IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA117/2020
[2021] NZCA 587

BETWEEN	C P GROUP LIMITED First Appellant	
	MILLENNIUM & COPTHORNE HOTELS NEW ZEALAND LIMITED Second Appellant	
	MLC SCENIC LIMITED Third Appellant	
	T & T CLARRY'S HOLDINGS LIMITED Fourth Appellant	
AND	AUCKLAND COUNCIL Respondent	

Hearing:	13–14 April 2021
Court:	Kós P, Gilbert and Courtney JJ
Counsel:	A R Galbraith QC, T B Fitzgerald and S R Hiebendaal for Appellants J A Farmer QC, J W S Baigent and J M T Salter for Respondent
Judgment:	10 November 2021 at 9.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B We make declarations that the decisions to impose the APTR in the 2017/2018 and 2018/2019 rating years were invalid. Those decisions are set aside.

C If the parties are unable to agree on consequential relief, this aspect is to be remitted to the High Court for determination.

D The respondent must pay one set of costs to the appellants for a complex appeal on a band B basis and usual disbursements. We certify for second counsel.

E Costs in the High Court are to be determined by that Court in the light of this judgment.

REASONS OF THE COURT

(Given by Gilbert J)

Table of Contents

Introduction

[1] As one of several initiatives to limit average rates increases for the general ratepayer to 2.5 per cent for the 2017/2018 year, Auckland Council (Council) decided to impose a targeted rate on a selected group of commercial accommodation providers to help fund expenditure on visitor attraction and major events by Auckland Tourism, Events and Economic Development Ltd (ATEED).[1] The objective was to shift the burden of this cost from Auckland ratepayers to visitors, thereby freeing up funds needed to pay for major infrastructure projects.

[2] Council did not have the power to target visitors directly through a bed tax or a visitor levy, but it sought to achieve a similar result through the mechanism of a targeted rate.

[3] Although Council recognised that four other categories of ratepayers benefited more from ATEED's expenditure on visitor attraction and major events than commercial accommodation providers, it considered the targeted group benefited more *directly* from this expenditure than other ratepayers. That was because almost all their revenue came from visitors and they would be able to pass on the increased cost to them. Assuming the cost was passed on, the targeted rate was expected to translate to approximately $5 per night for an average hotel room, which was broadly in line with bed taxes or visitor levies imposed in other countries.

[4] In large measure, the problems that have arisen in this case stem from the fundamental difference between a bed tax (or visitor levy) and a targeted rate, and the difficulties inherent in attempting to achieve the benefits of the former through the mechanism of the latter. Indirectly targeting non-ratepayers as an additional revenue source does not fit comfortably within the statutory rating framework.

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[1] ATEED was a Council Controlled Organisation (CCO) under s 6 of the Local Government Act 2002. In December 2020, ATEED merged with Regional Facilities Auckland Ltd to become Auckland Unlimited Ltd, which is also a CCO.

[5] The initial proposal was that the targeted rate would fund the entirety of ATEED's expenditure on visitor attraction and major events, projected to be $26.9 million in the 2017/2018 year. However, following a consultation process, the targeted rate was reduced by 50 per cent to $13.45 million. The targeted ratepayers were a relatively small group, being the owners of rating units located at 236 sites (comprising 2,921 rating units, being 0.5 per cent of a total of around 550,000 rating units in Auckland). As a result, the total rates payable by the targeted group increased markedly in the 2017/2018 year, more than doubling in some cases.

[6] A similar targeted rate was imposed in the 2018/2019 year although there were some modifications to the scheme, the most significant being to extend its reach to informal accommodation providers using platforms such as Airbnb. The scheme was suspended in 2020 due to the outbreak of COVID-19.

[7] The appellants are commercial accommodation providers affected by the targeted rate, referred to as the "Accommodation Provider Targeted Rate" (APTR). In 2018, they applied to the High Court for judicial review of Council's decision to impose the APTR in each of those years claiming that Council did not properly assess the mandatory relevant considerations in s 101(3) of the Local Government Act 2000 (the Act). They also claimed that the decisions were unreasonable in an administrative law sense.

[8] Section 101 of the Act imposes various financial management obligations on local authorities. Because of its central importance to the issues raised on the appeal, it is helpful to set it out in full at this stage:

> **101 Financial management**
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> (1) A local authority must manage its revenues, expenses, assets, liabilities, investments, and general financial dealings prudently and in a manner that promotes the current and future interests of the community.
>
> (2) A local authority must make adequate and effective provision in its long-term plan and in its annual plan (where applicable) to meet the expenditure needs of the local authority identified in that long-term plan and annual plan.

> (3) The funding needs of the local authority must be met from those sources that the local authority determines to be appropriate, following consideration of,—
>
> (a) in relation to each activity to be funded,—
>
> (i) the community outcomes to which the activity primarily contributes; and
>
> (ii) the distribution of benefits between the community as a whole, any identifiable part of the community, and individuals; and
>
> (iii) the period in or over which those benefits are expected to occur; and
>
> (iv) the extent to which the actions or inaction of particular individuals or a group contribute to the need to undertake the activity; and
>
> (v) the costs and benefits, including consequences for transparency and accountability, of funding the activity distinctly from other activities; and
>
> (b) the overall impact of any allocation of liability for revenue needs on the current and future social, economic, environmental, and cultural well-being of the community.

[9] The appellants claim that Council failed to comply with these requirements in two key respects. First, they contend that Council failed to adequately identify and measure the benefits arising from the funded activity, both generally and for those to be subject to the targeted rate (s 101(3)(a)(ii)). They say the most that can be said is that they obtain some unascertained benefit from ATEED's activities. In any event, it is common ground that four other categories of ratepayers benefit to a significantly greater extent than the targeted group does. The appellants argue that Council did not assess the benefit with any rigour because it assumed accommodation providers could pass the cost of the increased rate to their guests in the same way as bed taxes or visitor levies are applied overseas. However, they say this "pass through" assumption was fundamentally flawed. Secondly, the appellants argue that Council did not adequately consider the costs and benefits, including consequences for transparency and accountability, of funding the activity distinctly from other activities (s 101(3)(a)(v)).

[10] The appellants also say that Council's decision to impose the APTR, narrowly targeting a small group of ratepayers to fund an activity that Council knew principally benefited others, was unreasonable. They contend that Council failed to obtain

the information rationally required to support the decision, unreasonably failed to treat like cases alike and that the decision to impose the APTR led to unreasonable outcomes for the targeted group.

[11] In a comprehensive judgment delivered on 5 February 2020, Moore J rejected all aspects of the appellants' claims.[2] The Judge found that each of the factors listed in s 101(3) were assessed in a measured and even-handed way. Given the practicalities and relative urgency of local body decision-making, the Judge considered Council could not have done more to comply with its statutory obligations under s 101(3).[3] The Judge did not consider the decision to impose the APTR (in either rating year) was unreasonable.[4]

[12] The appellants now appeal.

The issues

[13] The agreed issues on appeal are broadly stated as being whether the High Court was wrong to find that:

(a) Council complied with s 101(3) of the Act in making the decisions to impose the APTR; and

(b) the decisions were not unreasonable in an administrative law sense.

[14] Before addressing these issues, it is helpful to summarise the context for, and process leading to, the imposition of the APTR in the 2017/2018 rating year and the refinements to the scheme that were introduced in the 2018/2019 rating year. This survey will show the underlying rationale for the APTR, the basic architecture of the scheme, and the basis on which Council ultimately sought to justify it in terms of the statutory framework.

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2 *CP Group Ltd v Auckland Council* [2020] NZHC 89 [High Court judgment].
3 At [296].
4 At [287].

Decision to impose the APTR for the 2017/2018 year

Council governance structure

[15] Auckland Council was formed in 2000 following the amalgamation of seven territorial authorities and the Auckland Regional Council.[5] There are four substantive council-controlled organisations (CCOs) in Council's control, all limited liability companies. ATEED (now Auckland Unlimited Ltd) is one of these.[6]

[16] Council operates under a shared governance structure comprising the governing body and 21 local boards. The governing body comprises the Mayor, who is elected by Aucklanders as a whole, and 20 councillors who are elected on a ward basis. The governing body is responsible for the governance of the CCOs, the financial management of Council including preparing and adopting a long-term plan (which is reviewed every three years) and annual budget, and setting rates. The governing body delegates some of its powers and responsibilities to the Finance and Performance Committee (the FPC). The FPC's delegated authority includes advising and supporting the Mayor on the development of the long-term plan, annual budget and the setting of rates. The Mayor and all councillors are members of the FPC.

ATEED

[17] ATEED was incorporated in September 2010. Its objectives are to lift Auckland's economic well-being, support and enhance Auckland's performance as a key contributor to the New Zealand economy, and support and enhance Auckland's ability to compete internationally as a desirable place to visit, live, work, invest and do business.[7]

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5 The seven territorial authorities were Auckland City Council, Franklin District Council, Manukau City Council, North Shore City Council, Papakura District Council, Rodney District Council and Waitākere City Council.

6 The other three CCOs are Auckland Transport Ltd, Watercare Services Ltd and Panuku Development Auckland Ltd. At the material time, ATEED and Regional Facilities Auckland were separate CCOs.

7 Local Government (Tamaki Makaurau Reorganisation) Establishment of Council-controlled Organisations Order 2010, cl 8(2).

[18] ATEED adopts a Statement of Intent each year. This is prepared in conjunction with Council and sets out ATEED's strategic framework, proposed activities for the following three years and the objectives to which those activities will contribute together with performance measures and targets. ATEED's Statement of Intent for 2016–2019 described its role as follows:

> ATEED's role is to support the council's vision of creating the world's most liveable city and deliver great value for money by supporting the growth of a vibrant and competitive economy and generating customers for Auckland, with a particular focus on **facilitating new smart money[8] and high value jobs for Auckland**. The extent to which new opportunities deliver new smart money into Auckland and also increase the level of high value jobs within Auckland are two key pre-requisites upon which we prioritise and allocate our resources. This is our intervention logic for the investment of ratepayer funds.
>
> (Emphasis and footnote in original.)

[19] Mr Steven Armitage, the general manager of destination for ATEED, stated that ATEED's adopted purpose was "to support quality jobs for all Aucklanders". ATEED's 2016–2019 Statement of Intent identified five strategic objectives to achieve this end — to grow the visitor economy, build a culture of innovation and entrepreneurship, attract business and investment, grow and attract skilled talent, and build Auckland's global brand and identity.

[20] It can be seen that ATEED has a broad remit and is intended to benefit all Aucklanders. In terms of the 2015–2025 long-term plan, ATEED's funding was to be sourced primarily from general ratepayers on the basis this was considered to be fair and prudent. Average annual general rates increases of 3.5 per cent were projected.

[21] The level of funding ATEED receives from Council is determined annually as part of Council's budget process — either in the three-yearly review of the long-term plan or the annual plan. Mr Armitage explained that for the purposes of making its funding decisions each year, Council divides its operation into "themes" and "groups of activities" within each theme. Where appropriate, groups of activities are further broken down into "activities".

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8 ATEED defines "smart money" as productive foreign direct investment.

