, you know, 7 Brown Street, Mount Eden, that the accommodation providers – and assuming he's not an informal accommodation provider – that the accommodation providers get more benefit from ATEED than he does?

MR GALBRAITH QC:

No, no, of course not, your Honour, because –

WINKELMANN CJ:

You don't accept it?

MR GALBRAITH QC:

Well, it depends what you mean by "get more". ATEED does a whole –

GLAZEBROOK J:

They get a direct financial benefit. Mr – I can't remember what he was – Mr Smith in Brown Street is not really interested in any events at all.

MR GALBRAITH QC:

Oh, well, now you're changing the –

GLAZEBROOK J:

No, no, but I mean the point is you're just an ordinary ratepayer…

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

Are you suggesting the accommodation providers, even at 10%, do not have a greater benefit, at least in financial terms, than Mr Brown does?

MR GALBRAITH QC:

Well, it depends what you mean – well, in financial terms nobody's proved that…

WINKELMANN CJ:

Well, but there's a matter of simple logic. I mean, it's also a matter of common sense. One knows that if one tries to book into a city hotel when a major event is on one can't get in because the event is attracting so many people into the city.

MR GALBRAITH QC:

Yes, well –

WINKELMANN CJ:

So, I mean, it's a matter of simple common sense logic which is what the Council seems to have trying to apply, and you're saying they're applying it using wrong statistics.

MR GALBRAITH QC:

I'm saying, your Honour, that they didn't have the information to say that the accommodation providers would benefit to the extent that they were now going to have a charge imposed on them. Yes, of course there is some benefit, I've accepted that, but the events for which they were being charged are a handful of days a year and the actual evidence is that indeed in some period of the year, January through March for example in Auckland, you don't need events, the hotels are doing very nicely thank you very much and, indeed, there is some evidence that there was a decrease caused by concerts because their normal market stays away because of the matter that your Honour the Chief Justice just mentioned. So you can get displacement caused by events as well as getting – I don't know what the opposite of that is – implacement is I don't think the right word, but you know what I mean. And again getting back to Mr Smith and Mount Eden, he may not be making the dollars but he might have gone to the British Lions games or the games of the Super Rugby or he might be an

Adele fan or something else, and while he may not have got mere dollars out of it he may have got a lot more satisfaction out of it than mere dollars.

WILLIAMS J:

Well, his dairy might have.

MR GALBRAITH QC:

I'm sorry?

WILLIAMS J:

His dairy might have or his restaurant or his café.

MR GALBRAITH QC:

Or his dairy or his restaurant or…

WILLIAMS J:

It depends on what he does for a job.

GLAZEBROOK J:

Well, I mean, I'm just assuming a normal ratepayer who doesn't have any financial interest in visitors. So you're saying he gets personal satisfaction from the possibility he could have gone to the concert?

MR GALBRAITH QC:

Well, it's more than that actually, if his Honour Justice Williams is correct, and that's of course what ATEED's doing this for, it's doing it to create a situation where Auckland is economically viable and Mr Smith may well have a job because of that, and you'll see from the evidence of the accommodation providers that they in fact provide an awful lot of employment, and one of the impositions of this rate has been that there may less people employed because they trim their costs because they can't pass through, or people will only get a minimum wage, whereas at the moment some of them try and pay above the minimum wage. It's just not as, with great respect –

GLAZEBROOK J:

I don't think many, to be honest, in the accommodation sector, but I might be wrong.

MR GALBRAITH QC:

Well, that's the evidence, your Honour. So if we take – if you wouldn't mind for the moment because that's the evidence of the accommodation providers and that's the evidence both from Mr Hamilton and Dr Small for the accommodation providers that 10% is the upper and Mr Hamilton got it to 8 to 8.5 and Dr Small over time got it to 5.8%, but let's just take the 10% at the moment.

If accommodation providers receive 10% then obviously other people receive 90% of that revenue and there they are in the table, and they're all – and so you've got, if you want to look at ratios, you've got a party that gets one part paying for parties, in effect, who are benefiting to the tune of nine parts. Now that is rather – not using this in a legal sense – but a rather disproportionate appropriation or imposition against parties who receive, if one assumes that ATEED create that same benefit that's generated here, and they may or may not, one part paying for other parties' nine parts.

WILLIAMS J:

That's your reasonableness fiduciary style argument?

MR GALBRAITH QC:

Yes, and, you know, let's just jump to *Woolworths* for a moment. If the commercial ratepayer's been paying – well, if it was a nine to one ratio there, which, of course, it wasn't, then there might have been some shock horror about that. But it wasn't nine to one, but it's a nine to one on these figures here.

Now Council didn't really ever grapple with that because Council's justification or way out, if I can put it that way, was pass through. That was the Mayor's justification, or pre-Mayor's justification, and that was the justification that was carried forward throughout, that the charges would be passed on. Now it's correct that the Council came to recognise, and the Mayor somewhat

reluctantly, that they couldn't impose a bed tax and although the wording changed to "visitor levy" the effective – there was effectively a continuity of assertion that it was simply a choice by the accommodation providers. If they wanted to they could pass it on. If they didn't want to, well, too bad. But to say it's a choice is to assume it can be done, and all of the material provided by the accommodation providers throughout was that it can't be done for two fundamental reasons, if not others, but certainly two fundamental reasons, and my learned friend yesterday, when you were looking at the feedback material which you will find at 308.1771 which is worth having a look at.

WILLIAMS J:

Mr Galbraith, I don't want to distract you but you could help me if you told me what the two reasons were first and then –

MR GALBRAITH QC:

Sorry. The two reasons were, one, it's probably two – well, within the first reason I'm going to talk about there's actually quite a few heads to it, Sir.

WILLIAMS J:

Just give me the headings so I've got some shape for understanding what you're saying to me.

MR GALBRAITH QC:

Okay. The first reason was the structure of the market and there's two pieces to that. One is the legal relationship structure of the market between accommodation providers and owners because, of course, the rate is imposed on owners, property owners, not on somebody who manages a hotel. So there's complications in that, but that's the first. But the subpart of that was that managers of hotels, to stay afloat, enter into long-term contracts. The foundation of the survival of any substantial hotel business depends upon having long-term fixed contracts, two, three years, sometimes longer, and the evidence is all about that. It's the core foundation for hotels. If you've got a fixed contract for two or three years, you can't pass it on. It's as simple as that.

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GLAZEBROOK J:

For two or three years?

MR GALBRAITH QC:

For two or three years. You get rated every year your Honour. The second reason is simply the market reason. That hotels are an intensely competitive market. The product you are selling each day is gone each day, like airline tickets, so the market is immediately and instantly reactive to supply and demand. That's how the sophisticated are operated, with revenue managers. Price may change during the day, it may change during an hour, and if you haven't sold it today, you haven't got it tomorrow to sell, it's gone, and so it's quite a different market from duopoly in supermarkets, or somebody who manufactures steel framing, or whatever else it might be. These are markets which are instant markets and what you're selling is a product, and the product, I don't mean by that it's like steel framing, but it's a product, the size of your room, the services you provide, is it clean, is it not clean. It's that sort of product. It's directly competitive. So those are the two reasons why pass-through, despite what his Honour Justice Moore suggested, can't be applied and doesn't work.

WINKELMANN CJ:

So it would be a cost that would be applying across their competitors, most of their competitors?

MR GALBRAITH QC:

I'm sorry your Honour?

WINKELMANN CJ:

It would be a cost that would be applied across most of their creditors, competitors, most of their competitors would also have to consider how to respond to the extra cost. I know that there is evidence that they can't enter into anti-competitive agreements to put their rates up, but extra costs does tend to lead to market wide response.

MR GALBRAITH QC:

With respect your Honour, no, no it doesn't, and the evidence is the revenue managers wouldn't have the faintest idea whether the rates had gone up, gone down or anything. Revenue managers work on what the market is on any day, or any hour or any half hour. So nobody sits down and adds up the fixed costs and then divides them by the number of rooms in the hotel and says, well today we're going to sell at such and such. That is not how it works.

WINKELMANN CJ:

I just find that hard to believe, that any business runs without working out what it's fixed costs are when it's costing its product, or else it may end up becoming insolvent.

MR GALBRAITH QC:

Well that is what will happen if you don't recover your average costs over time, there's no argument about that your Honour, I agree with you entirely.

WINKELMANN CJ:

Yes, that's simply my point.

MR GALBRAITH QC:

That is correct, and that of course is the point which both Mr Mellsop and Dr Small say, that over time you may be able to pass on fixed costs because those who can't will go out of the market, they'll fail, for the very reason that your Honour's saying, and so that's when fixed costs will get passed through because there will be less supply and you can then pass on fixed costs. But you can't just sit down on Friday because you've got a rates bill and change your – and it isn't what happens, and change your room rates. That's not what happens.

WILLIAMS J:

But you can in 2024?

MR GALBRAITH QC:

Sorry, do you mean over time?

WILLIAMS J:

Yes.

MR GALBRAITH QC:

I think Mr Mellsop also accepted that when he said “over time” he meant over time with people leaving the market.

WILLIAMS J:

Oh did he?

MR GALBRAITH QC:

He wasn’t saying – yes, and I'll take you to it in a moment, but he wasn’t saying that just over time you can gradually filter fixed costs out, that wasn’t – when I say “filter” –

WILLIAMS J:

Passing on.

MR GALBRAITH QC:

Passing on.

GLAZEBROOK J:

I have to say I'm in the Chief Justice’s camp on this, if you’re really having us believe that these people are off just selling things without having any idea what the fixed costs are, which – or even the variable cost from what you say, and they just operate on some…

MR GALBRAITH QC:

Well that’s surprising enough your Honour, that’s the very, that’s the evidence and it hasn’t been challenged as to how revenue managers operate. So I think it’s safer –

GLAZEBROOK J:

It's a wonder there aren't more – well, I think it's a wonder there aren't more insolvencies then.

WINKELMANN CJ:

Of course, they do have to deal with a variable cost market, don't they, Mr Galbraith? Their costs are going up and down all the time. They do need to respond to it and, you know, a cost change could be far more substantial in this market than the cost impost for this.

MR GALBRAITH QC:

Well, your Honour is absolutely right, of course, costs do change, but if you're selling into a market which is intensely competitive, which this one is, you've got to meet the market. With great respect, what the Court is suggesting is that somebody sets a – you can't set a price in a supply and demand perfectly competitive market. It just doesn't work that way and –

WINKELMANN CJ:

No, all I'm suggesting is that the market responds to variable costs.

MR GALBRAITH QC:

Yes, yes, your Honour's – well, the market on a daily basis will react to supply and demand. That's what will particularly drive the market, not the variable cost, because the revenue managers aren't working off the variable cost. They're working off – but ultimately what you are recovering, and that's quite right, prices driven by variable cost, I agree with your Honour, and that's what the economists say.

But if we could perhaps just go to, for a moment and we'll come back to this topic, to 308.1771 which was the feedback. The feedback part starts I think at 1769, and you'll recall my learned friend, Mr Hodder, took you through the local body feedback on this and somewhere in here there's the feedback from people who were consulted and, of course, those who wouldn't have to pay all voted

for it and those who would have to pay, the accommodation providers, et cetera, unsurprisingly voted against it.

But if we look at 1771, you'll recall my learned friend went here and suggested that there was no actual evidence that, from the consultation process, that there was objection on the basis it couldn't be pass through, and with great respect that's not correct, and you'll recall he referred to the Accor –

ELLEN FRANCE J:

I didn't think he went quite that far, Mr Galbraith, but that there were some who didn't.

MR GALBRAITH QC:

Well, let's just have a look and see what was said here in 1771 and –

WINKELMANN CJ:

He said that some said that it would be unpleasant and very difficult but they didn't say it couldn't be done.

MR GALBRAITH QC:

I don't think anybody said that it could be done, let's put it that way. But you'll see under the "Impact on owners" in the lower part of page 1771 – these are just bullet points from the feedback – "The targeted rate will have a huge financial impact lowering the value of existing businesses and may force some providers to close down." Well, if you can pass through that wouldn't be correct, so that's obviously saying, I would have thought, can't pass through. "The targeted rate is a huge unbudgeted cost. To manage the impact of the new rate, owners will have to reduce staff, the opportunities and benefits offered to remaining staff. Spending on refurbishment, corporate citizenship, reinvestment will be decreased." If it could be passed through that wouldn't be correct, so it's quite clearly saying can't be pass through.

WINKELMANN CJ:

Well, no, it's not. It's just saying that that's going to be a negative impact from passing it through, Mr Galbraith. We're maybe talking semantics here.

MR GALBRAITH QC:

No, because what the Council's position was, pass through has no impact was what they were saying. You just get it back. You choose – you get the rate. You simply pass it through. That was the whole thesis. If it's simply passed –

GLAZEBROOK J:

Well, they were disabused of that notion at least with long-term contracts and accepted that, didn't they, because there's no doubt with long-term contracts it can't be passed through.

MR GALBRAITH QC:

That's right. Well, that's – they accept –

GLAZEBROOK J:

And that…

MR GALBRAITH QC:

They accepted it for one year, your Honour.

GLAZEBROOK J:

Yes.

MR GALBRAITH QC:

I'll come back to that.

GLAZEBROOK J:

No, I understand there's an issue about the adequacy of that but they certainly had to accept that because it's just the case.

MR GALBRAITH QC:

Yes. Well, they accepted it with some caveats on that, your Honour, but I won't bother about that at the moment.

O'REGAN J:

Did anyone say what Mr Small said, the market doesn't allow it because that's not the way we –

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MR GALBRAITH QC:

Yes, well, you'll see – if I can just go through this list, Sir, you'll see it here.

O'REGAN J:

Yes.

MR GALBRAITH QC:

The next one is the complexity of ownership hasn't been considered: "Many of the buildings are not owned by the operator of the accommodation. Strata title arrangements mean more than 3000 owner across 330" – what they're saying there is that the structure of the market doesn't allow for pass through because you've got splits between operators and owners, the owners have the rates imposed, the operators don't, and it's the operators who are charging the, who are setting the rates for the hotel on a daily basis, which is another part of the reason, the discussion we had before, that fixed costs on the owner won't get passed through because they're not a cost on the operator of the hotel. But you'll see, just to take up his Honour Justice O'Regan's question, on the next page, "Passing on the cost of the targeted rate" is the heading, there's the "contracted rooms", et cetera, second bullet point: "35% total capacity 2017 and 17 and a half total capacity in 2018." Third bullet point, cannot be added as a surcharge, fourth bullet, room rates "only now starting to return". Fifth bullet point is the one, your Honour: "Accommodation providers are already charging the maximum room rate the market will bear," that's the fundamental market point and…

GLAZEBROOK J:

Well, that's certainly not right in terms of events, because those prices are through the roof with events, if you've ever tried to book anything.

MR GALBRAITH QC:

Well, that will be, but that will be the maximum price that can be charged on that particular day, no quarrel with that.

GLAZEBROOK J:

Well, it might be, but – well, anyway, I think we've probably gone through this enough.

MR GALBRAITH QC:

Yes.

WILLIAMS J:

Are you going to deal separately with the I think was 50% of the Council's response in respect of your reason one rather than your reason two, which is remissions, and your experience of them?

MR GALBRAITH QC:

Yes, I've got to come to that, Sir.

WILLIAMS J:

All right.

MR GALBRAITH QC:

So if I forget I'm sure your Honour won't forget.

WILLIAMS J:

I think if you forget I'll probably forget too. I just hope someone remembers.

MR GALBRAITH QC:

All right.

GLAZEBROOK J:
And at some stage if you can just articulate what the test should be?

MR GALBRAITH QC:
Yes.

GLAZEBROOK J:
And what the argument is in terms of what went wrong in terms of the test. Because, I mean, sometimes an error of fact can be such that it could be an error of law…

MR GALBRAITH QC:
Yes.

GLAZEBROOK J:
But it would be unusual for errors of fact and it would be unusual for the courts to be effectively adjudicating in a factual sense in the context of a judicial review and re-doing decisions. Because whatever the test is it doesn't mean that the Court re-does the decision, and I don't think you're suggesting that.

MR GALBRAITH QC:
No.

GLAZEBROOK J:
Well, if you are you…

MR GALBRAITH QC:
No, no, we're not suggesting that, your Honour. What we're saying is that, among other things, is that the information that was in front of the Council at the time did not allow for the conclusion which they maintained throughout, that this was only the price of a cup of coffee and could be simply passed on at the choice of the accommodation provider.

GLAZEBROOK J:

I suppose I'm asking more generally in terms of what you say the test is, rather than this particular point.

MR GALBRAITH QC:

Well, the test has got to be at the end of the day that the decision which was made can be justified in its terms, and if it can't be justified in its terms because a decision had to be made, and this particular decision and the reasons for it are apparent in the staff report and Council's reports, and they are simply not justified by the information that was before the Council at the time.

O'REGAN J:

The staff report doesn't say it's only a cup of coffee and you can pass it through.

MR GALBRAITH QC:

No.

O'REGAN J:

So, I mean, why are we even discussing it.

MR GALBRAITH QC:

I'm sorry, your Honour.

O'REGAN J:

The fact that some loose cannon councillor says that is neither here nor there, is it?

MR GALBRAITH QC:

No, no, look I – except that that was the number that was used, $4 to $6 you may recall, was used more formally than the way I expressed it, your Honour.

ELLEN FRANCE J:

Is it Dr or Mr Mellsop?

MR GALBRAITH QC:

Mr Mellsop.

ELLEN FRANCE J:

Mr Mellsop. He seems to say that there is a justification in terms of the benefits analysis in his section 2, section 4 rather, of his affidavit.

MR GALBRAITH QC:

Yes…

GLAZEBROOK J:

I suppose the question I'd still ask is what "justified" means. I'm just trying to get the difference between the rational connection, which is the appellant's test, and your reasonable connection and what "reasonable" means. I'm trying to get a test so that you say, well, legally this is what went wrong.

MR GALBRAITH QC:

Yes. Well, can we wait till I've, we've identified what I say that the issues are and then we can…

WINKELMANN CJ:

Well, it might help actually, Mr Galbraith, if you did. It may be because of our questioning that I'm beginning to lose the shape of what you're saying and it might just help us if we zoomed back out and you did that for us?

MR GALBRAITH QC:

Sure. Well, we've got to go back to where we started from. Because this was going to be a change in a targeted rate it had to be justified. The only justification which Council identified was the benefits that ATEED confer on accommodation providers.

GLAZEBROOK J:

What authority do you have for it, because it's a change it has to be justified? I mean, I would have thought you'd have to justify a targeted rate even if they were setting up ATEED now.

MR GALBRAITH QC:

Well, your Honour's quite correct, I mean, I agree with that, but…

WINKELMANN CJ:

Well, your point is a targeted rate had to be justified.

MR GALBRAITH QC:

A target rate had to be justified because it –

GLAZEBROOK J:

Yes, so it's a more, it's not because it's a change, it's because – I mean, that might be useful factually for you, I can understand that, but does it mean it has to be more justified than it would if you just were, had a clean slate?

MR GALBRAITH QC:

No, but you didn't have a clean slate, you had these expenses previously, Council satisfied that they were expenses that should be charged to a general rate. Now they want to change it so there had to be a reason for changing it, and the reason has to match the targeted rate reasoning, that's all I', saying.

GLAZEBROOK J:

Okay. But what does that mean?

MR GALBRAITH QC:

Well, you can only, what it means is that, you can only see what it means when you go down to specifics of –

GLAZEBROOK J:

Well, no, we've got to have a test.

WINKELMANN CJ:

Well, can we just, perhaps if we just let Mr Galbraith tell us the issues and then…

O'REGAN J:

I think we should just let Mr Galbraith finish, yes.

GLAZEBROOK J:

Yes, maybe, but…

WINKELMANN CJ:

Because I think you're telling it, at the point now you're just giving us a big overview of what your points are, yes.

MR GALBRAITH QC:

That's really what I was trying to do. The – I've lost my thread a bit.

WINKELMANN CJ:

So you're saying a targeted rate had to be justified…

MR GALBRAITH QC:

Yes.

WINKELMANN CJ:

Council had previously been satisfied that it should be paid through a general rate.