[22] Stepping ahead in the chronology, we note that in the 2017/2018 year, Council's funding of ATEED was considered under the theme "Economic and Cultural Development" with the activity group being "Economic Growth and Visitor Activity". ATEED received total funding of approximately $51 million that year. To put this in perspective, Council's total budgeted expenditure that year was $5.8 billion, comprising $3.8 billion for operating expenditure and $2 billion for capital expenditure. Of this total, approximately $1.7 billion was to be funded through rates. In that context, the $13.45 million intended to be raised by the APTR was not particularly material to Council, but the financial impact on the small group of targeted ratepayers was indisputably significant unless the assumption that the cost could be passed on to visitors was correct.[9] This is one of the key issues in this case.

Mayoral Proposal to introduce APTR

[23] The decision to impose the APTR can be traced back to an August 2016 policy document entitled "*Fiscal – Doing more with less*" authorised by Mr Phil Goff in connection with his successful mayoral campaign that year. This contained a qualified commitment to limit average rate rises to 2.5 per cent per annum or less. One of the proposed ways of achieving this was to investigate "adopting a fair level of user-pays where there are demonstrable private benefits generated from CCO operations". The example provided was ATEED, which Mr Goff observed "generates benefits for the city as a whole, but it also generates benefits for specific industries, such as tourism and hospitality providers".

[24] Following the election of Mr Goff as mayor and his taking office on 1 November 2016, the "user pays" idea to offset some of ATEED's costs was proposed by way of a targeted rate that could be passed on to guests, similar to a bed tax. For example, on 23 November 2016, Mayor Goff was quoted publicly as suggesting a $5 per night bed tax would be imposed for hotel stays in Auckland. This would raise $30 million and be applied to tourism advertising and building attractions for tourists. The Mayor said that although accommodation providers could expect their rates to rise, they could "easily recover costs through the levy". In this way he suggested they

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9 Auckland Council publicly announced after this proceeding commenced that the financial impact on the Council of an adverse outcome in the proceeding would be immaterial.

would "see the benefits of the tax without paying the levy". The article stated that the "onus of the levy will fall squarely on the visitor" and this would be "the biggest change in Mr Goff's first budget as mayor".

[25] The Mayor leads the development of the long-term plan and annual budget. This is initiated through what is known as the Mayoral Proposal. An initial Mayoral Proposal is prepared prior to public consultation and a revised version is then prepared for the purposes of final decision-making by the governing body.

[26] In late November 2016, a draft "Annual Budget 2017/2018 – Mayoral Proposal on items for Public Consultation" was prepared and approved by the Council. This included a section on the proposed "visitor levy":

> ***Visitor levy***
>
> 34. The number of commercial guest nights in Auckland rose from 6 million in the year ending July 2011 to 7.3 million in the year ending July 2016. This growth is partly attributable to the visitor attraction and major events activities of [ATEED], and has placed additional demands on the city's infrastructure and services. In light of the benefits visitors derive from the council activities, 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.
>
> 35. The council cannot set a bed tax, but may be able to achieve a similar outcome through a targeted rate on accommodation providers which we expect to be passed on to guests through an additional charge on their bills. The revenue captured through a levy is expected to be $20–$30 million per annum. Indicative council analysis suggests the levy would translate into a 3–4% surcharge on a typical tariff for a 4–5 star hotel – in the order of $6–10 per night. Municipal charges of this nature are common practice in OECD countries.
>
> 36. Staff will engage with the tourism and accommodation sector on the design of the levy and include their perspectives in a report back to the council in the New Year. In the event the levy is implemented the tourism and accommodation sector will be invited to participate on a governance body that will advise ATEED on the allocation of levy revenues.

[27] It is worth noting that the initial proposal was not formulated with reference to the statutory criteria in s 101 of the Act. This is perhaps not surprising given the stated aim was to obtain funding from visitors (non-ratepayers) to meet the expenditure.

No assessment against the statutory criteria appears to have been undertaken by Council until very late in the piece, shortly prior to the final decision in June 2017.

[28] The initial Mayoral Proposal was publicly released on 28 November 2016 in an article on "Our Auckland" website. Our Auckland publishes Council news and a monthly magazine delivered to Auckland households. The proposed targeted rate was described as a "visitor levy" that would be "collected" by accommodation providers to "replace ratepayer spending" by ATEED:

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

Consultation document

[29] For the purposes of public consultation on the annual budget 2017/2018 (including on the proposed targeted rate), a consultation document was prepared in late January 2017. This identified two options for paying for tourism promotion and major events in the order of $20 to $30 million per annum. The first option was to continue to fund this activity through general rates. This would cost the average residential ratepayer $46 and would not "release funds for other priorities within Auckland". The preferred option was to fund this expenditure through a targeted rate payable by accommodation providers such as hotels and motels equating to approximately four per cent of their revenue. Assuming these charges were passed on to visitors, the cost was expected to translate to $6 to $10 per night on the average hotel room rate. The idea was to use the general rates freed up by this initiative to invest $250 to $300 million in additional transport infrastructure over the following 10 years. While the language of "visitor levy" was departed from in the consultation documents (although not in the publicly available Mayoral Proposal), the rationale for targeting accommodation providers remained. The objective was still to minimise the cost burden on Auckland residents in the expectation that these costs would be passed on to visitors.

Supporting document

[30] A supporting document containing further information was also prepared for public consultation. This included a summary of the proposal for paying for tourism promotion through a targeted rate, central government's consideration of a nationwide bed tax, a breakdown of ATEED's expenditure on visitor attraction and major events, the spread of visitor expenditure across various categories of Auckland businesses and a calculation of the impact of the proposed targeted rate on tourism spending.

[31] Addressing the possibility of a bed tax, Council noted that central government had been in discussion with senior leaders in the tourism sector concerning an industry proposal to jointly fund additional investment in tourism and infrastructure from a combination of a bed tax, a border levy and an equivalent contribution from central government. The proposed bed tax would be set at two per cent and the border levy at $5 per head. This would raise around $65 million and be matched by central government. However, it was noted in the supporting document that it was not clear whether the government would introduce a bed tax and Council had rejected the option of waiting for this.

[32] Reproduced below is a table that appeared in the supporting document summarising ATEED's projected expenditure on visitor attraction and major events for 2017/2018:

Expenditure	Rates funding $,000	Activity
Major events	$14,373	Includes: Sponsorship and attraction of major events such as the NRL 9's, World Master Games and local events such as Chinese Lantern Festival
Visitor and external relations • **Tourism** • **International education** • **i-Sites** • **External relationships**	$8,876 $6,884 $995 $360 $637	Includes: • Advertising campaigns in Australia with partners such as Tourism NZ and Flight Centre • Domestic marketing campaigns promoting Auckland • Partnering with Education New Zealand and the education sector to attract students • Working with external parties such as the Ministry of Foreign Affairs and Trade and New Zealand Trade and Enterprise on hotel investment attraction

Destination and marketing • **Auckland convention bureau** • **Brand and marketing**	$4,603 $2,365 $2,238	Includes: • Auckland Convention Bureau (ACB) marketing and sales activity • Partnering with Tourism New Zealand and the New Zealand International Convention Centre to attract major business events to Auckland • Partnering with the cruise sector to promote Auckland as a destination and exchange port
Net expenditure	$27,852	

[33] A further table (reproduced below) showed the distribution of visitor expenditure across six categories of commercial ratepayer. Accommodation providers ranked number five on this list in respect of their share of Auckland visitor expenditure (second to last):

Industry category	Auckland visitor expenditure (int. and domestic) $m	Share of Auckland visitor expenditure
Accommodation	$724	10%
Cultural, recreation and gambling	$133	2%
Food and beverage	$1,206	16%
Other passenger transport	$1,229	17%
Other tourism	$981	13%
Retail	$3,148	42%
Total	$7,420	100%

[34] An attempt was made to calculate the impact of the proposed targeted rate on tourist spending in Auckland on the assumption that accommodation providers would pass on any charge imposed on them to visitors. Raising $27.85 million through targeted rates to cover tourism promotion costs was calculated as requiring a 3.9 per cent increase in accommodation costs translating to an increase in the cost of an average unit of $5.80 per night. However, it was noted that this represented only a small percentage of total visitor spending and was expected to have little impact in terms of reduced stay nights:

> A $27.85 million increase in the cost of visiting Auckland is only an addition of 1.55 per cent to the $1.795 billion spent by visitors to Auckland who stay overnight.
>
> …

> … a 1.55 per cent rise in the total cost of travel if all costs are passed on, … implies a fall in visitor demand of between 0.23 per cent and 0.62 per cent.
>
> …
>
> … Total spending, all else held equal would see spending by overnight visitors to Auckland rise by between $16 million and $23 million a year. Only a small number of visitors would be put off visiting, and greater revenues would be generated from the vast majority who would still visit.

[35] A comparison with bed night taxes set as a percentage of the room rate was said to be widely used in Europe and the United States. Examples were provided and a two-page schedule was attached setting these out.

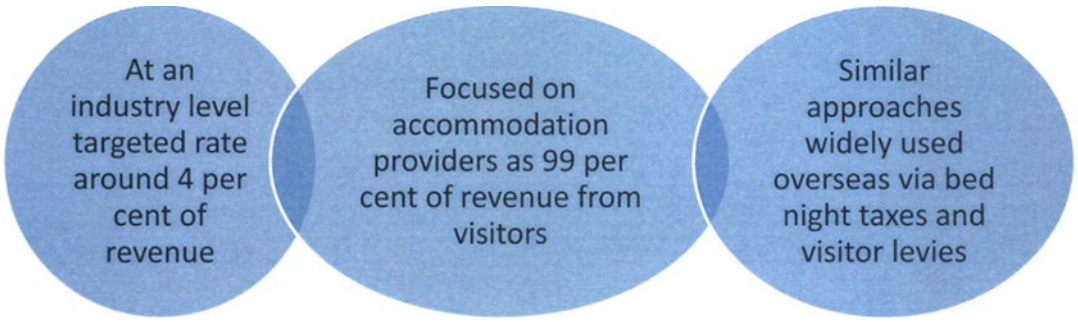
[36] The supporting document identified five funding options for visitor attraction and major events — general rates, targeted rates on the business sector, targeted rates on the CBD business sector, targeted rates on the tourism sector (fourth on the list above at [33] in terms of their share of visitor expenditure) and targeted rates on accommodation providers (as proposed). A comparative analysis of these options was set out in a table which summarised, first, the connection between those who would pay the rate and those that would receive the benefits from the services to be funded and, secondly, the anticipated impact of the rate. The analogy with a bed tax that could be passed on to the visitor was clearly central to the Council's preference for targeting commercial accommodation providers. One of the problems identified with imposing a targeted rate on the tourism sector was that the majority of this sector's revenue comes from Auckland residents. So, even if the costs were passed on, they would still impact Auckland residents. By contrast, it was thought that if the costs were passed on by accommodation providers, this would have almost no impact on Auckland residents. The expected impact of the proposed targeted rate on the accommodation sector was stated to be as follows:

> Proposed rate around 4 per cent of sector revenue
>
> Costs can be managed by passing them on to guests, as occurs with bed night taxes in many other international cities
>
> If the costs are passed on they will have nearly no impact on Auckland residents

[37] By this time, Council had become aware that accommodation providers might not have the ability to pass the cost on in all cases. Some may have contractual commitments that would prevent this:

> A rate set on the accommodation sector to raise $27.8 million represents around 4 per cent of the sector's revenue. This is at the lower range of revenue imposts set in many overseas cities through a bed night tax. Unlike a bed night tax if providers decide to pass on the costs they can choose to do so at the time of year when their demand is less price sensitive such as during the peak season. However, some providers may have contractual obligations which prevent them from passing on the cost for the term of the contract for example arrangements with airlines for crew accommodation.