MR GALBRAITH QC:

Yes. And I was just stepping through how Council set out to justify that, and the tests will be have they or haven't they, if you want to put it as simplistically as that.

GLAZEBROOK J:

So it's a factual analysis, is that…

MR GALBRAITH QC:

Well, facts obviously are important.

WINKELMANN CJ:

Well, yes, but we're talking about the Court's supervisory jurisdictions so…

MR GALBRAITH QC:

That's right, that's right.

WILLIAMS J:

Your point is there'd better be a really good reason, even as a matter of public law, for locking in a target rate that has a benefit asymmetry of nine to one.

MR GALBRAITH QC:

Yes.

WILLIAMS J:

It's just simple as that, isn't it?

MR GALBRAITH QC:

Yes.

WILLIAMS J:

Now there's some factual bases for that and some contention around that, but that creates the flag of suspicion to which the Council says: "Well, we shifted it 50% and we had this big remissions policy. You need to address whether the 50% and the remissions policy got things back into kilter."

MR GALBRAITH QC:

Yes. And –

WINKELMANN CJ:

But just using the test that you've applied, because you do move in your written submissions quite quickly from discussing the law about unreasonableness just to an in-depth consideration of the facts, and that's where I think I'm struggling

and Justice Glazebrook is struggling to understand how you say the standard of reasonableness or the content of a reasonableness test responds to the facts of this case.

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MR GALBRAITH QC:

Well, his Honour Justice Williams articulated it.

WINKELMANN CJ:

Well that's just an argument but it doesn't seem to engage –

MR GALBRAITH QC:

But it's the same as *Mackenzie* or any of those. That happened to be 56 to one in *Mackenzie*, so that's what got *Mackenzie* over the line.

WINKELMANN CJ:

So is your point that the change, the fact of the change and the size of the impost makes it an exceptional case, and you needed something, you needed a compelling factual basis for it?

MR GALBRAITH QC:

It's obviously more complicated than that, your Honour, but the nine to one, so what you're trying to do is a benefit connection, right? Benefit connection which is identified on my figures, I agree that some people could argue with that, is nine to one. There is nine parts that aren't paying for the benefit they're getting and this one part is being singled out for paying.

WILLIAMS J:

Well, they're paying 50% of it.

ELLEN FRANCE J:

I was going to say, they're not paying at all.

MR GALBRAITH QC:

It's paying one to nine on whatever part's not going to general rates, is the way I've been looking at it, your Honour. The reason, just to jump to that point which you asked me about before about the 50%, the reason the 50%, sorry, what was going to be 100% of 27 million was reduced to 13 million was because it was recognised that the accommodation providers weren't receiving any benefit from the bulk of that. Do you remember what went out in the staff report was identified as being couldn't really show a connection between four of those items, I think that went out, and the accommodation providers. So it was appropriate and the staff report went on to say there should be a material reduction.

Now, the Mayor plucked 50% out of the air but a decent chunk of that were those items where it was identified that the accommodation providers were not directly benefitting. Education was one of them. So the 50% is not a saviour for the Council. There was never a benefit connection which could justify an imposition on the accommodation providers for those.

WILLIAMS J:

So there was never justification for a targeted rate of any kind?

MR GALBRAITH QC:

Then that's where we've got to have the argument about nine to one et cetera, Sir.

WINKELMANN CJ:

Mr Galbraith, all I'm asking you to do is just in a couple of sentences put your case in a public law sense, in public law terms, instead of delving immediately into the fact. You're saying why is it unreasonable.

MR GALBRAITH QC:

It's unreasonable because there isn't a rational connection between the rate that was imposed and –

GLAZEBROOK C:

Is that a quantum issue, just so I'm clear?

O'REGAN J:

Let's let him finish and then…

MR GALBRAITH QC:

Quantum's obviously part of it, your Honour, must be.

WINKELMANN CJ:

There is no rational connection between the rate that was imposed.

MR GALBRAITH QC:

Sorry, that wasn't well put. The rate that was imposed was not rationally justified by the quantum and the circumstances relied upon by Council to justify. Let's put it as simply as that.

WILLIAMS J:

By quantum and circumstances?

MR GALBRAITH QC:

Well the circumstances, because there I'm encapsulating, Sir, the structure of the market, et cetera. So that's a very – that's as general as I can make it.

GLAZEBROOK J:

Well I think he was saying that the benefit wasn't – the rate was not rationally justified in terms of quantum and circumstances by the benefit. Is that?

MR GALBRAITH QC:

No, I'd say the quantum and circumstances, it's not just benefit, your Honour.

WINKELMANN CJ:

Council believed that they did have material that rationally justified this and they have set out a logical train of thought, so how far should the Court go in your submission in testing that? Because in one analysis –

MR GALBRAITH QC:

Well there's –

WINKELMANN CJ:

On Mr Hodder's submission, the Court of Appeal has undertaken a full merits review of the factual analysis.

MR GALBRAITH QC:

Well, certainly Justice Gilbert obviously read all the evidence, no argument about that, but the position is, when you come to take pass through, the evidence on one side that you can't pass it through is, to use a term picked up in the cases, "overwhelming". The only evidence, there's no actual evidence, no actual market evidence on the other side, the only evidence on the other side referred to in the staff report is an analysis, or not an analysis, sorry, a reference toa couple of US articles and I think a PwC article in New Zealand about elasticity in the hotel market. Those aren't studies that were produced and there was no analysis obtained at the time the decision was made in respect of pass through and, as I've said, the evidence is overwhelming that there could not be pass through. Now part of the Council's way out of that, and that is a public law issue –

O'REGAN J:

Well, except the Council know that.

MR GALBRAITH QC:

Sorry?

O'REGAN J:

The Council knew that. I mean, the fact that they thought two years before there'd be pass through, again it's neither here nor there, is it? We have to look at what they decided on.

MR GALBRAITH QC:

Well, they decided on the basis that the accommodation providers could choose whether to pass through or not, and the fact of it is the evidence is they couldn't.

O'REGAN J:

Well, they had the evidence, you just took us to it.

MR GALBRAITH QC:

Yes.

O'REGAN J:

It said they couldn't.

MR GALBRAITH QC:

Well, they didn't – Council appears –

O'REGAN J:

Well, yes they did, they reduced it by 50%.

MR GALBRAITH QC:

Ah, but the 50% -

O'REGAN J:

And put in place a remissions policy. I mean…

MR GALBRAITH QC:

Yes, yes, well can I just –

O'REGAN J:

It wasn't a static process, was it?

MR GALBRAITH QC:

No, no, it wasn't. But the 50% I have just spoken about, Sir, the 50% wasn't reduced because they believe that they couldn't pass through, there's not a skerrick of a suggestion that that was the justification for the 50%. The 50%,

the remissions policy was to meet the long-term contract issue. Now of course what that did was introduce another distortion because, as the evidence was from the accommodation provides, that you then had one hotel because of its circumstance getting a remission and the hotel next-door not getting a remission, and how do you cope with that in the marketplace. The hotel that's not getting a remission can't reduce its –

O'REGAN J:

But we're not reviewing the decision to give a remission, we're reviewing the decision that it had a remissions policy.

MR GALBRAITH QC:

No. Yes, I'm just explaining, Sir, that the Council didn't grapple with the implications of remissions policy because it didn't have any information about or effectively didn't have enough information about the implications of granting remissions. It ended up having to grant or ended up granting 35% of the accommodation providers with remissions and then in the following year recognised that if it continued to that then it wasn't going to be recovering what it wanted to recover, so reduced it to effectively only people who owned two units. So the major ones who had the long-term contracts, remissions gone. So it's hard not to talk about the facts, your Honour, because the facts are what have caused the –

O'REGAN J:

But we're not a body doing an appeal from the Auckland Council's decision.

MR GALBRAITH QC:

I appreciate that, your Honour, but –

O'REGAN J:

Well, you are doing the case as if it was, and the Court of Appeal seemed to decide it that way.

MR GALBRAITH QC:

I'm simply saying, your Honour, that the Council's decision was contrary to the evidence which it had before it on which it relied to make its decision, and that is a basis for judicial review challenge.

O'REGAN J:

Well, you know…

WILLIAMS J:

Can I…

MR GALBRAITH QC:

Yes, sure.

WILLIAMS J:

You go.

O'REGAN J:

You articulated your case as saying there wasn't a rational connection, or the Council didn't rationalise it by quantum and circumstances. So as rational connection, you agree with Mr Hodder on that, do you, that that's what the Council had to show?

MR GALBRAITH QC:

Well, the difficulty about using a word like "rational", Sir, is of course it's like any, like "reasonable", it's everybody's rationality is different from everybody else's. So it's got to be logical, Sir. Is that a less opaque word?

1110

GLAZEBROOK J:

I think you're probably arguing for a higher connection, aren't you, in terms of benefit than Mr Hodder is, so I think you are probably using "rational" in a different sense, which is when you used "reasonable" that's why I asked you to say what that way. Because I think you're saying that you have to look at both

quantum and circumstances and then analyse that there's a sufficient connection to justify –

MR GALBRAITH QC:

Sufficient.

GLAZEBROOK J:

– the quantum and imposition, aren't you, in terms of benefit?

MR GALBRAITH QC:

Yes, well, I think that's a better way of expressing it than I did, your Honour, and it's in the context, like everything in these issues, it's in the context of singling out not in area, and if it had been in area because that area was benefiting, then there are ups and downs, as her Honour the Chief Justice said yesterday, that's inherent in a rating system. But this is singling out a particular category of ratepayer to meet a particular category of expense, so it's a one-for-one, which is not the normal position, and so all your polycentric considerations, it's not like that, that is a –

GLAZEBROOK J:

Well, you're arguing for one-for-one, you're arguing at least an equivalence of some, equivalence of benefit and justification for imposition, which mightn't be one-for-one, it might be…

MR GALBRAITH QC:

Oh, no, sorry, no, I didn't mean one-for-one in that sense, no, I just meant it's…

GLAZEBROOK J:

Yes, there has to be that connection,.

MR GALBRAITH QC:

It's one group as against one expenses effectively, so it's direct, and so when one's comparing something directly then it's got to be, in my respectful

submission, it's got to be sufficiently justified, because you can measure it and normally you can't.

GLAZEBROOK J:
Thank you, that's very helpful.

WILLIAMS J:
So is your proposition something like the rates imposed is not rationally justified by quantum and circumstance relied upon by Council, given your client, the AP's experience of proportionate benefit in fact received by them and the ability of the Aps to pass through the additional cost?

MR GALBRAITH QC:
Yes, those are the circumstances, Sir, it's that context.

WILLIAMS J:
Right, so secondly is your argument about remissions really that in a febrile market a remissions policy would undermine the market?

MR GALBRAITH QC:
That's what it had the consequence of doing.

WILLIAMS J:
So you had to have, in a febrile market like this – my word, not technical – the highly competitive…

WINKELMANN CJ:
What's a "febrile" market? It's a "fevered" market, isn't it?

WILLIAMS J:
I don't know, it's not my area. But in a market like that, whatever the correct word is, you had to have a level playing field, you couldn't have some winners and some losers in terms of the rate.

MR GALBRAITH QC:

Well, the rate, you had to understand what the consequences of the rate was before you imposed it, and one of the consequences that they recognise was that there might be a need for remissions. But they had to, they didn't understand, didn't have the knowledge of what the consequences of a remissions policy would be in the market so they introduced a distortion into the market which penalised some accommodation providers as against other accommodation providers.

GLAZEBROOK J:

Can I just check whether the remissions policy was because – well, perhaps I'll put it another way. Mr Hodder's point I think was that the consultation process is the information gathering process for the Council, and I have a reasonable amount of sympathy for that view.

MR GALBRAITH QC:

I think, and –

GLAZEBROOK J:

I mean obviously you would say they needed to have done some more work beforehand, but I still have quite a lot of sympathy for you consult with the people who know, they put in the information in the consultation process, and then the decision comes.

MR GALBRAITH QC:

That's, I don't disagree at all, your Honour. But what my learned friend Mr Hodder took from the consultation process is what didn't come out of the consultation process, because the consultation process identified that pass through wouldn't work. It identified that there were serious issues about whether ATEED did make any substantial benefit to any number of the accommodation providers. What did come out of the consultation process was a recognition about the long-term contracts. What didn't come out of the consultation process which they were told about were the structural issues in the hotel market. That wasn't obviously fully recognised. For example, as I

say, the difference between the owner who's going to be rated and the fact you've got somebody as a manager and my learned friend, for example, yesterday talked about Accor Hotels. Accor Hotels don't own properties. They don't receive. They don't pay the rates. They're simply a manager.

Now what happened in the consultation process was that there was some toing and froing. I want to take you to something in a moment. But following the consultation process, all of these parties, I think, who provided evidence for the accommodation providers, provided written submissions, in some cases multiple written submissions, and those written submissions spelt out exactly what – sorry, "exactly" – spelt out in substance what I've been saying the difficulties and problems not recognised in what counsel then went forward in doing which is why I used the term "overwhelming" before.

WINKELMANN CJ:

That's often the case in a policy process though, isn't it?

MR GALBRAITH QC:

When you're getting your information – when you don't know anything yourself, and Council didn't, and you –

WINKELMANN CJ:

Well, they did know something, didn't they? They had the information from ATEED at the very least and the information from Statistics New Zealand that they'd gathered.

MR GALBRAITH QC:

Yes, they had that but they didn't know about how the market worked and they got the information from – I mean the whole purpose of consultation is so that you improve your knowledge. Their knowledge got improved and ignored is what we would say – and because I'm taking so long can I perhaps suggest a slight shortcut to help the Court, and I can see that's at least got a positive response, a shortcut in relation to the evidence because these issues were more fully obviously, because we're onto the second leg of an appeal here, in

the High Court and the appellant insisted that the submissions in the High Court be included in your bundle and so you'll find in your bundle the submissions in relation to "pass through" which start at 102.0404, and I hope that those are helpful because they summarise Dr Small's evidence and Mr Mellsop's and also the evidence of the various witnesses, and if I could, if you just turn there for a moment perhaps I can just identify two or three things.

At 102.0408 you'll see on that page that in counsel's submissions before you it's been suggested that Dr Small is just academic, the slightly pejorative comment is made. You'll see paragraph 221 it's not just theory, it's how the world works, and you'll see in 222 at the foot of that paragraph that what I said before about Mr Mellsop's view that there would be pass through in the long run because capacity would eventually leave the market. So it's not just it will happen in 2024. He's recognising the supply/demand issue. But, of course, as I said before, Council wasn't thinking of pass through in the terms of something would happen over time. It was saying that there won't be an adverse impact from this rate because it can be passed through and visitors will pay. You'll see across the page –
1120

GLAZEBROOK J:
Can you, not necessarily now, but if you could just give us the reference to where in the final decision, or in the end of the final decision they say "we think it can be passed through"?

MR GALBRAITH QC:
I can give you the staff paper reference, and I think it's pretty much the same in the final, your Honour. I can give you the references. The staff paper, which was the foundation for the final decision, starts at 310.2062 and at 310.2065, paragraph 71, there's I suppose the core of the justification: "The intent of the proposal is to make an appropriate shift of the burden of paying for visitor attraction and major events from the general ratepayer. Commercial accommodation providers derive direct benefit from the expenditure and they can decide whether to absorb the increased cost or pass

it on to their customers. Whether or not they choose to pass on the increased cost, and how, is entirely up to each accommodation provider to decide individually." Couldn't be more graphic that you can pass –

WINKELMANN CJ:

Sorry, what page is that?

MR GALBRAITH QC:

I'm sorry, your Honour. 310.2065.

GLAZEBROOK J:

I think they say so they could absorb the cost or pass it on and it's their choice, and you say that's wrong in terms of both long-term contracts and the structure of the market?

MR GALBRAITH QC:

Yes, and –

WINKELMANN CJ:

What's wrong about they could absorb the cost?

MR GALBRAITH QC:

Well then it would be a – the point –

O'REGAN J:

You're saying it wasn't a question of choosing to absorb it, you were stuck with it.

MR GALBRAITH QC:

Yes, you were stuck with it.

WINKELMANN CJ:

But that is your choice in the market though, isn't it? Because –

MR GALBRAITH QC:

No, because you can't pass it on, is all the evidence.

WINKELMANN CJ:

But that's a matter of, there's nothing constraining you from passing it on other than your choice about pricing, which is responding to the market. It might be a semantic point but I still think it's relevant. I don't think it's a semantic point actually.

MR GALBRAITH QC:

Well you haven't got a choice if you can't do it, I mean if you can't –

ELLEN FRANCE J:

Well they deal with that at 92(d) don't they?

MR GALBRAITH QC:

Yes, I was just going to go on to – well there's an earlier reference, your Honour, too in 310.2068 at 91(b). It's the affordability, and: "The targeted rate…would result in significant rates increases for commercial accommodation providers averaging 117%. However, council proposed the rate on the basis that individual accommodation providers could decide whether to absorb the increased cost or pass it on to their customers (without any significant impact on demand). Whether or not they choose to pass on the increase cost, and how, is entirely up decide individually."

Then you'll see at the start of the next paragraph is what I was referring to before: "The council has reviewed several studies." It's a US study that was the foundation study there and the US market's different from the New Zealand market, and then there was a PwC report in relation to bed taxes and these aren't bed taxes.

WINKELMANN CJ:

It's cost though, isn't it Mr Galbraith?

MR GALBRAITH QC:

Yes, but a bed tax is something which is passed on because you can simply put it on the bill. Then across the page at 91(c), the impact on the general ratepayer, and then the fourth sentence: "Individual accommodation providers can decide whether to absorb the increased cost or pass it on to their customers. Whether or not they choose to pass on…and how, is entirely up to each accommodation provider to decide individually. If they do choose to pass on…very little of the impact of the cost of visitor attraction will fall on Auckland residents."

Well that's an interesting one because of course if they don't pass it on, they're Auckland residents and all the people they employ are Auckland residents so it falls directly on Auckland residents. Not in the sense of being charged for the food or whatever else that might be in the restaurant.

It goes on, talks about bed taxes being "common in overseas cities", and then you'll see in 92(a) the points I was making to Justice Williams about the reduction, that the 50% was because, the third paragraph in 92(a), further analysis of the ATEED expenditures have: "Identified that several components of less direct benefit to the commercial accommodation sector…international education, external relations, Auckland festivals, I-sites", et cetera.

So the foot of 92(a): "Accordingly, staff recommend that the council set the amount of the targeted rate at a level of materially less…which recognises the factors…above."

Then you get 92(b) which is "the ability to pass on costs may differ for some categories" and they go through geographic locations et cetera and (d) is the "contractual commitments", and there is no, I may be wrong but I don't think I am, I don't think there's any recognition in the staff paper of the structural difficulties of the market.

GLAZEBROOK J:

Well they don't accept that, do they? If you look at 91(b). You say in not accepting it they're relying on wrong information?

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

But they do say well we don't believe them, they can pass it on, it is a choice.

MR GALBRAITH QC:

Yes, they do say that but that's the only information they have to justify that is against all the information which they can't pass it on, and in the structural, the owner –

GLAZEBROOK J:

Of course they didn't have Dr Small or Dr Mellsop in front of them.

MR GALBRAITH QC:

No, no, but they didn't need those because they –

GLAZEBROOK J:

I understand the point but you say that wasn't sufficient because they were relying on general studies.

MR GALBRAITH QC:

Yes, and simply –

GLAZEBROOK J:

But do you accept they say we don't believe they can't pass it on except if they have long-term contracts or if they're a particular structure, such as backpackers, et cetera.

MR GALBRAITH QC:

That must be what they are saying because they keep saying it's simply a choice and all the information I had was that it wasn't simply a choice, other than this Canina and Carvell US study.

WILLIAMS J:

Well they say that there's an inelasticity in motels and at the margins, but not hotels and –

GLAZEBROOK J:

No, I think they're saying the other way around.

WILLIAMS J:

Oh was it.

MR GALBRAITH QC:

And what I was saying that they haven't identified, which they should have identified, because again it was in front of them numerous times, is that you have a split of structure between owners, who are rated, and operators who aren't rated, and the owners in many situations can't pass on their increased fixed cost and rates to the operators because that's not the contract arrangements which exist between the parties. That's not noted anywhere, I don't believe, in the staff paper. It's blindingly obviously in the Accor and C P situation where Accor doesn't own the hotels, doesn't own the properties, but CP does and CP copped something well north of a million dollars in increased rates.