[38] The basic rationale for the targeted rate, reflecting the thinking at the time of consultation, was depicted in a simple graphic prepared for an FPC workshop on 9 March 2017:



Consultation

[39] The public consultation process on the proposed budget was conducted over a one-month period commencing on 27 February 2017. It drew strong opposition from the commercial accommodation sector. The consistent response was that, contrary to Council's assumption, the rate could not be passed on to guests for various reasons. Accommodation providers were already charging the maximum room rate the market could bear in a highly competitive market and room rates were only beginning to return to levels achieved in the late 1990s after more than a decade of decline. It would be unlawful and in breach of the Commerce Act 1986 for providers to enter into any agreement or understanding with each other that they would pass on the increased cost to guests. Further, many accommodation providers had fixed contracted room rates for three-year terms. The complexities arising from the various ownership and operating structures had also not been taken into account. For example, many of

the rating units that would be subject to the targeted rate were not owned by the accommodation providers. These unit owners would be forced to absorb this major unbudgeted cost.

[40] Another common theme was that there was a lack of connection between the benefit of ATEED's expenditure and the targeted group of commercial accommodation providers. ATEED's expenditure benefited the whole Auckland community, for example, providing funding for events such as Diwali, the Lantern Festival and the Pasifika Festival. It was argued that the costs should therefore continue to be borne by the community as a whole. ATEED's expenditure was considered to be of little value to commercial accommodation providers, especially those located outside the city centre or away from the airport. Further, some Auckland hotels already contributed to ATEED through joint marketing activities where this was considered to be beneficial.

[41] Other reasons were put forward by the targeted group as to why it would be inequitable to pass on the burden of funding ATEED's expenditure to them. First, it was said that only 26 per cent of visitors stay in commercial accommodation provided by the targeted group and these providers receive only nine per cent of overall visitor spend (as shown in the table reproduced at [33] above). Four other categories of ratepayers receive a significantly larger share of that spend. Secondly, a comparable number of visitors stay in accommodation offered through informal providers such as Airbnb. It would be unfair to exempt that large group of accommodation providers from the targeted rate. A third concern was that a rate assessed on capital value would not provide an appropriate basis for establishing the liability because of the lack of any correlation between capital value and the benefits received from ATEED's expenditure.

[42] Strong opposition to the proposed targeted rate came not only from commercial accommodation providers. Their position was supported by a number of other credible voices, including the Auckland Chamber of Commerce, Auckland Ratepayers Alliance, Heart of the City, Hospitality New Zealand, Conventions & Incentives NZ, Tourism Export Council NZ, and Tourism Industry Aotearoa.

[43] Tourism Industry Aotearoa made a comprehensive written submission dated 27 March 2017 strongly recommending that the proposal be dropped. We make brief reference to this submission because it captures the main objections. The following extracts, covering only some of the points made, are taken from the executive summary:

> There is … **no justification** for the proposed targeted rate solely on commercial accommodation providers. It is poorly designed and based on incorrect information. The targeted rate is **not the appropriate funding tool** for Auckland Council's purposes.
>
> …
>
> It is **demonstrably unfair** and inequitable to target solely the commercial accommodation sector with a targeted rate when the benefits are spread across the entire Auckland economy.
>
> The sector receives **9%** of the visitor spend in Auckland but is being asked to fund **100%** of Council efforts (through ATEED) to grow this spend.
>
> The proposal has been **misleadingly described** as a Visitor Levy, when it clearly is not. Councils in New Zealand do not have the authority to impose a bed tax or visitor levy. The proposal is for an average rates increase of 150% on the owners of 330 buildings in Auckland from which commercial accommodation is provided. In some cases, the rates increase will exceed … 300%.
>
> The Council has **erroneously claimed** that the targeted rate can be passed on by showing a charge on the guest's bill. This is not correct. A visitor levy could be added to the bill; a targeted rate cannot.
>
> The Mayor continues to insist that the rate can easily be recovered by accommodation providers adding $6 to $10 to the daily bill. This is **not correct**.
>
> The **complexity** of the ownership arrangements in much of the commercial accommodation sector has been ignored. The building owners are frequently a different party to the operator of the accommodation.
>
> …
>
> Auckland Council has incorrectly presumed that the overwhelming majority of visitors to Auckland stay in the commercial accommodation operated from the 330 targeted properties. In fact, only **a quarter** of the total visitor nights are spent with these providers.
>
> …
>
> The Council has claimed the commercial accommodation sector gets 99% of its revenue from visitors to Auckland and somehow this justifies targeting the sector. This is **wildly inaccurate**. Aucklanders stay and use the sector's facilities to a far greater extent than this. It is also completely irrelevant –

> the share of income received from ratepayers is not the test to be used when determining the appropriateness of a targeted rate.
>
> (Emphasis in original.)

[44] In late April 2017, Council staff prepared a report summarising the feedback received during the consultation process covering all aspects of the proposed annual budget. As to the issue of paying for tourism promotion, it was noted that 5,626 responses had been received with a clear majority (66 per cent) in favour of a targeted rate. Those in favour were mostly individual ratepayers who did not leave additional comments. However, comments received from this group generally supported the arguments proposed in the consultation documents, including that many cities internationally have a similar bed tax and the cost should not apply to Auckland residents. The many submissions received from industry participants, including commercial accommodation providers, were also summarised in some detail in this document.

Staff report

[45] A detailed staff report was prepared drawing together the key rating and budget issues following the public consultation on the annual budget 2017/2018. The section dealing with the APTR contained a number of recommendations including:

(a) the targeted rate should be set at a level "materially less" than the $27.8 million proposed in the consultation material with the balance continuing to be funded by general rates;

(b) consideration should be given to differential rate settings to recognise different categories and locations of commercial accommodation providers;

(c) applications for rates remissions should be dealt with in the interim under Council's existing remissions scheme to allow time for the development of a more tailored scheme in the coming year in conjunction with the 2018–2028 long-term plan;

(d) staff should develop a proposal to include informal accommodation providers in the targeted group for the 2018/2019 year; and

(e) staff should also develop and report back on a proposal for the introduction of alternate governance arrangements for ATEED, including by giving commercial accommodation providers a greater role reflecting their level of funding of its activities.

[46] The staff report also contained, for the first time, an assessment of the proposed APTR against the mandatory relevant considerations in s 101 of the Act. Given the appellants claim that Council failed to comply with s 101(3) in two respects, we set out the discussion of these criteria in full.

[47] As to the distribution of benefits in terms of s 101(3)(a)(ii), the following analysis was provided:

> **The distribution of benefits between the community as a whole; any identifiable part of the community; and individuals**
>
> 71. 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.
>
> 72. Submitters in support of the proposal pointed to the direct benefit received by businesses in the tourism industry and felt that general ratepayers should not be subsidising the promotion of these businesses. There was also a view expressed that additional visitors imposed extra costs on the city and residents through competition for services, congestion and pressure on infrastructure capacity.
>
> 73. Feedback from accommodation providers on this factor included:
>
> - There is no evidence of the effectiveness of ATEED's expenditure.
> - Some of the ATEED expenditure included in the proposal is not targeted at visitor attraction and is more for the benefit of local residents.
> - Other businesses (such as retail, food and beverage, and other tourism businesses) benefit from the activity, rather than just the accommodation providers.

- Auckland as a whole benefits from the economic activity generated by visitors.

- Some accommodation providers are excluded from the proposal i.e. informal providers such as AirBnB.

- Accommodation providers further away from the city centre … do not benefit as much from the activity.

- Only 26 per cent of visitors to Auckland stay in commercial accommodation.

74. ATEED's activity in this area is focused on and measured by increased number of visitors to Auckland. One of the key measures of ATEED's Statement of Intent is "visitor nights".

75. Most of the expenditure in this part of ATEED's activities is targeted at attracting visitors to Auckland and growing the visitor economy. The Tourism, Major Events, Brand and Marketing and Auckland Convention Bureau activities are designed to bring in visitors, international and domestic, who will stay in the Auckland region, which directly benefits accommodation providers.

76. Data collected by ATEED supports the proposition that its activities are in fact attracting visitors to Auckland … For example:

- Auckland Convention Bureau 2015/2016 – estimated 107,195 visitor nights generated.

- Major Events 2015/2016 – estimated 282,150 visitor nights generated.

77. Figures quoted by Tourism Industry Aotearoa show that more than 87 per cent of accommodation provider revenue is from visitors to Auckland (over 90 per cent when campgrounds are excluded).

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

79. However, these statistics include visits for all reasons - business, holidays, education and visiting friends and relatives. Business and leisure travellers are the primary targets of ATEED's visitor attraction and major events expenditure. Historical data on overnight domestic visitors to Auckland for the year ending December 2012 shows the proportion of visitor spending on accommodation for these visitors is higher at around 22 per cent.[11]

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10 Figures drawn from the Monthly Regional Tourism Estimates prepared by Ministry of Business Innovation and Employment for 2016 [The table referred to at [33] above was reproduced here].

11 Statistics New Zealand, Domestic Travel Survey, 2012. Note this data is not strictly comparable to the preceding table from Statistics New Zealand as the data source and categorisation of expenditure are different.

Expenditure category	Reason for visit					
	All	Business	Education	Holiday	Other	Visiting Friends or Relatives
Accommodation	18.9%	21.9%	28.2%	22.4%	23.8%	10.9%
Alcohol	5.3%	3.8%	5.3%	5.8%	5.0%	6.5%
Food and Beverages	18.8%	13.9%	15.5%	20.9%	20.6%	22.0%
Gambling	0.5%	0.3%	0.2%	0.5%	0.7%	0.6%
Gifts	2.5%	1.5%	1.8%	2.6%	3.2%	3.4%
Other	11.9%	8.3%	7.7%	12.8%	13.4%	15.0%
Recreation	5.8%	3.5%	4.0%	6.1%	8.1%	7.9%
Transport	36.4%	46.8%	37.4%	28.9%	25.2%	33.7%

80. The feedback highlights that there are significant direct benefits to other businesses that operate tourism based activities. There are also indirect benefits to other businesses and the community as [a] whole from the increased economic activity.

81. There was also considerable feedback on who benefited from events. Major events (e.g. the Lions series, the NRL Auckland Nines, NZ fashion week) strongly support the visitor economy in attracting international and domestic visitors, while also benefitting the wider community who attend them. Data suggests that 40 per cent of visitors to Auckland for the ITM Supersprint 2016 and 50 per cent of visitors to Auckland for the Auckland Nines in 2017 stayed in commercial accommodation …

82. Auckland Festivals are of benefit to the wider Auckland community but also support the Auckland brand as a culturally diverse and vibrant city. It is acknowledged that expenditure on these festivals primarily benefits Auckland residents.

83. It is also acknowledged that informal accommodation providers may benefit from the expenditure and that there may be variations in the degree of benefit sustained depending on geographical location. These points are discussed under "Modification of proposed option based on feedback".

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 other businesses also benefit, as does the wider community.

(Footnotes in original.)

[48] The staff report addressed the criteria in s 101(3)(a)(v) as follows:

The costs and benefits, including consequences for transparency and accountability, of funding the activity distinctly from other activities

87. Transparency and accountability for this activity could be enhanced through a targeted rate, in conjunction with new governance arrangements that give commercial accommodation providers a role in determining how the revenue is spent. As funders, accommodation providers would have a strong incentive to scrutinise the expenditure and provide advice on how to get best value for money.

88. It is administratively possible to implement a targeted rate for commercial accommodation providers. Most of the relevant information is already held and there would be only a small one-off administrative cost to establish and apply any differentials and also in assessing the apportionment between accommodation provision and other commercial activities in a property.

89. In contrast, applying the targeted rate to the wider tourism sector (for example) would have considerable administrative challenges. It is not practically possible to identify all relevant businesses in the tourism sector. It would require arbitrary geographic and economic distinctions to be made between retail and food and beverage industries, some of whom will benefit more and others less from the visitor economy. An extreme example would be CBD restaurants compared to suburban takeaways.

Modifications to proposed APTR

[49] In light of the staff report, three significant amendments to the proposed targeted rate scheme were made. These were incorporated in the "Final Annual Budget 2017/2018 — Mayoral Proposal" that was approved by Council on 29 June 2017 (the revised Mayoral Proposal).

[50] First, the targeted rate was set at 50 per cent of ATEED's budgeted expenditure on visitor attraction and major events, being $13.45 million (not the full $26.9 million as earlier proposed).[12] This apportionment was described as a "political judgement" applying a "stand back" consideration of the factors set out in the staff report.

[51] Secondly, the targeted rate would be applied on a differential basis according to three tiers and three geographical zones. Tier 1 would comprise hotels and serviced apartments. Tier 2 would include motels, lodges and motel-like accommodation in campgrounds. Tier 3 would cover other accommodation providers such as backpackers, campgrounds and hostels.

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[12] By the time the revised Mayoral Proposal was drafted, ATEED's anticipated expenditure for the 2017/2018 year had fallen from $27.8 million to $26.9 million.

[52] The three geographical zones were intended to better reflect the distribution of benefits for commercial accommodation providers. The three zones comprised local board areas extending out from the central city. Zone A incorporated local board areas nearest to the central city and airport. Zone B comprised the local board areas of Henderson-Massey, Hibiscus and Bays, Howick, Kaipātiki, Manurewa, Ōtara-Papatoetoe, Puketāpapa, Upper Harbour, Waiheke and Whau. Zone C comprised the local board areas of Franklin, Aotea/Great Barrier, Papakura, Rodney and Waitākere Ranges.

[53] Tier 3 accommodation providers would not be liable for the targeted rate, nor would any accommodation provider in zone C. The differential rate ratio would range from 1.0 (for tier 1 providers in zone A) to 0.3 for tier 2 providers in zone B.

[54] Further information on how the targeted rate would apply to these various categories, including how it would translate as an increased cost per room per night was set out in the following table:

Differential ratio and estimated rates increase		Provider type		
		Hotels and serviced apartments	Motels and lodges (including motel-like accommodation at campgrounds)	Other (campgrounds, backpackers, hostels)
Location	**Zone A** **Differential ratio** Average rates increase % of original proposal Average $ per room per night	**1.0** 64% 60% $3-$6	**0.6** 58% 36% $2-$3	**0.0**
	Zone B **Differential ratio** Average rates increase % of original proposal Average $ per room per night	**0.5** 36% 30% $2-$4	**0.3** 30% 18% $1-$2	**0.0**
	Zone C **Differential ratio**	**0.0**	**0.0**	**0.0**

NOTE: Amounts are estimates only and are stated exclusive of GST

[55] The third significant change was the introduction of a rates remission scheme to cater for special cases, particularly where ratepayers were unable to pass on the cost of the targeted rate. The example given was where the owner/ratepayer was separate from the accommodation operator and the nature of the relationship between the parties meant the targeted rate could not be passed on to the accommodation operator.

Decision

[56] On 1 June 2017, the FPC met to formally consider and vote on the revised Mayoral Proposal in light of the staff report. The FPC was divided on whether to approve the APTR. The motion that the governing body adopt it as part of the final annual budget for 2017/2018 was carried by 11 votes to eight. Among those in favour, some plainly adhered firmly to the belief that the impact of the APTR would be limited, with one commenting that the cost was the same as "a cup of coffee" that "can be passed on and it is the visitor who will pay for it". The Mayor agreed with this. He said publicly that accommodation providers could pass on the cost as a surcharge to tourists.

[57] The governing body duly approved the imposition of the APTR for the 2017/2018 year on 29 June 2017. The voting was again split. The motion was carried by 10 votes to eight, with two other councillors recusing themselves from the discussion and voting.

Decision to impose the APTR for the 2018/2019 year

Experience with the 2017/2018 APTR

Rates increases

[58] We give some examples to illustrate the effect of the APTR on accommodation providers operating in various market segments in the 2017/2018 year.

[59] C P Group Ltd owns or manages approximately 160 properties ranging from large hotels such as the Pullman to individual strata-titled rooms such as the 171 rooms in the Sofitel Auckland. Nearly 10 per cent of the APTR in this year was borne by hotels owned or managed by the C P Group, a considerable additional cost burden. By way of example, the targeted rate paid by some of their hotels was as follows:

(a) Pullman — $498,335.[13]

[13] This is the amount paid in respect of units owned by C P Group. It is responsible for paying rates for a further 10 units but can recover the cost from the owners. If these additional units are taken into account, the total targeted rate paid by C P Group for units in the Pullman is $551,764.

(b) Novotel/Ibis Ellerslie — $273,048.

(c) Sofitel Auckland — $177,105.

(d) Grand Mercure — $166,329.

(e) Ibis (Wyndham Street) — $134,217.

[60] The effect of excluding informal accommodation providers from the scheme can be illustrated by comparing the rates payable by strata-title units/apartments that are physically comparable in the Pullman Residences and the Sofitel:

(a) Residential unit [A] in the Pullman pays residential rates of $2,890. Apartment [B] pays $15,786 of which $7,181 is the targeted rate.

(b) Residential unit [A] in the Sofitel pays residential rates of $1,653. Apartment [B] pays $6,390 of which $2,556 is the targeted rate.

[61] This differential means that those offering the same form of accommodation in the same building using a platform such as Airbnb enjoy a significant costs advantage over their direct competitors. This incentivises strata-title owners to withdraw their units from the hotel pool. All of this is to the detriment of the targeted commercial accommodation providers. As we have seen, Council recognised this inequity but chose to implement the scheme despite it on the basis the APTR would be extended to pick up the informal commercial accommodation providers in the following year.

[62] The cost increases for Millennium & Copthorne Hotels New Zealand Ltd, which owns three hotels in Auckland, were also significant:

(a) For the M Social Hotel, the rates payable increased from $231,428 (as at 1 May 2017) to $574,940 (at 1 August 2017), an overall increase of $343,512 of which the targeted rate component was $237,587.

(b) The rates payable for Copthorne Hotel rose from $112,534 to $190,353, an increase of $77,818 of which the targeted rate component was $74,006.

(c) The comparable figures for the Grand Millennium were $872,924 rising to $1,587,343, an increase of $714,419 of which the targeted rate component was $695,059.

The rates increase attributable to the APTR across these three hotels alone was in excess of $1 million (approximately $659,000 after partial remission).

[63] Scenic Hotel Group is New Zealand's largest independently-owned and operated hotel group. It has a total of 18 hotels spread throughout New Zealand and the South Pacific including two in Auckland, one at the airport (Heartland Hotel) and the other in Queen Street (Scenic Auckland). The targeted rate assessment for the Heartland Hotel was $142,705, being more than half of the total rates bill. For Scenic Auckland, the targeted rate was $137,002, being approximately 38 per cent of the total rates.

[64] Mount Wellington Licensing Trust (a community-owned licensing trust) owns and manages the Waipuna Hotel and Conference Centre, a 148-room hotel specialising in the residential meetings market (conferencing with onsite accommodation) for New Zealand-based businesses. The targeted rate for this hotel was $136,990, approximately 40 per cent of the total rates bill of $334,876.

[65] We refer to one further example to illustrate the impact of the APTR on providers operating in different segments of the market. Ms Wendy Ranson and her husband operate (through their company) the Greenlane Manor Motel in Ellerslie, a four-star motel with 20 self-contained units. The capital value of this property for rating purposes was $2,350,000. The total rates payable for the 2016/2017 year were $16,670. In 2017/2018 the total rates increased by 62 per cent to $27,449, of which the targeted rate component was $10,389. As we now come to, this increased cost could not be passed on. The Ransons did not qualify for any rates remission so the burden of the APTR ultimately fell on them personally.

Pass through

[66] The Ransons' Greenlane Manor Motel is a suburban motel located close to business parks, training facilities and government departments. The business mainly caters for people visiting Auckland for business purposes during weekdays (Monday to Thursday). Ms Ranson estimates that 40 per cent of their business comes from government departments, multinational companies and other businesses. She says they could not pass on the increased cost by increasing room rates. First, most of their customers negotiate agreements fixing accommodation rates in advance, usually for one year, but sometimes two. Secondly, these customers generally set accommodation pricing bands for their staff. The Ransons have to maintain their pricing within these bands if they want to retain this business. Thirdly, Ms Ranson explained that they cannot recover the increased costs from other guests. To attract custom on weekends, they have to drop their prices.

[67] Mr Alan Fisher of C P Group said the hypothesis that the targeted rate could be passed on in a similar way to a bed tax was simply not true. In some instances, this was impossible because rooms had already been booked in advance. For example, the Grand Mercure had an arrangement with an airline whereby room prices were fixed for two years in advance. In other cases, individual owners/lessors had agreements with operators under which the owners are responsible for paying rates. In the case of the C P Group, this includes Ibis Styles, Grand Mercure, Pullman and Novotel/Ibis Ellerslie. C P Group had no ability to pass the cost of the targeted rate to the operators running those hotels. More fundamentally, pricing was already optimised in a competitive market which takes no account of fixed costs such as local body rates, targeted or otherwise. Like many of the larger operators, C P Group has a regional revenue manager who sets room rates by monitoring the prices offered by other hotels online and adjusting constantly to reflect market conditions at any given time. Fixed costs incurred by particular operators are irrelevant in this exercise.

[68] Mr Karl Luxon, vice president of operations for Millennium & Copthorne Hotels New Zealand, expressed similar views. They also employ a revenue manager to ensure room rates are optimised. Mr Luxon agrees that the targeted rate has no bearing on the amount they can charge for rooms. Prices are fixed with reference to

other prices being offered in the market, including by direct competitors who are not subject to the APTR either because they are informal accommodation providers or because their rates have been remitted in the particular year.

[69] Mr John Forgie, the acting chief executive of the Mount Wellington Licensing Trust, said much the same thing. He says there were three reasons why they were unable to recover the cost of the targeted rate by increasing room rates. First, their business operates in a conference hosting market that has cheaper options outside of Auckland. Hamilton, Rotorua, Tauranga and Taupō are nearby, desirable alternatives offering cheaper accommodation for customers in this market. Secondly, the market determines what hotels can charge guests, not the hotel's individual costs structure. Their business operates in a market that is particularly sensitive to room rate increases. Thirdly, under their contract with their largest customer, an airline, variations to room rates are permissible if a bed tax is imposed, but not if operational overheads increase. Accordingly, they have no ability to pass on the increased costs to this major customer.