WINKELMANN QC:

Mr Galbraith, the footnote around page 310.2068 has got three studies, the Canina and Carvell, the PricewaterhouseCoopers, and Effects of an increases in travel ticket price in New Zealand tourism, Sapere Research Group. So have you reviewed those, and your point – and on your case, they provide no basis for the view?

MR GALBRAITH QC:

No, the PWC one was about bed taxes. The Sapere one was about a visitor levy at the airport at the frontier, so it was about the effect of that on visitor travel to New Zealand, and the Canina and Carvell ones not only were they US but I think they were all demand side and didn't look at supply side either. I think

that's another problem with them, but Dr Small comments on them in his evidence.

So if I could just go back to those High Court, I know your Honours will flinch at that, but at the High Court written submissions –

1130

GLAZEBROOK J:

So you say a bed tax is different, so that somebody who – you say that that doesn't show people will pay more because it just gets put on the bill.

MR GALBRAITH QC:

Well they will pay more but that's going to land on their bill. It's just a tax on the –

GLAZEBROOK J:

So they couldn't – so people will pay more if it's a bed tax but they won't pay more otherwise? It just doesn't seem logical to me. I mean, I know people mightn't know about the bed tax but they will after the first time, won't they?

MR GALBRAITH QC:

Well they should know that there is a bed tax imposed, but there is a different – it doesn't change the competitive market in the way that the imposition of a fixed cost does because it is recoverable by law. It can be simply put on the bill, bed tax, like GST. It doesn't change the competitive elements of the market at all.

WINKELMANN CJ:

Mr Mellsop says something to the effect that this may be Dr Smalls' theory but in reality accommodation providers or, providers do find ways to pass costs on in such a situation.

MR GALBRAITH QC:

I'm not sure he put it quite like that.

WINKELMANN CJ:

No, because he didn't put it quite like that because I'm paraphrasing it, having heard it two days ago. But he does say this is all fine in theory but in reality, providers do find ways of passing on costs.

MR GALBRAITH QC:

Well –

WINKELMANN CJ:

Because we know they do because they have to deal with increasing variable costs from all sorts of inputs all the time.

MR GALBRAITH QC:

Yes but – well. It's 11.30, perhaps I'll find that.

WINKELMANN CJ:

All right, we'll take the break.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.52 AM

WINKELMANN CJ:

Mr Galbraith.

MR GALBRAITH QC:

Yes, think you your Honour. That reminds me of that Dr Pittman paper that Mr Mellsop was relying on, which I see the document itself says the economics profession has been mostly unpersuaded by his views so that's in the academic world and what I've been trying to say is that, forgetting about Dr Small and Mr Mellsop, that the actual evidence and actual people who were incurring this rate is that they couldn't pass it on and the evidence actually from them by the time they got round to giving evidence, and the rate had been imposed, was that that's what has happened, in fact they haven't been able to pass it on, and in Mr Luxon's evidence, for example, you'll see that average daily's rate gone

down for a significant part of the period since this rate was imposed. That's the average daily rate as compared to what it was before it ever had a rate so, or had this extra rate.

So if I could just stay with this High Court submission just for a moment. After that reference to Dr Small it goes on to refer to Mr Hamilton's evidence, and you'll see that in – is it helpful if I give you the references to where that evidence is now, so you can – right. I thought it just might be helpful I give it you in the margin. Mr Hamilton is at 201.0067, and reply evidence 202.0474.

WILLIAMS J:
Sorry, just a moment. Tell me that again?

MR GALBRAITH QC:
201.0067 and 202.0474. He is an expert in this market and he gives evidence about both the structure of the market and pricing in the market and how revenue managers operate et cetera.

WILLIAMS J:
Is Luxon the second one?

MR GALBRAITH QC:
Now Luxon is at paragraph 228(a), Mr Luxon is at MCK. His references are 201.0116 and 203.0520, and as with, I think all of these witnesses, they also made submissions, and their submissions are consistent with what I've been saying. The next page, paragraph 228 –

WINKELMANN CJ:
So they also made submissions to the Council?

MR GALBRAITH QC:
Written submissions, yes, and they're hyperlinked in their briefs of evidence. Then Mr Fisher, who is on page 102.0410, (b), his evidence is 201.0104 and it's probably worth looking at his evidence at .0109.

WILLIAMS J:

That's also Fisher is it, .0109?

MR GALBRAITH QC:

Yes, that's Fisher too. If I can just get myself to it. He's C P Group, which is one of the parties that I'm representing. At .0109 he's talking about the different ownership models. So you get C P Group as an owner/operator. You get C P Group as an owner with a third party operator and Accor is one such for them, and then C P Group as an owner/facilitator of strata titles, and one of the complications which the Council were told about but chose to ignore, is that quite a few hotels are strata titled, or have, you know the position where something gets built, strata titles are sold off to, or strata interests are sold off to individuals, they pool their units and somebody manages it. I think my learned friend Mr Hodder stays in one such place frequently in Auckland. One of the problems is that the strata titles they get valued more highly, the strata interest gets valued more highly than a normal unit in such a building but you can't charge more. That's the problem about capital value. Just because the capital value of one room is higher than the capital value of the room next door, doesn't mean you can charge more on a nightly basis because people will only pay for the value they're receiving, not for your capital value. So that's what Mr Fisher is talking about.

Mr Clarry, I will ask you to have a look at his evidence. The reason for this is Mr Clarry is a small owner. Some of these other ones are big commercial owners. Mr Clarry runs a small business. The reference for his evidence is 201.0005.

WINKELMANN CJ:

So he's listed in your High Court submissions is he, Mr Clarry?

MR GALBRAITH QC:

Yes, he's little (c) in the High Court submissions and he operates on the Whangaparoa at Little Manly Beach. He's interesting, perhaps just worth reading Mr Clarry because one, he was on the steering committee.

You remember that my learned friend talked about the steering committee that had before this all got underway, and he also has ended u on whatever they call the new committee, which they've set up the destination committee or something, to help advise ATEED on what might be a good idea and what might not be a good idea and he expresses his – it's better to have it than not have it, but he expresses his frustrations because the difficulty is that they don't actually have any determinative power and the other problem is that when things are brought to them it's virtually too late, the commitment has been made, so they don't drive what ATEED does. ATEED, at the moment doesn't do it.

1200

What is also, I think this might be worth just looking at, he filed at least one submission. If we just go to one page of his submission at 307.1526. The rest of the submission he's talking about, his is a small business and it managed to make $27,000 profit which was the best it'd ever done before this all happened, and on .1526 he's just got a subheading: "Ability to meet the cost by increasing the Room Rates." What he says is a targeted rate would mean that increased "about $7.80 per room night; for all room nights".

Second bullet point, 50% of his "business is corporate and travel agent business" fixed rates so he can't change that. Fifteen to 20% is Auckland based business which means that in fact, if he increased his rates, it will cost Aucklanders. Fifty per cent of business is with online travel agents: "They charge a minimum of 15% commission on the gross rates." So what he's got to recover, the $15.60 which he's talking about, now increases to become $18 because he's got to pay Trivago or whatever else it might be. He's then got a 2% credit card fee on top of that, so he's up to $18.30 for guests in a business which, as he says in the next bullet point, $5-$10 swings whether he gets a customer or doesn't get a customer. So just very difficult for him to pass on an imposed rate because he doesn't have the elasticity in his market.

Perhaps if we just go on to (f), Mr Yan at Heritage. His evidence is at 201.0190 and his reply evidence at 203.0515, and perhaps just worth having a quick glance at his evidence at 201.0196 because in a sense it summarises –

WINKELMANN CJ:

So his reply is at what? 203 –

MR GALBRAITH QC:

Sorry, 203.0515. But at 201.0196, he's been through describing why they can't pass it on because you've got an owner operator split et cetera et cetera. But what he's saying in paragraph 11 on that page is that large hotels don't rely on special events for their core business. They may be able to hike the rates on a particular night, but that's not how they stay in business, and I said before. As he says: "We do not rely on ATEED. We conduct our own marketing activities." We "participate in ATEED-led efforts when it makes economic sense", and all the major hotels said yes, they do co-operate with ATEED when it's sensible. Towards the foot of that paragraph: "In any event, a very large majority of our corporate and business travellers would stay with us regardless of any event to which ATEED contributes, as would most of the guests booking rooms pursuant to our long-term contracts. We are being made to pay for a service that we consider we do not need."

That's why it's different from the sort of target rate issue we were looking at before where Council decides it's got a service that it wants to provide to an area and the beneficiaries will be the people in the area, and so they get something. They get a better water supply or wastewater or whatever else. What you've got for the accommodation providers is ATEED's providing a service they don't actually want. It's not something which they choose, and they spend an awful lot of money themselves promoting not only their individual hotel but Auckland, both in New Zealand and around the world, and there's plenty of evidence from the accommodation providers as to that. One group, $7 million a year, I think Mr Yan talks about $2 million, and now they're having a service provided to them that frankly they could do without is their position. He goes on to say that they can't pass the targeted rate on, and that's what he's saying in paragraph 12. It's competitive and it just doesn't work in that way.

1205

Then we go back to those High Court submissions. Ms Ranson, who's (h), which is at 201.0183, is also at the small end of the market and she is Greenlane. Doesn't make much money out of running the motel. Dependent upon a small number of repeat customers and 40% of her business come from government departments, and government departments have levels which their staff can stay, and if she pushes it up, then she falls out of that level, and then the government department won't send their staff to stay with her anymore. So her evidence is that it's certainly worth considering.

So none of that evidence, as we said in the High Court, was contested. Sorry, I should have noted Mr Roberts on (l) also, his evidence is 201.0172. He's Tourism New Zealand effectively. It's got an Aotearoa name now. 201.0172. You'll see there in the summary, which is in the High Court submissions, is that the number of room nights booked in advance for 2017, over 600,000; in 2018, 300,000 and right into 2019.

Mr Taylor, at paragraph 229, his evidence at 201.0026. He's for my learned friend Mr Smith's, one of his parties, so I won't intrude, but other than to just draw your attention to what he says at 201.0030, where much is made of the consultation and those events, and Mr Taylor explains that he tried to have a discussion with the Mayor and the Mayor brushed him off and said, well it's your problem, and that, with respect, is very consistent with the staff paper which says it's all for the accommodation providers to choose whether they pass on or not, and as was said in the High Court in paragraph 232, none of the evidence is directly contested by the Council and the Council hasn't heard evidence from any accommodation provider who has successfully passed on this rate. So whatever Mr Pittman said in his academic paper is all very interesting but not relevant to the facts here.

Then perhaps I should just comment, because my learned friend Mr Hodder did, on the other person who said in reality, and that was the High Court judge, who said in reality this could get passed on. That was in reliance upon some submissions from my learned friend Mr Farmer, and no doubt recognition of Mr Farmer's expertise in this area, which was based on another paper that

Mr Mellsop's report had referred to, which was in an American paper again, which related to the manufactured product, I forget, I think it was an aluminium product of some sort or other, and a proposition about pricing by building up the costs and then putting the prices as a return on whatever the cost of producing the product was. As I've said before, and as the evidence clearly is, this is not such a product. This is a wasting product that goes day by way and the price can't be built up in that nice theoretical way because the market is what it is.

Perhaps just to take you to paragraphs 24, 25 again, it was suggested that pass through wasn't really such an issue, as far as the Council was concerned, but in fact the Council gave evidence, Mr Duncan on behalf of the Council that, as we say in 244(a), "that pass through was, in fact, an important issue for the Council, not just in designing the rate, but also later when it designed the remissions policy." And that's acknowledged in Mr Walker and Mr Wood's evidence. Councillor Newman confirmed that, and could I just take you to another extract from Councillor Newman's evidence at 203.0509?
1210

GLAZEBROOK J:
I'm sorry, I didn't –

MR GALBRAITH QC:
Sorry, 203.0509. As I said before, Councillor Newman was one of the minority who voted against the imposition of the rate. On 203.0509 in paragraph 13 he's been talking about the "lack of engagement" which Council had with the accommodation providers, and you'll see in paragraph 13 he says that "the Mayor was politically committed" and put pressure on, and that's probably part of the democratic process I suppose. Then a couple of inches down, he said the Mayor: "Asked to speak with me in…May. I was very apprehensive… I explained to the Mayor" at our meeting why I considered the rate to be "unreasonable", tried to engage about "alternatives". "Mayor was not interested… raised with him the unfairness" of the fact that the rate applied "regardless of the actual revenue or occupancy of the accommodation

provider", because if you're doing it off capital value it doesn't matter whether there are people staying or not saying, you're still paying the rate.

"As he had done with me before, including at committee workshops earlier in the process, the Mayor acknowledged the targeted rating mechanism was imperfect, but said he hoped that our attempt would act as a catalyst for a law change by central government that would lead to it imposing a bed tax. Because he did not have the tools to implement a bed tax, he was committed to the proposed APTR… Again, these answers did not directly engage with my concerns."

So that was, I suppose one would say, part of a political consideration; put the rate up and use it as a go to getting a bed tax, which suggests that's not a purpose under the Rating Act, the rating provisions. He also goes on to talk about bed tax, targeted rated, the page at paragraph 17, that's a further page over, .0510, and perhaps just note .0511 –

GLAZEBROOK J:
Is this a separate ground of review that you're arguing at the moment or is this just part of the unreasonable?

MR GALBRAITH QC:
It's part of.

GLAZEBROOK J:
Thank you.

MR GALBRAITH QC:
He goes on to discuss, say, bed tax against the –

WINKELMANN CJ:
What are we to make of this, Mr Galbraith?

MR GALBRAITH QC:

I'm sorry?

WINKELMANN CJ:

What are me to make of this evidence? What are you taking us to it for?

MR GALBRAITH QC:

Well the evidence is interesting because – oh, that's what I really wanted to take you to, sorry. He talks about the consultation process back at .0507, I'm sorry. What he's saying is despite all that's been said about the consultation process that it is a relatively informal process and it doesn't necessarily produce real engagement, and he says in paragraph 12 on .0508 that he tried to facilitate some direct engagement and he sets out a meeting which he organised, and he was a bit surprised to find that Mr Walker was, I'm not saying claiming credit for it, but Council were claiming credit for it, but it actually was something that he organised because he felt there were defects in the process of consultation, which Council had organised. So its consultation depends upon the content of the consultation and the notice which is taken of it and, as I've said previously, a finding of consultation, but if it's then the consequences of the consultation or the knowledge which is gained is then ignored, then it's not of much advantage. Now, can I pass –

O'REGAN J:

The consultation would normally be done by officials rather than councillors though, wouldn't it?

1215

MR GALBRAITH QC:

I think yes or no is the answer to that Sir. The Have Your Say meetings, for example, I think councillors attend, and which is the one Mr Taylor said he had the brush-off from the Mayor at. But your Honour is obviously right in the sense if you're actually trying to get some hard information it should be officials, and there were some meetings, Sir, with officials which were referred to.

To the Court's relief can I pass on from this particular issue. Thank you. To somewhat more briefly I hope to talking about ATEED for a moment, and what my learned friend Ms Baigent had to say yesterday. Again I think it's quickest and I hope helpful if I simply refer to, well not simply refer, but refer to the High Court submissions because it's set out in writing there and I can do it more quickly and this part of it in the High Court submissions starts at 102.0431, and talking about actual and benefits et cetera, and I won't say much more here because we've already had a reasonable discussion. But you will see there all together some of what I probably said a little bit more loosely.

Perhaps just to note, and I think my learned friend the other day said this, those fresh info reports weren't targeted at identifying who benefited from room nights or. Indeed they weren't targeted at identifying the number of room nights that ATEED's involvement in an event produced. They were target focused on what did the event produce, and of course the involvement of ATEED could be more or less, and when one sees that someone with things like rugby, the Lions tour et cetera, ATEED's involvement would be less, and the consequences for accommodation providers may well be more, but not derived from ATEED's efforts, certainly not in any way directly from ATEED's efforts.

You'll see, actually, just in reading that, will give you some sort of indication of the sort of activities ATEED was involved in, and interesting my learned friend yesterday and Mr Armitage was making the point, or made a point which we don't accept at all, there's no evidence of it, that if ATEED wasn't involved then the event wouldn't take place. Well that's clearly not correct in relation to quite a number of those events. But you'll remember yesterday that much was made I think by both Ms Baigent and also my learned friend Mr Hodder, about a Supersprint event, which of course is one of those noisy car things, which occur. It, Council, ATEED, as I understand, aren't sponsoring events anymore. Supersprint event continues, it's on in September this year, it's three days in Pukekohe. It doesn't do an awful lot for central city hotels. Maybe something, you would think the point has ben made that 40% of the people stayed in accommodation, and that will be in the Pukekohe area one would assume, and it won't reflect room nights either because one point Mr Hamilton makes it that

numbers of individual people doesn't mean numbers of individual rooms. If you've got hotel rooms it's about 1.9-odd to a –

WINKELMANN CJ:

So is your point that they need to do a more thorough going analysis?

MR GALBRAITH QC:

Well that's what it would've identified had there been a more thorough going analysis, but there wasn't of course, which was the point I made earlier on. In any event I'll pass on with that. So there's a whole section there about the ATEED thing, and I think the best thing is to simply ask the Court –

WINKELMANN CJ:

Is this picked up in your written submission at all?

MR GALBRAITH QC:

We didn't get into a conflict about ATEED because to be honest I don't think there was much said in the appellant's written submissions either so certainly not to the extent that my learned friend went through it yesterday.

1220

WINKELMANN CJ:

Okay.

MR GALBRAITH QC:

So if I could, if you wouldn't mind, take – resort back into our written submissions and try and… And just one thing, one point to make on page 1 of our written submissions is really in the footnote. Footnote 2. Since this all happened ATEED's now been rolled into another council entity called Regional Facilities Auckland, actually it's now called something else. I've forgotten. And as you'll see about half way through footnote 2 because of the Court of Appeal decision and the rate disappearing and possibly because of other events which we're all aware of, the investment in visitor and event activities has been identified as not a priority so it's been discontinued. Which goes back to the

point I was making before about targeted rates. I mean targeted rates in, certainly under the old section 16, were for things where you were actually providing something because it was necessary, so you wouldn't stop your waste management and you wouldn't stop your water supply but this is something that can be turned off or turned on. It's not a necessity in any sense. It's simply a choice by Council.

GLAZEBROOK J:

Oh, is that really what's been said because what you've got is a COVID issue and one can see why you're not going to be saying let's have a whole pile of people to attract them to events that might actually be cancelled at the last minute which has been happening.

MR GALBRAITH QC:

I agree with that. I don't think that was the reason though, your Honour. My understanding is – you'll see the quote: "A recent court ruling means we are unable to charge the rate. We do not know long the disruption of visitor economy caused by COVID will last. Given the current financial pressures here…" So your Honour's right. I mean COVID obviously plays a part in that.

Page 3 we – this is background which I suspect the Court's well aware of now, but perhaps I would just ask your Honours to note the rendition of this term "visitor levy" you'll see in paragraph 9 could be collected by hotels, motels. No suggestion about absorbing. It's all to be passed on. Paragraph 10, could "easily recover costs", "see the benefits of the tax without paying the levy". Nothing about absorbing the cost and it's consistent with that subsequent staff paper saying could choose to pass on or not choose to pass on.

Paragraph 12 across the page simply noting what I've been saying about the nine to one and the pass through assumption. You'll see below in footnote 10 the quote from the Council analysis suggesting 3-4% surcharge, $6-10 a night. Municipal charges common practice. That's all bed tax stuff of course. Again repeated at footnote 13. "Costs can be managed by passing them on to guests, as occurs with bed night taxes in most other international cities." I mean it was

a constant theme through the Council documentation and that footnote 13 comes from paragraph 13 which is the consultation document, so that's what went out for consultation with the public and with the accommodation providers. 1225

Paragraph 15, the footnote reference there again is to a statement saying: "Costs can be managed by passing them on. If passed on will have no impact on Auckland residents." 16 is the revised Mayoral proposal and that includes the staff report that we've been looking at and in that report the, I think we've probably looked at enough, has the reduction to 50% and the justification or the reasons for that. We talk in paragraph 18 about the remissions policy, and you'll just note as I said before at the foot in little (d) the remissions policy was a, there was a specific policy adopted for the second year. The first year they applied their, the Council's existing remissions policy and you'll see in footnote 25 the reference I made before to the significant risk to the rate funding, if the remissions policy were applied to large investors, by which it meant anybody who owned more than two units, so the remissions policy under the APTR was reduced to the two units, one or two rating units, and it also had a time period on it too, so it phased out over time.