Rates remissions

[70] Ms Deborah Acott is the head of rates, valuations and data management at Council. She confirmed that 2,921 rating units at 236 different sites/street addresses were assessed for the APTR in 2017/2018 (approximately 0.5 per cent of all rating units). The total APTR invoiced was $14,595,002 (including GST). Council received 102 objections to the information contained in the Rating Information Database used for the purposes of assessing the APTR.[14] Eighty-three of these objections were approved resulting in a reduction to the total APTR of $623,100. Sixty-one of the 83 successful objections related to serviced apartments that were taken out of hotel pools for residential use ($111,352 reversed). A further 11 related to a change of use ($166,257 reversed).

[71] Leaving aside the objections, Council received 1,446 applications for full or partial remission of the APTR, equating to just under 50 per cent of the targeted rating

[14] A local authority must keep and maintain a rating information database pursuant to s 27 of the Local Government (Rating) Act 2002. Information contained in this database is used for the purpose of assessing rates under s 43.

units. Some form of remission of the APTR was granted for 1,022 rating units as at 16 August 2018, representing 35 per cent of the total rating units assessed for the APTR. The total amount remitted was of the order of $2.6 million. Remissions were granted in five main categories:

(a) Where the rating unit was an apartment owned by an individual ratepayer who was unable to pass on the cost to the accommodation provider — 703 rating units totalling $1,386,606.

(b) Properties comprising many individually owned apartments operated by an accommodation provider who was the ratepayer, but where the owner bears the cost because the operator pays rent less expenses — 239 rating units totalling $531,003.

(c) Large experienced commercial ratepayer with no ability to charge operator — 69 rating units totalling $432,350.

(d) Forward bookings for bulk rooms under contracts agreed before 1 June 2017 — five rating units totalling $228,173.

(e) Emergency accommodation where the property was used for temporary emergency accommodation through the Ministry of Social Development, Housing New Zealand,[15] or another central government agency — six rating units totalling $11,476.

Proposed modifications to the scheme

[72] In 2018, Council addressed the three issues that had been signalled at the time the APTR was introduced — the inclusion of informal accommodation providers, a tailored remission scheme, and a proposal to alter ATEED's governance arrangements to allow greater participation by commercial accommodation providers.

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[15] On 1 October 2019, Housing New Zealand merged with Homes, Land, Community (HLC) and the Kiwibuild Unit from the Ministry of Housing to become Kāinga Ora.

[73] Provider types would now be grouped into seven tiers, six of which would be liable for the APTR. The three zones described at [52] were retained. As before, only two of these zones would attract the rate. The new provider type tiers were:

(a) Tier 1: hotels, serviced apartments and high-occupancy online accommodation providers (more than 180 nights per annum).

(b) Tier 2: motels and motor inns, lodges, pub accommodation and serviced apartments and high-occupancy online accommodation providers not included in tier 1.

(c) Tier 3: moderate-occupancy online accommodation providers (136–180 nights per annum) that have characteristics similar to hotels (different to motels as described in tier 2).

(d) Tier 4: moderate-occupancy online accommodation providers that have characteristics similar to motels (as described in tier 2).

(e) Tier 5: medium-occupancy online accommodation providers (29–135 nights per annum) that have characteristics similar to hotels (different to motels as described in tier 2).

(f) Tier 6: medium-occupancy online accommodation providers that have characteristics similar to motels (as described in tier 2).

(g) Tier 7: other accommodation providers such as backpackers, short stay hostels, bed and breakfasts, homestays and campgrounds.

[74] Differential ratios would be applied to the first six tiers of accommodation providers across the two zones as set out in the table below:

Differential ratios		Provider type					
		Tier 1	Tier 2	Tier 3	Tier 4	Tier 5	Tier 6
Location	Zone A	1.0	0.6	0.50	0.30	0.25	0.15
	Zone B	0.5	0.3	0.25	0.15	0.125	0.075

[75] Secondly, a rates remission policy tailored to the APTR allowed for remissions to be granted in two circumstances. One was where the ratepayer had contracted some or all of their accommodation capacity to Work and Income New Zealand or another central government agency for the purpose of emergency housing. The second was where the ratepayer owned no more than two rating units, was bound by a contractual arrangement entered into prior to 1 June 2017 for their use for commercial accommodation and had no ability to pass the additional cost to the accommodation provider. The finalised specific remission criteria for this latter category were:

> The ratepayer owns no more than two rating units that attract the Accommodation provider targeted rate, and which are under contract to be used as serviced apartments, and where the applicant can demonstrate that they have
>
> a. entered into a contractual arrangement regarding the use of the rating unit as commercial accommodation prior to 1 June 2017, or subsequently purchased a rating unit subject to such an arrangement that was unable to be renegotiated at time of purchase.
>
> b. no contractual or relational/negotiating means of managing the additional costs of the rate.
>
> c. no ability to exit, terminate or renegotiate the contract prior to the start of the rating year in which remission is applied for.

[76] The third modification to the APTR scheme was to give commercial accommodation providers some representation in the governance of ATEED. To that end, a subcommittee was formed called the "Destination Committee" with three people selected to represent the interests of those paying the APTR and the other three appointees being two ATEED directors and the former deputy chair of the ATEED board. This subcommittee had its inaugural meeting on 2 August 2018.

Decision

[77] On 31 May 2018, the FPC resolved to recommend to the governing body that it adopt the modifications we have described to the APTR as part of the "10-year budget for 2018–2028" — the Mayor's Final Proposal. Included with the materials prepared for this meeting was an updated assessment of the APTR against the statutory criteria in s 101(3) of the Act. As to the community outcomes to which the activity primarily contributes (s 101(3)(a)(i)), these were identified as being those set out in the 2015–2025 long-term plan (when the activity was entirely funded by general rates):

> 1. An Auckland of prosperity and opportunity
>
> – through promoting Auckland as a business and leisure visitor destination and attracting visitors to attend events that are unique to Auckland
>
> 2. A culturally rich and creative Auckland
>
> – providing opportunities to showcase Auckland's unique arts and culture through support for and delivery of a portfolio of major events including the annual Auckland Diwali, Lantern and Pasifika Festivals
>
> – growing Auckland's visitor economy through promotion of and support for a range of culturally focussed visitor products
>
> 3. Te hau o te whenua, te hau o te tangata
>
> – celebrating and showcasing Māori culture and identity through major sporting and business events including a Māori Signature Festival for Auckland

[78] In terms of s 101(3)(a)(ii) — distribution of benefits — the analysis was as follows:

> **The distribution of benefits between the community as a whole; any identifiable part of the community; and individuals**
>
> The intent of the proposal is to more fairly apportion the burden of rates between online accommodation providers, traditional accommodation providers, and other ratepayers.
>
> The benefits that accrue to traditional providers were considered when the council made its original decision to introduce the rate. Particular feedback received from traditional accommodation providers from consultation of the APTR noted that some accommodation providers were unfairly excluded from the proposal i.e. online providers such as Airbnb.

> Acknowledged at the time, online accommodation providers also derive direct benefit from the expenditure. This proposal specifically responds to this issue.
>
> ATEED's activity in this area is focused on and measured by [an] increased number of visitors to Auckland. One of the key measures of ATEED's Statement of Intent is "visitor nights".
>
> Most of the expenditure in this part of ATEED's activities is targeted at attracting visitors to Auckland and growing the visitor economy. The Tourism, Major Events, Brand and Marketing and Auckland Convention Bureau activities are designed to bring in visitors, international and domestic, who will stay in the Auckland region, which directly benefits all accommodation providers.
>
> Auckland Festivals are of benefit to the wider Auckland community but also support the Auckland brand as a culturally diverse and vibrant city. Expenditure on these festivals primarily benefits Auckland residents.
>
> In terms of the distribution of benefits factor it is clear that all accommodation providers receive an immediate direct benefit from ATEED's expenditure in attracting visitors to Auckland, but other businesses also benefit, as does the wider community. The benefits may be felt differently depending on geographic location.

[79] The governing body duly approved the modified APTR as part of the 2018–2028 long-term plan at its meeting on 31 May 2018, which immediately followed the FPC meeting.

High Court proceedings

[80] In early May 2018, the appellants issued proceedings in the High Court at Auckland seeking judicial review of Council's decision to impose the APTR in the 2017/2018 year. They filed an amended statement of claim in December 2018 extending the application for judicial review to include the decision to impose the APTR in the 2018/2019 year. Four causes of action were advanced but only two of these are pursued on appeal — alleged non-compliance with s 101(3) of the Act and unreasonableness.

[81] As to the first of these grounds of review, the appellants claimed that Council failed properly to consider the distribution of benefits between the community as a whole and any identifiable part of that community (a reference to s 101(3)(a)(ii) of the Act) and the costs and benefits of funding the activity distinctly from other activities (a reference to s 101(3)(a)(v) of the Act). The appellants also claimed

Council failed properly to consider the overall impact of any allocation of liability for revenue needs on the community as required by s 101(3)(b) of the Act. This latter contention was not pursued in the High Court or on appeal.

[82] The appellants claimed in the alternative that no reasonable local authority would have made the decision to impose the APTR. Amongst other things, they alleged the APTR imposed a wholly disproportionate burden on the targeted ratepayers relative to any benefit they receive, and it was also unfairly discriminatory.

First ground of review — alleged non-compliance with s 101(3) of the Act

Legal principles

[83] Given the potentially wide audience for this decision, it is worth emphasising that, unlike a general appeal, on an application for judicial review the Court is not engaged in considering the merits of the decision, nor does it substitute its own view for that of the decision-maker. The focus is on the decision-making process and whether the decision has been made in accordance with the law.

[84] As this Court stated in *Waitakere City Council v Lovelock*, when reviewing the exercise of local authority rating powers, the first step is to examine the scheme of the legislation, the nature and scope of the rating powers and the statutory provisions governing their exercise.[16] The next step is to review the processes followed by the local authority and the decision in question to determine whether the local authority has discharged its legal responsibilities.

[85] We have already set out s 101(3) of the Act which lies at the heart of the case.[17] It lists mandatory relevant considerations local authorities must take account of in relation to each activity to be funded when determining appropriate funding sources.

[86] Rating powers are provided for in the Local Government (Rating) Act 2002 (the LGRA). The LGRA provides local authorities with flexible powers to set, assess

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16 *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 390.
17 At [8] above.

and collect rates to fund local government activities. Rating decisions are expected to be made in a transparent and consultative manner.

[87] Section 16 of the LGRA provides for targeted rates. A targeted rate may be set for one or more activities or groups of activities if those activities are identified accordingly in the local authority's funding impact statement. A targeted rate may be set in relation to all rateable land within the local authority's district or one or more categories of rateable land under s 17, namely those categories of rateable land so identified in the funding impact statement and defined in terms of one or more of the matters listed in sch 2. Section 18 provides that the calculation of liability for a targeted rate must utilise only a factor or factors that are identified in the local authority's funding impact statement and are listed in sch 3:

> **18 Calculating liability for targeted rate**
>
> (1) The calculation of liability for a targeted rate set under section 16 must utilise only a factor or factors that—
>
> (a) are identified in the local authority's funding impact statement as factors that must be used to calculate the liability for the targeted rate; and
>
> (b) are listed in Schedule 3.
>
> (2) Despite subsection (1), the liability for a targeted rate may be calculated as a fixed amount per rating unit.
>
> (3) To avoid doubt, if targeted rates are set differentially, the rates concerned do not have to be calculated using the same factors for each category of land.

[88] The factors listed in sch 3 include the extent of provision of any service to the rating unit by the local authority, including any limits or conditions that apply to the provision of the service (cl 8).

[89] The appellants drew our attention to the fact that the Select Committee considering the Local Government (Rating) Bill noted that many small councils faced difficulties funding facilities required by tourists and visitors to their districts.[18] The Committee considered these councils should have the option of meeting such costs through rates being imposed on hotels, motels and other forms of visitor

[18] Local Government (Rating) Bill (149–2) (select committee report) at 11.

accommodation according to the number of rooms or units they provide. The Committee therefore recommended that a new clause be added to sch 3 to allow liability to be calculated on this basis. Parliament rejected this recommendation believing it could have negative consequences for the continuing development of the tourism industry.[19] The appellants submit that the APTR is Council's attempt to approximate the very rate that Parliament declined to permit.

Distribution of benefits (s 101(3)(a)(ii))

High Court judgment

[90] The High Court addressed the issue of compliance with s 101 of the Act after assessing the reasonableness issue. The discussion in this section of the judgment was somewhat truncated, but this was because the same or similar topics had already been covered in the earlier section dealing with unreasonableness. Like the Judge, we will attempt to avoid unnecessary duplication in addressing these grounds. However, we prefer to address the specific criteria in s 101 first, consistent with the way the appeal was argued before us.

[91] The Judge concluded his discussion of the benefits provided by ATEED in the context of whether Council's decision was unreasonable, as follows:[20]

> [242] Similarly, much of ATEED's spending would benefit both the accommodation sector and the regional economy. But any overlap of benefit does not operate to reduce the benefit to local accommodation providers. Nor is it helpful to argue otherwise without embarking on a detailed analysis of trickle-down economics. While other sectors may benefit from the accommodation providers' payment of the APTR, that is justified on the basis that accommodation providers benefit considerably more from visitor spend than other industries. In any case, the extent to which ATEED's spending benefits the local economy in general is now reflected in the fact that it is still funded, in half, by the general ratepayer. That may not have been the basis upon which the APTR was originally formulated, but it is how it operates now.
>
> [243] It is apparent that ATEED's spending, as might be expected, is a positive factor operating to attract visitors to Auckland. It is neither necessary nor helpful to go further. That is not only due to the economic and practical difficulties in calculating the benefit with any degree of precision, but also, any attempt to do so risks misdirecting the enquiry towards the utility

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19 (26 February 2002) 598 NZPD 14627.

20 High Court judgment, above n 2.

> of ATEED itself. That is beyond the scope of this judicial review. Such an approach risks extending the enquiry into how the Council operates and structures its internal arrangements.
>
> [244] In conclusion, I consider that this aspect of challenge is also without foundation. There is no requirement to demonstrate a proportionate relationship between a ratepayer's liability and the benefit they receive from the rate itself. In the present case, accommodation providers were targeted by the APTR to partly fund ATEED on the assumption that they would benefit from ATEED's spending more than any other sector. That assumption was neither inherently illogical nor factually flawed. While it is correct that the Council did not undertake a fine-tuned or precise cost benefits analysis that was because to do so would have been fraught and all but impossible. It was not unreasonable for the Council to conclude there was a connection between ATEED's spending and a future, albeit incalculable, benefit to the commercial accommodation sector.

[92] In a later section of the judgment, dealing with the issue of compliance with s 101 specifically, the Judge said this:

> [293] I have already addressed those arguments in some detail. It is unnecessary to repeat my findings save to say that I have found that the Council's decision-making was not flawed in any of the ways complained of. This conclusion necessarily makes the second ground of review more of an obstacle for the applicants. The treatment of s 101(3) occupied six pages in the Staff Report. …
>
> [294] Mr Galbraith submits that more than mere lip service is required in respect of each mandatory consideration.
>
> [295] It is plain to me that the Council's engagement with each of the factors listed in s 101(3) was entirely sufficient. Furthermore, given the factual findings I have already made I do not accept that the Council either did not consider any of the relevant factors or should have done so more rigorously. This was not a "lip service" analysis. It was comprehensive, detailed and, where relevant and available, supported by statistical evidence. As can be seen, each of the factors listed in s 101(3) is assessed in a measured and even-handed way.
>
> (Footnotes omitted.)

Submissions on appeal

[93] The appellants submit that Council failed on any measure of adequacy to identify the benefits arising from the activity, both generally and for those that would be subject to the targeted rate, and then meaningfully consider what that benefit would be. They say the figures in the staff report (quoted at [47] above) used to measure the benefit of the activity were merely asserted and reliance on these figures was not

justified. The appellants complain that there was very little analysis of how ATEED's activities would actually benefit the commercial accommodation sector. It was not sufficient for Council to consider whether there was a connection between the activity and the targeted ratepayer. Rather, under s 101(3)(a)(ii), Council needed to consider the extent to which the activity creates the claimed benefit. They say this required a counterfactual analysis.

[94] In particular, the appellants say Council needed to ask itself the following sorts of questions:

(a) What proportion of the events ATEED is associated with would have gone ahead irrespective of ATEED's funding?

(b) If ATEED did not undertake visitor attraction activity, what would the industry do in its place?

(c) What proportion of room nights attracted by ATEED displace other room nights that would otherwise have been booked?

(d) To what extent do room nights attracted by ATEED benefit the accommodation providers that pay the rate? For example, national accommodation providers may not benefit from an event being hosted in Auckland as a result of ATEED's activities if it would otherwise be hosted in Wellington or some other centre in which they operate.

[95] Even if the assumed benefits were correct, the appellants submit Council did not consider adequately how those benefits were distributed. The data showed that the accommodation sector received less benefit than four other sectors. They say Council was therefore wrong to say that accommodation providers were "the most immediate direct beneficiary of expenditure to raise visitor numbers".

[96] The appellants submit the Judge erred in concluding it was "neither necessary nor helpful to go further"[21] than finding "[i]t is apparent that ATEED's spending … is

[21] At [243].

a positive factor operating to attract visitors to Auckland"[22] and Council "proceeded on a logical assumption that ATEED's investment provided a benefit to accommodation providers".[23]

[97] In response, Council submits there is no requirement in s 101(3)(a)(ii) for a local authority to measure the benefits as contended by the appellants, even if these could be quantified in a meaningful way. Council says the appellants are attempting to place an unjustified gloss on the statutory wording of s 101(3)(a)(ii) which, if applied to every activity, would make the section unworkable. Quantifying the benefit generated by ATEED's spending was difficult. It was appropriate to adopt a global approach with reference to empirical data where this was available. No counterfactual analysis was required of the sort suggested by the appellants. Council was determining how to fund the activity rather than determining whether to undertake the activity or how successful the activity was likely to be. Further, there was no requirement to establish a proportionate relationship between what a ratepayer pays and the benefit they receive from the activity. Council says this notion was debunked in this Court's decision in *Wellington City Council v Woolworths New Zealand Ltd (No 2)* (*Woolworths*).[24]

[98] In making a broad assessment of the distribution of benefits, Council maintains it was sufficient to conclude that while the accommodation sector benefited the fifth-most from visitor spending in the year ended March 2017, it was the most immediate direct beneficiary of expenditure because over 90 per cent of its revenue came from visitors. Council submits the appellants have not shown that this assessment was illogical.

Our assessment

[99] It is clear from the summary provided above that the APTR was motivated from the outset by a desire to shift the burden of ATEED's expenditure on visitor attraction and major events from Auckland ratepayers to visitors to Auckland.

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22 At [243].
23 At [286(c)].
24 *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) [*Woolworths*].

The idea was to create a new source of revenue, thereby freeing up ratepayer funds for other purposes including major infrastructure projects. It seems equally clear that if it had been within its power to do so, Council would have set about achieving this outcome by imposing a visitor levy or bed tax. However, Council had no such power and it was not prepared to wait for central government to consider the introduction of a visitor levy or bed tax on a nationwide basis. Council therefore decided to attempt to achieve a comparable outcome employing the only mechanism available to it, being a targeted rate.

[100] Three points emerge from this. First, the pass through assumption was central to the design of the scheme, otherwise the outcome would not be comparable to a visitor levy (or a bed tax), the visitor would not end up paying and the burden would remain with Auckland ratepayers. Secondly, because the true target was the visitor, not Auckland ratepayers, the APTR was not formulated on the basis of the statutory criteria, nor was it justified on that basis at the time it was promoted publicly. The statutory criteria in s 101(3) did not drive the proposal and that is why no assessment against them was undertaken until a very late stage, shortly prior to the APTR being finally approved by the governing body. Reference to those criteria was necessary, but only to justify a course that was fundamentally driven by other considerations. Because the assessment of the benefit and its distribution was not the motivating consideration in the conception or promotion of the targeted rate, the assessment was not only late, but was very limited. Thirdly, the pass through assumption (irrespective of whether it held true) was not a relevant consideration in setting a targeted rate in accordance with the Act. The focus on this corrupted the analysis.

[101] The pass through assumption is the reason why this small group of ratepayers (0.5 per cent), who benefited far less from the funded expenditure than four other categories of ratepayer, were singled out. There is no doubt that is why they were chosen. There is ample evidence of this. The simple graphic reproduced at [38] above illustrates it well — "[f]ocused on accommodation providers as 99 per cent of revenue from visitors", "[s]imilar approaches widely used overseas via bed night taxes and visitor levies". Absent pass through, there could be no proper justification for targeting this small group to shoulder alone the burden of funding an activity that provides

greater benefits to four other larger groups as well as benefiting the wider Auckland community overall.

[102] The use of the word "directly" when referring to the relative benefits to the accommodation sector compared with others is telling. That was the expressed justification for targeting this sector and excluding the others. Because the accommodation sector derives more of its revenue from visitors than other sectors, it was seen to benefit more *directly* than others whose customers would include a higher proportion of Auckland ratepayers. This would only matter if the pass through assumption was valid and relevant. If most of the accommodation sector's revenue came from visitors, any price increase would be funded by visitors assuming the costs were passed on. That would not be the case for other groups whose customers are a mix of visitors and Auckland ratepayers. If the increased costs were passed on by these latter groups, Auckland ratepayers would still end up paying. However, if the pass through assumption was not correct and the increased cost was in fact borne by the ratepayer, it would not be appropriate to place the funding burden on the group that stands in fifth position in terms of benefit, while giving the other four groups ahead of them a free pass.[25]

[103] After the scheme was designed and the targeted group identified to facilitate its objective, Council recognised that pass through might not be possible in all cases and could not lawfully be required. While the language employed to justify the scheme softened to reflect this, the targeted group did not change. The basic rationale for their selection — pass through to the visitors — remained embedded in the architecture of the scheme.

[104] We can illustrate how the language employed to describe the scheme evolved during the process by referring to some of the key documents.