The, perhaps just noting little (c) there. One of the issues, of course, that made inequality or, in relation to the rate, was that the informal accommodation providers, the Airbnb weren't included in the first year in the rating structure, even though the showpiece for ATEED's expenditure was the World Masters games, and that was, I think, far and away the greatest number of dollars that was applied to any promotion, I think probably any promotion in ATEED's existence. I know something about it because I ran in it, or ran one of the events sorry –

WILLIAMS J:

Did you win?

MR GALBRAITH QC:

Third.

WILLIAMS J:

Well done.

MR GALBRAITH QC:

I'm getting old, but that's not the sponsor, the co-sponsor for the World Masters Games was Airbnb, and that was because people who travel the world running in those things do it on the cheap because it's not the wealthy that stay in five star hotels, and so the accommodation providers who have the rate imposed upon them certainly didn't benefit much, if any, at all from that. Certainly retailers and certainly restaurants did. It was full of people from all around the world. So informal accommodation providers were brought on board in the second year but unfortunately identifying them was a task. I think at best Council got to possibly 10%, possibly. Probably much less but possibly 10% so that was –

GLAZEBROOK J:

Ten per cent of what sorry?

MR GALBRAITH QC:

Sorry, 10% of what one could identify as being the total Airbnb market, and all sorts of issues about privacy and that, whether the Airbnb were prepared to hand over their names, et cetera, and there were negotiations and I think finally the Council had some success, but in that first year Ms Heath's evidence looks like it's around about 10%.

So if I can turn somewhat briefly to the law. I certainly won't go through the Local Government (Rating) Act structure. My learned friends have done that. I've talked about the original in section 16 of the 1988 Act. We do say that when one looks at schedule 3, this is paragraph 24, which sets out the factors for setting a quantum of a targeted rate, we would say that there is an emphasis or a theme through there that relates to services, or what the benefit that whoever is being asked to pay is getting, and that's capable when you're talking about services are being objectively able to be verified, and that's what we say in 25. So the key purpose, we say, is "to allow councils to align the nature of a service

provided more closely with the manner of rating for that service" and you can see that in all those targeted rates that I took you to, and to Auckland Council's long-term plan that there has got to be a sufficient connection, or a direct connection in fact, between the rate, its purpose and who pays it.

Paragraph 26 refers back to that long-term plan and those matters and I don't need to go back to that.

1230

Just going across to paragraph 29, there's been somewhat limited discussion, well, more discussion coming from the Court than from Council about section 101, and what's slightly surprising is that counsel for Council didn't refer to the leading authority on section 101 which is *Neil Construction Ltd v North Shore City Council* [2008] NZRMA 275 (HC), which was a successor to a judgment of her Honour Justice France's in a case called *Reid v Tararua District Council* (High Court, Wellington CIV 2003-454-615, 8 November 2004, Ellen France J). I suggest that *Neil Construction* is worth looking at. It's in our bundle of authorities, a decision of Justice Potter.

Many years ago in relation to development contributions – I'm just having trouble getting myself there.

WINKELMANN CJ:

So are you taking us to that case?

MR GALBRAITH QC:

Yes, I'm just trying to get myself there. Sorry.

GLAZEBROOK J:

It should be coming up on your screen.

MR GALBRAITH QC:

Yes. It was a North Shore – development contributions you've already, the Court will understand what they are. There was an issue there about in setting

up its development contributions policy and applying it to various things, including the busway et cetera, where the Council had appropriately applied section 101. Council had, if I say, tended to say well who causes this and therefore they should pay. I'm putting it a bit simplistically but that section 101 isn't as simple as that. Section 101 has the considerations which are to be taken into account and so her Honour set aside, or gave directions in any case, in relation to the appropriate application of 101. Probably the best way to do that is to go across to paragraph 210 of the judgment. It's referred to in the headnote, obviously. At 210, her Honour sets out section 101(3): "Must determine the appropriate sources." The consideration, 211, has to be "'in relation to each activity'". 212: "The consideration required in respect of each activity must extend to and include each of the five factors… in each case. The factors are clearly stated to be cumulative, not alternatives or options for consideration." 213: "Section 101(3)(b), having considered the five factors in (a), the Council must stand back and consider the overall impact", must be satisfied "as to the overall impact… on the four well-beings".

Paragraph 214: "I regard the plaintiff's description in section 101(3) as a 'critical filter' by which funding sources in respect of each activity, must be considered and determined is very apt." That term "critical filter" in my respectful submission, we would agree with. Then 215: "The critical place of the section 101(3) 'filter' is reinforced by the requirements of section 106(2)(c)" et cetera. I think we can skip 216.

Paragraph 217: "I agree with the submissions for the plaintiffs, that the statutory processes… do not permit the Council to single out and adopt a causation or exacerbator-pays approach at a policy level… I accept that section 101(3) does not *direct* Councils to a particular outcome, all the critical factors… must be weighed and factored in, in respect of 'each activity'. I… reject the Council's submission, that having considered the matters in section 101(3), it is entitled to choose in respect of its development contributions policy, one particular approach", et cetera.

So 218 follows, doesn't accept what Council has done. 219: "While acknowledging the principles of equity and fairness in… adopting exacerbator-pays approach across the board… Council failed to be mindful that section 14… requires it to act in accordance with the principles, that it should have regard to the views of all of its communities… interests of future as well as current communities." Et cetera.

1235

So in conclusion, 220: "Resolution of the economic efficiency: causation versus benefits debate is reached by a proper interpretation and application of the relevant provisions in the Act. The causative approach adopted by the council has excluded appropriate consideration of and allowance for distribution of benefits between the community as a whole, is inconsistent with the council's obligations under the Act. The council has accordingly, erred in law."

The principal case relied up on in opposition by the Council, and that was of course *Woolworths*. David Kirkpatrick for the Council –

WINKELMANN CJ:

Can you just tell us how you say this case helps you?

MR GALBRAITH QC:

It only – I suppose I've got a slight concern that in the way that Council are producing, presenting their case now, that it's undermining what I think is an important decision, long-respected and applied in this area under section 101(3), but each of the aspects of 101(3) needs to be –

GLAZEBROOK J:

To be honest I thought that was their point.

WINKELMANN CJ:

I thought so too.

GLAZEBROOK J:

But you can't just look at benefit, you have to look at all of the factors and then do an overall impact.

MR GALBRAITH QC:

Yes, but you've got to do that in relation to the actual facts, and one of the slightly surprising things about Council's written submission is that if you go to paragraph 6.25 it suggests that this is something done in the abstract, and that's the terminology that's used there "in the abstract" and in my respectful submission what Justice Potter makes very clear here, in this case, it's not something done in the abstract. It's something done in relation to each –

WINKELMANN CJ:

I have to say I didn't understand it to be the Council's case that there was something they could do in the abstract.

MR GALBRAITH QC:

No, no, I'm just saying that, if you find in 6.25 is –

WINKELMANN CJ:

Because when I was reading your High Court submissions they did rather seem to take the approach that Mr Hodder was arguing against, because it refers to, in the High Court submissions, the importance of benefit being enshrined in section 101(3). I think the word "enshrined" was used.

MR GALBRAITH QC:

All right, well it certainly is in 101(3) your Honour. Benefit is, I think, in about three places in 101(3), but –

WINKELMANN CJ:

I was thinking about the word "enshrined".

MR GALBRAITH QC:

Yes, sorry, no, fair enough. 6.25, what's said in the written submissions for Council is: "The Council's 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," well that's correct, "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."

WINKELMANN CJ:

Yes, I just think they mean the abstract from the particular activities? Maybe not?

MR GALBRAITH QC:

"It is not a question as to what was, as a fact, the specific tangible benefits in past years." Well the problem about that, your Honour, is if you don't go to facts you don't, frankly – I mean all you're doing then is just saying, well it might be. Okay, if Adele comes, hotels might get something from it. It is a question if you're going to weigh, which is what Justice Potter has said, you've got to weigh these issues. You've got to weigh them against something which is not abstract and really the Council's case is that they have "weighed" this in the abstract because in the real world there's been no attempt to find out what the actual benefits have been, or might be. It's assumed, and in the real world, in the actual world of standing back even, they assume pass through, and that's not the real world, that's in the abstract, like Mr Pittman's paper in America, and in the real world where you've got a split between owner and operator, you can't pass it on and you just stalk the market, that's the real world, that's not the abstract, so with respect I do believe that councils' decision-making has been justified – they've relied upon the abstract rather than in facts, let's put it that way, and if they'd relied upon facts then they couldn't have come to the answer they did, to put it simply. So – and it's a criticism of the judgment below in the Court of Appeal on the basis that the judgment focuses on the quantification of

actual benefits in comparison with rates and therefore misconstrued section 103(a)(ii). I do with respect –
1240

WINKELMANN CJ:

Well at some point I was going to ask you, section 101(3) obviously shapes the consideration of what's reasonable because section 101(3) as you say does say that all of the factors have to be considered –

MR GALBRAITH QC:

Yes.

WINKELMANN CJ:

– and yesterday Mr Hodder made the submission to us that the Council also is entitled to take into account factors such as recoverability. So in that case that was the informal sector made it difficult and they're entitled, the nature of the informal sector and the information they had about it made it difficult to apply a target rate to them and they're entitled to take that into account. So I just wanted to know what you said about that, because you've rather tended to focus on benefit and pass through.

MR GALBRAITH QC:

Yes because that's the, that's specifically what's being applied to justify positively the application of the rates, so they've got to justify the positive decision. Yes they may have considered it to be hard to do something different but it wasn't necessary. I mean there's no necessity driving – taking this payment off where it had been happily ensconced for several years on general rates and imposing it on a targeted small group of ratepayers. There's nothing necessary about it. It's not driven by any actuality.

WINKELMANN CJ:

So what do you say about what Mr Hodder said then, which is that the Council was entitled to take into account when they did all this big stepping back and looking at the whole wash thing when they arrived at the 50/50 they were

entitled to take into account yes there are the parts that have benefited but this sector was the one that both benefited most directly on their assessment but also was the one that was most easily administratively targeted.

MR GALBRAITH QC:

Yes, well as I said before this was a straight line process. It wasn't a process that at any stage was directed towards Airbnb or any of the other particular beneficiaries. It was a straight line process driven at accommodation providers. And yes those other ma – if they'd started an inquiry what should we do with ATEED then that may be justifiable but that isn't what happened. and it wasn't –

WINKELMANN CJ:

Well that's answering a different question to the one I've asked you –

MR GALBRAITH QC:

Sorry.

WINKELMANN CJ:

– which is what do you say about Mr Hodder's point that that was something you're entitled to take into account at the back end when they – of their process as you've described it where they've gone through and they've looked in the different things and they step back and they decide about how they're going to proceed and they say to themselves, et cetera, et cetera.

MR GALBRAITH QC:

Well in my respectful submission there's no evidence that it is, that it was considered in that open, an open context way I suppose is the short answer.

WINKELMANN CJ:

I thought we were taken to material yesterday which showed that they did take into account the difficulty of targeting the informal sector.

MR GALBRAITH QC:

Yes I think that's fair. I think that's fair your Honour. Those paragraphs I referred you to this morning, or we saw this – no, not this morning any more – do account for that and I think it's dealt with, I think I'm right in saying it's dealt with on the basis that they'll look at that, if I use the term next year, I mean subsequent to the considerations which have been given as to the application of the rate to the accommodation providers.

WINKELMANN CJ:

Well as Ms Baigent put it to us she said the Council didn't have adequate information on their files and therefore they decided to wait for the next year because they didn't have the –

1245

MR GALBRAITH QC:

Yes, but in the meantime your rating, you're actually charging something to somebody where you've recognised that in fact there's a whole, because the table they're working off, well in any case, sorry. You're recognising that there is another sector which is also earning the same benefit, if I can put it that way. You don't have the information to target them so you – sorry, target them to apply a targeted rate to them, so you choose to target who you have identified at the moment. One would think that –

GLAZEBROOK J:

So is the submission that's an error of law, or unreasonable, or…

MR GALBRAITH QC:

I think unreasonable that you'd wait and see. I mean you'd get your ducks in a row before you shoot the first duck and the same with the failure to recognise the difference in the legal structures. You'd find out about that so that you knew what you were doing wasn't going to cause a distortion.

WINKELMANN CJ:

So you would say then that because there's another entity in this kind of collective too, which is the rental car companies, there really wasn't any feasible way to rate them, targeted rate them because of the lack of connection between their operation and their benefit, you know, because they don't have a large footplate on the ground.

MR GALBRAITH QC:

Well I must confess what I would say, but I know it's not meant for what I would say, I would say that actually rating for this was not a good idea, and if one stood back that, in fact, it should have stayed where it was as a general rate. 46 to $52 a year on properties in Auckland all going up in value by whatever they're going up in value by, as against trying to pot-shot one particular beneficiary when you know there are other beneficiaries, nine to one plus Airbnb. That's not a reasonable –

WINKELMANN CJ:

Can I ask you the question in another way. Section 101 does actually direct this, doesn't it, it does direct council to issues of recoverability et cetera I think in some way, and so simply I'm asking you do you accept that that was something that they could take into account?

MR GALBRAITH QC:

In making that decision, yes, they can consider those issues. It goes then to whether that's appropriate to apply the rate to somebody who you can recover from, as against a lot more people who you potentially can't recover from. So -

WILLIAMS J:

Isn't your point a rationality point, that is that it's irrational to advance a targeted rate which the decider knows to be flawed, before resolving a flaw.

MR GALBRAITH QC:

And that's, of course, what Councillor Newman says, the Mayor said he was doing for political reasons to put a bomb under the politicians to try and get bed

tax through. He knew it was a flawed exercise but was pushing it through for those reasons, and that's –

WILLIAMS J:

So actually you're advancing several different heads of rationality or reasonableness, aren't you?

MR GALBRAITH QC:

Yes, or unreasonableness or reasonableness. If you add them all together, one of things we say, and we haven't come to in the paper yet, but we would say the appropriate way to deal with this was on a negotiated voluntary basis similar to what already existed between individual accommodation providers and ATEED in relation to individual events or development of business propositions, and again the evidence shows that the accommodation providers, for example, provided free rooms, did all sorts of things to assist ATEED. This was taking a blunt instrument to something which should have been dealt with, and a recognised blunt instrument, to something that could've been dealt with, and the accommodation providers were advocating should be dealt with, in a more sophisticated fashion.

1250

WILLIAMS J:

What you're not addressing is the wider context. All those points are taken, and that is that what drove this was rates, not the targeted rate but the rates burden on the ordinary Auckland punter, and that must be a relevant consideration for a politician running a council. How does that factor in – does that ameliorate or mitigate the unreasonableness that you suggest is there, or should it be ignored?

MR GALBRAITH QC:

No, I don't think it should be – I would never say it should be ignored, Sir, no, but one's got to put it in perspective and we're talking here, we were originally talking about 27. We're down to 13 million out of a, I forget the, I think it comes down to either 1 or 2%. Somebody will nod or shake their head at me.

WILLIAMS J:

But again this is in the broader context of a 2. whatever it is million dollar operation.

MR GALBRAITH QC:

Yes. That's right.

WILLIAMS J:

It's always only a little bit here, a little bit there, and every single one of the people affected by those things, the nature of politics, says it's just a little bit. Let me off.

MR GALBRAITH QC:

Yes. But it's in, as I said before I think at one stage it's identified as $46 for residential ratepayer and one somewhere else it might have been $52. I think I've got the range of figures pretty right. That's against as I said before and I'm not criticising but that's going on properties which are going up in value by the publicity says you're better to stay at home and your property will increase in value more than –

WILLIAMS J:

Yes, I'm trying to get you to contextualise that, though of course that's –

MR GALBRAITH QC:

Oh, right.

WILLIAMS J:

– as a rhetorical flourish that's very powerful but what's –

MR GALBRAITH QC:

No, but –

O'REGAN J:

It's not a great political answer to say to a ratepayer your property's going up so don't worry about paying rates.

MR GALBRAITH QC:

No. But when you're standing back and looking at the community aspect of it which you're meant to do under 101(3) and you've got accommodation providers who, the problem for them is their properties may be going up in value but their ability to receive revenue off doesn't go up in any proportion –

GLAZEBROOK J:

Well even more so for people on fixed incomes.

MR GALBRAITH QC:

Oh, yes, of course they're –

ELLEN FRANCE J:

But isn't that – doesn't that get you into questions of weight?

MR GALBRAITH QC:

Yes. But weight is still relevant to reasonableness, your Honour.

WILLIAMS J:

Only right at the margins though. Otherwise we're an Appellate Court.

WINKELMANN CJ:

Did you want to take us onto your part – your unreasonableness review since 1996?

MR GALBRAITH QC:

Sure. Well –

WINKELMANN CJ:

Because I'm just thinking about timing Mr Galbraith.

MR GALBRAITH QC:

Yes, I know. I was trying to race through.

WILLIAMS J:

Fair enough.

MR GALBRAITH QC:

Well can I just talk about the law very briefly on that and *Woolworths* because it seems to be of some relevance. We've set it out, Woolworths in context, paragraphs 34 on. It is interesting, I think it's interesting because I had some interest in this area at the time, to see the sequence of cases that led up to *Woolworths*. The *Electricity Corporation of New Zealand Ltd v Waimate District Council* HC Christchurch CP 47/90, 27 March 1992, case which we refer to in footnote 39 and in paragraph 34, decision of Justice Tipping. An issue there about, again it was the *Electricity Corporation*, et cetera, failure to consider benefit. Argument that didn't have to consider benefit under the then Rating Powers Act. Justice Tipping saying that if you're going to impose anything then you've got to have a reason for it and the only reason I can possibly think of is its benefit, and that sentence in my respectful submission would be entirely common sense. And then that translates forward into *Mackenzie* which, again because we haven't got much time I won't dwell on, but there when one looks at *Mackenzie* its very standard approach identifies that benefits are more than relevant. They're really the determinant in that case, and no reference to the irrationality, having been irrational or that that only rears its head when one gets to *Woolworths*. And accepts the fiduciary obligations. And again his Honour, Justice Williams, asked about that and I think the best track we've seen on the origin of that is in Justice Thomas' decision in *Lovelock* and he tracks it back to the fact that in England local authorities were regarded as holding assets on trust for their communities, et cetera and this is going back to the previous century and derives out of that. Perhaps also just to say in passing, I can't resist, is that the history of the prerogative writs in fact is largely, not totally, but largely founded on effectively challenges to rating. Now not rating in the way we know it today, but in the Poor Laws, for example, and the commissioners who ran the ports and whatever else. So that's actually where most of our history on prerogative writs comes from, having done a thesis on it many decades ago.

1255

WILLIAMS J:

Really?

MR GALBRAITH QC:

Yes, it's quite interesting.

WINKELMANN CJ:

He was saying really about you having done a thesis on it.

MR GALBRAITH QC:

Sorry, well I spared the Court that in any case.

WINKELMANN CJ:

I don't know that's what he was saying.

MR GALBRAITH QC:

I can understand Justice Williams' surprise. In any case, sorry, I do want to say something briefly about *Lovelock*, partly because I was counsel in the High Court on that case, on the winning side of the High Court, and never got the chance to say anything in the Court of Appeal. The reason being that the deal was struck between the ratepayers and Council which provided that ratepayers could not be represented in the Court of Appeal, which is why it was a one-sided case, and what happened was Local Government New Zealand went off and paid for George Barton to appear with Matt Casey and so as Justice Thomas notes it was, well as I say it was one-sided and perhaps there may have been more said for the judge. There had to have been somebody there to defend him. But Justice Thomas' judgment is, in my respectful submission, a very useful judgment. It's a slightly dated case now, 1997, but he did foresee and argue for a lot of what has occurred in this administrative law area, correctly in my view, and I think he, no, he didn't note, but I'm about to say that *Woolworths* was really a judicial policy decision when it came out, rather than a judicial interpretation decision, and it was because of cases like *Lovelock* for that matter, and the electricity cases, that we're showing up the processes which local government were undertaking at that time in relation to

rating. Now Local Government New Zealand has done a very good job, both in the development contributions area following on from *Neil Construction* and I would say in the rating area to make much more explicit and compliant local authorities actions in these areas, accepting, as my learned friend Mr Hodder said, that some local authorities of course are much smaller and less well-resourced than others.

But it's not, in my respectful submission, sufficient to just say, oh well, it's local authorities' rating and therefore put it to one side. It is a significant activity and a significant imposition and it does carry with it significant, in my respectful submission, legal obligations including those, and it traditionally has always been accepted as being an area for possibly, depending on the context, judicial control or judicial review, and the way Justice Thomas dealt with it, and a point that I have considerable sympathy with, was to support who was then Sir Robin Cooke's view that you don't put epithets around the word "reasonable". Something's either reasonable or its not reasonable. But what you will do is look at the context, and if the context is local authority, for example, in this area, then you'd be, I don't, I'll use the word "deference", you might be more deferent than you would be in some other context, and that will be a balancing of the various factors. But it's not a, I've never liked *Wednesbury*, and if one reads *Wednesbury* it's, and the facts of *Wednesbury* it's very hard to feel any sympathy to that decision, which of course would have been quite different if it had been perhaps 10 years later, but it was just a post-war decision.

1300

WINKELMANN CJ:

As a matter of context, I can't get my computer to open this document, but Michael Taggart in his article *Proportionality, Deference, Wednesbury* because I can't get my computer even to open its title, has a paragraph in which he refers to a decision of Lord Justice Laws who attempted a list of relevant contextual matters when determining the approach to review, and then might attempt to add some additional consideration. Are you familiar with that paragraph?

MR GALBRAITH QC:

Yes I am but –

WINKELMANN CJ:

I was just going to ask you for your response.

MR GALBRAITH QC:

I'll have to find it also your Honour too. Sorry, I'm not answering your question now, but I can still remember that seminar series that Michael Taggart organised that Sir Robin Cooke spoke out really, where he first said epithets are unnecessary. I can still, sitting there with Jim Farmer, and both nodding our head and thinking that was a valuable contribution. So I'm on that site, hang on, we're just trying to find –

WINKELMANN CJ:

It might be that we break for lunch at this point, since it is one o'clock, but when we look ahead at the timing.

MR GALBRAITH QC:

I'll be very quick. I've said that before of course.

WINKELMANN CJ:

Okay, and hopefully Mr Smith is confident he can be quick too. So we'll come back at two.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.02 PM

MR GALBRAITH QC:

Yes, thank you your Honour. Your Honour was referring to Lord Justice Laws and it's page 458 of Professor Taggart's article. He identified some factors to be taken into account in relation to deference in the human rights area and Professor Taggart went on to identify other factors which includes of course impact on an individual or group, et cetera –

WINKELMANN CJ:

I thought it was broader than the human rights area. He was making a point in here.

MR GALBRAITH QC:

Oh, no. I wasn't trying to, no limit it –

WINKELMANN CJ:

So contextual. What were the contextual factors.

MR GALBRAITH QC:

Yes, that's right. No, I was, in fact I was just going to say you can sort of link that to what we've said in our written submissions from *De Smith* about context in effect is everything and that's a superficial way to put it but one has to look closely at context and perhaps the other thing just to identify in our written submissions is the footnote at, footnote 50 I think it is, a couple of pages on, again from *De Smith's*, which says, talking about the relevance of representative decisions. You'll see at footnote 50 there's a section in *De Smith's* discussing this: "… 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 reasonableness … 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." And I think also perhaps footnote 52 which is getting me through this quickly. The ex-Chief Justice in England again in *De Smith*: "even where the courts recognise their lack of relative capacity or expertise to make the primary decision," I wouldn't say that's true here, "they should nevertheless not easily relinquish their secondary function of probing the quality of the reasoning and ensuring that assertions are properly justified," and it's justification which is the issue that we raise under the unreasonableness head here and –

1405

WILLIAMS J:

Is “justified” the right word though? Isn't it “supported?”

MR GALBRAITH QC:

Well –

WILLIAMS J:

Because one’s a threshold. The other one is an opinion.

MR GALBRAITH QC:

Yes. I think it’s the right word, Sir, where you're working off evidence which is this situation here, information or evidence, whichever way one likes to describe it. There still is a – it has got to be justified and Council set out to justify it and we would say it’s not sufficiently supported on the material that they had –

WINKELMANN CJ:

Is he discussing a general right of appeal here because it rather reads like a general right of appeal, of probing the quality of the reasoning.

MR GALBRAITH QC:

Yes. I don’t think he’s talking about a general right of appeal.

WINKELMANN CJ:

Because –

WILLIAMS J:

Not in a judicial review text.

MR GALBRAITH QC:

No. I don’t think so.

WINKELMANN CJ:

– it just seems rather unusual statement because –

MR GALBRAITH QC:

Well it's – I guess it's –

WINKELMANN CJ:

– judicial review's primarily about –

MR GALBRAITH QC:

What he's saying is it's often said that because there's expertise in the decision-maker therefore the Court shouldn't trespass on that and that's fair enough. But if the reasoning says one and one equals three then that's something the Court can say, well, not generally, and I think that's all he's really trying to say in words.

WINKELMANN CJ:

Okay. Because it's not just the fact of expertise in the decision-maker. It's also the fact that Parliament has delegated that decision to that decision-maker.

MR GALBRAITH QC:

Absolutely and that is a factor your Honour I accept entirely. But –

WILLIAMS J:

As is the fact that so is the local community.

MR GALBRAITH QC:

Yes but Parliament will have, and it's said in some cases, Parliament may have delegated that power but it hasn't delegated them to proceed on the basis that one and one is three.

WILLIAMS J:

Absolutely.

MR GALBRAITH QC:

They've delegated them to proceed on the basis, a reasonable basis and if it can be demonstrated that it's not reasonable well then so be it. We – there was a swag of material including Professor Taggart's which turned up I think on

Tuesday night but I was tempted, I'll just refer to it just if anybody's interested. There's quite a good article by Paul Craig who Professor Taggart also refers to in the same breath as Lord Cooke. In *Current Legal Problems*, actually we can send it to the registrar, but *Current Legal Problems*, volume 66, it's 2013, pages 131 to 167, *Current Legal Problems*, volume 66, 2013, 131 to 167, "The Nature of Reasonableness Review," and it's trying to pull back the discussion in the UK on proportionality and focus more on reasonableness because most of the discussion in the UK in recent times has been about proportionality because of the influence of the European community law. But I suppose finally what I'd say on that is that it's a question that's got to be determined in the particular context and it will differ from obviously context to context and just because it's a local authority my submission is that if there isn't identifiably support for the justification or proposition then that is something which the Court can and should be able to review.

WINKELMANN CJ:

So if you indicate – if you accept that context might suggest a closer look in some cases and in others more of a hands-off approach and in *Woolworths* the Court placed this, placed rating in the hands-off approach what do you say about that? Do you say you accept hands off or –

MR GALABRAITH QC:

Well I think it was, well, one can see why the decision was made in *Woolworths*, let's put it that way, because you had a status quo decision. Commercial ratepayers did pay probably more than they should. That's been typical of most of the major councils in New Zealand. They've all been trying to rebalance over time. There was an attempt to bring the rebalancing forward so it was a status quo decision saying in those circumstances it's not – the Court's not going to go there. I can well understand that. But it wasn't a decision where a council was deciding where it was going to go from where it already was which is the decision here and changing from one form of general rate to a targeted rate and identifying a very small group of people and deciding that the justification had to be on what did they get from ATEED and deciding that didn't really matter

because they could pass it through if they chose to. That's rather different from the Wellington – from the *Woolworths* consideration.

1410

WINKELMANN CJ:

In terms of category of decision are you saying it's different because it's a targeted rate?

MR GALBRAITH QC:

No, I'm saying no because that's why I say context is important. It's –

WINKELMANN CJ:

I know but you're place – making it the context of the decision but of the particular decision but it has to be – it can't – that's not what they're talking about when they're talking about context is it? It's the –

MR GALBRAITH QC:

No, I still think what's being said in *Woolworths* is the context of what was engaged in that case. It's not saying that just be – I know that they say that, well, it was a full court, I know that they say that elected council decisions in relation to rating are, I suppose, one might – are to be treated with deference, I suppose one can use that term. And that obviously will be correct in the general run of what councils are deciding on rating. But it depends, context is everything. It depends what the particularity is and what the particularity was in *Mackenzie* was too extreme, went too far and –

WINKELMANN CJ:

Well that's because – that's not the standard of review though. That's applying the standard of review. So they said in *Mackenzie* the decision was –

MR GALBRAITH QC:

No, I accept your Honour that the local authority and rating if one's using the rainbow thing, you're at one side of the spectrum as against the other side of the spectrum. No argument about that. No, I can –

WINKELMANN CJ:

Just to be clear, the argument that you need to really make it seems to me is to answer Mr Hodder's point that the Court of Appeal basically went right down into the detail of the case in something that looks awfully a lot like a general appeal approach and *Woolworths* is against you on that.

MR GALBRAITH QC:

Yes.

WINKELMANN CJ:

So the question I'm asking you is do you say that it's not the *Woolworths*' standard of approach that the Court should apply when it assesses the reasonableness of this?

MR GALBRAITH QC:

Not in this case, no, and that's because of the context of this case. Just because one defers for example to ministers in lots of things it doesn't mean that when a particular decision of the ministers one backs off from or the Court backs off from.

WINKELMANN CJ:

Yes. So when I'm asking you what the context of this case is I'm not asking you what you say is objectionable about the decision. I'm asking you what is the context that suggests a different standard of review applies? Because it can't just be that the decision's wrong. It must be that it's because it's a different kind of decision to that in *Woolworths*, different category of decision.

MR GALBRAITH QC:

Well the *Woolworths*… Well, it's really, I suppose I was looking at that list of Chief Justice Laws but, or Justice Laws. It's that this was a decision made in the context of a targeted rate. Targeted rate is different from general rates. That's the first thing.

WINKELMANN CJ:

Okay. That's your fundamental submission.

MR GALBRAITH QC:

That's the starting point. It requires a benefit and a connection, so that's got to be identified because if there was no benefit and no connection, they just plucked the names out of a hat, well then there wouldn't be much argument. And that benefit has got to be – the connection's got to be sufficient to justify the imposition and not in a dollar for dollar sense at all but there's got to be sufficient information that justifies the imposition which is made, and it's hard to – well, yes.

1415

WILLIAMS J:

The way you stated it earlier was a bright line. You said they can't add one and one and get to three.

MR GALBRAITH QC:

Yes, that's right.

WILLIAMS J:

That's a bright line, and it does seem to me in this area of administrative law it's got to be black and white. You can't have shades of grey because the shades of grey belong to the politicians. So you're basically saying this overall rate is the result of a series of one plus one equals three decisions or conclusions, right?

MR GALBRAITH QC:

Yes, well that's – yes.

WILLIAMS J:

So your starting point is this was pre-determined as policy before the Council embarked on the statutory process. Now, but you're careful to say not predetermination in an issue of law sense.

MR GALBRAITH QC:

No.

WILLIAMS J:

That's your deference.

MR GALBRAITH QC:

Yes.

WILLIAMS J:

Because if it were unofficial, you would be saying that.

MR GALBRAITH QC:

Yes, but not for politician –

WILLIAMS J:

That's your deference, right?

MR GALBRAITH QC:

Yes.

WILLIAMS J:

Because it's a democratic process and that's how his Worship got elected. Focused on too few ratepayers who did not receive remotely proportionate benefit when compared to the cost to them. That's your nine to one ratio.

MR GALBRAITH QC:

Nine to one, yes Sir.

WILLIAMS J:

Yes?

MR GALBRAITH QC:

Yes.

WILLIAMS J:

Which was said to be acceptable, nonetheless, by asserting that accommodation providers could choose to pass through when in fact they couldn't?

MR GALBRAITH QC:

Yes.

WILLIAMS J:

So those are your one plus ones equal three?

MR GALBRAITH QC:

Yes, they are, Sir.

WILLIAMS J:

There might be disagreement on the facts, we might disagree with you on the facts.

MR GALBRAITH QC:

Yes, yes.

WILLIAMS J:

But those are bright lines, they're not vague.

MR GALBRAITH QC:

No. I think your Honour's put it better than I've put it.

WILLIAMS J:

Yes, I've heard you say that a few times, Mr Galbraith.

WINKELMANN CJ:

I still think it's answering a different question, but I think the answer to my question is that because this is targeted rates and that's why a different approach to *Woolworths* is required.

MR GALBRAITH QC:

Yes, if you'd –

GLAZEBROOK J:

Woolworths was a targeted rate, but –

WINKELMANN CJ:

Yes, and it's –

MR GALBRAITH QC:

No. *Woolworths* was a differential, your Honour, not a targeted rate.

WINKELMANN CJ:

What I discussed with Mr Hodder yesterday was that might not actually justify a different standard of review, but it might just be the factual circumstance which leads you to conclude that a reasonable approach had not been taken, that as fact, you're targeting rate onto a small number of people, et cetera. It just means that when you look at it, as you say, you then have to check the benefit connection or else why are you doing this? Because you can easily say it's irrational if there isn't that benefit connection.

MR GALBRAITH QC:

Yes, that's right, and if you go back to those other targeted rates we were looking at, if Council had made a mistake about the – there's a case, my memory's just lost it for a moment, where an area was wrong because, you know, they're targeting an area saying a rate, but somebody got the area wrong. Well, that's got to be challengeable.

WILLIAMS J:

Five-star hotels in Manurewa.

MR GALBRAITH QC:

Yes, something like that. Sorry, not in this case.

WILLIAMS J:
No.

MR GALBRAITH QC:
I'm just talking about a targeted rate or a special rate somewhere else. So right, now let me perhaps just note, there's an example at the end of paragraph 44 where – something a little bit similar. The Queensland cases I won't go through. We've made our submission there but the point of it was, I think one of your Honours picked up, talked to my friend Mr Hodder, in the appropriate case where they talked about special rates and in that situation the Court felt perfectly able to consider the justification, I suppose, one might say whether it matched the special rate requirement and that was despite the fact of *Wednesbury* being legislatively stipulated as applying.

So finally, turning to page 20, "decisions were unreasonable". The matters considered there, the "first consideration: pass-through". Your Honours have heard from me enough on that. Second consideration, which never got much traction I must confess in either court below, but the fact of it is, and the evidence is that the accommodation providers actually do provide a lot of the generation of, understandably, of the business which they receive by tourist promotion and major events and activities and just to give you one reference, 201.0135/7 is Mr Luxon again setting out what MCK do and as I said to you before, and I think he speaks of it also, some of that in conjunction with ATEED and I'll come to that in a moment. Again, well, no. Enough said.
1420

Third consideration, actual and measurable benefits. Well we know that wasn't assessed actually and as we say in our second sentence: "A reasonable decision to impose a targeted rate requires a reasonable justification in terms of benefit versus cost to the targeted ratepayer."

Fourth consideration across the page. "Like cases are not treated alike," and we go through some of the categories there. So you've got the horizontal inequity accommodation sector versus other sectors. The one in nine against

the other sectors which are benefiting, presumed to benefit from ATEED's activity.

In paragraph 60 you've got the accommodation providers versus the Airbnb market and perhaps just note footnote 72: "The most direct comparisons arise in the context of buildings used for commercial accommodation," where there are individual strata titles, and there's evidence on that and you can see the differences paid in rates for identical, subject to the legal category they fell into, identical units, very significant differences which can't recover in a room rental.

62, the freehold versus strata title which I've spoken about before which distorts the ability to recover and certainly distorts the competition.

The backpacker camping accommodation exclusion. No assessment of what that effect was on the market and it's in some areas very real competition for people like for example Mr Clarry.

The owners versus operators which as I say I don't really think gets acknowledged anywhere in, certainly in a way relevant to the decision-making that owners are rated and operators aren't. The focus is more on the long-term contracted arrangements which properties have but there is that clear distinction. It was picked up in the remissions and so in the remissions policy as it was applied that distinction was recognised though with qualifications. So if for example the two entities were in some way related then they weren't allowed a remission despite the fact that that was the legal relationship between the two entities and often a contractual relationship also.

And then as I told the Court, and you'll see in 65, the next year the remissions policy, the large parties in the accommodation providers were excluded and it was down to Mum and Dad investors who own one or two units.

Fifth consideration: implemented without sufficient consideration of a less discriminatory regime. It was said in Mr Wood's evidence that the accommodation sector had backed away from committing to a voluntary policy.

That's not what Mr Armitage for ATEED said. His evidence was that they were still in continuing discussions. The evidence is that there was a lot of co-operation between ATEED and individual accommodation providers and ATEED's view was that it was best to enter into a voluntary operation, sorry, voluntary contribution arrangement and that's what has happened in other places such as Queenstown for example, but as you would I think understand from Mr or Councillor Newman's evidence about his discussions with the Mayor that wasn't apparently politically acceptable which doesn't have much to do with the Rating Act.

1425

Sixth consideration: inadequate information. That was in fact inadequate information about the accommodation provider's properties also and proportions that were applied to visitor accommodation but the major thing was the discrimination in favour of or ignoring the relationship of the Airbnb, and there's where I got my 10% from. It's not quite 10%, so it's a bit more than 10%. So you'll see there 1,230 out of an estimated 11,300, but probably the 11,300 might well have been on the low side because of the difficulties of identifying them.

69, just some information about – which is contained in the evidence I've referred to. The financial imposition over $1 million in relation to CP. Heritage. You see the amounts. Crown Plaza, 460-odd thousand. These were large numbers, not incidental numbers that might fall out of the normal general rating attribution. These were very large numbers, and I've referred to Ms Ranson's evidence before.

So what we say in summary in 71 is the decision to impose the rates was unreasonable by any standard, made without any rational foundation. To the extent that Council had any analysis at all it was premised on a pass-though that even Mr Mellsop doesn't support. Disproportionate in the sense it imposed costs on targeted ratepayers without any meaningful attempt to assess the benefit to them. Inconsistent with Council's own policy on targeted rates which says there has to be a very direct relationship between rates and ratepayer,

and unjustifiably large and unjustifiably sudden departure from existing policy, which had been the policy for some years and we don't, as I've said previously, think *Wednesbury* applies, but have just had that discussion with her Honour, the Chief Justice.

So those are the submissions.

WINKELMANN CJ:
Thank you, Mr Galbraith. Mr Smith.

MR J SMITH QC:
May it please your Honours, I will be addressing a different case essentially than the one presented by my friend, Mr Galbraith, because I'm presenting the case in relation to section 101 as opposed to "unreasonableness". There is some need, although I will restrict it as much as I possibly can, to go to some of the same documents. But as I say, I will keep that exercise as clipped as I can with reference to what my friend's done with those documents.

There are two broad subject matters I'm going to address and the first is the legal requirements of section 101 and the second is simply why we say that the statutory compliance wasn't achieved or, should I say, there was a disregard of mandatory relevant criteria.
1430

So first of all the question of what is required by section 101, first of all we say that it is a set of mandatory relevant considerations. We have in our volume of authorities at tab 11 the *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1998] 1 NZLR 544 (CA) decision, and the requirement for consideration of mandatory relevant considerations is that the consideration is required to be genuine. It must be a consideration which isn't on the other hand token or superficial. The words "token or superficial" might seem pejorative or tendentious, I suppose, but we say that that level of disregard isn't what is required. All that is required is a want of consideration, that is to say a consideration which doesn't exist at all or, alternatively,

consideration falling manifestly short of what's required in the circumstances, and I'll come to what to look at when we come to the circumstances.