[105] The initial Mayoral Proposal quoted at [26] above described the proposed targeted rate as a "*visitor levy*" that would "*achieve a similar outcome*" to a "*bed tax*"

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[25] Save to the extent that, like the targeted ratepayers, they would contribute through their general rates to the other 50 per cent of ATEED's expenditure on this activity.

which "*we expect to be passed on to guests through an additional charge on their bills*".

[106] By 13 December 2016, the wording in the initial Mayoral Proposal was modified by the addition of the words "*but not require*" to read:

> ***Visitor levy***
>
> …
>
> 33. The council cannot set a bed tax, but may be able to achieve a similar outcome through a targeted rate on accommodation providers. 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. The revenue captured through a levy is expected to be $20 - $30 million per annum. Indicative council analysis suggests the levy would translate into a 3-4% surcharge on a typical tariff for a 4-5 star hotel – in the order of $6-10 per night. Municipal charges of this nature are common practice in OECD countries.
>
> (Emphasis added.)

[107] By the time of public consultation in February 2017, the language of visitor levy had been dropped, as had the expressed expectation of pass through to the visitor. Pass through was by then described as being a matter of choice for the accommodation provider. This was the language used in the staff report prepared for the FPC meeting on 1 June 2017:

> Applying the rate to the commercial accommodation sector achieves this desired outcome [shifting the burden of funding this activity off the general ratepayer]. 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 the increased cost, and how, is entirely up to each accommodation provider to decide individually. *If they do choose to pass on the increased cost to their customers, very little of the impact of the cost of visitor attraction will fall on Auckland residents, as nearly all of the sector's revenue is from visitors.*
>
> This desired allocative outcome cannot be as effectively achieved by other options.
>
> (Emphasis added.)

[108] The statement that "*other options*" — such as targeting other ratepayers who benefited more — "*cannot … as effectively*" achieve the "*desired allocative outcome*"

confirms that the desired allocative outcome remained to pass the cost onto visitors to Auckland.

[109] The pass through assumption also underpinned the APTR remission policy. Council recognised that not all targeted ratepayers would be able to choose whether to pass on the increased cost to visitors because, in some cases, they were not the accommodation providers and had no ability to adjust tariffs. The remission policy was specifically intended to provide relief to those targeted ratepayers who faced this impediment.

[110] There was some disagreement between the economists about the extent to which the pass through assumption was valid. Dr John Small, who was engaged by the appellants, considered that accommodation providers were unlikely to be able to pass the cost of the targeted rate to visitors because they were already optimising their room rates and collusion to achieve an industry-wide response of adding the cost to room rates would be commercially very difficult and unlawful. Mr James Mellsop, for Council, agreed that, in general, changes to fixed costs will not be passed through, but he considered this was true only in the short term. Over time, he said that fixed costs will be passed through. Both opinions are likely to be broadly correct and we doubt there is any real difference in the views expressed. 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 or bed tax. That assumption was plainly not correct.

[111] We agree with the appellants that this fundamental misconception about pass through, which was not relevant under the statute in any case, diverted attention from a proper assessment of the distribution of the benefits and corrupted the analysis. It is noteworthy that the discussion of this statutory criterion in the staff report (quoted at [47] above) begins with the assumption that commercial accommodation providers would be able to pass the increased cost on to the visitors.

[112] The assessment of "benefit" and its "distribution" in the staff report was as follows:

> Commercial accommodation providers derive direct benefit from the expenditure … [At 71]
>
> …
>
> Most of the expenditure in this part of ATEED's activities is targeted at attracting visitors to Auckland and growing the visitor economy. The … activities are designed to bring in visitors, international and domestic, who will stay in the Auckland region, which directly benefits accommodation providers. [At 75]
>
> …
>
> … more than 87 per cent of accommodation provider revenue is from visitors to Auckland (over 90 per cent when campgrounds are excluded). [At 77]
>
> …
>
> … there are significant direct benefits to other businesses that operate tourism based activities. There are also indirect benefits to other businesses and the community as a whole from the increased economic activity. [At 80]
>
> …
>
> Auckland Festivals are of benefit to the wider Auckland community but also support the Auckland brand as a culturally diverse and vibrant city. It is acknowledged that expenditure on these festivals primarily benefits Auckland residents. [At 82]
>
> … informal accommodation providers may benefit from the expenditure … [At 83]
>
> 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 other businesses also benefit, as does the wider community. [At 84]

[113] The logic reduces to this. The expenditure is, in part, aimed at increasing visitor numbers, 90 per cent of accommodation provider revenue comes from visitors, therefore accommodation providers receive an immediate direct benefit from the expenditure. The benefit was asserted, but there was no real attempt to assess it. Council simply worked from the premise that ATEED's expenditure was directed to increasing visitor numbers to draw the conclusion that commercial accommodation providers would benefit. The analysis went no further than that.

[114] The Judge considered it was sufficient for Council to proceed on the assumption that ATEED's spending was "a positive factor operating to attract

visitors to Auckland" and it was "neither necessary nor helpful to go further".[26] He considered it was enough for Council to conclude "there was a connection between ATEED's spending and a future, albeit incalculable, benefit to the commercial accommodation sector".[27] We are unable to agree with this. Given that such a small number of ratepayers (0.5 per cent) were being required to pay a targeted rate in the order of $13.45 million annually, being half of the expenditure on an activity intended to benefit the whole Auckland community, we consider more analysis was required to assess the benefit to that group, and to others. In our view, it was not enough simply to show there was "a connection" between the spending and a "benefit" to this small group and leave it there because any benefit was "incalculable". It cannot be enough to show there would be *some* benefit. Taking account of the significance of the decision for the targeted group, there needed to be a meaningful assessment, even if necessarily broad and imprecise, of that benefit to the targeted group in comparison with others.

[115] The statements in the staff report may well have been all that could be said at the time that report was prepared but, as we have pointed out, that is because the rate was originally conceived as a visitor levy on non-ratepayers and not a cost that would ultimately be met by ratepayers. Had the matter been considered from the outset as a cost that would be borne by ratepayers, we are confident that greater attention would have been paid to the assessment of the relative benefits when making the rating decision and selecting who, if anyone, should be targeted to meet it.

[116] As to the distribution of the benefits, apart from including the table showing the distribution of visitor expenditure (reproduced at [33] above), the staff report contained remarkably little by way of analysis or assessment, concluding as follows:

> 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 other businesses also benefit, as does the wider community.

[117] This statement goes no further than saying that commercial accommodation providers benefit, as do other businesses and the wider community. It does not purport

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[26] High Court judgment, above n 2, at [243].
[27] At [244].

to assess in any meaningful way how any benefits are distributed and could not in our assessment justify imposing half of this significant cost on such a narrowly targeted group.

[118] The Judge stated that accommodation providers "benefit considerably more from visitor spend than other industries".[28] That is not correct. Employing Council's logic that the funded activity would lead to benefit through increased visitor nights and expenditure, four other categories of ratepayer were acknowledged to benefit more — in one case four times as much (the retail sector). In aggregate, the benefit of visitor expenditure enjoyed by these other groups eclipsed the benefit to the accommodation sector, exceeding it by a ratio of nine to one. This is accepting Council's figures; the appellants say their share of visitor expenditure is significantly less than this.

[119] Council's claim was not that the accommodation sector benefited more, rather that it benefited more *directly* than other categories of ratepayer. This is because such a high percentage of its revenue comes from visitors. That would have been an important consideration in a scheme designed to enable the cost to be passed to visitors, akin to a visitor levy or bed tax. However, even if it were relevant in the context of a targeted rate, others also benefit directly from visitor expenditure in this sense. Obvious examples would include rental car companies and tourism businesses. The informal accommodation providers would also fit into this category, as Council recognised.

[120] However, the Act does not differentiate between direct and indirect benefits. It requires consideration of the community outcomes to which the activity primarily contributes and the distribution of benefits between the community as a whole, any part of the community and individuals.[29]

[121] As we have seen, the community outcomes identified by Council in 2017/2018 to which the activity (visitor attraction) primarily contributed were for the benefit of the whole of Auckland — an Auckland of prosperity and opportunity, a culturally rich and creative Auckland and one which celebrates and showcases Māori culture and

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28 At [242].
29 Local Government Act, s 101(3)(a)(i) and (ii).

identity. Benefit to commercial accommodation providers was assumed from the outset using increased visitor numbers and visitor nights as a proxy and attributing this to ATEED's activities. Beyond that, there was virtually no assessment of the benefit to the targeted group or how the benefit of the funded activity was distributed across other groups of ratepayers and the community as a whole.

[122] The same assessment was relied on for the 2018/2019 year. The staff report prepared the following year recorded that the "benefits that accrue to traditional providers were considered when the council made its original decision to introduce the rate". The discussion focused on the acknowledged inequity of excluding informal accommodation providers from the scheme. The stated intent was to "more fairly apportion the burden of rates between online accommodation providers, traditional accommodation providers, and other ratepayers". This removed an obvious (and acknowledged) inequity in the scheme as implemented in the 2017/2018 year. To that extent, it was an improvement. However, the basic rationale for selection of the targeted group remained.

[123] In summary, we conclude that Council did not adequately consider the benefit of the funded activity to the targeted group, nor the distribution of the benefits across the community including other identifiable groups. Fundamentally, this was because the assessment was carried out at the end of the process to reverse engineer a justification for a scheme that had been formulated without regard to these criteria in an attempt to achieve an outcome that was beyond the proper scope of a rating mechanism, namely to obtain an additional source of revenue from non-ratepayers, being visitors to Auckland.

[124] The Council's failure to adequately consider this mandatory relevant consideration was an error of law going to the heart of the decision. Given the significance of this error to the rating decision in both years, we consider it impeaches the validity of these decisions. This is sufficient to dispose of the appeal. However, for completeness, we will briefly address the remaining grounds.

Costs and benefits of funding the activity distinctly from others (s 101(3)(a)(v))

High Court judgment

[125] The Judge did not address this issue directly. This may have been because it was not given prominence in the submissions before him. The Judge referred to the staff report and observed that each of the factors in s 101(3) had been assessed in "a measured and even-handed way".[30] The Judge did not consider Council could have done more to comply with its statutory obligations in all the circumstances.[31]

Submissions on appeal

[126] The appellants submit that Council failed to comply with this duty in two ways. First, Council incorrectly assumed the APTR would not impose a real economic cost on the targeted ratepayers because they could choose to pass it on to guests. We have already accepted the appellants' argument that this assumption was flawed. The appellants' second point is that Council failed to recognise that accommodation providers undertake similar tourism promotion to ATEED to a much greater extent than other sectors of the tourism market that also benefit from ATEED's expenditure. For example, they say the retail sector receives four times as much of the visitor spend as the accommodation providers, but they contribute little effort or resources to generate it. The appellants complain that Council gave no consideration to these relative contributions. In the result, the appellants contend that Council did not consider the cost of the APTR for the targeted ratepayers, let alone the true cost of their contribution to the funded activity.

[127] Council submits that the appellants have misinterpreted s 101(3)(a)(v) in a fundamental way. Council says the provision is an operational, rather than an economic, consideration. It is concerned with the transaction costs of creating a specific charging regime with separate data and collection requirements as compared to, for example, funding through a general rate which would be less transparent.

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30 High Court judgment, above n 2, at [295].
31 At [296].