The reason for the disregard, if that's proven, we say, is beside the point other than as part and parcel of evidencing, or deciding, for that matter, that the disregard occurred. It could, for instance, be a clean miss, a complete failure to refer to a statutory criterion, for example, or it may be that the statutory was played down due to a provably false assumption or it could be a flaw in the reasoning process which is significant enough to negate genuine consideration of the statutory criterion.

A useful way of looking at it, albeit, I think, unreported but it's in our bundle – it's in the High Court – is *CRA3 Association Industry Association Inc v Minister of Fisheries* HC Wellington CP 317-99, 24 May 2000. It's at tab 7 of the respondent's bundle. The relevant passage is at 60 where Justice McGechan said what's required is the reasonable extent commensurate with what the Minister must do and what is at stake. So "reasonable" as per *CRA3* depends on circumstances prevailing at the time, he says. It encompasses issues such as, Justice McGechan said, time, resources available, knowledge, expertise, reliability of sources of information, and, of course, we're saying in this case that the Council's not short of, or at least is not short of the ability to obtain all of the things I've just mentioned.

Then as to the circumstances, what is the standard which the circumstances demand, the circumstances demand regard to what is at stake, and what is at stake is that the APTR, as you've seen, is a significant charge for a relatively few ratepayers that imposes 50% of ATEED's visitor and major events expenditure on part of the tourism sector which, we say, is 10, it may be 22% and I'll come to that presently, of the whole with reference to tourism revenue.

Then continuing with section 101, although it postdates *Mackenzie*, we rely on *Mackenzie* and, in particular, *Mackenzie* at 43, 44 and 47. Going to 43, the relevant passage is at the bottom of the page between lines 47, 48 and the next few lines. "When exercising a statutory power a local authority must act within

the powers conferred on it by Parliament and its rate-fixing decisions are amenable to review on the familiar *Wednesbury*" principles. Then 44 at the top of the page: "Rating authorities must observe the criteria laid down in the legislation. So they must call their attention to matters they are bound by the statute to consider and they must exclude considerations which on the same test are extraneous." And then at 47, coming to a specific rating context at approximately line 39: "It must also involve some consideration of 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."

WINKELMANN CJ:

What page is that, Mr Smith?

MR J SMITH QC:

47, your Honour, and it's lines 39 through to the mention of the *Bromley* case. 1435

Just while we're on the subject of the *Bromley* case, Justice Williams has asked a number of people about the antecedents of the use of the concept of fiduciary duties and rating legislation. I'm happy to go to it in slightly more detail but suffice it to say that what has been put forward by my friend, Mr Hodder, and also Mr Tim Smith we agree with as being and accept as being fundamentally right. These are cases which go back to the mid-20th century and I think even earlier and involve consideration by senior Courts in the United Kingdom at the time of, as my friend, Mr Hodder said, left-leaning councils. One such consideration was whether or not there would be free transport or partially free transport on public transport for certain members of the community. Another, and I think the earlier one, was a consideration of what would be the maximum wage, perhaps the equivalent of what –

WILLIAMS J:

And whether they would be equal between men and women, something that was considered to be problematic at the time.

MR J SMITH QC:

Seemed to be problematic at the time that it would be equal between men and women or that there would be what translates these days to a minimum – a living wage. My point about all that is quite simply that time has moved on. I can't say that I've looked carefully at the rating statutes involved in each of those cases but no doubt there was seen as a need to fill a gap about how they would be interpreted. We live in a completely different world, and although I'm not suggesting that we can get rid of the fiduciary duties so far as councils are concerned completely because there's always the possibility that there remains a gap in some rating legislation which can appropriately be filled with a fiduciary answer, that may not be the case here. My case sits squarely within section 101. At the same time we're saying fiduciary duties aren't gone but I'm relying on section 101.

Now just continuing with section 101, we have in a rating sense a "what is a benefit and burden" consideration or a net benefit type of analysis which is implied in section 101. That is to say section 101(3)(a)(ii). It's implied by the statutory wording, accepting that *Mackenzie* pre-dated the current Act, and as *Mackenzie* says, there should not be "an inordinate burden on the new ratepayer", which might just as well in this case be substituted for, indeed, any ratepayer.

South Waikato District Council v Electricity Corporation of New Zealand HC Wellington CP 16-93, 18 August 1994 or *Lovelock* – sorry, *South Waikato* is a case we rely on, not *Lovelock* – and *South Waikato* is another first instance unreported decision of, in this case, Justice Heron. It's at tab 22 of the respondent's authorities, and at page 33, in terms of what one looks at for statutory compliance, what you can't do is shut your mind, as the Judge said, "to attempting to apportion and value services". It's not good enough. More than just lip service is required.

Again, the standard, as it happened to be described in that case, is described as if a failure which can be couched in pejorative terms is needed, but we say that that just happens to be what happened in that case. We don't need to go

to the extreme level of conduct which may be pejoratively described. All that's required is, we say, a marked falling short of what is needed in the circumstances.

1440

One of the cases which both sides paradoxically rely on is the Queensland case referred to by the appellant, *Leagrove*, tab 12 of the respondent's bundle at 9 and 10, and that isolates, in broadly similar rating legislation both parties accept, I think, a number of principles. 1 through – in my screen I can't see below 6. I think, my friend, Mr Hodder, went to considerations 1, 2, 3, perhaps 4, perhaps more, but regardless of which ones he looked at we would say two things; first of all, that we have no argument with any of the principles which are extracted and set in those paragraphs and, secondly, that 5 and 6 are particularly useful and apposite in this case. "The opinion cannot be reasonably formed if some land is included where the land or its occupier does not specially benefit," and then, secondly and more importantly, under 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;" and that is a principle, in my submission, which would apply, or it could be adopted –

WINKELMANN CJ:

But doesn't that come from a particular statutory scheme?

MR J SMITH QC:

Yes, it does come from the particular statutory scheme but I say it's implicit in our particular statutory scheme under 101(3)(a)(ii) in the sense that one has to keep benefits in balance and it is an unusual situation that you could arrive at where you find a number of businesses in different sectors in the tourist servicing community all of whom benefit, and I'll come onto this in slightly more detail later, all of whom benefit for that matter directly just as much as every single other one does for every single dollar and yet you single out one group in that sector for a targeted rate even in defiance of the fact that there are other members of that group who not only benefit, not only benefit equally, but in fact

dollar for dollar benefit more. But I'll come to that on a more factual basis presently.

Sticking with the principles for now, I wanted to go to the question of substitution of decision and assessments of weight really for the purposes of clearing that out of the way so far as our submissions are concerned. The appellants say a great deal about substitution of decision-making and also assessments of weight or inappropriate assessments of weight, and we say that there's no issue of –

WILLIAMS J:
Time's up, Mr Smith.

MR J SMITH QC:
I've paid my power bill.

WILLIAMS J:
I can't vouch for us.

MR J SMITH QC:
We say that there's no issue of substitution or weight which arises on this appeal and that's for the following reasons. First of all, as to substitution, the anti-substitution prohibition is hardly novel. It needs no explanation here or re-explanation here. It's –

WINKELMANN CJ:
Well, other than I'm not following what you're talking about.

MR J SMITH QC:
What I'm doing is – I'm very sorry – I'm replying to my friend, Mr Hodder's, submissions about the prohibition against substitution of a judicial review, judicially reviewing body's decision for the –

WINKELMANN CJ:

All right, our substituting or the Court of Appeal substituting its view of merits?

MR J SMITH QC:

With the implicit submission that the Court of Appeal has substituted its opinion, and I'm simply saying that – well, several things. First of all, it's not to be lightly thought that the Court of Appeal would have done that because it's a, in colloquial terms, a rookie pitfall. But quite apart from that, we can, for example, observe that in the Court of Appeal, albeit in a different context, Justice Gilbert speaking for the Court cited and must therefore have been mindful of *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721, and as you'll all recall *Bryson* cites the well known case of *Piggott Brothers*. At paragraph 27, I think, of *Bryson* – *Bryson* is not in the bundle but it hardly matters for present purposes – and *Piggott Brothers* says: "It does not matter whether, with whatever" – the passage cited in *Bryson*, I mean: "It does not matter whether, with whatever degree of certainty, the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal was a permissible option," and it goes on from there and enlarges on that proposition. So it can hardly be thought that Justice Gilbert or the Court of Appeal were unaware of that principle which applies just as much in error of law cases as it does in judicial review cases. It happened to be dealing with the unreasonableness side of the argument at that point but that makes no odds.

1445

And then in any event the Court of Appeal did expressly cite the relevant passage from *Waitakere* against *Lovelock* which is in the appellant's bundle at 16 and at 390, I think page 390 of *Waitakere*, first paragraph we have the following: "As noted in *Wellington City Council v Woolworths* at page 540, the first step in reviewing the exercise of local authority powers is to examine the scheme of the legislation and determine the nature and scope of the rating powers and the statutory processes governing their exercise. The next five step" – "The next step," it should say, "is to review the relevant facts including the processes followed by the council and the decision in question, to determine

whether it discharged its legal responsibilities." That's hardly – that is the language of review. It's not the language of likely substitution by the Court of its own opinion.

GLAZEBROOK J:

I don't think anyone is suggesting they didn't know the law. They're just saying that in fact what happened in the case, that's a submission, in fact that's what they did.

MR J SMITH QC:

Yes, well we will come to that but my starting point is that that's an improbable submission with respect simply for the fact that one could assume that the Court of Appeal was aware of it and they – it must be with –

GLAZEBROOK J:

Well they either did or they didn't. Doesn't matter what they were aware of does it?

MR J SMITH QC:

Well you could only infer that they did. They're unlikely to have said: "We hereby substitute our own decision in defiance of the law judicial review." And in taking account of the decision to decide whether or not you can possibly infer such a thing you would take into account the passage that they cited from *Waitakere*, being the one that I referred to you. So –

WINKELMANN CJ:

I think you can be satisfied that we're going to look at what they actually did.

MR J SMITH QC:

Yes. And now I want to come to simply the fact that in any event at paragraph 83 they said that they were not substituting their decision and nor were they getting carried away with issues of weight, and indeed I will come to that presently.

On the question of principles the – there are two more points to make. The first is that all the mandatory relevant consideration cases we say permit examination of reviewed decisions and the evidence relevant as to how they were made to see whether consideration, if the statutory considerations were applied both purportedly, ie, expressly, and secondly substantively, ie, genuinely albeit it without interference on the merits of course.

The last point arises from a question yesterday by Justice France and I think it came up again today which is a question of whether or not section 101(3)(a)(ii) is in the circumstances entitled to more weight and needless to say just as my friend Mr Hodder eschews use of or reliance on the word "deference," I equally eschew use of or reliance on the word "weight" in these circumstances. What I would say, it's not a question of weight as such but in any given case with a set statutory, a set of statutory mandatory considerations one or some are likely to be more engaged than others and it or they will be – will require more regard in order to be genuinely considered which is the test, and so too here with subsection (3)(a)(ii). It's not intrinsically entitled to more weight. It was more engaged on the circumstances of this case.

1450

The next section, and last section in fact, is the question, against that background was there compliance in development of the APTR with section 101(3)? We say first of all it is a factual analysis. Not as to the merits. That's not what I'm saying at all, but rather as to what was done in order to achieve compliance. It requires a study of the documents which show that the Council – what the Council did and what it took account of. There's no doubt about the requirements of section 103(a)(ii) in setting a rate including a targeted rate which targets a "source" in inverted commas of funding a local authority has to consider where an activity's benefits are experienced and the range of options covers the whole spectrum, expressly in the statute, the whole community, parts of the community or right down to individuals. It's always been seen, the APTR in this case, as a pass through but even that statement can be slightly misleading because as we will see, and I regret I do need to take you to some of the earlier documents, and I will make it very clear why I'm doing

that, it wasn't a pass through. It was essentially conceived as a disbursement on a hotel bill. The pass through covers any manner – any number of means of recovering the rate on a piecemeal basis in respect of various guests and that could be done no doubt in a number of ways, but what was specifically envisaged here was a disbursement or an addition, a surcharge the word was used sometimes on persons' bills and I'll come to that presently. That was repeated again and again and before looking at the Council papers. In addition the benefit of ATEED expenditure was seen as more direct or more immediate where accommodation providers were concerned, ie, more than for the other sectors that benefited from ATEED expenditure and we challenge both the pass through assumption and we challenge also the so-called more direct or immediate benefit. We say they're both wrong and observedly so on the face of the documents. So I said that I would go to some of the evidence and I will tramp through that as quickly as I possibly can –

1452

WINKELMANN CJ:

I see you've gone straight to really saying they got it wrong on the merits there, Mr Smith.

MR J SMITH QC:

I'm saying that they, what I'm going to say is they got it wrong from the very start, and that necessarily affected to the point of preventing it being properly carried out, a proper analysis under section 101, and I plan to step through why I'm saying that with reference to the documents.

So you have, first of all, Mr Luxon's affidavit –

GLAZEBROOK J:

Just so – there's an issue of a proper analysis but you just said it was wrong as well. So are you saying it's so wrong that it's an error of law, is that different from your point about preventing a proper analysis, which is more of a procedural point.

MR J SMITH QC:

It's a procedural point. It prevented a proper analysis and that by itself might not be enough, I accept that willingly in principle. It's a question of degree and here it happened to the point, it's nothing to do with weight, because you've got facts wrong, it's not a question of what the allocative significance of a proven fact is. It's a question of whether you got the facts right in the first place, which they didn't obviously I'm saying so proleptically because I haven't shown you yet why I think that is. That is something which if it reaches a certain level negates proper consideration, or genuine consideration, as per the *Mackenzie* dicta, of a mandatory relevant consideration, if I'm right.

GLAZEBROOK J:

Yes, so it is two points, isn't it? It prevented a proper analysis but even if that isn't enough in itself the facts were so wrong that again there's an error of law, is that – or do you say you have to have – it prevented a proper analysis and the facts were wrong. I just wonder if they're two separate things or one together. I'm just trying to get the conceptual framework before we start on the facts.

MR J SMITH QC:

Yes, it –

GLAZEBROOK J:

Sorry, I did the same to your friend Mr Galbraith, but it does help to have the conceptual framework before we go through this Act I think.

MR J SMITH QC:

The conceptual framework is that there is at the same time an error as to the facts, and one which cuts across or prevents, and the word I've used is "negates" the proper consideration of a mandatory relevant consideration, and again I don't want to get tied up semantically because my friend, Mr Hodder, will –

WINKELMANN CJ:

So it's the one point, isn't it, Mr Smith? You're saying they got some facts wrong, which meant they didn't undertake a proper analysis, and thereby negating a consideration or a mandatory consideration.

MR J SMITH QC:

That's entirely it, and so my point, the only other point I make is that it really, as I said before, it really doesn't matter what is the mechanism by which you fail to have a proper regard to a statutory mandatory consideration or you don't have genuine regard to it. The only thing that matters is whether or not you did, and that's why I'm anxious that your Honours don't place too much attention to words like "lip service", "closing your mind", "default" and all the sorts of epithets that we see in the various cases. The only thing that matters is whether by whatever vector, if we put it that way, you ended up failing to take account of a statutory consideration which you ought to have, were required to.

WILLIAMS J:

Isn't your argument a closed their mind argument though, in the end, because you say they sell this as a surcharge, as a disbursement. When they discover that doesn't work, the repackage it and the repackaging so deeply problematic it's effectively a closing of the mind to facts which ought to have been dispositive had they been applied properly.

MR J SMITH QC:

That is exactly it. This is –

WILLIAMS J:

Whether I agree with that, I don't know, but that's…

MR J SMITH QC:

No, I appreciate your – in the wind as to whether you agree with it or not yet Sir, but as you have described it, that's exactly it. How I would put it is, in the highest level what happened here was that there was a perfectly unremarkable political campaign, which I make no particular comment about, it's not up to us to talk

about that other than it's factual relevance in the genesis of this idea, which is that there would be user pays, and the particular aspect of user pays was hotels, I'm not going to get into the vernacular of accommodation providers, but hotels or commercial accommodation providers, they would have a pass through and the pass through was expressly literally, and I'll come to it presently, conceived as a surcharge to the bill, an add-on to the bill, because they could pass it on in contradistinction, it was thought, to other sectors. As time went on it became abundantly clear, and this really can't be gainsaid, that it was not possible for that to happen, at least not in all cases, and there is a debate about the margins in the Commerce Act and the Fair Trading Act, I don't need to or intend to get into any of that. There are other more practical reasons why quite a number of the ratepayers who were going to be rated couldn't pass on their charges, and that's been discussed in the evidence.

So what happens then is that for the first time, that anybody has foreseen, and I maybe wrong about this, but I think it's right, in the staff report, and I'll come to it, compliance with section 101 is referred to. Up until that point in time when it was discovered via feedback and through other means, that the rate simply couldn't be passed on, it wasn't as simple as that, the Council could well have thought, if it was considering section 101, that a careful section 101(3)(a)(ii) analysis was obviated by the fact that all of the rate was going to be passed on as a surcharge in any event. So the net benefit analysis is easy, barring administrative charges, which may not be minor, but they're not major in the scheme of things, it would be a pass through, a wash, and they were not, in effect, imposing a rate as, in effect, on accommodation service providers because it was a wash through. If that was true then they had correspondingly less need to concern themselves about what was the level of benefit, and if that was true they had correspondingly less need to be concerned about the benefits received by others, because if that was true there wasn't an imbalance between the two sets of ratepayers, accommodation providers on the one hand, and all the other, the tourist industry sector on the other. So that's what I'm putting forward and the question then –

GLAZEBROOK J:

You accept that that would have been – sorry, I'm just making sure I understand you, you accept that that would have been a legitimate way of reasoning?

MR J SMITH QC:

Yes, I have to.

1500

GLAZEBROOK J:

I was just checking.

WINKELMANN CJ:

Do you really, because they always have to look at section 101 factors, they are mandatory, which is what – I was struggling with your analysis because these are people who do this job day in and day out, and the thought that they just thought to themselves they didn't have to worry about section 101, one of the considerations seems unlikely.

MR J SMITH QC:

I've overstated to make the point. What I really mean to say is that in the circumstances that I'm describing if I'm right, and I'll come to that, I'm not saying that Council officers who I'm sure are perfectly professional and competent and look at section 101 regularly, the extent to which they had to be concerned about it, lessened in the sense that they were not imposing a rate which these ratepayers were going to be lumped with, and so the necessity for the detail and the cogency and extent of the benefits analysis recedes. That's all I'm saying.

WILLIAMS J:

That's the starting point but it becomes clear that it's problematic and the report, the Council report addresses that.

MR J SMITH QC:

Yes, and that's the next difficulty that – that's the exact next step in the chain of events because what happens at that point is they look at some figures, they arrive at the conclusion that it is either 10% or 22%, initially it's 10% of the revenue from tourists which goes to hotels, and at that point they say, well, the benefit which, never mind about the fact that it can't be passed through, we'll fix that with remissions or by other means or delaying some parts of the rate, we're still going to impose it in any event because the benefit which the accommodation providers receive is "more direct" or "more immediate". The difficulty with that is that at the same time they've not only recognised that the pass through can't be worked in all circumstances, they've also recognised that there are other service providers who themselves get benefits out of this. It expressly stays so in the staff report, and I'll come to it at the risk of boring you when I do because you've already seen it. The problem is that the dollars which, shall we just say an airport clothing outlet catering as it happens obviously to travellers and therefore tourists, they sell umbrellas when you find its raining in Auckland. Every dollar they receive is every bit as much a direct benefit if measured in revenue, which it is, as every dollar that an accommodation service provider receives. There is no pretext for saying that the benefit received by hotels in their room charges is "more direct". At one point it wasn't sufficient in the report to refer to the benefit as being more direct. It was described as "more immediate". The same criticism applies, and the reason that is, in my respectful submission, a clearly wrong conclusion. It must be.

O'REGAN J:

Is that it, I thought they were saying that it was more direct because hotels are pretty much always dealing with people from outside Auckland whereas retailers by and large are dealing with both Aucklanders and outsiders, and therefore it's hard to differentiate.

MR J SMITH QC:

That just means – there's an administrative problem, and I'll come to that in the papers as well, but first of all the point is it must be just as direct. There is

another difference, you're quite right Sir, which is that a relatively higher proportion of the revenue that commercial hotel providers in particular, but others as well, derive in Auckland comes from tourism, that is true.

WINKELMANN CJ:

Yes, because they're saying effectively the business model depends upon tourism, which is not true of retailers or the – the business model depends on tourism.

MR J SMITH QC:

That's all true but my point is that the numbers don't particularly matter. Each and every single dollar, whether you get 90% or 99% or 87%, those figures have been bandied about, of your revenue from tourists as a hotel provider, or 50% as a clothing retail outlet in the airport, possibly even more –

GLAZEBROOK J:

Well the airport provider, the airport clothing provider will be leasing off the airport. So that's a silly example.

MR J SMITH QC:

That's true, it's a matter of detail, it could just as easily be –

GLAZEBROOK J:

Well is the example you used –

WILLIAMS J:

Also airports are non-rateable.

MR J SMITH QC:

Bad example but the point remains. In my respectful submission you could have – let's look at it from a different perspective, you could have a clothing outlet in Queen Street, with a long-term lease which is akin to ownership, and a good example is Working Style Clothing, for example, been there a long time, and very well established. I don't know what their arrangements are with their

landlord, or if they don't own their own premises, they may well, but the point is –

WILLIAMS J:

Is that a tourist shop?

MR J SMITH QC:

It is for me, I never have time to go there unless I'm in Auckland. The point is that nevertheless there are restaurants for instance, which have the same experience. The Simply New Zealand tourist shop, which is purely a tourist shop may, for all we know, I think its own premises have a long-term lease, and if it does, doubtless much of its revenue comes from tourists, but even that doesn't matter. It wouldn't matter if it was only 50% or 40%. Each and every single dollar which it derives is every bit as much direct or immediate as a dollar derived by the hotel industry. The difference was twofold. First of all it was thought to be more difficult administratively to sort out the wheat from the chaff if you were a hop in Queen Street, and I am sure that that's correct. But one has to ask, for whom should that be a problem in respect of a statutory criteria where you're required to look at the balancing of benefits, not whether it's administratively difficult –

GLAZEBROOK J:

Well that's' one consideration among a number of considerations and overall impact in section 101. So it's not the same as the previous legislation which did seem under the Rating Act to be much more direct.

MR J SMITH QC:

That is certainly true but in this case the question of benefit was central, even in the staff report.

WINKELMANN CJ:

Mr Smith, I am finding your argument quite hard to follow. Is your argument, what is the mandatory consideration or considerations that the Council failed to have regard to?

MR J SMITH QC:

The mandatory consideration is that in section 101(3)(a)(ii), namely the question of who benefits from the activity as a potential source for rating purposes, and so the Council has said is the accommodation providers who benefit. They benefit more –

WINKELMANN CJ:

Well can I just stop you, before you go into detail. You accept they did actually have regard to that but your point is something else. So just if we take your submission at its highest level, you're saying they failed to have regard to the question of who benefits from the activity as a potential source, but you accept, of course, they did look at that.

MR J SMITH QC:

Oh yes.

WINKELMANN CJ:

But you say it was, what, why has it failed to meet the relevant standard you took us through earlier about what is necessary for consideration around mandatory.

MR J SMITH QC:

One cannot meet the relevant standard merely by reciting section – I know you're not going to argue with this your Honour, but by simply reciting section 101 and –

WINKELMANN CJ:

We know they undertook some analysis and you're saying, what, it was so –

MR J SMITH QC:

It was clearly wrong, and it sits –

GLAZEBROOK J:

It was clearly, what sorry, clearly wrong?

MR J SMITH QC:

Clearly wrong, on the face of the staff report. On the face of the staff report it's as simple as this. Once it was appreciated that perhaps a more detailed section 101 analysis was required than had hitherto been perhaps thought necessary, because of the unavailability of the so-called pass through assumption, there was a need, a greater need to look at just what were the benefits which hotel providers got in contradistinction to those benefits derived by other sectors in the tourism industry. They did focus on that, I accept that, but their focus on that was limited to an observation consisting of a couple of words, and of course that, by itself, isn't enough, they could be completely correct in those few words, but when we examine them we see that all it is, is that off the back of tourist hotel, or hotel accommodation providers earning 90% or 99% of their revenue from tourists, they have a "more immediate" or "more direct" connection with ATEED and a more direct benefit from ATEED, and my simple point is that is observably, on the face of it, incorrect. It must be wrong. 1510

GLAZEBROOK J:

Can I ask you the same point as I asked Mr Galbraith. Do you accept my Mr Smith, that the accommodation providers had a greater benefit from my Mr Smith in Brown Street in Mt Eden, or do you adopt Mr Galbraith's view –

WINKELMANN CJ:

The hypothetical Mr Brown, or Mr Smith.

GLAZEBROOK J:

My hypothetical Mr Smith and my hypothetical Brown Street.

MR J SMITH QC:

It will appear as if I'm trying to duck the question, but it's too hypothetical to be, with respect –

GLAZEBROOK J:

Well not really because the argument that you'd be making is because – well. The argument would be because it's not going to be spread among everybody who benefits more than the general public, or the general body of ratepayers, it should all be paid by the general body of ratepayers. Or is there a different argument.

MR J SMITH QC:

No it had hitherto been, and that was an options which should have been looked at. I'm not, it's not for me to say what they should've done as a result, I'm just talking about process, and the relevant comparison here is that the Council is considering a rate, a targeted rates for the purposes of funding ATEED, part of ATEED's expenditure for the purposes of that they need to look at sources of funding, those sources being the providers of the targeted rate when it's eventually struck. That is the part of the individuals within the community to adopt the working of section 101, and all I am saying is that if they were doing that, and were set to differentiate between one lot of tourism service providers, and the rest of them, then unless they had a valid basis, a logical basis for doing so, then it would appear as if they had failed, on the face of it, to comply with section 101 because they have not considered in a balanced way the distribution of benefits between all players in the tourism industry.

WINKELMANN CJ:

Are your submissions summed up, but not summed, they're actually put in paragraphs 59 and 60 of your written submissions?

MR J SMITH QC:

It's 60(a) is where it comes in.

WINKELMANN CJ:

But this whole point, really, is covered in those paragraphs, isn't it?

MR J SMITH QC:

Yes it is.

WINKELMANN CJ:

Which you are saying this is not a sufficient analysis and then you say at 60, this is what they should have done.

MR J SMITH QC:

It's 60(a): "A meaningful analysis of the actual benefit to the accommodation providers of the activities to be funded, in comparison…" is the vital words "with the benefit to others…" If that's not done then one does not see the balancing which is implicit in section 101(3). I'm eager to – if there is doubt about what I'm saying, it maybe, that's to say in terms of understanding it, it may be preferable if I simply take you as quickly as I can to the documents which I say make good the point that I'm outlining.

WINKELMANN CJ:

Sorry, can you just explain the balancing exercise? What is the balancing exercise?

MR J SMITH QC:

Well *Mackenzie* uses the phrase "balancing" in language which is the precursor of section 101. So in other words – and how it finds expression implicitly in section 101 is as follows, 101(3), "the funding needs of a local authority must be met from those sources that the local authority determines appropriate" having regard to "(ii) the distribution of benefits between the community as a whole, any identifiable part of the community, and individuals".

So the Council have, thoroughly conscious that (a) if not the relevant and certainly the most relevant comparison to be made, was what is the pretext upon which we decide to lump this rate on hotel providers and not on the other hand levy any such rate in relation to other players in the tourist –

GLAZEBROOK J:

Well the fundamental one, wasn't it, the saying this shouldn't be general rates, it should be a special targeted rate.

MR J SMITH QC:

No.

GLAZEBROOK J:

Well that's why they went to a targeted rate from it being paid by everybody, didn't they?

MR J SMITH QC:

Which is not the concern I have.

GLAZEBROOK J:

I understand it's not the concern you have, but that was certainly what the Council was saying, and right back from when the Mayor said it. That generally general ratepayers should not be paying for this.

MR J SMITH QC:

My starting point is that the Council have, the Mayor then the Council, have decided there will be a targeted rate and so that's, the legislation says you can do it, it's just a question of whether it's been done in accordance with the statutory criteria. We're not in the world of conserving general rates at this point. I'm not challenging that there can, or even should be, a targeted rate, provided that the pain is spread across –

GLAZEBROOK J:

Well I think Mr Galbraith was, because he said there wasn't enough to get a targeted rate. You agree there's enough to have a targeted rate, you just say they didn't analyse enough the benefits to other people from ATEED, is that…

MR J SMITH QC:

My point is similar to the one that you're making. There is argument, and there was argument in the High Court, about the level of benefit that was obtained, and that's not really central to my argument under section 101. Mr Hodder himself, during the course of argument, accepts that it's very difficult to find out what the level of benefits were. I do intend to come to one minor aspect of it

presently, but that's not what I'm principally concerned with. In principle there can be a targeted rate and having decided, though, that there's going to be a targeted rate, and having decided that the rate is to pay for the activities of ATEED, and having decided, in fact, known all along that ATEED serves, besides accommodation providers, other members of the tourism service community, and knowing full well that those other members of the tourism serving community also benefit from ATEED, and knowing full well that in some instances they benefit on a pure dollar for dollar comparison basis even more, there has to be an extremely good reason for why it is you, in defiance of that information, nevertheless proceed to levy a rate against just one player, and there isn't.

WILLIAMS J:

I don't know if you need to pitch your case quite that way because aren't you really saying that once you get yourself to the point of having to accept that the lack of pass through creates the imbalance, then you've got to genuinely take that into account, in construction of the rate.

MR J SMITH QC:

Yes.

WILLIAMS J:

The nine to one asymmetry suggests it was not genuinely taken into account. It was, in fact, token, or whatever the word was in Justice McGechan's decision, and you're left concluding that the Council must have closed its mind, for manifesto reasons, in undertaking no genuine analysis of the consideration.

MR J SMITH QC:

Mackenzie is the token case, and it may well be that it closed its mind for manifesto reasons. Whether or not that's the case is not part of my argument. It's purely that it did close its mind. The only relevance of manifesto reasons is that that was the provenance or genesis of the idea and so we just plotted through as a matter of fact how it came about.

WINKELMANN CJ:

Justice France, I think you had a question?

ELLEN FRANCE J:

In *Mackenzie*, in terms of the idea of balancing, what the Court said was "the local authority must seek to balance fairly the respective interests of the different categories of ratepayers and not cast an inordinate burden on the new ratepayer".

MR J SMITH QC:

Yes.

ELLEN FRANCE J:

That's a slightly different proposition from the one you're advancing, it seems to me.

1520

MR J SMITH QC:

Only in its micro expression. I'm not, in my submission, in the world of discussing targeted rates, or differential rates on the one hand, as against general rates on the other. In fact I'm not in the world of discussing differential rates at all, so I'm not, and this will come out inappropriately, I'm not concerned about general ratepayers. We're only looking at the issue of fairness because that's implicit in section 101 as between those who derive benefits, all of them, from ATEED's activity, and who, on the other hand, amongst those who derive benefits, are to pay for those benefits. Is it fair, for example, and this is implicit in the word "distribution" in the section, is it fair that you derive 10% or 22% of the visitor income in Auckland, propped up to an extent by ATEED, but on the other hand have to pay for wholly half, at one stage 100%, but now wholly half of ATEED's expenditure on that subject where a significant portion of ATEED's expenditure is reaped benefit wise by different players in the industry, and it could be, for example, that there are, I guess it's highly likely, that there are many instances where, in relation to a given tour or tour group a hotel doesn't

benefit at all, whereas other players in the tourism industry do, but that's a point of detail. Now if I may I do –

WINKELMANN CJ:
So you want to take us to the documents?

MR J SMITH QC:
I definitely want to take you to the documents. So first of all is the document 303.0543, this is on Mr Goff's letterhead, for want of a better word, "Fiscal – Doing more with less" and the relevant passage is at 303.0545, page 3 of 4 at the top, and so there is going to be an investigation: "… adopting a fair level of user-pays where there are demonstrable private benefits generated from CCO operations. For example, Auckland Tourism, Evens and Economic Development (ATEED), a CCO with expenditure of around $70 million a year, generates benefits for the city as a whole, but it also generates benefits for specific industries, such as tourism and hospitality providers. This could generate savings…"

So that's the genesis and there's nothing wrong with it, I'm not suggesting that there is anything wrong with it at all, but that's the genesis of the idea.

Then the next document is 303.0711, commonly called the Mayoral proposal, and the relevant passage is intrinsic paragraph 33 of that document and 34. So 33: "The number of commercial guest nights in Auckland rose from 6 million in the year ending July 2011 to 7.3 million," so I just ask you to tag that figure mentally, 7.3 million, "… partly attributable…" et cetera et cetera to ATEED. ATEED, third line to the bottom: "… ATEED has been exploring with the commercial accommodation sector the available options for indirectly funding some or all of ATEED's visitor-related expenditure from visitors rather than Auckland ratepayers. The council cannot set a bed tax, but may be able to achieve a similar outcome through a targeted rate… which we expect to be passed on to guests" and the important words, "through an additional charge on their bills." That's clear, that's the earliest explanation of what is expected to happen.

So the next document is 304.0804, and this is a terms of reference for the visitor levy steering group, and all of the first bullet point is relevant, but in particular in the first indented paragraph below the words “reproduced below”. “The council cannot set a bed tax” just as we’ve seen in the previous document “but is able to achieve a similar outcome… We would expect, but not require, the financial impact of the targeted rate to be passed on to guests through an additional charge on their bills.” That wording again, a month later, it’s clearly intended, not just that there’ll be a pass through, not just that accommodation providers will somehow get it back by averaging an overhead and hoping that they get enough guests to apply the overhead per each, but rather it’s gong to be a line item charge on their bill at the bottom or somewhere. A bit like GST but of course in another sense completely unlike GST because this would be, for the purposes of recovery of an overhead, whereas GST is purely volume related.

O’REGAN J:

Is that really significant? I mean it’s up to them how they tell their customers about it, isn't it? I mean when you go to a restaurant on a public holiday they charge you 15% more because they have to pay a bigger wage, but that’s’ just a charge. I mean that’s not a tax, that’s not a pass through, it’s not something where they’re collecting money on behalf of somebody else, but they still put it as a surcharge on the bill.

MR J SMITH QC:

Yes, they do, whether it’s a GST or whether it’s a surcharge, they certainly do. But the issue here is not whether there is anything wrong with the tax, not whether there’s anything wrong with putting a surcharge on the bill, that’s not what I'm saying at all. The point is that for the time being the Council perceived that this was possible, and it was –

WINKELMANN CJ:

This material is all relevant just to your narrative that they’re actually caught a bit short on details and facts when they’ve got time to analyse because they were proceeding on the basis that this could all just be passed through.

MR J SMITH QC:

I'm saying it's an actuating cause of the inadequacy of the analysis done in the staff report, and I'll come to that. Because they thought this could be done, added to the bill as a separate charge or a surcharge, they thought that it was in colloquial terms a wash or, if we must use the word, pass through. That automatically means that the need for an in-depth analysis of respective benefits if you just do this to hotel service providers recedes because indeed apart from administrative charges, hotels are not going to be greatly affected because just as they're having to pay the rate they are recovering it, as the Council had expected that they would.

WILLIAMS J:

Can I just say, Mr Smith, for myself, I get this. We've been told this a few times now. I get it.

MR J SMITH QC:

All right.

WINKELMANN CJ:

I think that's probably a fair statement for the whole of us.

MR J SMITH QC:

In that case these are the relevant documents re: references.

WILLIAMS J:

The point is these are the early documents. Later documents pick up the mistake. Your point is that they didn't genuinely do so because if they had they'd have changed the model more radically than they did?

MR J SMITH QC:

Well they certainly would of, and I'll come to how that might have happened presently. The next relevant document, and again I won't spend any time on it, is the consultation document, 305.0991, and the relevant page is 305.0999, and

again the passing on the charges mentioned in the green shaded preferred option, and in the text below that.

Then we have two rather more documents being the supporting document, which in support of the consultation proposal, and also the staff report. So the supporting document beginning at 305.1027.

WINKELMANN CJ:
Starting from that previous document, it does say "if they were passed on" which seems to be a constant, from that point on at least, that is the theme that carries through. The not assuming it necessarily will be, just that it may be.

MR J SMITH QC:
It weakens, it fluctuates, because in the next document I'm going to show you, which is intrinsic page 15 at 305.1041, you see, for example, at the bottom of the page: "If they wish, the accommodation sector can pass through the costs of the rate by adding an Auckland Council accommodation sector targeted rate surcharge of around 4 per cent to guests' bills." So the weakening was only as to whether or not they would wish to do so, and one would assuredly think that they would, but it still suffers, and it's not the Council's fault at this point, it still suffers from the misunderstanding that that is possible, whereas in many cases it's not, as the Council itself came to recognise.
1530

But you see consistent text supporting that view on that page in the paragraph beginning "Funding" and also in the paragraph, the next one, beginning "Proposed rate", and then over the page at the top, the first three lines, reference to bed tax in the beginning of the second full paragraph on that page.

Then at the bottom of page 213, I'm sorry, intrinsic page 17, 305.1043: "If accommodation providers decided to pass on the costs of the targeted rate alongside a bed night tax prices could increase by … 6 per cent. This would have an impact on the number of guests," and so on, over to the top of page 18, and then, of course, if there was any doubt about it, the notion is that this is a

bed tax we see both from the top of intrinsic page 19 and indeed the lengthy table later at pages 28 and 29 of overseas examples.

Then section 101(3) is referred to in the middle of page 19. That's the first time we see it. Well, I'm not making a point about that. I'm not suggesting the Council didn't know it existed. But that's the first time that it is mentioned.

Then page 20, under the heading "Options for funding visitor attraction and major events": "Accommodation providers receive immediate direct benefit," so you see this immediate direct benefit from increased visitor numbers. But, of course, so does every other tourist organisation. They can manage it if they wish by the "added expense on to guests as occurs with bed night taxes in many other international cities." So they're still, because we haven't had the consultation at this point, they're still at the view that this can simply be managed by accommodation providers by adopting the expedient of a third charge on the bill, and the theme carries on throughout this part of the consultation document.

We then arrive at an important table which is on intrinsic page 30. It's the bottom of the two tables and that's the table which tends to indicate that it's about 10% of the overall visitor spend in Auckland that hotels get. So if you go to the second column you conclude that it's about 22 million, yes, 22,201, to add the entire column, which is about 11% of the total, if you apply the money spent by visitors on accommodation 2,439, so the point being, of course, that there are many other tourist industry providers who derive substantially more income in dollar terms. The only thing is that there's a higher proportion internally of the accommodation providers' revenue which comes from –

O'REGAN J:

We have covered all of this ground, Mr Smith. You're just…

MR J SMITH QC:

Now the next thing that I wanted to go to is finally the staff report and the relevant passages in the staff report at 310.2052 begin on page of the bundle

310.2063 where they're recounting some of the feedback. "Some accommodation providers may have contractual impediments to passing on the rate through higher prices," and they described why that is. Then they go on at paragraphs 65, 66 and 67 to recount the statutory criteria. There's nothing wrong with any of that.

Over the page, 71, this is where the mistake, in my submission, begins to be made between 71 and 84. "Commercial accommodation providers," in 71, "derive direct benefit from the expenditure and they can decide whether to absorb the increased cost or pass it on to their customers." Point of fact, they can't but again their derivation is no more or less direct than anybody else's.
1535

75: "Most of the expenditure in this part of ATEED's activities is targeted at" –

WINKELMANN CJ:
So can I just ask you are you asking us to accept from you that the derivation is no more or less direct, or are you coming to tell us why it's wrong?

MR J SMITH QC:
No, it's for the reasons that I mentioned which is that if you are another provider in another part of the tourism sector then the business you derive from tourism, dollar for dollar, is every bit as direct as hotel providers. They don't receive their revenue more directly. The only difference, the only material difference, and it's not particularly material, is that they derive proportionately more of their revenue from tourists as opposed to less, but all of the players in the industry derive money directly from tourists, and in some cases it may well be that you have a smaller proportion of your income derived from tourists and yet that proportion in numerical terms is greater than that derived by hotels in the round, and that is clearly shown in the table.