Council also points out that the appellants did not argue Council had failed to properly interpret or apply this subsection in their statement of claim.

[128] Putting these matters to one side, Council argues that this Court should not interfere as the High Court's dismissal of the pass through issue was based on three findings that were supported by the evidence. First, the Judge found that the APTR was never premised on pass through being a certainty.[32] Secondly, the Judge considered Dr Small's evidence was of limited utility and "its applicability to real-world situations is fraught".[33] The Judge said that "in the longer term, [he could] see no reason, economic or otherwise, why [the APTR's] burden will not be incorporated into price and gradually passed through to the consumer, at least in part".[34] Thirdly, the Judge stated that the "APTR was always going to be commercially jarring" and "[c]ompensatory strategies to maximise revenue [would] need to be implemented, adjusted and refined".[35] As to the appellants' claimed contribution to visitor attraction, Council says this is irrelevant to s 101(3)(a)(v).

Our assessment

[129] We broadly agree with Council's interpretation of this provision. It is concerned with the advantages and disadvantages (benefits and costs) of funding the particular activity distinctly from others. This is likely to entail consideration of operational efficiencies, including implementation costs. However, it also requires consideration of how separately funding the costs might bring other benefits, including for transparency and accountability as between the party incurring the cost (the local authority) and those required to meet that cost (the ratepayer).

[130] We do not agree with the appellants that Council was required to consider in this part of the analysis the extent to which the targeted group already contributes to visitor attraction. It seems to us that this factor could instead be relevant under s 101(3)(a)(iv) — the extent to which the actions or inaction of particular individuals or a group contribute to the need to undertake the activity.

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32 At [200].
33 At [195].
34 At [197].
35 At [197].

[131] We have already considered the pass through issue. We do not consider it adds anything to this part of the claim. Council did not refer to pass through when considering this particular provision in the staff report. The staff report focused attention on the issues of administrative capability to impose the targeted rate and the cost of implementing it. These matters were appropriately considered. It also considered that transparency and accountability would be enhanced through a targeted rate in conjunction with modified governance arrangements for ATEED that would enable those paying for the activity to determine how to obtain the greatest value from it. We detect no error in Council's analysis of the factors relevant under this provision.

Second ground of review — unreasonableness

Legal principles

[132] Council places heavy reliance, as did the Judge, on this Court's decision in *Woolworths*, a case involving an unsuccessful challenge to a rating differential between residential and commercial ratepayers.[36] The Court restated the principles to be applied in assessing the amenability of such decisions to judicial review as discussed in its earlier decision in *Mackenzie District Council v Electricity Corporation of New Zealand*.[37] In summary, judicial review of the exercise of local authority powers is essentially a question of statutory interpretation. The local authority must act within the powers conferred on it by Parliament. It must have proper regard to matters it is bound by the statute to consider and exclude extraneous irrelevant considerations. The decision-making power must be exercised to promote the policy and objectives of the statute. The local authority will act outside the scope of its power if the decision is made for a purpose not contemplated by the legislation. So long as these requirements are properly adhered to, the decision will be amenable to judicial review only on grounds of unreasonableness.[38]

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36 *Woolworths*, above n 24.

37 At 545; referring to *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 41 (CA) at 43–44 and 47.

38 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

[133] In giving the judgment of the Court in *Woolworths*, Richardson P made the following general observations concerning general and differential rating decisions:[39]

> 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 (in contrast with user charges and special purposes authorities), make it clear that rating was not intended to be a calculation of benefits and allocation of the incidence of rates by reference to the outcome. The very complexity and inherent subjectivity of any benefit allocation for these specified outputs points away from using relative benefit as a definitive criterion. …
>
> …
>
> Rating requires the exercise of political judgment by the elected representatives of the community. The economic, social and political assessments involved are complex. The legislature has chosen not to specify the substantive criteria but rather to leave the overall judgment to be made in the round by the elected representatives.

[134] However, the full context in which the particular decision is made will obviously be important, as Wild J observed in *Wolf v Minister of Immigration*:[40]

> [47] I consider the time has come to state — or really to clarify — that the tests as laid down in *GCHQ* and *Woolworths* respectively are not, or should no longer be, the invariable or universal tests of "unreasonableness" applied in New Zealand public law. Whether a reviewing Court considers a decision reasonable and therefore lawful, or unreasonable and therefore unlawful and invalid, depends on the nature of the decision: upon who made it; by what process; what the decision involves (ie its subject matter and the level of policy content in it) and the importance of the decision to those affected by it, in terms of its potential impact upon, or consequences for, them. This is a rather long-winded way of saying, as Lord Steyn so succinctly did in *Daly*:
>
> > In administrative law context is everything.

[135] Drawing on the decisions of the House of Lords in *Edwards v Bairstow*[41] and the Supreme Court of New Zealand in *Bryson v Three Foot Six Ltd*,[42] Palmer J recently

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39 *Woolworths*, above n 24, at 552–553.

40 *Wolf v Minister of Immigration* [2004] NZAR 414 (HC); referring to *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL); *Woolworths*, above n 24; and *R v Secretary of State for the Home Department, ex parte Daly* [2001] 2 AC 532 (HL). *Wolf* was later applied in *Quake Outcasts v Minister of Canterbury Earthquake Recovery* [2017] NZCA 332, [2017] 3 NZLR 486 at [73].

41 *Edwards v Bairstow* [1956] AC 14 (HL) at 36.

42 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

offered a useful formulation of the test for unreasonableness in *Hu v Immigration and Protection Tribunal* as follows:[43]

> A decision may be unreasonable if it is not supported by any evidence, or if the evidence is inconsistent with or contradictory of it, or if the only reasonable conclusion contradicts the determination. The first two of these involve the adequacy of the evidential foundation of the decision. The last involves the chain of logical reasoning in the application of the law to the facts: if there is a material disconnect in the chain of logic from a fact or a legal proposition to a conclusion, a decision may be unreasonable and therefore unlawful.

[136] While *Woolworths* should continue to be regarded as the leading authority on the exercise of general and differential rating powers, we consider the broad policy considerations that were at the forefront in that case do not apply with equal vigour here. In *Woolworths* this Court emphasised that there are constitutional and democratic constraints on judicial intervention in cases involving wide public policy issues. The larger the policy content and the more the decision making is within the customary sphere of those entrusted to make it, the less inclined the Court should be to interfere.[44] The Court applied those principles in declining to interfere with complex and inherently subjective decisions about benefit allocation affecting the general rate and differential rating. In contrast, here we are dealing with a narrowly targeted rate that imposed a substantial burden on a very small subset of ratepayers. The only effective check on local authority decision-making for this small group is through recourse to the courts on judicial review. The courts may be expected to scrutinise more closely a decision that disproportionately affects only a small group of ratepayers and for whom the democratic process offers little protection.

High Court judgment

[137] The Judge summarised his conclusions on the unreasonableness claim as follows:[45]

> [286] In summary, I have concluded that:
>
> (a) The APTR was not premised on the assumption that accommodation providers could immediately pass on its economic burden to customers. There will likely be a degree

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43 *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [30].
44 *Woolworths*, above n 24, at 546.
45 High Court judgment, above n 2.

of financial hardship for the sector; but in time this will fade as accommodation providers adjust their business models.

(b) The fact that accommodation providers already contribute to destination marketing was not taken into account by the Council, but it did not need to be.

(c) The Council did not engage in a precise analysis of the benefits caused by ATEED's spending because this is all but impossible. It is sufficient that it proceeded on a logical assumption that ATEED's investment provided a benefit to accommodation providers.

(d) It is inevitable that the APTR leads to a degree of horizontal inequity, but none of the inequities complained of is so gross as to render it unreasonable. The starkest unfairness was addressed by the remissions schemes.

(e) The Council did not need to devote resources to considering an opt-in funding scheme for ATEED.

Submissions on appeal

[138] The appellants submit that because this was such a narrowly targeted rate, the decision to impose it is not entitled to the same degree of deference that would be accorded to the general run of rating decisions. They argue that the APTR is not an example of the usual balancing between ratepayers in any rating decision. Rather, the decision was made to target a small group of ratepayers of apparent means to fund an activity Council knew principally benefits others.

[139] The appellants' essential contention is that Council failed to meet its fiduciary obligations when targeting these ratepayers for the following reasons:

(a) Unreasonable reliance on the false pass-through assumption.

(b) Failure to take account of the overall contribution that accommodation providers make to tourism promotion and major events activity.

(c) Failure to assess adequately the benefits of ATEED's activities to commercial accommodation providers.

(d) Failure to treat like cases alike such that the APTR applied unfairly and arbitrarily creating inequity for accommodation providers.

(e) Failure to consider the possibility of a less discriminatory regime.

(f) Failure to obtain adequate information about the properties to be rated.

[140] Council submits the decision to set the APTR was clearly open to it, acting reasonably, to make. Council observes that the appellants' unreasonableness claim overlaps with their claim based on non-compliance with s 101(3). It says the proper approach is to consider legal compliance with s 101(3) as being "the correct lens" for deciding the unreasonableness claim. Having made that overarching submission, Council disputes the validity and relevance of each of the six considerations relied on by the appellants. To a large extent, this involves repeating its earlier submissions and relying on the Judge's findings.

Our assessment

[141] We accept Council's submission that the unreasonableness claim has considerable overlap with their claim based on non-compliance with s 101(3) of the Act. This is particularly so in respect of the issues we have found to be dispositive of the appeal, namely improper focus on the pass through assumption in an attempt to achieve an outcome beyond the proper scope of Council's rating powers and the consequent failure to make an adequate assessment of the benefits of the funded activity to commercial accommodation providers and others. This led to the imposition of a disproportionate burden on the targeted ratepayers. To the extent that visitor spend can be equated to benefit (Council's working assumption), we consider it was unreasonable to target a very small group that receives 10 per cent or less of this supposed benefit and exclude all other groups, despite them receiving a far greater share of that benefit. Had it been necessary for us to determine this ground, we would have concluded that a finding of unreasonableness was inevitable given the combination of (1) the failure to consider adequately the distribution of benefits and (2) the imposition of such a disproportionate burden on the targeted group.

Relief

[142] In their statement of claim, the appellants sought a declaration that the decision to introduce the APTR was invalid and an order quashing or setting aside the decision. We will make declarations and orders accordingly.

[143] The appellants also sought an order that Council make restitution of any amounts paid pursuant to a demand for payment of the APTR. They sought a similar order in their notice of appeal. Council responded in its submissions that if the Court were to find there were reviewable errors in the decision-making, the matter should be remitted to the High Court for it to consider relief. In the circumstances, we consider that is the appropriate course if the parties are unable to agree. We have no information and have heard no argument that would enable us to resolve any issue of consequential relief.

Result

[144] The appeal is allowed.

[145] We make declarations that the decisions to impose the APTR in the 2017/2018 and 2018/2019 rating years were invalid. Those decisions are set aside.

[146] If the parties are unable to agree on consequential relief, this aspect is to be remitted to the High Court for determination.

[147] The respondent must pay one set of costs to the appellants for a complex appeal on a band B basis and usual disbursements. We certify for second counsel.

[148] Costs in the High Court are to be determined by that Court in the light of this judgment.

Solicitors:
Bell Gully, Auckland for Appellants
Simpson Grierson, Auckland for Respondent