WILLIAMS J:
Do you accept that those other direct beneficiaries operating in the tourism sector are not as easily rated as hotels and accommodation?

MR J SMITH QC:

No, they cannot as easily – it would have been understandable that they could not, they would not have been thought to have been in as easy a position as hotels to pass on the rate. It turns out that that assumption –

WILLIAMS J:

I'm not talking about passing on. I'm talking about targeting.

MR J SMITH QC:

Well, in terms of targeting, yes, it would be perfectly possible to say to an entity such as a tourism shop or a duty-free store, for example, which is in downtown Auckland and all like facilities, that they derive benefit from this and they are therefore going to be rated and very likely on a differential basis, a targeted rate on a differential basis, and the differential would relate particularly to the proportion of their revenue that they derived from the tourism sector.

O'REGAN J:

How would you know?

MR J SMITH QC:

Well, they would just…

O'REGAN J:

I mean the targeting is to a sector, isn't it?

MR J SMITH QC:

Yes.

O'REGAN J:

It's not to a shop at number 1 Queen Street. It's to the retail sector.

MR J SMITH QC:

You have to set a general differential rate based on information which you set about giving. But my – obtaining. But my complaint is not that they did not do that. It is sufficient, in my submission, if the Council operated on the basis that,

on the mistaken basis, that the revenue streamed from tourists was more direct when it simply wasn't more direct.

GLAZEBROOK J:
Wouldn't they really –

O'REGAN J:
It was absolutely clear to the Council what the revenue streams were. You just took us to the table before. There wasn't any error involved.

MR J SMITH QC:
I'm sorry, I couldn't quite hear that.

O'REGAN J:
It was absolutely clear to the Council who was getting what from the tourism budget, the tourism income.

MR J SMITH QC:
Yes, it was. It was –

O'REGAN J:
So they knew what they were doing.

MR J SMITH QC:
They knew what they were doing. They knew that it was absolutely – it was clear to them who in the tourism sector was getting what but – and I accept all that. That's not my point. My point is that what was received by hotels, dollar for dollar, was in no sense more direct than that which was received by –

O'REGAN J:
But the Council knew that too. It was absolutely clear from the papers that that was the case.

MR J SMITH QC:
But then if they –

O'REGAN J:

The only difference was that hotels got 90-something per cent or 87 or whatever, depending on who you believe, whereas retailers it varied between zero and probably 80%.

1540

MR J SMITH QC:

But if that was clear to the Council, and whether or not it was clear, it begs the question why it is therefore that you would fix the accommodation portion with 50% of the rate, knowing full well, and I've already been over this ground, knowing full well that there are a number of no doubt higher earning from tourist revenue businesses who are not being rated at all. This was the point that I think Justice Gilbert made, in his own way, very clear in paragraph 102 or thereabouts of his decision, which is to say that the tourism sector get a free pass. Now it may have been difficult to deal with that and to make it fairer, whilst giving a rate to, opposing a rate on the hotel sector, but that's the difficulty which the Council has to deal with, the issue of balancing the distribution of benefits amongst like ratepayers. This is exactly the type of concern which was mentioned, albeit in a slightly different statutory context, but not materially different, in the Queensland case. Why would you exclude – what is the basis for excluding liability for a targeted rate for one landowner, which receives like benefits, and not the other. That would have to be rationalised on a coherent and cogent basis in the staff report, or in what other document the Council cared to produce, to say that that is a rational result which satisfies the requirements of section 101.

WINKELMANN CJ:

Well we know what their reasoning is. Your submission is no more or no less than that their reasoning was illogical and irrational. Isn't it?

GLAZEBROOK J:

And of course one of the things they were saying was not related on a dollar for dollar basis, because of course you'd never get that revenue information from retailers, they've got no reason to provide it. But to say, well, the raison d'être

of the accommodation, and most of their revenue comes from tourism, they therefore directly benefit from ATEED. Others benefit from the local market as well, and so they don't get as much benefit from ATEED in terms of their business model, and it wasn't a dollar for dollar analysis, was it? I mean I think that's what they mean by "direct benefit".

MR J SMITH QC:

It's hard to see exactly what they meant by direct benefit other than to see that the higher proportion of the hotel's revenue came –

GLAZEBROOK J:

So therefore they benefit more from ATEED –

MR J SMITH QC:

No they don't.

GLAZEBROOK J:

– because they're reliant on offshore, that's what, they're out of Auckland visitors, that's what they're saying.

MR J SMITH QC:

In my submission that –

GLAZEBROOK J:

It might be irrational, you might say it's wrong, but that is what their analysis was.

MR J SMITH QC:

It's, with respect it's factually wrong. They don't benefit more. There are other players, there are other sectors, subsectors of the tourism industry who earn more dollars, and they earn them more directly, but I – I mean I think you understand my point.

O'REGAN J:

I think we're just going over old ground here. Let's just leave it.

MR J SMITH QC:

Yes, we are. Now –

WILLIAMS J:

Can you just give some thought to paragraph (b) of 101(3).

MR J SMITH QC:

Sorry 9-0…

WILLIAMS J:

The step back clause, section 101(3)(b), for bravo.

MR J SMITH QC:

Yes.

WILLIAMS J:

Doesn't that contemplate cross-subsidy? In the step back process?

MR J SMITH QC:

I must say looking at it I cannot see that it necessarily does.

WILLIAMS J:

It's not necessary but you're required to look at the overall impact of allocating liability to one group on the wellbeing of the wider community. Isn't it possible to read that as if it, is that it contemplates levels of cross-subsidy.

MR J SMITH QC:

It, yes, it, I mean for example bus fares. That's a differential for example, and any number of other differentials, I accept that. So that's not an exercise, in my submission, which appears to have been undertaken here, and even if it has been undertaken, it's been undertaken after a false premise, which is one which I've described, and I don't really want to go through again.

WILLIAMS J:

No, but it could be that the Council simply decided that the hotel sector would carry this burden and that the rest, the other burden holders would be represented in the 50%.

MR J SMITH QC:

Yes, could be. If that's what they had done, and there would have to be a rationale for it, but given that's – yes it's theoretically possible but it wasn't what was done. This was a straight line comparison. You get most of your revenue from tourists therefore your benefit is more direct, and it's plainly wrong.

So I just want to go to one last paragraph, because I appreciate that time's going by and my friend Mr Hodder will want to reply, but 84 in particular is where I say – 84, 88 and 89 of the staff report are where I say the staff report goes wrong, as well as the other paragraph I mentioned, 71.

1545

So 84: "In terms of the distribution of benefits factor it is clear that commercial accommodation providers receive an immediate direct benefit from ATEED's expenditure," et cetera. We say it's wrong. Secondly, 88 and 89. This is the administrative barrier, and I say that factually the administrative barrier may well exist but it can't be erected as a pretext on which to have an imbalance or in terms of distribution of the cost of benefits, particularly when there's no other pretext for that differential in the distribution between tourist service industries.

So…

WILLIAMS J:

That drives, you, doesn't it, your argument does come down to a targeted rate in this sector cannot be struck because it's administratively impossible to ping the largest beneficiaries of it.

MR J SMITH QC:

I wouldn't go that far.

WILLIAMS J:

And because of that, nowhere in the sector can be rated.

MR J SMITH QC:

I wouldn't go that far necessarily. That involves an acceptance in this courtroom that it is likely to be impossible to carry out a better analysis of whether it is feasible to have other tourism service providers rated and that would involve an intense factual investigation by people who are qualified to do that, who I don't count myself amongst them, and the other point about that, of course, is that we have no business, with respect, to be saying it's not possible because self-evidently it's not something which the Council set out to do in the first place. They're not saying: "We've tried and we simply cannot do that."

WILLIAMS J:

Well, they say it's not practically possible. They say it's impossible.

MR J SMITH QC:

Well, this is off the back of thinking that it didn't matter in the first place because there was going to be a pass through, and that drives that approach. There's no – there must be other entities who are able to be rated and who are – transport sectors, for example.

O'REGAN J:

Yes, it's hard though because they don't have much land. That's the problem, isn't it?

MR J SMITH QC:

Well, rental (**inaudible** 15:47:54) with that, but they have – they don't have much land but that's dealt with in terms of differential. There's no reason why that can't be looked at.

O'REGAN J:

Well, not if they are just leasing land.

WINKELMANN CJ:

Don't have land.

MR J SMITH QC:

If they don't have land, that becomes –

O'REGAN J:

Most retailers don't own their shops, do they?

WINKELMANN CJ:

Well, for instance, Uber.

MR J SMITH QC:

If they have no land whatsoever that's a different issue. But my point is that on the false assumption that there could be a pass through, none of this –

GLAZEBROOK J:

Well, of course, as I pointed out to Mr Galbraith, the Council doesn't accept there can't be a pass through, if you look at 92(1), I think. They obviously accept there can't be a pass through in the short term in respect of those contracts and do accept that and say to deal with that they'll look at remissions.

MR J SMITH QC:

Well, two points. The first of all is that in some respects there can't be a pass through because if you are talking about an ownership structure that's not going to change in a year or two, and the same applies to a lesser extent in relation to forward rates. That's not going to change in a year or two.

GLAZEBROOK J:

Well, you do have rent reviews so it will change because additional costs are taken into account in rent reviews.

1550

MR J SMITH QC:

But that involves that the same applies in relation to all ownership structures and that simply may not be the case. That would depend on a consideration of the contractual arrangements on a reasonably widespread basis and we're not in a position to talk about that here. But the real point about the remissions, or the adequacy of the remissions regime, is that this is the establishment of a targeted rate and even with their remissions regime the targeted ratepayer faces, whereas it didn't beforehand, a legal requirement to pay a rate unless it not only applies for a remission but is successful in applying for its remission. So what I'm saying is that in my submission it's not good enough to simply set the rate and say, well don't worry, we'll clearly all this up with a remissions programme which is yet to be fully devised, and in any event depends, for it's efficacity on how it is administered. We know, for example, from some of the evidence that my friend Mr Galbraith took you to, that there have been complaints, and no doubt justified complaints, about the way in which it has been implemented. That is a matter of implementation, things like that can be overcome, but my point is that that throws into relief that the problem is that remissions or not in the first instance a targeted rate has been imposed without proper consideration of the statutory criteria in section 101, that's the issue, not remissions.

Now again I am very conscious of the time, and I'm tolerably sure –

WINKELMANN CJ:

We'll you've pretty much covered all you material, it seems to me.

MR J SMITH QC:

I have and there was some evidential references but my friend Mr Galbraith took you to most of those so that you would get the drift. So unless I can help your Honours with anything further, those are my submissions.

WINKELMANN CJ:

Thank you Mr Smith. Mr Hodder?

MR HODDER QC:

Thank you your Honour. I'll try and be selective in reply in various ways. The first point that I should make is that there has been a degree of attention paid to the 10% and the 22%, then that morphed into a discussion about what "overnight" meant, which took me a little by surprise in the sense that I had thought that overnight was simply a way of saying, well, possibly there was a case of the singular includes the plural. I don't know how the Court feels about this, but my team decided to follow that up through the MBIE website and we can make this available to you, but the MBIE website makes it clear that an overnight visit is defined as "spent one or more night on their trip". So it's not a single night, it means any trip. That's the frame which is explicitly put in the questionnaire, which is also available on the MBIE website. This is a survey that was done through –

WILLIAMS J:

So it's overnight as opposed to day trip?

MR HODDER QC:

Yes, so conferences and things and room, day rooms don't count it seems, but any more than one night. So the particular question that was asked in the survey was: "Have you returned from any OVERNIGHT trips in New Zealand. An overnight trip is where you stayed away for at least one night." So the proposition that these are somehow counting that the numbers that get to the 22% only, or somehow or other distorted by reference to single nights as opposed to multiple nights, with our respect, doesn't apply. But what I suggest is that we file a memorandum that attaches that material for the Court and leave it at that.

O'REGAN J:

Well we should let the other side respond to it as well.

MR HODDER QC:

I'm sorry?

O'REGAN J:

We should also let the other parties query it if they have any difficulty with it.

MR HODDER QC:

Yes, that was my contemplation. That if I file a memorandum and they have a response they can put it in. As the Court pleases. one matter was, going back to section 101 that says what there has to be is consideration of the various matters that the Court has now heard a great deal about, and somehow or other "consideration" got elevated into a degree of mandatory importance that struck me as worthwhile mentioning, that the concept is also used in section 78(1) and section 82(1)(c) and (e) of the Act, things have to be taken into consideration, and it's not possible to get the mandatory flavour out of those provisions either, we say, and so while I accept this is a mandatory relevant consideration, the concept of consideration as used in the preface of 101(3) is inherent in the concept of discretion, and yet to a very large extent what you've then heard from our friends is there really isn't much by way of discretion.

1555

WILLIAMS J:

Well, I think the argument was that it wasn't genuine consideration, closed-mindedness, that sort of thing, as a result of the way it developed.

MR HODDER QC:

Indeed, but that –

WILLIAMS J:

You reject that in the way you've argued your case, anyway.

MR HODDER QC:

Well, the point obviously that follows that, your Honour, is that that requires a close minute examination of each rating decision, including a decision not to impose a rate effectively, or not to impose a rate on some people, which is what you're hearing from or which is the whole point, as I understand it, of the

Mackenzie, *Woolworths* and *Lovelock* cases, that the Court doesn't do that, it doesn't make sense to do that, and it shouldn't make any more sense now.

In terms of pass through, I simply invite the Court, if it has the opportunity and the time, to read the feedback provisions that I took the Court to yesterday in relation to the discussion of what the feedback – sorry, that's the feedback report – what it actually said. In my count there are nine providers whose feedback is summarised in the staff report, and I have checked a couple of them against the material that's elsewhere from those providers, which do not say that they cannot pass it through. They say they can only pass some of it through or they imply that or infer that. I don't want to take it further, but the point is that that is where one gets one answer to pass through.

There's also – can I draw attention to the fact that there were room-rate increases after this came into effect? That's Mr Duncan's first affidavit which is at 202.0430, paragraph 71 to 75, and his second affidavit which is at 203.0577 at paragraph 38.

My learned friend, Mr Galbraith, said to you that the staff report in effect is to be read as saying that a 50% reduction was contemplated because there were no benefits at all for that particular range of activity. I have to confess of myself I don't read paragraph 92(a) of the staff report or the rest of 92 as saying that but I'll leave it to you. The references seem to indicate that in some cases and in 92(a) there's a reference to some matters that add up to about $5.2 million out of the total ATEED spend that doesn't fit. But nowhere can I find it saying that 50% of it was written off because it had no benefits at all to the accommodation sector.

Remission data. If the Court – that's then discussion about remission data. Can I draw attention to the Acott affidavit at 202.0359? The data is set out there at paragraph 56. There's also a discussion in the first Walker affidavit which is 202.0230 at 217. You were taken to the 2012 long –

WILLIAMS J:

Sorry, just before you go on. This was in relation to what point? The Acott and Walker?

MR HODDER QC:

Acott and Walker is about remissions data, about what actually happened by way of remissions data, and you will see there exactly the proportions of who made successful applications for remission. It's set out in some detail in that rather long paragraph.

WILLIAMS J:

Was it Mr Galbraith? Do you agree with Mr Galbraith that in the second year of remissions experience the remissions window shrunk to owners of two or fewer rating units?

MR HODDER QC:

I confess I haven't stated it but I think I don't have a basis to disagree with him at the moment. I think it did shrink and it was different but I don't actually have the detail.

The long-term plan, you were taken to the 2012 long-term plan but can I suggest that the more relevant one is the 2017 financing policy which you will find at 310.2267? "Targeted rates are appropriate for funding operating activities where the activity mainly benefits a specific group of ratepayers," et cetera.

In terms of the value of –

WINKELMANN CJ:

Sorry, I missed the 201…

MR HODDER QC:

310.2267, sorry, Ma'am.

WILLIAMS J:

Does your 20% get you, 22%, get you over that line?

MR HODDER QC:

That depends what the 22% relates to and the other factors that come into play, but yes.

1600

WILLIAMS J:

Why so?

MR HODDER QC:

Well, the activities that are taken on are the activities providing accommodation who benefit 90-something per cent from the activities that ATEED undertakes.

WILLIAMS J:

So it's – yes, I see.

MR HODDER QC:

So the reason I mention the – the 22% diminishes the ratio point that my learned friend, Mr Galbraith, wished to make and – but that really isn't the main point. The main point, as has been discussed by members of the Court and my friends, is that what was seen here is that this particular rate on commercial accommodation providers was a manageable rate on a body that, or on a group, that got the great bulk of their revenue from this particular activity, and what the rate is targeted to is an activity. The activity is the activity of bringing visitors to Auckland.

On the topic of bringing visitors to Auckland, can I also draw attention to the fact that in the staff report at paragraphs 78 to 79 one can see the difference between the national figures and the Auckland figures which seem to suggest that there is some relevance in that, or I suggest there's some relevance in that as well.

In terms of the activities of ATEED versus the activities of the accommodation providers, we're happy to refer this Court to the High Court's judgment, in particular around paragraph 215, and, of course, you heard from my learned friend, Ms Baigent, yesterday.

In the context of discussing targeted rates, I think both my learned friends, Mr Galbraith and Mr Smith, somewhat suggested that the scope of section 16 of the LGRA is defined by the scope of what the Auckland Council rates other than accommodation providers, that is to say those specific infrastructure matters. With respect, that's the wrong way round. One starts with –

WINKELMANN CJ:
Can you just repeat what you say they suggested?

MR HODDER QC:
I think the suggestion was that the scope of section 16 of the LGRA – this is my words, not theirs – is effectively limited to the kind of things that are dealt with by other targeted rates that the Auckland Council imposed at the same time as this one. We say that's the wrong way of looking at it. We start with section 16 LGRA and the whole point of the LGRA is it's about flexible rates. That's what the Act says its purpose is, and within that flexible rating those are particular examples but they don't define the boundaries of the scope of the statute by any means at all.

Nothing particular to say about *Neil Construction* although it has a different flavour in some ways to the way in which the *Mackenzie* and *Woolworths*, *Lovelock*, line of cases approached the general issues, but the idea that section 101 is to be read as a whole which we take from *Neil Construction* we, of course, endorse for our particular purposes and for our submissions.

In the end, I think where my learned friend, Mr Justin Smith, takes us down to in his search for something observably wrong, is really an "all or nothing" argument. Justice Williams really was making the point, I think, towards the end of the dialogue with him, if you can't rate everybody in the tourism sector

then you can't rate anybody, and we again say the LGRA is designed to provide flexible rating according to wide-ranging factors set out in schedule 2 and schedule 3 and, with respect, that isn't what one expects to find out of that particular statutory regime.

In terms of the general thesis from my learned friend, Mr Smith, that is that the idea of surcharge which starts back in 2016 diverts the Council throughout 2017 until it makes its decisions, being the ones under review, from the need for analysis, including reference to the rest of the tourism sector, we say doesn't stack up. If one, with respect, looks at this at paragraphs 71 to 84, in particular 84, which he mentioned, then, with respect, that simply is not the case. The position of the rest of the tourism sector is understood and the matter really comes down more to the question of whether the fact that it is more manageable and the fact that the – that it is administratively manageable and the fact that the tourism sector gets such a high proportion of its revenue, sorry, the accommodation providers get such a high proportion of their revenue from the tourism sector, are matters that the Council is entitled to take into account which, of course, we say it can and did and that is sufficiently for the more direct benefit. It was not obliged to wait for an all or nothing approach and do nothing and could rate all of the tourism as a whole.

Now if the Court pleases, that is a restrained and constrained reply on my part, but unless there are any questions I think those are the points that I wanted to make by reply.

WINKELMANN CJ:
Thank you, Mr Hodder.

MR HODDER QC:
If your Honours please.

WINKELMANN CJ:
So, Mr Hodder, you'll file that memorandum I imagine pretty much straight away?

MR HODDER QC:

This afternoon, your Honour, I expect.

WINKELMANN CJ:

Yes, and if the respondents can indicate quite promptly whether they are going to want to file anything in reply, but they should file anything in reply within the week perhaps, so by the end of next week, Friday, whichever date that is.

All right, well, thank you very much, counsel, for your submissions. We will take some time to consider our decision.

COURT ADJOURNS: 4.06 PM